



August 9, 2019

Via e-mail to: ATR.MEP.Information@usdoj.gov

The Honorable Makan Delrahim
Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

RE: Antitrust Consent Decree Review - ASCAP and BMI 2019

Dear Assistant Attorney General Delrahim:

The National Restaurant Association (Association) and the Restaurant Law Center (Law Center) respectfully submit the following comments pursuant to the United States Department of Justice, Antitrust Division's (Department) notice of solicitation of public comments, concerning its review of whether the final judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) continue to protect competition within the music-licensing system.¹

The Association was founded in 1919 and is the nation's largest trade association representing and supporting the restaurant and foodservice industry. Its mission is to represent and advocate for industry interests, primarily with national policymakers and in the courts mainly through its affiliate, the Law Center. Nationally, the foodservice industry consists of more than one million restaurant and foodservice outlets employing over fifteen million people—about ten percent of the American workforce. Despite being mostly small businesses, the foodservice industry is the nation's second-largest private-sector employer.

The Law Center is a 501(c)(6) legal entity affiliated with the Association. The purpose of the Law Center is to promote business laws and regulations that allow restaurants to continue growing, creating jobs and contributing to a robust American economy. The Law Center's goal is to protect and advance the restaurant industry and to ensure that the voice of America's restaurants is heard by giving them a stronger voice, particularly in the courtroom. The Law Center pursues cases of interest to the restaurant

¹ Dept. of Justice, Antitrust Div. Consent Decree Review – ASCAP and BMI 2019 <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019>.

industry, and tenders *amicus* filings in cases which it believes will advance those policy interests. In fact, the Law Center did file *amicus* briefs in some of the relevant proceedings related to the consent decrees.

The joint comments will address whether the ASCAP and BMI Consent Decrees (Decrees) continue to perform a necessary role in maintaining competition within the music-licensing system, and present suggestions on how to improve the process and structure, along with reasons why the Department should keep the Decrees in place until Congress enacts legislation that establishes an improved framework.

I. Introduction & Background

The Decrees remain as critically important in the modern era for promoting competition as they were in 1941 when the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) voluntarily agreed to their conditions, which have been occasionally modified since that time.² The Department echoed this position as recently as 2016 when the Antitrust Division completed its review of the Decrees, and recommend preserving them in their current form because “the Division’s investigation confirmed that the current system has well served music creators and music users for decades and should remain intact.”³

Many restaurants seek to play music in order to offer their guests an entertaining experience, which requires a license to “publicly perform” the musical compositions.⁴ The majority of these venues license music from a performing rights organization (PRO), which grants licenses to music users for a fee, and then distributes the royalties among its affiliated copyright holders. In essence, the PROs act as a centralized clearinghouse, which was almost an inevitable development “because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that, as a practical matter, it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses.”⁵

ASCAP and BMI are the two largest domestic PROs, and their repertoires include about 90 percent of the musical compositions publicly performed in the United States.⁶ Presently, there are also at least three additional PROs: SESAC, founded in 1931; Global Music Rights (GMR), founded in 2013; and Pro Music

² Second Am. Final J. (ASCAP Consent Decree) § XIV, *United States v. ASCAP*, 2001 WL 1589999 (S.D.N.Y. June 11, 2001); Am. Final J. (BMI Consent Decree) § XIII, *United States v. BMI*, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. 1966), modified by 1994 WL 901652 (S.D.N.Y. 1994).

³ See United States Dept. of Justice, [Statement of the Department of Justice on the Closing of the Antitrust Division’s Review of the ASCAP and BMI Consent Decrees](#) (Aug. 4, 2016), at 3.

⁴ See 17 U.S.C. § 106(4).

⁵ See *BMI v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4-5 (1979).

⁶ See Diane Bartz, *U.S. Justice Department to Review 1941 ASCAP, BMI Consent Decrees*, Reuters, Jun. 5, 2019, <https://www.reuters.com/article/us-usa-antitrust-ascap-bmi/u-s-justice-department-to-review-1941-ascap-bmi-consent-decrees-idUSKCN1T62GP>.

Rights recently emerged in 2018.⁷ (Although these PROs are not subject to a consent decree, both SESAC and GMR have both been engaged in antitrust litigation.)⁸

A centralized collective creates certain efficiencies by allowing a PRO to offer a blanket license, which reduces the transaction costs of licensing copyrighted compositions. This in turn enables songwriters to monetize their works immediately upon signing with a PRO while simultaneously enabling music users to immediately perform the works upon submitting an application without being liable for infringement; rights provided for in the Decrees.⁹

At the same time, the PROs' collective bargaining on behalf of otherwise competing rights holders affords them massive market power because blanket licenses offer all songs in the PRO's repertory on an all-or-nothing basis; thus preventing songs from competing with each other based on price. Therefore, although collective licensing can create efficiencies, it also raises profound antitrust concerns. With respect to ASCAP and BMI, the Decrees help protect against these threats to competition that are inherent to the collective licensing of musical compositions while also helping to preserve the benefits.

The Decrees also remain necessary because ASCAP and BMI, as well as the other PROs, are not competitors in a traditional sense. Due to common marketplace circumstances, nearly every music user must obtain a license from both PROs. Therefore, the "market" lacks any meaningful choice because a music user does not have the ability to compare the value of one PRO's license against another. Instead, restaurants and other music users must purchase multiple licenses, which artificially and unfairly drives up costs. Certain oversight provisions within the Decrees help to limit the ability of ASCAP and BMI to use their monopoly power to demand arbitrarily inflated license rates. However, the absence of options and choice continues to be exacerbated due to the lack of transparency, as well as the issue of "fractional licensing."

ASCAP's consent decree includes a commonsense provision that requires the PRO to make its catalog available on the internet, as well as update it weekly, although it has never been fully compliant (BMI's consent decree does not contain a similar obligation.)¹⁰ In fact, ASCAP, BMI, GMR, and SESAC, all refuse

⁷ About SESAC, <https://www.sesac.com/#/our-history> (last visited Aug. 9, 2019); About Who We Are, <https://globalmusicrights.com/About#who-we-are> (last visited Aug. 9, 2019); *VNUE, Inc. And Pro Music Rights Partner To Create New Paradigm In Music Performance Licensing*, Bloomberg (Apr. 16, 2019) <https://www.bloomberg.com/press-releases/2019-04-16/vnue-inc-and-pro-music-rights-partner-to-create-new-paradigm-in-music-performance-licensing>.

⁸ See Ben Sisario, *SESAC Settles Antitrust Lawsuit Over Royalty Rates*, N.Y. Times, Jul. 23, 2015, <https://www.nytimes.com/2015/07/24/business/media/sesac-settles-antitrust-lawsuit-over-royalty-rates.html>; Chris Eggersten, *Irving Azoff's Global Music Rights & RMLC Antitrust Lawsuit Moved to California Court Pa.*, Billboard, Apr. 1, 2019, <https://www.billboard.com/articles/business/legal-and-management/8505236/irving-azoff-global-music-rights-rmlc-lawsuit-california>.

⁹ ASCAP Consent Decree § IX; BMI Consent Decree § XIV.

¹⁰ ASCAP Consent Decree § X(B)(2).

to even attest to the accuracy of their own databases.¹¹ Under the present system, restaurants and other venues who are attempting to legally play music in their establishments risk statutory damages of up to \$30,000 for each act of infringement, despite the fact that they lack the means to discover the content of a PRO's repertoire.¹² This is anticompetitive and also exposes licensees to potential litigation for accidental acts of infringement, which is both expensive and unfair.

This complete lack of knowledge deprives prospective or current licensees of any meaningful choice, and an opportunity to select the license(s) that best serves their needs. Instead, the current model places many licensees in a position where they feel compelled to obtain a license from every PRO despite not knowing what music they're paying for, or what songs they can legally play. Therefore, prices continue to increase, but a music user does not even know if they're going to gain any additional value. Moreover, a restaurant or other music user could still face costly litigation if they unknowingly play a song that's not included in the PROs' catalogs. This anticompetitive problem becomes additionally compounded by the issue of "fractional licensing."

Oftentimes, a composition will be authored by two or more songwriters who each have a fractional interest in the work, and they are free to affiliate, or not, with the PRO of their choice. All of the PROs offer a blanket license that provides music users with immediate, indemnified access to their repertoire, and historically this allowed a licensee to legally perform all of the PRO's works without fear of infringement, commonly known as "full-work licensing."

The Decrees refer to the PROs' repertoires as composed of "works" or "compositions" and the PROs' licenses provide the right to perform these "works" or "compositions." It should be obvious that a license cannot grant the right to perform a composition if it covers only a fractional interest in the composition. However, in 2017 the U.S. Court of Appeals upheld a ruling by the U.S. District Court for the Southern District of New York that found the BMI Consent Decree "neither bars fractional licensing nor requires full-work licensing."¹³

As previously mentioned, the primary value of a blanket license should be the ability to perform all the works in a PRO's catalog. Due to fractional licensing, the blanket license does not provide the same protections it used to, and has made it more expensive, complicated, and challenging for music users, especially small businesses, to obtain the legal rights to perform co-owned works; combined with the lack of transparency, it may actually be impossible. This is particularly concerning for restaurants and establishments that cannot always control the music that's performed, such as music played during televised sporting events, commercials, live television programming, etc. Finally, fractional licensing is

¹¹ *Terms of Use Agreement*, ASCAP, <https://www.ascap.com/help/legal/terms-of-use> (last visited Aug. 08, 2019); *Terms and Conditions of Use*, BMI, https://www.bmi.com/legal/entry/terms_and_conditions_of_use (last visited Aug. 08, 2019); *Terms & Conditions*, GMR, <https://gmrmarketing.com/en-us/terms/> (last visited Aug. 08, 2019); *Repertory Search Additional Terms of Use*, SESAC, <https://www.sesac.com/#/repertory/terms-of-service> (last visited Aug. 08, 2019).

¹² 17 U.S.C. § 504(c).

¹³ *United States v. Broad. Music, Inc.*, No. 16-3830-cv, 2017 U.S. App. LEXIS 25545 (2d Cir. Dec. 19, 2017); *United States v. Broad. Music, Inc.*, 207 F.Supp.3d 374, 377 (S.D.N.Y. 2016).

demonstrably anticompetitive because it artificially increases the leverage of a composition co-owner, which can be used to “hold-up” the license of their work to extract an inflated fee.

Clearly, there are several outstanding issues related to music-licensing that must still be resolved, but the Decrees have brought a measure of stability, certainty and order to an inherently chaotic process that can be especially susceptible to anticompetitive forces due to the unique nature of the music-licensing system.

II. The Consent Decrees Help Safeguard & Protect Competition

a. Nondiscrimination & Reasonable Fees:

Licensing rates and the criteria used by the PROs to charge music-licensing fees continue to be a top concern for the restaurant industry.

ASCAP and BMI may not discriminate in license fees, terms, or conditions among similarly situated users.¹⁴ This provision is especially important for restaurants and other small businesses that license music who typically do not have the resources or sophistication to directly negotiate rates with the various PROs, especially ASCAP and BMI who control about 90 percent of the market. Most venues are already in a “take it or leave it” position because there are no meaningful alternatives due to the lack of competition between the PROs, and their resistance to developing a public, accurate and comprehensive database of their catalogs. The nondiscrimination provision provides a useful check on the ability of ASCAP and BMI to abuse their outsized market power by indiscriminately and unfairly charging similarly situated restaurants differing levels of fees.

A longstanding perception within much of the restaurant industry has been that the criteria used to set fees is arbitrarily established solely by each PRO, and is essentially non-negotiable. The Decrees at least offer some level of protection against this anticompetitive behavior. If a licensee cannot reach an agreement with ASCAP and/or BMI on the appropriate fee, then the federal district court in the Southern District of New York is charged with determining a “reasonable fee” that would exist in a competitive market.¹⁵ However, the costs to challenge any license fee proposal and the legal mechanism to do so inhibits small business owners from obtaining more practicable means to review the reasonableness of a PRO demand. Therefore, while important, this provision does not necessarily solve the underlying economic concerns that many licensees have in resolving fee disputes.

b. Blanket License Alternatives & Prohibition on Exclusive Licensing:

Both ASCAP and BMI are required to offer an alternative to the blanket license, and are prohibited from exclusively licensing any of the works in their catalogs.¹⁶ This allows members of ASCAP and BMI to

¹⁴ ASCAP Consent Decree § IV(C); BMI Consent Decree § VII(A).

¹⁵ ASCAP Consent Decree § IX; BMI Consent Decree § XIV.

¹⁶ ASCAP Consent Decree § IV(B); BMI Consent Decree § IV(B).

directly license their songs to a licensee, and provides for an adjustable fee blanket where the cost of the blanket license is reduced to account for the music directly licensed from the songwriter(s). They are also required to offer per-program and per-segment licenses.¹⁷ The Decrees also prohibit “partial withdrawals.”¹⁸

The prohibition on exclusive licensing, and alternatives to the blanket license place some level of market pressure on ASCAP and BMI to act in a manner that doesn’t resemble that of a monopoly.

c. License Upon Application:

As previously noted, restaurant owners that play copyrighted music face substantial penalties and potential litigation for violations of federal copyright laws if they do not obtain licensing agreements with the PROs. Under the Decrees, ASCAP and BMI must provide a license to play the music in their repertoires to any restaurant and other licensee who submits an application even if the parties have not yet reached an agreement on the rate.¹⁹

This provision helps ensure that the two largest PROs cannot use their monopoly power as leverage to withhold a license in an effort to unjustly demand exorbitant fees that don’t accurately reflect their true market value. This would have the effect of forcing restaurants and other venues into an untenable position where they would have to choose to stop playing music in their establishment altogether, or risk potentially ruinous fines.

III. Suggested Reforms

a. Transparency:

As mentioned above, all of the PROs refuse to attest to the accuracy of their own databases, and music users who are attempting to legally play music in their establishments risk statutory damages of up to \$30,000 for each act of infringement.

All PROs should be required to upload accurate and comprehensive copyright ownership and licensing information into a central database that can be accessed and easily searched by the public. Licensees should have the ability to know precisely which songs they are licensing in exchange for payment, and be protected against infringement claims for reliance on a PRO’s representations of what’s included in its repertoire. The need to address this issue is particularly acute due to the PROs’ intransigent resistance to be more transparent; evidenced by ASCAP and BMI’s continued failure to create a comprehensive database, despite announcing it would be available by the end of 2018.

¹⁷ ASCAP Consent Decree § VII; BMI Consent Decree § VIII(B).

¹⁸ *In re Pandora Media, Inc.*, 785 F.3d 73 (2d Cir. 2015) (per curiam).

¹⁹ ASCAP Consent Decree § IX; BMI Consent Decree § XIV.

The lack of transparency combined with costly statutory damages is manifestly unfair to good faith actors who are attempting to pay for and legally play music for their guests.

b. Full-Work Licensing:

A public performance license must grant the immediate right to actually perform the musical work, and play all songs in the PRO's catalog with corresponding indemnification from copyright infringement claims.

c. Fair Practices:

As part of the licensing process, restaurants, and other small businesses are routinely harassed by ASCAP and BMI. In recent years, states including Nebraska, Colorado, Oregon, Washington, and Virginia have enacted laws at the state level that are designed to reign in abusive, coercive or other forms of troubling behavior carried out by PROs. To prevent such behavior from occurring in the future, any new framework should require all PROs to abide by a predetermined "code of conduct" that would be subject to enforcement by the Federal Trade Commission.

d. Simplified & Streamlined Process:

The current licensing process is overly and needlessly complex, which many licensees, especially small businesses, have difficulty understanding. The process should be simplified and streamlined so that all music users, regardless of size and sophistication, can better navigate the process.

e. Flexible Options:

Although some licensees have successfully obtained alternatives to blanket licensing, businesses that play music in their establishments occasionally do not have the option to pay based on use and must agree to licenses that cover more substantial music usage. The lack of options tailored for each business forces proprietors to stop providing music for the enjoyment of their customers.

f. Universal and Standardized Set of Rules:

The current decrees apply only to ASCAP and BMI. This has led to the emergence of newer PROs engaging in questionable licensing practices and leaving licensees with little recourse outside of private antitrust enforcement actions. Any alternative framework must be broadly applicable to other PROs and licensors not currently operating under consent decrees to ensure a level playing field.

IV. Need for Congress to Implement Comprehensive & Improved Framework

The Department of Justice should not take any steps to terminate, sunset, or modify the ASCAP and BMI Consent Decrees before Congress has the opportunity to develop and implement an alternative, comprehensive, and updated music-licensing framework.

In the 115th Congress, the leaders of the House and Senate Judiciary Committees sent a bipartisan letter to the Department expressing concern that terminating the Decrees “without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers.”²⁰ More recently, the current Chairman of the Senate Judiciary Committee, Senator Lindsay Graham (SC), sent a letter to the Department noting his concern over the possibility that the Department would seek to terminate or sunset the Decrees “without first working with my committee and the Congress as a whole to establish an alternative licensing framework” because that “could severely disrupt the entire music licensing marketplace.”²¹

Most notably, is the fact that in 2018 Congress clearly signaled their concern about the unanimously passed *Orrin G. Hatch-Bob Goodlatte Music Modernization Act* (MMA), and specifically included a provision requiring the Department to notify them prior to terminating or sun-setting the Decrees, as well as mandating a report from the department detailing the impact that such an action could have on the market.²²

It’s readily apparent that Congress understands the importance of the ASCAP and BMI consent decrees, and their role in protecting competition within the music-licensing system. Furthermore, Congress has unambiguously cautioned the Department to refrain from taking any unilateral actions that would fundamentally upend or alter the status quo while also excluding them from the process. It’s clear that a strong bipartisan consensus exists within the House and the Senate who believe that Congress must take the lead when it comes to updating and reforming the current music-licensing framework, and would not approve or support any premature decisions that impose an unnecessary and artificial timeline before they have introduced and enacted a legislative solution.

V. Conclusion

The restaurant industry supports a functioning model that ensures songwriters are properly compensated. At the same time, the current music-licensing system and process makes this difficult to achieve due to the unnecessary lack of transparency, complexity, and uncertainty; especially for small businesses.

The Decrees have been a cornerstone of the music-licensing system for several decades, and remain vital for fostering competition. It’s difficult to envision a future framework that wholly lacks any of the safeguards or mechanisms for oversight that the Decrees currently provide, and the Department should refrain from acting precipitously to terminate, sunset, or modify the ASCAP and BMI Consent Decrees;

²⁰ Chairmen and Ranking Members of H. and S. Comms. on the Judiciary., 115th Cong., Letter to Dept. of Justice, Antitrust Div., regarding review the ASCAP and BMI Consent Decrees (Jun. 8, 2018) <http://src.bna.com/zyr>.

²¹ Chairman of S. Comm. on the Judiciary, Sen. Lindsey Graham (SC), 116th Cong., Letter to Dept. of Justice, Antitrust Div., regarding review the ASCAP and BMI Consent Decrees (Feb. 12, 2019) <https://mic-coalition.org/cms/assets/uploads/2019/02/LG-letter-to-Delrahim-Consent-Decrees-02121911-1.pdf>.

²² *Orrin G. Hatch-Bob Goodlatte Music Modernization Act*, Pub. L. No. 115-264 § 105 (MMA).

thereby completely exposing the restaurant industry, as well as other establishments and music users, to anticompetitive and predatory behavior.

Instead the Department of Justice should encourage Congress to enact comprehensive reform that establishes an improved and updated music-licensing framework.

Sincerely,



J. Michael O'Neill
Director of Public Policy; Technology & Innovation
National Restaurant Association
2055 L St NW
Seventh Floor
Washington, DC 20036
P: 202-973-5363
Email: moneill@restaurant.org



Shannon Meade
Deputy Director, Restaurant Law Center
Vice President of Policy, National Restaurant
Association
2055 L Street, NW
Seventh Floor
Washington, DC 20036
P: 202-331-5994
Email: smeade@restaurant.org