Via email to: ATR.MEP.Information@usdoj.gov

The Honorable Makan Delrahim
Assistant Attorney General
Antitrust Division, Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Re: Comments Regarding ASCAP and BMI Consent Decree Review 2019

Founded in 1996, and based in the United States, Navarr Enterprises, Inc., is a music licensing and publishing company representing a catalog of over 900,000 works. Navarr has direct music licensing relationships with over 6,500 composers, artists, publishers, and labels from around the world. Navarr licenses music from these rightsholders and in turn, via its AudioSparx and RadioSparx websites, and numerous reseller agents, it sublicenses the music to clients around the world for all types of commercial uses including for TV, film, Internet, radio, corporate use, as well as for in-store background music. Navarr is itself a publisher member of both ASCAP and BMI.

Our nation has always prized the can-do spirit of rugged individuals who struggle against the odds to succeed. Such is the story of the modern composer. New technologies and the Internet have opened doors that were once closed to all but a few and created a new class of self-reliant, independent musicians who navigate the complex world of music licensing with the assistance of numerous digital platforms, like those provided by Navarr. In these comments we speak on behalf of those thousands of composers, songwriters and industry employees whose lives would be adversely affected if sweeping changes are made to the Consent Decrees without consideration of the potential impact on their livelihood.

One area of specific concern is that the existing non-exclusive grant of rights from U.S. composers and publishers to ASCAP and BMI, which allows rightsholders and licensees to enter into direct license agreements, remain intact and in-fact be expressly affirmed in the language of any future Decree. The ability for composers to direct license their works springs from the 'bundle of exclusive rights' embodied in 17 U.S. Code § 106[1]. Similar language is found in the Berne Convention, Article 11[2], and in the in the WIPO Copyright Treaty, Article 8[3].

[1] 17 U.S. Code § 106, Exclusive rights in copyrighted works states, "…the owner of copyright under this title has the exclusive rights to do and to authorize any of the following…" and specifically under § 106 (6), "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."
[2] Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), Article 11, Certain Rights in Dramatic and Musical Works: Right of public performance and of communication to the public of a performance; (1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performance by any means or process.
[3] World Intellectual Property Organization (WIPO) WIPO Copyright Treaty (WCT) (adopted in Geneva on December 20, 1996), Article 8, Right of Communication to the Public: Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works.

Any weakening of the rightsholders' exclusive rights in the name of efficiency or competition would strike at a core value of our copyright system and our fundamental belief in self-determination.

The modern music business demands that composers and rightholders develop multiple revenue streams in order to create sustainable income. Although ASCAP and BMI generally do well at collecting and distributing public performance royalties, experience shows that reliance on this royalty income alone is insufficient for most.

While the Consent Decrees require transparency with respect to royalty rate and payment systems[4], the PROs' performance detection methods remain a mystery to many. In-store background music, for example, is an area of public performance in which there has been little correlation between the music performed in any given venue and the composers who receive PRO payments for those performances. Restaurants and other venues must pay a high annual blanket fee to the PROs, yet it is nearly impossible for the PROs to accurately account for what music is played and to properly compensate the actual rightsholders, which results in lost income to some and unjust enrichment to others. The ability for rightholders to direct license via a service like Navarr's RadioSparx division solves this problem, providing the actual rightholders with fair and accurate compensation for every performance.

To their credit, ASCAP and BMI have supported their members' right to direct license within our borders. They have, unfortunately, offered little or no support in this regard for their members' foreign performances, for which our PROs receive payments under reciprocal agreements with foreign Collective Rights Management Organizations (CMOs). In the international arena, we have routinely been subjected to CMOs' aggressive strongarm tactics against our clients for the purpose of collecting royalty payments including police raids, nuisance litigation, and misrepresentation of the law resulting in market distortion and substantially increased legal and operating costs.

Examples of CMOs' anti-competitive conduct are readily found. SGAE, the Spanish CMO, has engaged in anti-competitive behavior including "discriminatory treatment of rightsholders" and has been temporarily expelled from The International Confederation of Societies of Authors and Composers (CISAC) for its conduct[5]. SGAE's anti-competitive conduct is not isolated. In 2018, in response to a complaint filed by Soundreef, Ltd, an Independent Management Entity (IME), the Italian Antitrust Authority (AGCM) ruled that SIAE, Italy's CMO, had "abused its dominant position by practicing multiple instances of unfair and illicit conduct against writers, publishers, competitors and music licensees."[6] Additionally, AGCM determined that SIAE's conduct was intentional, part of a "complex strategy that frustrated authors' rights" and was intended to "exclude Soundreef from the market-place." SIAE's "unfair and illicit" conduct included "establishing constraints, with the objective of managing the rights of non-SIAE-affiliated

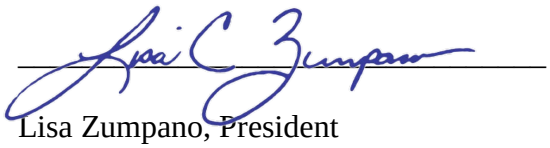
[4] ASCAP Consent Decree§ XI.B.1-2; BMI Consent Decree § VII.A.
[5] *See* CISAC Newsroom Articles, https://www.cisac.org/Newsroom/Articles/The-expulsion-of-SGAE-from-CISAC-a-regrettable-but-essential-step-towards-reform
[6] See CISION PR Newswire, *Soundreef: Italian Antitrust Authority (AGCM) Rules in Favor of Songwriters' Rights,* published November 5, 2108, https://www.prnewswire.com/news-releases/soundreef-italian-antitrust-authority-agcm-rules-in-favor-of-songwriters-rights-300743922.html

writers and publishers, even when these rightholders had explicitly affirmed their wish not to avail themselves of SIAE's services." [7]

Similarly, when rightsholders elect to direct license their works through Navarr and RadioSparx, they are in effect explicitly affirming their wish not to avail themselves of the US PROs' and foreign CMOs' services in the narrow context of in-store background music. Thus, in essence, when the U.S. PROs accept payment from the foreign CMOs for these performances, in contravention of the rightholders express wishes and their right to direct license, our PROs become *de facto* participants in their foreign partners' anti-competitive conduct.

In the shadow of such conduct, the Consent Decrees remain relevant as a potential check on anti-competitive conduct. Therefore, rather than terminating the Consent Decrees we suggest modifying them in a manner that protects and reinforces rightsholders' autonomy. For a model approach, we can look to the European Union. In a recent Directive, the E.U. has addressed the need to improve the function of its CMOs. [8] With respect to rightsholders exclusive rights, the Directive states: "Those rights may be managed by the individual rightholders themselves…"[9] and that "Rightholders shall have the right to… withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice…"[10]

Succeeding, even surviving, in the highly-competitive, modern music business requires that composers and other rightholders develop and maintain multiple sources of income. ASCAP and BMI provide income in the form of performance royalties, but that alone is not enough. Direct licensing, in which rightsholders or their representative negotiate deals directly with music users, provides another equally vital revenue stream upon which thousands of composers, songwriters, and industry employees rely. Unfortunately, as seen in the EU, the specter of anti-competitive conduct remains and cannot be ignored. Therefore, we believe that the Consent Decrees should remain in place as a check against anti-competitive conduct but with modifications that reflect the needs of rightsholders in the modern era. Specifically, the Consent Decrees should be modified to express and affirm the ability of rightholders to self-administer their own catalogs, including the ability direct license, both within and outside the US, and to avail themselves of the services of ASCAP and BMI as they see fit.



Lisa Zumpano, President

---

[7] *Id.*
[8] *See* European Parliament and Council, Directive 2014/26/EU of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rjghts in Musical Works for Online Uses in the Internal Market, 2014, O.J 20.3.2104
[9] *Id.*, Recital 37
[10] *Id.*, Art. 5, § 4.