IN THE UNITED STATES DEPARTMENT OF JUSTICE

In re: Antitrust Consent Decree Review—ASCAP and BMI 2019	Via email, ATR.MEP.Information@usdoj.gov

COMMENTS OF THE R STREET INSTITUTE

The R Street Institute respectfully submits the following comments on the Department of Justice's review of the consent decrees relating to the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), as announced on June 5, 2019. R Street is a nonprofit, nonpartisan public policy research organization that promotes free markets and limited, effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty. Of relevance to the present proceeding, R Street has produced significant work on both antitrust and intellectual property, including research papers,[1] *amicus curiae* briefs in the Supreme Court and other federal courts,[2] testimony before Congress,[3] and comments in agencies including the Department of Justice.[4]

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[1]*See* Sasha Moss, *Transparency in Music Licensing and the Statutory Remedy Problem* (R St. Inst., Policy Study No. 47, Dec. 2015); Mike Godwin, *Congress, Not DOJ or the Courts, Should Decide Whether to Update Music-Copyright Framework* (R St. Inst., Policy Study No. 62, May 2016).

[2]*See* Brief of Public Knowledge, R Street Institute, et al. as *Amici Curiae* in Support of Respondent, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (Oct. 2017) (No. 16-712); Brief of the R Street Institute as *Amicus Curiae* in Support of Petitioner, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (Aug. 2018) (No. 17-204).

[3]*See The State of Patent Eligibility in America: Part I: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 116th Cong. (June 4, 2019), https://www.judiciary.senate.gov/imo/media/doc/Duan%20Testimony.pdf.

[4]*See* Comment from Tom Struble, R St. Inst., to U.S. Dep't of Justice, *Public Workshop on Competition in Television and Digital Advertising* (June 14, 2019), https://www.rstreet.org/wp-content/uploads/2019/06/FINAL-DOJ-Advertising-Comments-June-2019.pdf.

In this review of the ASCAP and BMI consent decrees, R Street recommends that the Department act cautiously before upending decades-old arrangements that have become settled expectations for businesses and individuals across the nation. The "goods" in the relevant market—licenses for music copyrights—have such unusual legal and economic characteristics that simplistic free-market principles cannot apply. The arrangement of the consent decrees is also consistent with practices in other intellectual property licensing, such as digital music and patents on standardized technology, where the government plays a similar oversight role. While some adjustments to the consent decree frameworks may be warranted, broad-stroke appeals to eliminate the consent decrees in the name of "market-based approaches" are inapplicable to this idiosyncratic market.

1. Ordinary free market principles do not apply to the music licensing market because music licenses are not goods. Music licenses are founded on copyrights, a type of intellectual property. And as the Supreme Court observed recently in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, intellectual property rights are a form of "public franchise" subject to the limits of the Constitution and of federal statutes. 138 S. Ct. 1365, 1374–75 (2018).

The market for music copyright licenses greatly differs from markets for other goods in at least three ways. First, the number of music licenses that consumers require is often unpredictably large: Restaurants and gyms that play background music, for example, may go through hundreds or thousands of songs a year.

Second, the performance venue may not actually have control or choice over what copyrights to license. As one district court explained, a television station that broadcasts a show containing music must separately obtain a license to the copyright in that music; the station cannot choose a different song for the show. *See Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 187–88 (S.D.N.Y. 2014).

Third, even for a single song, the number of copyright licenses required is indeterminate. As the Department itself recently learned in its fractional licensing litigation, multiple entities may hold rights to license a single sound recording, such that a license from every single one is necessary. *See United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374, 376–78 (S.D.N.Y. 2016), *aff'd*, 720 F. App'x 14 (2d Cir. 2017) (summ. order). Thus, obtaining a license to a song from one artist or licensing entity does not guarantee permission to play a song, since other artists or entities may hold further necessary copyright interests.

2. These differences mean that the market for music copyright licenses is necessarily distinct from markets for other goods, both legally and economically.

As a legal matter, copyrights are a statutory construct of Congress, and it makes little sense to speak of an objective "free market" when the government itself sets the rules of the market. *See, e.g.*, Steven K. Vogel, *Marketcraft: How Governments Make Markets Work* 36–38 (2018). Indeed, insofar as the Framers of the Constitution saw intellectual property rights as government grants of "monopolies" that themselves restrained free markets, it would be contrary to the Framers' original intent in authorizing those grants of copyrights and patents to let the grantees assert them unrestrainedly. *See* Edward C. Walterscheid, *The Nature of the Intellectual Property Clause* 242 (2002); Brief of Public Knowledge, R Street Institute, et al. as *Amici Curiae* in Support of Respondent at 13–17, *Oil States*, 138 S. Ct. 1365 (Oct. 2017) (No. 16-712).

As an economic matter, the multiplicitous and pervasive nature of music and copyrights leads to an "anticommons" problem where transaction costs of licensing can dominate ordinary market dynamics. *See* Nancy Gallini, *Competition Policy, Patent Pools and Copyright Collectives*, 8 Rev. Econ. Res. on Copyright Issues 3 (2011); *cf.* Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 Science 698 (1998). Thus, as the Department itself explained

in 1967, there are "unique market conditions for performance rights to recorded music" warranting unique antitrust treatment. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 15 (1979) (quoting DOJ brief).

The many music copyright licenses required by a performing venue or other consumer give rise to a second economic problem called "holdup," in which a single copyright holder among many can stop or extract unduly high rents from a consumer who requires a complete portfolio of licenses to proceed with a business. *See Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015); Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 Stan. L. Rev. (forthcoming July 28, 2019) (manuscript at 11–12), https://ssrn.com/abstract=3397352 (citing Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 Tex. L. Rev. 783, 786 (2007)). Fractional licensing obviously gives rise to holdup when one artist out of many can prevent a consumer from obtaining rights sufficient to play a song. Holdup can furthermore occur when a music consumer, such as a television station or restaurant, plays a large amount of music or has little choice in what music is played, such that a single artist's refusal to license could stymie an entire business operation.

The ASCAP and BMI consent decrees thus actualize the limited nature of the government franchise that the Framers envisioned for copyrights, and they alleviate the unusual and problematic economic phenomena that music copyrights cause.

3. The importance of the Department's continued involvement in the music copyright licensing market is underscored by at least two analogous fields: copyright licensing of digital music and patent licensing on standardized technologies. Complex intellectual property licensing arrangements in both of those fields confirm that the music copyright licensing arrangements set forth in the consent decrees are not outliers.

With regard to digital music, Congress recently enacted the Orrin G. Hatch–Bob Goodlatte Music Modernization Act. Pub. L. No. 115-264 (Oct. 11, 2018) (codified at 17

U.S.C. § 115). Title I of the 66-page bill constructs a detailed scheme for the licensing of music for digital performances, including the designation of a statutory entity called the "mechanical licensing collective" tasked with collecting and distributing royalties. *See* 17 U.S.C. § 115(d)(3)(C)(i)(ii). That Congress saw fit to impose a detailed licensing scheme for digital music funneled through a single licensing entity suggests that it is not unreasonable for the Department to manage a licensing scheme operated largely by two licensing entities.

Similarly, for standardized technologies such as Wi-Fi or 4G LTE, device manufacturers who use those technologies must obtain licenses to many patents tied to those technology standards. *See, e.g., Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1208 (Fed. Cir. 2014). The potential anticommons licensing problem that would otherwise arise from such "standard-essential patents" is mitigated by licensing rules set forth by the standard-setting organizations that promulgate the technology standards. *See id.* at 1209. The activities of standard-setting organizations have long been the subject of antitrust scrutiny, especially scrutiny by the Department of Justice. *See* U.S. Dep't of Justice & U.S. Patent & Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Jan. 8, 2013), http://www.justice.gov/atr/public/guidelines/290994.pdf. While the Department has recently indicated its intent to change the focus of that scrutiny, Assistant Attorney General Delrahim has made clear that the Department will not be leaving patent licensing practices unexamined; instead he continues to "be inclined to investigate" patent licensing arrangements of standard-setting organizations. *See* Makan Delrahim, Address at the 19th Annual Berkeley–Stanford Advanced Patent Law Institute: "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law (Dec. 7, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-19th-annual-berkeley-stanford.

These examples show that, at the intersection of intellectual property and antitrust law, it has long been the place of competition agencies to oversee the licensing of copyrights

and patents in complex markets where anticommons problems and economic holdup could potentially arise. The music copyright licensing market is no different in that respect, and the ASCAP and BMI consent decrees are in line with similar arrangements in markets such as those mentioned above.

No doubt the passage of time has changed the nature of consumer interests and technological possibilities. Among other things, technology now makes it more feasible to obtain accurate counts of song performances, and it likely could facilitate licensing and reduce transaction costs. Furthermore, the Department may wish to revisit its work on fractional licensing, perhaps revising the consent decrees to say explicitly what the Second Circuit found could not be implied from the existing language. Nevertheless, the unique legal and economic nature of intellectual property means that, for copyright licensing, the best approach for competition and free markets is almost certainly not for the Department to step back entirely and let private holders of copyrights act in ways that could potentially undermine competition and economic activity.

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The R Street Institute thanks the Department of Justice for the opportunity to submit these comments. If any questions remain, the Department is welcome to contact the undersigned attorney at the address listed below.

Respectfully submitted,

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August 9, 2019