August 9th 2019

Comments in Response to the Antitrust Consent Decree Review by the Department of Justice

THE SOCIETY OF COMPOSERS & LYRICISTS (SCL) is the primary organization for professional film, television, video game, and musical theatre composers and lyricists with a distinguished 74-year history in the fine art of creating music for visual media. Current SCL members include the foremost professionals in their fields whose experience, expertise and advocacy is focused on the many artistic, technological, legislative, legal and other issues as they relate to audiovisual music creators. While the vast majority of our members are based in North America, we have many others around the world and our international affiliations with like organizations allows us to speak on behalf of thousands of music creators. It is with this voice that we welcome the opportunity to offer our comments on the proposed revisions to the Consent Decrees that currently govern the manner in which ASCAP and BMI license the works of SCL members and other music creators.

The SCL applauds the initiative taken by the Department of Justice (DOJ) Antitrust Division and its head, Makan Delrahim, in undertaking a review of the Consent Decrees and strongly supports the views presented by ASCAP and BMI in their joint statement of February 28, 2019 (Attachment A) which they have reiterated and elaborated upon more recently in response to DOJ's call for comments.

However, there is an additional issue of grave importance to music creators that SCL respectfully requests DOJ take into consideration as the decrees are being reviewed: the right of exclusive assignment by the music creator to the PRO of his/her choice.

From the respective inceptions of ASCAP and BMI, their writer members and affiliates have been entitled to determine the initial registration of their work(s) with the society where they hold membership or affiliation but in recent years, certain publishers have taken the position that they are entitled to move these works without the consent of, or consultation with, the actual creator of the work. This is particularly problematic on several levels, not the least of which is transparency. Moreover it's completely out of step with the rest of the world, where a music creator's exclusive right of assignment to his/her chosen PRO is sacrosanct. In other words, foreign composers and songwriters are afforded an absolute protection not currently available to their American counterparts, which in turn means the foreign societies offer a distinct advantage to their membership, an advantage we'd like to see codified in any revision of the Consent Decrees.

For a film, TV or other media composer there are many competitive factors to be considered before choosing which society to join:

"time-of-day" (ASCAP) vs. audience measurement (BMI)
feature performance duration of use (limited at ASCAP, unlimited at BMI),
multiple use of the same composition in the same program (reduction at ASCAP, not at BMI),
differing definitions (background, feature, theme/super theme)
vocals, jingles, trailers, arrangements of P.D. works, logos etc.
Neilsen ratings, multiple airings in a quarterly period, bonus/rewards for success provisions etc.

However, possibly the single most important factor are the personal relationships music creators develop with their chosen PRO over time and it is unconscionable to allow these relationships to be shown scant regard when the very reason publishers established separate companies within ASCAP and BMI initially was, in fact, to accommodate the choice of the creator.

To be clear, SCL understands that there are often business opportunities presented to publishers to transfer or even directly license works, that may also advantage the music creator and our request should not be construed, in any way, as a means to restrict such opportunities.

We ask that works may only be removed from a PRO by mutual agreement of both the creator and the publisher.

The primary revenue stream for the audiovisual music creator is the performance royalty, generated every time there is a transmission of a program containing their music. Other revenue streams (e.g. soundtracks CDs, downloads, sheet music etc.) pale in comparison. Also, as a rule, AV music creators do not share in any revenue from DVD sales and, because of the 1948 Alden Rochelle court ruling, there are no performance royalties generated by theatrical exhibition in U.S. cinemas. Again, the latter is out of step with the rest of the world where cinemas do pay performance royalties to their local performing rights organization for theatrical exhibition and raises the question of reciprocity in the eyes of the foreign PROs.

Music creators find themselves at a critical juncture through no fault of their own. While the introduction of new technologies and delivery platforms ensure their music is, and will continue to be, delivered to a much broader audience, they are less assured of receiving fair payment for their works than ever before. We are therefore hopeful that the current review of the Consent Decrees will go a long way to correcting anomalies we are experiencing as our industry moves into the digital domain.

The copyright economy is growing faster than the national economy. Between 2009-2012 the copyright economy grew by 4.73% while the national economy only grew by 2.14%[1]

Audiovisual works, of which music is an integral component, generated $96.48 billion dollars of foreign income from 2009-2012[2] accounting for approximately 6.5% of the U.S. Gross Domestic Product. AV music creators may be small in number but they generate enormous revenues around the world and unless they are guaranteed protection of their revenue stream from their chosen PRO, may have no choice but to consider joining a foreign society, many of whom are already openly courting writers, peddling “the advantages." This could also lead to the prospect of sizeable revenues from royalty income, traditionally been collected and distributed in the U.S. by ASCAP and BMI, remaining offshore.

It’s understood that the problems with the current Consent Decrees, if not corrected, may cause certain publishers to consider withdrawing from the ASCAP and BMI in order to maximize their earning potential. This scenario would be catastrophic for music creators who rely on the transparency of, and the payments from, performing rights organizations to earn a living. Moreover, should DOJ ultimately determine that to sunset the Consent Decrees is in the best interests of licensees, licensors and consumers, it will be imperative that music creators have the unfettered right to elect the collection agent of their choice. For the AV music creator, performance royalties are their lifeblood and the PROs currently offer the best solution.

The prospect of a consistent revenue stream for composers and songwriters relies on the viability of collective licensing of rights through the performing rights organizations. Allowing ASCAP and BMI to negotiate with fewer encumbrances than the current Consent Decrees furnish will go a long way to complementing the changes introduced by the Orrin G. Hatch-Bob Goodlatte Music Modernization Act and, in so doing, permit an open market to determine the fair value of the music we write.

Thank you for your consideration.

Sincerely,

ASHLEY IRWIN
President,
Society of Composers & Lyricists

[1] From the 2013 report: *“Copyright Industries and the U.S Economy” by Stephen E. Siwek*
[2] From the 2013 report: *“Copyright Industries and the U.S Economy” by Stephen E. Siwek*

ANNEXURE A

February 28, 2019

BMI President & CEO Mike O'Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform

With the U.S. Department of Justice (DOJ) evaluating the future of the BMI and ASCAP consent decrees, there has been much discussion and concern throughout the industry about the potential long-term impact. This is not surprising, since modifying or sunsetting the decrees would have far-reaching implications for the entire music business. Given that BMI and ASCAP are at the core of this issue, we feel it is important to share our perspective on how potential changes to our decrees could benefit all involved – if done right.

The DOJ's attention to this matter represents a clear opportunity to do what BMI and ASCAP have been trying to do for years – modernize music licensing to better reflect the transformative changes in the industry. It's why when we first heard about the possibility of the DOJ sunsetting the consent decrees, it came as welcome news.

We believe that a free market with less government regulation is hands down the best way for music creators to be rewarded for their hard work and intellectual property. A free market would create a more productive, efficient and level playing field for everyone involved. Competition is a good thing.

We also know that change is hard. The BMI and ASCAP consent decrees have been in place for nearly 80 years, and suddenly getting rid of them would provoke drastic changes to the current system that would cause chaos in the marketplace. We'd venture to say all sides agree on this.

So, in order to provide an orderly transition, we're recommending the DOJ replace the current BMI and ASCAP consent decrees with newly formed decrees that would protect all parties. Like all modern consent decrees, they would also include a sunset provision. Those new decrees would contain four key provisions:

- First, allow all music users to still gain automatic access to the BMI and ASCAP repertoires with the immediate right to public performance. However, this right should be contingent upon a fairer, more efficient, less costly and automatic mechanism for the payment of interim fees.
- Second, retain the rate court process for resolution of rate disputes, as recently reformed by the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA).
- Third, BMI and ASCAP will continue to receive non-exclusive U.S. rights from our writers and publishers, which allows licensees, songwriters, composers and publishers to still do direct deals if they so choose.
- Fourth, preserve the current forms of licenses that the industry has grown accustomed to beyond the traditional blanket license, such as the adjustable fee blanket license and the per-program license.

These provisions will allow the industry to function more efficiently and effectively, and facilitate a thoughtful transition to a free market.

But a word of caution. As we've seen over the years, some organizations will try to use this moment and BMI's and ASCAP's consent decrees to serve their own interests at the expense of the songwriter. Old and new issues could come into play, such as 100% licensing, or, even more concerning, a push in Congress by music users to create a compulsory licensing model. Compulsory licensing would take us backwards, not forward, creating a system in which the government – not the market – would determine the value of songwriters' work. It could also have dire consequences for other creative industries.

In fact, we see no scenario in which more government regulation of this industry would benefit anyone.

It's important to remind everyone that protections exist today, in the form of antitrust laws, that would continue to exist in a post-decree world and govern current parties as well as any future market entrants. We don't need to create or rewrite legislation to accomplish what antitrust laws already effectively oversee. PROs and licensees all have the same goal of keeping music flowing to the public.

Ultimately, a vibrant PRO system is important to maintain the balance of the industry. With more music being used than ever before, it is critical to safeguard the value of the performing right and grow the income stream it generates for creators. BMI and ASCAP operate on a non-profit-making basis, returning nearly 90 cents of every dollar in licensing fees to our songwriters, composers and music publishers, and we do this in the most efficient and effective way possible. Simply put, BMI and ASCAP offer an essential layer of protection for creators, from helping them through the early stages of their careers, to tracking and paying on performances across all mediums, and advocating for their rights on Capitol Hill. All of this helps keep the music flowing and enables licensees to play the world's best music today, as well as the hits that will be created in the future.

We don't have to look far back to see just how much we can accomplish when the industry comes together and puts music first. The MMA was signed into law because creators and licensees found common ground and solutions that supported the greater good of the industry. That greater good is reflected in the four provisions we are recommending to the DOJ that don't necessarily benefit BMI and ASCAP, but stand to benefit the industry at large. It is that same spirit of compromise which will allow both our licensees and the music creators we represent to thrive in this new era.

Mike O'Neill
President and CEO
BMI

Elizabeth Matthews
CEO, ASCAP