

August 9, 2019

Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: Request for Public Comments on U.S. Department of Justice Consent Decree Review

Thank you for this opportunity to submit comments regarding the United States Department of Justice’s (the “Department”) review of the consent decrees governing the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”). This comment paper is submitted on behalf of Songwriters of North America (“SONA”) and its songwriter members in support of action that will serve to benefit the songwriting community.

I. Introduction

SONA is a completely member funded, grass-roots organization formed by and for professional songwriters to advocate for the rights of songwriters and music creators alike. SONA’s mission includes fighting for fair pay, providing the means for a collective voice to the songwriting community, and upholding the standards of safety and equality in workplaces where music is created. In four short years, over 600 professional songwriters and composers have joined SONA, representing a broad range of musical genres and levels of songwriting success from new on the scene songwriters to Grammy, Emmy, and Academy Award-winning creators. SONA has quickly built its ranks to become a prominent and respected voice on the leading edge of issues affecting songwriters in the industry and in the new digital music economy.

Since its inception, SONA, under the leadership of songwriters Michelle Lewis and Kay Hanley, and our attorney/advisor Dina LaPolt, has led groundbreaking mediations, liaised with major music industry stakeholders and members of Congress, and played a pivotal role in the crafting, lobbying and passage of the landmark copyright legislation, the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”), which will help to transform the way songwriters are paid for the use of their works by streaming services. We were also on the forefront of the fight with the Department for the continuance of “fractional licensing” of our creative property.

In partnership with other advocacy and trade organizations, SONA is committed to assuring that songwriters’ livelihoods are protected and that their songs are never devalued or taken for granted.¹ ASCAP and BMI continue to play a key role in protecting the rights of songwriters and we support

¹ See SONA, *Our Mission*, <http://www.wearesona.com/our-mission> (last visited August 8, 2019)

their view that the consent decrees are in need of modernization. However, we have experienced a number of debilitating challenges and setbacks when working through governmental review in the past. Thus, we strongly urge the Department to proceed with caution and keep songwriters' small business owner interests at the forefront before making any abrupt changes.

II. The Department's History of Consent Decrees Review Causes Songwriters Concern

In 2014, ASCAP and BMI requested that the Department's Antitrust division consider modifying the then nearly seventy-five-year-old consent decrees governing them to allow for more flexible licensing practices.² After two years of review, the Department not only failed to adopt any of the suggestions offered by SONA and other songwriter groups, but it further announced that ASCAP and BMI were now required to provide "full-work" or "100% licenses" for all songs in their repertoires, even if that specific performance right organization ("PRO") did not represent all of the co-writers of such composition.³ ASCAP and BMI became subject to this 100% licensing regulation despite the fact that there was no active discussion of the proposal during the Department's review process.⁴ Had it been implemented, the 100% licensing rule would have been tremendously harmful to songwriters as it would have limited and undermined the creative and economic activities of every songwriter and composer in the United States, as well as internationally.⁵

To understand the harm that this would have inflicted on songwriters, one must understand how songwriters collect public performance income in the United States, and then distinguish "100% licensing" from "fractional licensing" (the industry norm). The United States has four PROs – ASCAP, BMI, The Society of European Stage Authors and Composers ("SESAC") and Global Music Rights ("GMR"). A songwriter becomes a member of one and only one PRO at any given time which issues a blanket license (granting "the right to perform all the compositions controlled by *all* the publishers affiliated with that society"⁶) on the songwriter's behalf, collects monies from distributors of music for the public performance of their songs, and pays the songwriter their share. Because there are multiple PROs, the practice of fractional licensing allows co-owners of a work to separately license their own share of a song and receive direct payment for that share. Fractional licensing is essential to songwriters because it allows them to properly track and receive direct payments for the use and exploitation of their works.

² See generally Department of Justice, *Antitrust Division Review of ASCAP and BMI Consent Decrees 2014*, December 16, 2015, <http://www.justice.gov/atr/ascap-bmi-decree-review>.

³ Department of Justice, *Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees*, August 4, 2016, <http://www.justice.gov/atr/file/882101/download>.

⁴ Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, BILLBOARD, July 30, 2015, <http://www.billboard.com/articles/business/6649208/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for>.

⁵ Ed Christman, *'Disappointing': Publishing Industry Expresses Confusion, Concern Over Sweeping Dept. of Justice Decision*, BILLBOARD, July 5, 2016, <http://www.billboard.com/articles/business/7424128/publishing-industry-ascap-bmi-sony-atv-umpg-confusion-concern-blanket-licenses-100-percent>.

⁶ Donald S. Passman, *All You Need to Know About the Music Business*, (9th ed., Simon & Schuster 2015) (1991), 242.

On the other hand, 100% licensing permits a music user the right to secure a license for 100% of that composition from any *one* co-owner of a work, as opposed to licensing from each songwriter. That one songwriter (or PRO acting on their behalf) would then be responsible for accounting to all of the other songwriters for each songwriter's share of licensing revenues.⁷ Since ASCAP, BMI, GMR and SESAC issue and administer licenses on behalf of different songwriters, that would mean that ASCAP, for example, could issue a license and collect money on behalf of a BMI writer at a rate lower than BMI might charge, and then have to account and pay those monies over to the BMI writer with whom they have no relationship, both delaying payment for the BMI songwriter and forcing such songwriter to accept rates to which they had never assented. This would eliminate competition and create a "race to the bottom" as music users shop for the lowest rates between PROs.⁸ By pushing for 100% licensing, the licensee community appeared to be wanting to have their cake and eat it too: they want anti-trust protection from the consolidated market power of licensors, but at the same time want to be able to shop at one store and to dictate to the manufacturers of the goods what the prices will be. And by implementing 100% licensing, the Department diminished the value of copyrighted musical works, abrogated the rights of songwriters and composers under copyright law and undermined the legal and practical ability of songwriters and composers to exploit their works in the marketplace.

So in 2016, SONA was compelled to file a lawsuit against the Department in federal court with respect to the 100% licensing ruling, arguing that it violated songwriters' Fifth Amendment right against the deprivation of property without due process and that it violated the Administrative Procedure Act that precludes federal agencies from exceeding their respective authority.⁹ SONA and LaPolt Law dedicated over a year of our time and effort, meeting with countless law firms and ultimately convincing Gerard Fox Law, P.C. to come on board with additional expert copyright assistance, all pro-bono, to draft the complaint and help spearhead the lawsuit.

Meanwhile, BMI appealed the Department's 100% licensing ruling on the basis that there is nothing in the language or the history of the consent decree that compels full-work licensing.¹⁰ ASCAP filed an Amicus Curiae Brief in support of BMI's lawsuit and planned to lobby Congress in an effort to seek a legislative correction of the ruling if the court case failed.¹¹ In September 2016, BMI's rate court judge, Judge Louis Stanton, ruled in favor of BMI and issued an order rejecting the Department's 100% licensing interpretation of the BMI consent decree.¹² Despite BMI's success against the

⁷ Ed Christman, *100 Percent Licensing: U.S. Copyright Office Argues New Proposal Threatens Song Owners' Rights*, BILLBOARD, Feb. 26, 2016, <http://www.billboard.com/articles/business/6890403/100-percent-licensing-us-copyright-office-threatens-song-owners-ascap-bmi-dept-of-justice>.

⁸ Robert Levine, *Songwriters of North America File Motion to Proceed in DOJ Consent Decree Lawsuit: Exclusive*, BILLBOARD, February 8, 2017, <https://www.billboard.com/articles/business/7685106/songwriters-of-north-america-file-motion-to-proceed-in-doj-consent-decree>.

⁹ *Songwriters of North America et al v. United States Department of Justice et al* (1:16-cv-01830) (D.D.C. 2016).

¹⁰ *United States v. Broadcast Music, Inc.*, 207 F. Supp. 3d 374, 2016 U.S. Dist.

¹¹ Brief for ASCAP as Amicus Curiae, *United States v. BMI*, U.S. App. LEXIS 25545 (2d Cir. N.Y., Aug. 24, 2017).

¹² *United States v. Broadcast Music, Inc.*, 207 F. Supp. 3d 374, 2016 U.S. Dist.

Department, the Department appealed again.¹³ Eventually, after almost seventeen months in litigation and multiple motions, in February of 2018 the Department filed a motion asserting lack of jurisdiction to adjudicate the matter.¹⁴ It should be noted however, that the Second Circuit had ruled in favor of fractional licensing under its interpretation of BMI’s consent decree.¹⁵ Furthermore, the U.S. Copyright Office, when asked about this 100% licensing requirement, stated that it would “severely undermine the efficacy of ASCAP and BMI, which today are able to grant blanket licenses covering the vast majority of performances of musical works—a practice that is considered highly efficient by copyright owners and users alike.”¹⁶ For this reason, the music industry currently operates under fractionalized licensing, with each copyright owner in a song licensing their respective share of the song. And, in February of 2018, SONA filed a supplemental brief asserting that the issue is settled as a matter of law.¹⁷

Although the worst potential outcome of the matter was averted, the path leading up to and the process of pursuing the lawsuit against the Department was not an easy one and it left SONA wary about another Department review resulting in further injury to songwriters. This is all to say that we, understandably, remain uneasy with any Department review. While we believe that change is necessary to update the consent decrees, we implore such review to be done with a constant eye towards promoting the progress of science and the useful arts by protecting the songwriter community and their livelihoods, and not just the financial interests of music users.

III. Songwriters Are In Support of Change That Will Be Beneficial To Songwriters Such As The MMA

SONA, along with a half dozen other music industry stakeholders, created an industry first consensus bill (the MMA) and witnessed its passage into law last year. SONA supports its industry partners, including ASCAP and BMI, and relishes being able to work together for a common goal. We believe that the MMA is just the beginning of the strides that industry stakeholders will make together for the betterment of the industry and its creators. The passage of the MMA has helped to modernize copyright-related issues and is the biggest step in decades for songwriters to protect their works and realize their deserved compensation. The benefits to songwriters from the passage of the MMA include:

- a newly created non-profit mechanical licensing collective (“MLC”) paid for by the digital service providers (and not by taking commissions from songwriters and decreasing their

¹³ United States v. Broadcast Music, Inc., 2017 U.S. App. LEXIS 25545 (2d Cir. N.Y., Dec. 19, 2017).

¹⁴ Songwriters of North America et al v. United States Department of Justice et al (1:16-cv-01830) (TJK) (2d Cir. Feb. 16, 2018).

¹⁵ United States v. Broadcast Music, Inc., No. 16-3830-cv, 2017 WL 6463063 (2d Cir. Dec. 19, 2017).

¹⁶ Maria A. Pallante, *Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works*, January 12, 2016, <https://www.copyright.gov/policy/pro-licensing.pdf>.

¹⁷ Songwriters of North America et al v. United States Department of Justice et al Civil Action No. 16-cv-01830 (TJK) (2d. Cir. Feb. 16, 2018).

income) to create a free, searchable, global database of all works for tracking and matching works with owners;

- allowing the rate courts to consider all market evidence when setting rates for digital public performances other than by terrestrial broadcasters;
- establishing a process for copyright owners to claim ownership of songs and receive royalties and that songwriters will receive at least 50% of all royalties paid to publishers for unmatched works;
- confirming that digital interactive streaming utilizes the mechanical reproduction right under copyright law;
- providing audit rights for the MLC to audit digital service providers and also for copyright owners to audit the MLC to ensure accurate payments are being made;
- moving mechanical royalty rate setting from an outdated four-part formula to a willing buyer willing seller in a free market standard; and
- appointing self-published songwriters to the MLC board.

But the MMA is not nearly enough to fully enable songwriters to achieve “fair pay” which is one of our primary missions. As you can see, SONA and songwriters are inextricably invested in the development and success of the MMA, just as we would be in favor of any appropriate and properly vetted changes for the benefit of songwriters.

IV. Conclusion

Songwriters, along with ASCAP and BMI, have been hampered by the antiquated consent decrees. Unfortunately, we, along with ASCAP and BMI, are further hampered when the Department makes decisions and regulations without following constitutional and administrative procedures. The one thing we do not want is for matters to become worse for songwriters as has happened in the past.

SONA and its middle-class songwriter members are strong supporters of the collective rights management regime. We believe that it remains the best way to organize an otherwise chaotic marketplace and that it works for us, the licensors, as well as for the licensees who would otherwise be forced to track down millions of independent licensors in order to run their businesses. And while we recognize that the ASCAP and BMI consent decrees were entered into to adjudicate potential imbalances in market forces, they were enacted decades ago, with ASCAP’s dating back over seventy-five years, and they desperately need updating to reflect current market conditions.

SONA urges the Department to proceed carefully, and if changes are to be made, we generally support the consent decree reforms proposed by ASCAP and BMI as expressed in their CEOs’ open letter dated February 28th, 2019, and in their public comments filed with the Department. Although not a direct party to the consent decrees, we are the millions of small business owners likely to be most

impacted by any changes that are made. To that end, we respectfully request that we be consulted directly on any changes the Department is contemplating. SONA is supportive of any updates that promote an increase in free market bargaining power for our members.

Thank you for your time and consideration.

Respectfully Submitted,



Dina LaPolt, Esq.
LaPolt Law, P.C.
9000 Sunset Blvd, Suite 800
West Hollywood, CA 90069

and



Songwriters of North America (SONA) Board of Directors

Michelle Lewis
Kay Hanley
Adam Dorn
Michelle Featherstone
Adam Gorgoni
Jack Kugell
Brendan Okrent
Shelly Peiken
Pamela Sheyne