Via Electronic Mail (ATR.MEP.Information@usdoj.gov)

August 9, 2019

Owen Kendler
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Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 4000
Washington, DC 20001

Re: *ASCAP/BMI Antitrust Consent Decree Review*

Dear Mr. Kendler:

I. Introduction

On behalf of the Computer & Communications Industry Association ("CCIA"),[1] we write in relation to the ongoing Justice Department ("DOJ") review of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") consent decrees.[2]

Preserving the competitive music marketplace should be the goal for all stakeholders. In light of this goal, CCIA's responses to DOJ's questions regarding the ASCAP and BMI decrees follow below.

II. Do the Consent Decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Which ones and why? Are there provisions that are ineffective in protecting competition? Which ones and why?

As CCIA stated during the 2014 review,[3] the ASCAP and BMI decrees continue to serve important competitive purposes today, as the same underlying market power and distribution problems that existed in music licensing beginning in the 20th century still persist in 2019.[4] As

[1] CCIA is a 501(c)(6) trade association representing the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 750,000 workers and generate annual revenues in excess of $540 billion. A list of CCIA members is available at http://www.ccianet.org/members.

[2] U.S. Department of Justice, Antitrust Division, Antitrust Consent Decree Review - ASCAP and BMI 2019, https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019 (last updated June 19, 2019).

[3] CCIA submission to John R. Read, Chief, Litigation III Section, Antitrust Division, Dep't of Justice, re: ASCAP/BMI Antitrust Consent Decree Review, at 2-3 (Aug. 6, 2014), *available at* https://www.justice.gov/atr/page/file/1095876/download (hereinafter "CCIA 2014 ASCAP/BMI Comments").

[4] Illustrating that competition regulators around the world must supervise price coordination by PROs, on the same day that the Department of Justice announced it was again reviewing the decrees, the Australian Competition

the Division noted when soliciting public comment again this round, the consent decrees were put into effect "to address competitive concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers."[5] One reason for the consent decrees being instituted in the first place was that PROs' publisher members had originally agreed to license their rights exclusively through their PRO, eliminating competition among them. DOJ should reaffirm that this behavior prohibited in the 1940s is still prohibited today, and that publishers still cannot exclusively license rights through ASCAP or BMI.

The concerns underpinning the ASCAP and BMI decrees have not dissipated. As Judge Denise Cote ruled in 2014, there is not—and never has been—a fair, competitive market for music performance rights.[6] This is in part because the ASCAP and BMI repertories do not substitute for one another; a music service that needs a blanket license to operate typically must secure licenses from each of these PROs (and, indeed, also requires licenses from SESAC and GMR, and may need to obtain licenses from other PROs that may emerge as well). There are many reasons for this. For instance, when a record is released, it is often not known for months *or years* which songwriters and publishers are claiming interests in the underlying composition.[7] Moreover, the PROs have taken the position that they each only license the "fractional" share of songs controlled by their writers. And, as discussed below, the PROs do not even reliably inform licensees what songs they license. In the face of this extraordinary leverage, even the existing mechanisms to protect competition are not always sufficient to curtail misconduct.

Below, CCIA's comments highlight some of the decrees' critical features that mitigate the inherently anticompetitive market power of ASCAP and BMI. These mechanisms provide a

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and Consumer Commission (ACCC) announced it was seeking feedback on a proposal to reauthorize the musical works licensing arrangements for the local leading performing rights organization, the Australasian Performing Right Association (APRA). *See* Press Release, U.S. Department of Justice, Office of Public Affairs, Department of Justice Opens Review of ASCAP and BMI Consent Decrees (June 5, 2019), https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees; Press Release, Australian Competition and Consumer Commission, Proposal for more transparency on music performing rights licensing (June 5, 2019), https://www.accc.gov.au/media-release/proposal-for-more-transparency-on-music-performing-rights-licensing.

[5] *See supra* note 2.

[6] *In re Petition of Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014), *aff'd sub nom. Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 785 F.3d 73 (2015).

[7] U.S. Copyright Office, Copyright and the Music Marketplace at 194 n.954 (2015), *available at* https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (noting that "publisher and songwriter disagreements over their respective ownership shares" are often not resolved "for months or years after the record is released").

critical bulwark against the PROs' monopolistic practices. And, by streamlining the clearance of performance rights on fair and reasonable terms, they have allowed for the creation of a vibrant music ecosystem for consumers.

A) 'Partial withdrawals' and 'fractional licensing' are prohibited

DOJ should reaffirm that 'partial withdrawals' and 'fractional licensing' are prohibited, as discussed in CCIA's 2014 and 2015 comments, respectively.[8] Publishers have previously attempted to 'partially withdraw' from a PRO specifically with regard to 'new media' services, attempting to extract higher royalties through direct licensing with certain licensees. However, both district courts held, and the Second Circuit affirmed, that the consent decrees do not permit partial withdrawals because they require ASCAP and BMI to issue licenses to all works in their repertories 'on request', as soon as a service makes a written request to perform the works in a PRO's repertory.[9] *See* ASCAP AFJ2 § VI; BMI AFJ § IV. Permitting publishers to 'partially withdraw' rights with respect to an arbitrarily defined type of licensee, such as 'new media', is tantamount to ignoring the license-on-request obligation. Without the decrees, PROs could deny a licensee a license outright, exposing them to enormous statutory damages and liability risk. The mere possibility of such holdup would give PROs extraordinary leverage over music users and enable them to impose monopoly prices.

'Fractional licensing' is harmful to competition for several reasons. First, it not only would institutionalize the high transaction-cost environment that presently exists, but also would risk exacerbating the problem by incentivizing rightsholders to create more and more individually-licensable fractions. These ever-increasing transaction costs would further discourage entry, expansion, and innovation in music distribution platforms, to the detriment of competition, consumers, and artists. Second, fractional licensing invites more of the strategic behavior described by Judge Cote.[10] Finally, it would contravene the legal principle allowing a single rightsholder to license all of a work, subject to a duty of accounting. While some

[8] CCIA 2014 ASCAP/BMI Comments, *supra* note 3, at 9-10; *see generally* CCIA submission to David C. Kully, Chief, Litigation III Section, Antitrust Division, Dep't of Justice, re: ASCAP/BMI Antitrust Consent Decree Review (Nov. 20, 2015), *available at* https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi16.pdf.

[9] *In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013), *aff'd sub nom. Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 785 F.3d 73 (2015); *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037 (LLS), 2013 WL 6697788 (S.D.N.Y. Dec. 18, 2013).

[10] *In re Petition of Pandora Media, Inc.*, 6 F. Supp. 3d at 357, *supra* note 6.

individual authors may presently elect to contract around this rule, the competition policy and principles underlying the decrees are inconsistent with the practice of fractional licensing.

B) Modernizing and harmonizing repertory disclosure

That PROs and their members benefit from obfuscating what PROs may license demonstrates the lack of a functional competitive marketplace, and illustrates the need for consent decree obligations ensuring transparency regarding what works PROs administer, and who holds the rights to those works. As CCIA's 2014 comments stated, given this fact, more robust transparency mechanisms are warranted. Marketplace transparency regarding what musical works a PRO controls, the identity of the publishers of those works, and publishers' respective ownership shares, as well as additional oversight of the licensing process, would help mitigate harms to competition. Despite announcements from ASCAP and BMI two years ago that a joint musical works database was in progress and expected to launch by the end of 2018,[11] 2019 is more than half over and the PROs have still not launched a publicly accessible database that is updated in real time and accessible to licensees at scale. And even if ASCAP and BMI deliver this data, the SESAC and GMR catalogs will still remain unknown.

To be sure, ASCAP's amended consent decree requires not only that ASCAP maintain a public list of works, but also enable access to a current, machine-readable version of that database. *See* ASCAP AFJ2 § X(B)(2). Unfortunately, ASCAP provides, at best, grudging access to its repertory information. While it provides a searchable database called ACE on its website, it specifies in its terms of use that "ASCAP makes no guarantees, warranties or representations of any kind with regard to and cannot ensure the accuracy, completeness, timeliness, quality or reliability of any information made available on and through ACE."[12] In addition, the ASCAP online search tool only permits song-by-song searches of the repertory information, which renders it essentially unusable for services that are required to clear millions of songs per year. Each PRO should maintain online, open, and accurate catalogs that comprehensively articulate all songs the PRO administers, the rightsholder of each of those

[11] Press Release, ASCAP, ASCAP & BMI Announce Creation Of A New Comprehensive Musical Works Database To Increase Ownership Transparency In Performing Rights Licensing (July 26, 2017), https://www.ascap.com/press/2017/07-26-ascap-bmi-database; Press Release, BMI, BMI & ASCAP Announce Creation of New Musical Works Database: Comprehensive Resource To Increase Ownership Transparency In Performing Rights Licensing (July 26, 2017), https://www.bmi.com/news/entry/bmi-ascap-announce-creation-of-new-musical-works-database.

[12] ASCAP, ACE Terms Of Use Agreement, https://www.ascap.com/help/legal/ace-terms-of-use (last visited Aug. 9, 2019).

songs, and the rightsholder's respective ownership share. Rights ownership information should be updated in a timely manner, in bulk, digital, machine-readable formats, and potential licensees should be able to obtain online electronic files detailing the current contents of the PRO's repertory.

Further, ASCAP's consent decree hinges the PRO's ability to litigate upon having previously disclosed the appropriate rights management information pertaining to the allegedly infringing works: it may "not institute or threaten to institute . . . any suit or proceeding against any music user for copyright infringement relating to the right of nondramatic public performance of any work in the ASCAP repertory that is not, at the time of the alleged infringement, identified on the public electronic list. . . ." *See* AFJ2 § X(D). CCIA believes this obligation should extend across all PROs, in connection with an obligation to make all repertory information available online.

C) Non-discrimination principles

As discussed above, the decrees ensure that PROs do not engage in price discrimination against so-called 'new media' companies. ASCAP and BMI cannot discriminate among similarly situated licensees, which prevents the PROs from exercising their market power to exclude new entrants into the licensee markets, particularly with respect to new technologies and modes of content distribution. DOJ should enforce the decrees accordingly, and furthermore ensure that PROs do not discriminate against licensees based on their size or corporate affiliation.

III. What, if any, modifications to the Consent Decrees would enhance competition and efficiency?

Termination of the ASCAP and BMI decrees would not serve the public interest. The decrees should be maintained, particularly in light of the recent and very robust two-year review process the DOJ itself completed. While the ASCAP and BMI decrees remain important mechanisms to protect competition and should be maintained, more robust transparency requirements under the decrees may be warranted, which would help mitigate harms to competition. As explained above, PROs may not be complying with their obligations to disclose information to potential licensees, and repertory disclosure regulations could be modernized and harmonized across all PROs.

To the extent regulatory action is taken, any regulation in this space should be technology-neutral, and should not merely apply to existing licensees based on particular media formats or uses, so as not to discourage future innovation and competition.

IV. Would termination of the Consent Decrees serve the public interest? If so, should termination be immediate or should there instead be a sunset period? What, if any, modifications to the Consent Decrees would provide an efficient transitionary period before any decree termination?

Termination of the decrees—whether now or at some point in the future—would be extremely harmful to the public interest. It would be particularly incongruous for the Department to take this step only months after Congress enacted the Music Modernization Act ("MMA"),[13] which was squarely intended to streamline the music licensing process for digital music services. Indeed, Congress was explicit that the MMA was designed to work together with the consent decrees, and essentially directed DOJ to *not* terminate the consent decrees.

> There is serious concern that terminating the ASCAP and BMI decrees without a clear alternative framework in place would result in serious disruption in the marketplace, harming creators, copyright owners, licensees, and consumers. *In fact, sections of the [MMA] assume the continued existence of the decrees* . . . . Enacting the [MMA] only to see the Department of Justice move forward with seeking termination of the decrees without a workable alternative framework could displace the [MMA]'s improvements to the marketplace with new questions and uncertainties for songwriters, copyright owners, licensees and consumers.[14]

Any effort to terminate, or even materially weaken, the consent decrees would thus run directly counter to Congressional intent.

If the Department is nevertheless inclined to terminate the decrees, it should explicitly tie such termination to Congress's enactment of legislation to replace the decrees with a legislative solution. In the alternative, the Department should impose conditions on ASCAP and BMI before releasing them from the constraints of the consent decrees, to at least somewhat mitigate the competitive harms that are sure to arise. At a minimum, it should reaffirm the impropriety of exclusive licensing, partial withdrawals, and fractional licensing under the current decrees, and require ASCAP and BMI to implement and release the long-promised joint musical works

[13] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).
[14] S. REP. NO. 115-339, at 16-17 (2018) (emphasis added).

database, which is now overdue. The Department should have to certify that the database is fully functional and meets the necessary threshold requirements before the decrees are terminated. These threshold requirements should include: (1) authoritative musical work, songwriter, and publisher information, including industry-standard identifiers, such as International Standard Work Code ("ISWC") and Interested Party Information ("IPI") numbers, for at least 90% of musical works in the combined ASCAP and BMI repertories; (2) real-time updates of musical work, songwriter, and publisher information; and (3) the ability for potential or current licensees, or their agents, to freely obtain bulk, downloadable data in industry standard formats such as the Common Works Registration ("CWR") and Digital Data Exchange ("DDEX") formats.

The MMA process should also serve as a model for any reform, as it was a process in which multiple stakeholders jointly arrived at a consensus, ensuring fair and efficient licensing for all, as opposed to precipitous unilateral action undermining the decrees.

V. Do differences between the two Consent Decrees adversely affect competition? How?

PROs should be subject to symmetrical obligations. As noted in CCIA's 2014 comments, the provisions in BMI's consent decree regarding disclosure of its catalog are not symmetrical to those of ASCAP.[15] These provisions should be harmonized across all PROs. Another salient distinction between how PROs are currently overseen by antitrust authorities is that SESAC, the next-largest PRO after ASCAP and BMI, is not governed by a consent decree at all. Neither is the newest PRO, GMR, which was launched in 2013. All PROs should be subject to the same oversight and should be subject to the same pro-competitive protections for licensees.

VI. Are there differences between ASCAP/BMI and PROs that are not subject to the Consent Decrees that adversely affect competition?

As stated above, SESAC, the next-largest PRO after ASCAP and BMI, is not subject to antitrust consent decrees. Multiple courts have made clear that SESAC's conduct, if left unchecked, will violate the antitrust laws and harm competition and consumers. Indeed, the local television and commercial radio industries have successfully sued SESAC in antitrust actions resulting in settlements providing for decree-like protections for their industries.[16]

[15] CCIA 2014 ASCAP/BMI Comments, *supra* note 3, at 7.

[16] *Radio Music License Committee, Inc. v. SESAC, Inc.*, 29 F. Supp. 3d 487, 501-02 (E.D. Pa. 2014) (finding (1) "plaintiff has sufficiently pleaded that SESAC's lack of transparency exacerbates the exclusionary nature of its conduct by forcing radio stations to purchase the SESAC license even if they do not plan to perform the songs in

However, the absence of any comprehensive oversight on SESAC similar to ASCAP and BMI adversely affects competition in public performance rights licensing. It also demonstrates that smaller PROs can still engage in anticompetitive behavior against licensees. While SESAC only controls performance rights for a small percentage of American compositions, the current structure of the music licensing industry gives that small percentage disproportionate leverage—any significant audio or audiovisual service cannot do without a SESAC license. The same is true of GMR, which has amassed, by its own account, a "must-have" collection of public performance rights, and thus raises the same antitrust concerns as the other PROs. Indeed, GMR has been sued by the radio industry for antitrust violations on that basis.[17] There is significant confusion as to what songs GMR is truly in control of thanks to license-in-effect provisions within the decrees.

VII. Are existing antitrust statutes and applicable caselaw sufficient to protect competition in the absence of the Consent Decrees?

Competition could not be protected without the ASCAP and BMI decrees, because the decrees regulate otherwise unlawful collusion between competitors. This collusion, which would otherwise violate antitrust law, is accepted because it occurs pursuant to operating norms imposed by the decrees' oversight and organizes the market in such a way that benefits consumers. The abrupt elimination of the decrees would subject PROs and licensees alike to burdensome antitrust litigation ultimately harming consumers. There is also no guarantee that private litigation would result in the even enforcement of antitrust laws to the benefit of all licensees and consumers. For example, as mentioned above, SESAC currently affords decree-like protections to sector-specific licensing committees, but to no other licensees. Therefore, the consent decrees are needed to ensure the even application of pro-competitive restraints to a wide

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SESAC's repertory for fear that they may unwittingly air copyrighted content"; (2) "the complaint contains sufficient allegations that SESAC has taken advantage of its position as the only non-regulated PRO by paying its affiliates supracompetitive profits and refusing to offer radio stations carve-out rights for copyrights obtained directly from its affiliates"; and (3) "SESAC's anticompetitive conduct has driven up the price of copyright licenses and deteriorated the quality of service insofar as customers only have the option of purchasing a blanket license"); *Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 220 (S.D.N.Y. 2014) (citing evidence that "since 2008, fewer licensing options are realistically available to stations, and stations must pay supra-competitive prices for the one license that is available-SESAC's blanket license" and concluding "[t]his evidence is sufficient to establish competitive harm") (citations omitted).

[17] A lawsuit arguing that GMR must also be governed like ASCAP and BMI due to antitrust violations is currently being litigated. *See* Gene Maddaus, *Judge Moves Global Music Rights Dispute to California Court*, Variety (Apr. 1, 2019), https://variety.com/2019/biz/news/global-music-rights-dispute-transferred-1203177423/.

variety of licensees so that consumers continue to enjoy music through a robust array of compelling services.

VIII. Conclusion

In conclusion, rather than terminating or sunsetting the ASCAP and BMI consent decrees, CCIA urges DOJ to maintain them and strengthen their enforcement, as discussed above, by: (1) prohibiting 'fractional licensing' of rights, which has no pro-competitive benefits; (2) greatly increasing the transparency of PRO repertories by requiring the PROs to provide data online in bulk, in a machine-readable format; and (3) ensuring that the PROs do not discriminate in their licensing based on the particular technology employed to deliver music to consumers. Enforcing the decrees in this fashion will ensure that they continue to serve their vital role: allowing efficient clearance of public performance rights while curbing the inevitable anticompetitive excesses of the PROs.

If the Department decides instead to terminate the decrees in spite of the grave economic consequences that this would have, it should impose some minimum requirements on ASCAP and BMI before terminating the decrees: most importantly, that they implement and release the joint musical works database they promised to release last year, and obtain government approval that the database meets necessary threshold requirements including providing real-time, authoritative information about at least 90% of musical works in their repertories in industry-standard bulk formats.

Respectfully submitted,

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