Before the
U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION
Washington, D.C.

In re Antitrust Consent Decree Review: American Society of Composers, Authors and Publishers/Broadcast Music, Inc.

COMMENTS OF NATIONAL ASSOCIATION OF BROADCASTERS

Introduction and Summary

The National Association of Broadcasters ("NAB") hereby submits its comments in connection with the review ("Consent Decree Review") undertaken by the U.S. Department of Justice ("DOJ") Antitrust Division with respect to the operation and effectiveness of the Final Judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) (collectively, "Consent Decrees"). NAB members are both creators and users of copyrighted works and, as such, recognize the important need to balance the rights of copyright owners against the public interest. In particular, the public's interest in products and services that increase the availability of copyrighted works is one that has been repeatedly recognized by the Supreme Court as an essential policy objective of the copyright law, and should be a key consideration in this review.

NAB supports the joint comment submitted by the Television Music License Committee ("TMLC") and the Radio Music License Committee ("RMLC"), which are the entities most directly engaged with the Consent Decrees on behalf of broadcasters. In addition to the points raised by TMLC and RMLC, NAB offers the enclosed analysis of economist Steven Peterson, Ph.D., as summarized in and supplemented by the discussion below. The major points addressed in Dr. Peterson's analysis are that: (1) the Consent Decrees provide important protections against the inherently anti-competitive features of Performance Rights Organization ("PRO") licensing, which remain essential and should not be diminished; (2) the unique history, context, and necessities animating the Consent Decrees render the DOJ's general policy favoring sunset provisions inapplicable; (3) ASCAP and BMI should not be permitted to discriminate against certain types of licensees by allowing music publishers to selectively withdraw their catalogs for only some licensees but not others; (4) improving the availability and reliability of information concerning the PROs' repertories can facilitate alternative licensing of performance rights and otherwise introduce a degree of competition to the licensing process; and (5) the due process, efficiency, and expertise afforded by the rate courts should not be sacrificed in favor of truncated, private arbitration.

The Consent Decrees remain essential to the functioning of the market for musical composition performance rights

The Consent Decrees serve an essential purpose in today's music licensing marketplace by providing necessary protection against anti-competitive conduct and effects inherent in the collective licensing of musical composition performance rights. As a preliminary matter, the collective and blanket licensing of performance rights remains essential to the functioning of the music licensing market, both for copyright owners and licensees. PROs aggregate the musical works of many songwriters. This aggregation creates numerous efficiencies, including those relating to licensing, enforcement, and administration of rights. Without collective licensing, the transaction costs associated with all of these functions would be prohibitive for all involved.

At the same time, the blanket licensing of performance rights is inherently anti-competitive because the very nature of the PROs' blanket license involves the fixing of a single price for all music, irrespective of which songs are actually used. Moreover, the aggregation of rights gives the PROs tremendous market power, which in the absence of the Consent Decrees would allow the PROs to extract supra-competitive pricing for their licenses. Radio and television broadcasters lack control, in certain instances, over the particular songs that are broadcast. Even with respect to programming created by broadcasters, each of the PROs has aggregated such a large repertory that there is often no practical way to avoid playing music licensed by each of the PROs.[1]

Notably, there is no competition between ASCAP and BMI with respect to these licenses because neither license provides a substitute for the other. Thus, in order to avoid potentially devastating penalties for infringement, broadcasters must license performance rights from each of the PROs. In the absence of the Consent Decrees, the resulting market power would allow ASCAP and BMI to engage in the "hold up" of licensees, and otherwise allow the PROs to supra-competitive rates, terms, and conditions from licensees. [2]

The inherent anti-competitive effects of collective, blanket licensing are clearly demonstrated by the conduct of the one (as of yet) unregulated PRO, SESAC. In particular, recent rulings in two antitrust cases brought against SESAC by the TMLC and RMLC, respectively, illustrate how such an unregulated PRO has abused the market power inherent in the blanket license. In the TMLC case, the court found that the "evidence would … comfortably sustain a finding that SESAC . . . engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." *Meredith Corp. v. SESAC LLC*, 09 CIV. 9177 PAE, 2014 WL 812795, *10 (S.D.N.Y. Mar. 3, 2014). The court further determined that the evidence was "more than sufficient" to support findings that "SESAC's conduct harmed competition, and that this harm outweighed any pro-competitive benefits of that conduct." *Id.* at *34.

[1] This problem is further aggravated by the PROs' refusal to provide sufficient information about their repertories, as discussed further below.

[2] As the Copyright Office has previously acknowledged, the collective licensing of large catalogs of music copyrights inherently raises antitrust issues and therefore typically requires regulation and oversight. U.S. Copyright Office, *STELA §302 Report* 95-96 ("there is a significant risk that the collective may exploit its market power by charging supra-competitive rates or discriminating against potential licensees").

Similarly, in the RMLC case, after the presentation of extensive evidence in a preliminary injunction hearing, the magistrate judge concluded in her Report and Recommendation (which the District Court subsequently adopted) that "the challenged conduct has produced anticompetitive effects in the relevant market," *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5087, Report and Recommendation, *30 (E.D. Pa. Dec. 20, 2013), and that "SESAC has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no alternatives but to purchase their licenses," *id.* at 33.

The PROs and music publishers have alleged that the Consent Decrees somehow unfairly suppress the compensation that songwriters and composers receive for the public performances of their music and are causing songwriters' incomes to drastically decrease. According to their own press releases, however, ASCAP's and BMI's revenues have recently experienced "record setting" revenue growth, and resulting increases in distributions to songwriters.[3] If songwriters' incomes are truly decreasing on an industry-wide basis, it is certainly not due to a decrease in performance royalties.

Among the most important protections afforded by Consent Decrees are (1) the mandatory license upon request; (2) the protection of rate court if the PROs and licensees cannot agree on reasonable rates; and (3) the guaranteed availability of real alternatives to the blanket license.

Sunset provisions should not be added to the Consent Decrees

NAB appreciates that DOJ's current policy generally favors the inclusion of sunset provisions in new consent decrees. It would be inappropriate, however, to apply that general policy to the PRO Consent Decrees, which are unique in several important ways. First, the Consent Decrees have been in place for almost the entire history of the market for blanket public performance licenses. During those many decades, the various stakeholders involved have grown and adapted to the regulatory regime of the Consent Decrees.

Second, the rationale behind sunset provisions is that in the more typical situation a consent decree is fashioned in reaction to a particular set of market conditions, which may reasonably be expected to change after a certain period of time. In those cases, the terms of the consent decree may be expected to improve those market conditions such that the restrictions eventually become unnecessary. The ASCAP and BMI Consent Decrees are fundamentally different. The need for the Consent Decrees arose from the very nature of the blanket licenses, which are fundamentally anti-competitive, but also necessary to enable wide scale music licensing. The blanket license, itself, creates the market power necessitating its regulation. Even decades later, the market power of the PROs is no less today than it was in 1941. If anything, that market power has increased, and there is no evidence or other reason to believe that such market power (and its abuse in the absence of the Consent Decrees) will decrease at any time in the foreseeable future.

[3] *See* http://www.bmi.com/press/entry/563077; *see also* http://www.ascap.com/press/2014/0213-2013-financials.aspx.

The Consent Decrees should not be amended to allow the PROs to discriminate against certain licensees by allowing music publishers to selectively withdraw their catalogs with respect to some licensees but not others

In an attempt to circumvent the Consent Decrees, ASCAP and BMI music publishers have sought to selectively withdraw their catalogs from the ASCAP and BMI repertories for only certain licensees but not for others. Both rate courts interpreted the Consent Decrees to prohibit such withdrawals, and the Consent Decrees should not be amended to allow them to do so.

One of the hallmarks of the Consent Decrees is nondiscrimination. Allowing the PROs to facilitate discrimination against licensees would undermine not only the nondiscrimination principle, but also the very purpose of the Consent Decrees: to prevent anti-competitive conduct. The major music publishers with substantial catalogs have essentially the same market power as the PROs because their catalogs do not compete with one another, and each has aggregated a large enough number of songs from individual songwriters as to make the licensing of their catalogs indispensible for broadcasters. Moreover, the recent *Pandora* decision provides ample evidence that, if allowed to circumvent the Consent Decrees, those publishers will abuse their market power to extract supra-competitive rates, terms, and conditions from the blanket licensees they choose to target. Indeed, when Sony and UMPG attempted to withdraw certain rights from the scope of the Consent Decrees, the court in *Pandora* found that:

> the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying AFJ2 . . . Because their [ASCAP, Sony, and UMPG's] interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified.

In re Pandora Media, Inc., 12 CIV. 8035 DLC, 2014 WL 1088101, *35 (S.D.N.Y. Mar. 18, 2014).

If the Consent Decrees are amended at all, they should require greater transparency with respect to the PROs' repertories

The Consent Decrees could be improved by requiring ASCAP and BMI to provide more accurate and comprehensive information to licensees about their repertories. Lack of meaningful access to such information has increased transaction costs and hindered licensing activities – both direct and collective. Repertory transparency would allow licensors, licensees, and the rate courts to better understand the rights that are being licensed and their value. Such information is also crucial for the development of real alternatives to the blanket licenses, which in turn may help lessen some of the anti-competitive effects of the blanket licenses.

The due process, efficiency, and expertise afforded by the rate courts should not be sacrificed in favor of truncated, private mediation

One of the most fundamental protections afforded licensees by the Consent Decrees is rate court supervision of license negotiations. For decades, the rate courts have been successful in setting

rates that have been largely uncontroversial. Even in the vast majority of instances, where the parties are able to agree on rates without rate court litigation, the availability of rate court helps moderate the PROs' ability to abuse their market power in negotiations.

In recent years, however, ASCAP and BMI have lost a string of rate cases against digital music licensees, in which the rate courts found that the PROs failed to justify their requested rate increases. Of course, the very fact that ASCAP and BMI have lost so many recent cases proves that the courts are working and why they are so essential. The various changes to the Consent Decrees requested by the music publishers and their PROs, discussed above, are all motivated by their desire to eliminate or circumvent rate court supervision. Eliminating the rate courts in favor of truncated private arbitration risks weakening this protection, and should be rejected.

The proposal to move to arbitration assumes, in the first instance, that the rate courts are inadequate. This assumption is false. The rate courts are presided over by inherently neutral, sophisticated federal judges, who routinely adjudicate copyright and antitrust issues and who regularly hear complex expert testimony. The same judge hears disputes for each PRO, which allows each judge to develop significant industry expertise, and decisions are subject to appellate review before changing panels of the Second Circuit Court of Appeals. There has been no legitimate argument that these federal judges have been unable to understand the music industry or relevant legal issues in any way that negatively impacts ratemaking. Each of the judges has also developed streamlined procedures, which are nonetheless consistent with the due process afforded by federal court, to ensure that rate cases are decided quickly and efficiently. The rate courts are also governed by precedent, with increased resulting predictability.

By contrast, a private arbitrator will have far less experience with the relevant copyright and antitrust law than a federal judge. To the extent an arbitrator has music industry experience, the arbitrator would necessarily have represented either copyright owners or licensees, creating lingering concerns over fairness and perceived conflicts of interest. Discovery in arbitration is typically minimal, or eliminated entirely. Such lack of discovery would disproportionately prejudice licensees, because the PROs have access to potential benchmarks and other relevant information while licensees typically do not.

Given the financial stakes in rate disputes, parties will aggressively litigate royalty rates regardless of whether the venue is in federal court or arbitration. There is no reason to believe that, without drastic elimination of discovery and appellate review, private arbitration will be any more efficient, speedy, or cost-effective than the rate courts. To the contrary, arbitration will introduce a destabilizing uncertainty into the licensing process. The due process guaranteed by the rate courts should not be sacrificed for the dubious expedience of private arbitration.

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NAB appreciates this opportunity to provide a meaningful contribution to the Consent Decree Review, and looks forward to continued dialog on these important matters.

Respectfully submitted,

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