



MUSIC. INNOVATION. CONSUMERS.

May 14, 2018

The Honorable Makan Delrahim
Assistant Attorney General
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Assistant Attorney General Delrahim:

On behalf of the millions of restaurants, bars, hotels, wineries, breweries, local radio and television broadcasters, digital music services, retailers, and other venues that bring music to consumers, as well as the millions of employees and artists and songwriters they support, we write to urge the Antitrust Division to preserve the consent decrees governing the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).

The MIC Coalition's top priority is maintaining a functional music marketplace for the benefit of consumers. Terminating these decrees would be extraordinarily disruptive for the entire music marketplace and would jeopardize the licensing system that enables millions of businesses across the country to efficiently play and pay for music performed publicly. The ultimate result of such action would be substantial consumer harm.

Since the consent decrees were first established in 1941 to address the anticompetitive impacts of collective licensing by ASCAP and BMI, there has been unprecedented innovation and growth in music delivery modes and technologies. Consumers have more choices than ever and songwriters are collecting record-high revenues.

Throughout this period of change and growth, the basic operational functions of these licensing collectives, and the mutually beneficial and essential efficiencies they provide for both songwriters and licensees—guided by the consent decrees' principles of competition, non-discrimination and fairness—have remained constant and vital. The PROs aggregate large numbers of musical works into a single catalog, grant licenses to perform those works to music users, collect license fees from those licensees, and distribute those royalties among affiliated

copyright holders. The PROs continue to collectively negotiate and set prices on behalf of their members. The core function of collective licensing—collectively setting prices for the use of millions of works—simply would not survive antitrust scrutiny were it not for these time-tested consent decrees. In fact, the music publishing industry has become even more consolidated over the term of the consent decrees—consolidation that has been approved in part because of the existence of the decrees—making them more necessary today than they were eighty years ago to address the inherent anticompetitive harm of collective licensing.

The outcome of terminating the consent decrees would be nothing short of a nightmare scenario for the functioning of the music marketplace. Every place of business, non-profit venue, broadcaster or music service seeking to play music would be faced with an untenable choice: attempt to navigate a chaotic licensing landscape with the potential for exorbitant price demands, discriminatory conduct by licensors, uncertainty about rights obtained, and a sky-high risk of ruinous infringement claims or stop playing music, including live music, altogether. And any entity that sought to collectively license musical works in the absence of the decrees, regardless of market share, would face significant risk of private antitrust litigation. The outcome is equally harmful to millions of legitimate businesses and services that seek to play—and pay for—music, as well as to songwriters and artists who rely on these entities to perform their works and receive compensation.

While the current music licensing market is not perfect, it is far from broken. The decrees have allowed the music marketplace to thrive, to the mutual benefit of consumers, songwriters, and those who perform music. Given the potential for anticompetitive harms and profound market disruption posed by the termination of consent decree protections, our members must reinforce how critical the consent decrees are to maintain our ability to play music for the benefit and enjoyment of our listeners, viewers, patrons and consumers, and for songwriters to get paid for those performances.

Even with the decrees in place, many of the venues represented by MIC Coalition members already face ongoing challenges to secure the appropriate licenses for their establishments. Bars, restaurants and wineries around the country have had to eliminate music, which negatively impacts the experience of their guests and deprives songwriters of a significant revenue source.¹ A market without the decrees would see far more coalition members faced with the same terrible choice and far fewer places to hear the music we all want to hear.

¹ Moreover, the recent decision by the U.S. Court of Appeals for the Second Circuit concluding that the consent decrees do not prohibit PROs from licensing their works on a fractional basis—requiring licensees to find and negotiate rights untold numbers of different owners for every song—has already created a major licensing hurdle that could drive many venues and services to simply forego music altogether. The lack of transparency as to the often-changing identities of the owners of musical works and the PROs with which those songwriters and

If the decrees are abandoned with no alternative in place which balances the needs of consumers, songwriters, and licensees, the entire system of publicly performing music will be thrown into chaos, causing irreparable harm that could shutter businesses and decrease both songwriter compensation and consumer choice. While we agree that Congress *could potentially* create a better system for the benefit of both licensors and licensees, comprehensive reforms of that magnitude are only achievable when all stakeholders reach consensus. Any determination by the Antitrust Division to terminate the decrees must be preceded by enactment and implementation of a viable alternative framework developed with Congress and the entire music ecosystem.

Therefore, we urge the Department of Justice to leave in place the important protections in the consent decrees that help maintain efficient licensing for music users and fair compensation to music creators. These pro-consumer efficiencies are the very rationale that underpins these antitrust consent decrees in the first place. For the sake of consumers and the integrity of the nation's antitrust laws, preserving the consent decrees is paramount.

Respectfully,

The MIC Coalition

American Beverage Licensees
American Hotel & Lodging Association
Brewers Association
Computer & Communications Industry Association
Consumer Technology Association
Digital Media Association
National Association of Broadcasters
National Restaurant Association
National Religious Broadcasters Music License Committee
National Retail Federation
Radio Music License Committee
Television Music License Committee
WineAmerica

publishers are affiliated could dramatically increase costs and the risk of copyright infringement assumed by users in securing music performance licenses. See *United States of America v. Broadcast Music, Inc.*, No. 16-3830, 2017 WL 6463063 (2d Cir. May 18, 2017), available at <https://www.justice.gov/atr/case-document/file/967556/download>.