MINTZ LEVIN
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202-434-7300
202-434-7400 fax
www.mintz.com

Bruce D. Sokler | 202 434 7303 | bdsokler@mintz.com

August 6, 2014

David C. Kully
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street, Suite 4000
Washington, DC 20001

Re: ASCAP/BMI

Dear Mr. Kully:

The National Cable & Telecommunications Association ("NCTA") hereby submits its comments in connection with the Antitrust Division's review of the operation and effectiveness of the Consent Decrees in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) and *United States v. BMI,* 64 Civ. 3787 (S.D.N.Y.).

NCTA is the principal trade association for the United States cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $210 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 27 million customers.

Through its Music Licensing Committee, NCTA has negotiated directly with ASCAP and BMI for blanket licenses that cover the public performance of music in locally-originated programming by cable operators. This license covers music contained in programming on local origination channels, leased access and local public, educational, and governmental access channels, commercials inserted into programming by the cable operators, certain locally-sourced pay-per-view or on-demand programming, and certain state or local news and sports channels.

For 25 years, and sometimes longer, NCTA's cable program network members have negotiated public performance licenses with ASCAP and BMI. Over that period, both NCTA and its program network members have invoked the protections of the ASCAP and BMI Consent

Decrees, including access to the rate courts. These proceedings have included both interpretations of the then-existing Consent Decrees and rate proceedings.[1]

NCTA responds to the DOJ questions as follows:

1. **Do the Consent Decrees continue to serve important competitive purposes today? Why or why not?**

   From the perspective of providers of audio-visual television programming, the Consent Decrees continue to serve very important purposes, acting as safeguards to constrain ASCAP's and BMI's substantial market leverage, while providing a framework that facilitates licenses for program providers and fair compensation for music creators. Our members continue to support and see the necessity for the Consent Decrees. Without the protections contained in the Consent Decrees, ASCAP and BMI would be in a position to extract excessive rates from licensees through the threat of copyright infringement litigation. The Consent Decrees also reduce what might otherwise be sizeable transaction costs for all parties and reduced availability of both programming and music.

   The necessity for the Consent Decrees is particularly important in order to facilitate the public performance of programming that incorporates prerecorded music for which the grant of blanket licenses minimizes the opportunity for "holding up" users who wish to utilize the programming. Cable program networks offer a variety of programming incorporating music, from newly-produced original programming to movies, television shows, and documentaries that were created years, sometimes even decades, earlier. Every week, NCTA's members publicly perform tens of thousands of hours of programming containing "music in the can," i.e. movies and television programming that contain background, featured, and other music added at the time of production. In large part because of the "music in the can" problem, cable program networks, since the advent of cable television, have relied upon the blanket license framework in the ASCAP/BMI Consent Decrees in connection with such programming. No system should be countenanced that would create practical and unnecessary barriers that could prevent millions of individuals from enjoying this programming on a daily basis.

---

[1] See, e.g, *ASCAP v. Showtime/The Movie Channel, Inc.,* 912 F.2d 563 (2d Cir. 1990); *United States v. ASCAP (In the Matter of Application of Turner Broadcasting, Inc.),* 956 F.2d 21 (2d Cir. 1992), *affirming,* 782 F. Supp. 778 (S.D.N.Y. 1991). Prior to the establishment of a BMI rate court under the BMI Consent Decree, NCTA and BMI engaged in antitrust litigation over BMI's practices regarding public performance licenses. *NCTA v. BMI*, 772 F. Supp. 614 (D.D.C. 1991).

The Decrees provide a number of other protections to users, including: a) the requirement that ASCAP and BMI grant licenses to applicants upon written request, a feature that is consistent with other licensing mechanisms in the music industry, when a user needs immediate access to a catalogue; b) the right to secure a "reasonable" fee determination by the federal court overseeing the Decrees in the event the user and ASCAP/BMI cannot reach a negotiated resolution; c) consistent with the principle established in the *Turner* litigation, the right to obtain a "through to the audience" license covering all distribution utilized by an originating service provider through to the end user; d) the requirement that ASCAP/BMI offer a license at a comparable fee to all similarly situated music users; e) the requirement that ASCAP/BMI provide a per-program or per-segment license option as a check on market power; and f) the requirement that ASCAP/BMI may only secure a non-exclusive grant of rights from its members, which enables users to secure direct licenses from individual ASCAP/BMI members outside of the blanket licenses.

With respect to the last point, the Antitrust Division's support of a rate-setting mechanism that gives users offsets or rate reductions to the degree they have directly licensed music or acquired music performance rights outside the blanket license is an important contribution to the competitive marketplace, which helps offset ASCAP's and BMI's market power.

Finally, the existing system would be very difficult to dismantle. Performance rights are often licensed by different parties than synchronization and other rights, and there is little transparency in the system. Even one song often is controlled by multiple composition rights holders, the performance rights for which are administered by multiple publishers and performance rights organization ("PROs"). The rights to receive royalties from songs may be tied up in estates or disputed. There is no technical means to locate the owner of performance rights in pre-existing content that is licensed to NCTA's members for exhibition. Doing away with the existing Consent Decree licensing structure after operating under it from the very beginning of the television industry would therefore be unwarranted, inefficient, and extremely expensive.

2. **Should the Consent Decrees be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others? If such partial or limited grants of licensing rights to ASCAP and BMI are allowed, should there be limits on how such grants are structured?**

NCTA is aware of activities in the marketplace by which certain music publishers have attempted to withdraw some performance rights from ASCAP and BMI. We will leave it to others to address the consequences in those particular circumstances.

With respect to audio-visual works, and "music in the can," we believe that any attempt to withdraw such rights from ASCAP and BMI should be considered a violation of the

Consent Decrees and a misuse of market power in violation of the antitrust laws. It should not be countenanced in any way. If any amendments to the Consent Decree are contemplated or proposed, affirmative steps should be taken to protect against any attempt to misuse market power associated with the decades of previously created programming with "music in the can."

Further, as noted above, for the "music in the can" associated with pre-recorded content exhibited by NCTA members, the marketplace has no infrastructure in place to license performance rights directly and the infrastructure necessary to make this possible would be expensive, difficult and inefficient. Further, partial withdrawals would need to be structured in a way to avoid accumulation of market power by market participants without the protections afforded by the Consent Decrees.

3. **Should the Consent Decrees be modified to permit rights holders to grant ASCAP and BMI rights in addition to the rights of public performance?**

We do not believe there is any benefit to audio-video content producers from permitting ASCAP or BMI to license additional rights. Today, content producers are free to choose musical compositions at the time content is created, and to make choices based on price and other considerations. Although, in theory, ASCAP and BMI rights are non-exclusive, in practice PRO members typically do not license performance rights to their works at the time synchronization rights are acquired. This is particularly true for productions that wish to use music familiar to the viewer.

There is no reason to believe that the same would not be true with respect to other rights, such as synchronization rights, if ASCAP and BMI were permitted to trade in such rights. The net result would be a transfer from a system in which competition is functioning to one in which prices would be set through collective negotiations by two (or more) large organizations with monopoly power, subject to regulation by courts and the government. The net result would likely be a significant reduction of competition and extend the failures of the performance rights system to new markets. This extension would have all of the effects of monopoly that the antitrust laws are designed to prevent—inefficiency, higher prices, lower output, and less innovation.

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

To protect users, we support the concept of a so-called "license-in-effect," which has been proposed in connection with the recent effort of certain music publishers who have attempted to withdraw particular rights from the ASCAP and/or BMI catalogues. The Consent Decrees should provide explicitly that when a user applies for a license under the provisions of the ASCAP and BMI Decrees, the user obtains a license to all rights then

currently in the catalogues of the PROs and its members and all rights subsequently added to these catalogues for the course of the license. Doing so would prevent publishers from using withdrawals to "punish" entities that do not capitulate to ASCAP/BMI license demands, or to adversely affect licensees while negotiations or rate-setting litigation is pending.

We also believe that ASCAP and BMI should be required to publish their methodologies for determining music usage, the content of their catalogues, the method of setting rates for users and for songwriters, and, where ASCAP/BMI licenses users on a percentage-of-revenue or other formulaic basis, the rates at which it has done so. The lack of transparency in the current system is a significant impediment to concluding transactions; creating greater transparency in these respects would have significant efficiency benefits.

5. **How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?**

The existing ASCAP and BMI song databases are fundamentally inadequate for users seeking to identify, for example, the songs licensable on a publisher-by-publisher or writer-by-writer basis. ASCAP and BMI should be required to identify, with specificity, all the songs which they are able to license, searchable by publisher and writer, as well as by title of the audio-visual work, including information regarding co-ownership, along with (where available) corresponding performing artist and sound recording information.

Further, enhancements in transparency would reduce the need for rate court litigation. Enhanced transparency as to the outcome of third party negotiations would reduce the reliance on dispute resolution mechanisms, and lead to a more efficient marketplace enabling reasonable rate setting outcomes by negotiation.

6. **Should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration?**

The rate court exists as part of a consent remedy for an antitrust violation, and hence for the benefit of users. Since the decision regarding reasonable rates is made against that antitrust backdrop, it is best made by the court, with the protections and appellate rights inherent therein.

Moreover, on a practical level, ASCAP and BMI would be heavily advantaged by an arbitration procedure where they are aware of the array of licenses and benchmarks available, but the licensee is not. Therefore, users would have a huge information deficit, putting them at a significant disadvantage in an arbitration setting.

Furthermore, NCTA members strongly support the provisions of the current Consent Decrees that a) afford copyright liability protection to music users once an application for a license is made, and b) create a process for negotiations that includes the issuance of interim licenses at a rate fixed, if necessary, by the court, with a presumption that the last existing similar license sets forth an appropriate interim rate.

There are ways to streamline rate court litigation where it occurs. There is no reason to believe that the rate court judges would be unreceptive to such proposals, and in fact have invited them.

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

We cannot point to an instance since the BMI rate court was established in the mid-1990s when differences between the two decrees have affected competition. Others may have different views.

Having said that, we see no reason why the two Consent Decrees are not identical or why they should not be combined with respect to provisions affecting users. We are not aware of any reason, other than history, for the differences and the language distinctions.

Sincerely,

Bruce D. Sokler
Attorney for NCTA