



# DEPARTMENT OF JUSTICE

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**“Thank You For The Music”\***

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**Remarks as Prepared for Delivery at  
The Antitrust Division’s Public Workshop on  
Competition in Licensing Music Public Performance Rights**

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For nearly three years now I have had the unique privilege of serving as the Assistant Attorney General for Antitrust at the Department of Justice. On behalf of the Department, I want to welcome you to our workshop today. I also want to thank our esteemed panelists for the presentations and perspectives they will share with us over the next two days.

Given these challenging times, I am welcoming you to a virtual workshop rather than to one in the Great Hall at the Department of Justice.

You may ask: what is our goal for this workshop? I have to say, in one word: competition. Competition for the benefit of the American consumer. Competition for the benefit of innovation. And, competition for the benefit of the songwriters, composers and artists.

I feel confident that this workshop will be informative and valuable to both the participants, the public, and us at the Division. After all, it is not every day that LeAnn Rimes, Pharrell, and Jon Bon Jovi share a stage with antitrust lawyers and economists. But artists, like all workers, creators, and innovators, benefit from competitive markets, so it is only natural that we should come together to discuss competition in music licensing.

This workshop is part of the Division's on-going effort to promote competition in the music licensing industry. Those efforts began with consent decrees first secured as resolutions to antitrust suits brought by the Antitrust Division nearly eighty years ago. For students of history, that is almost four scores ago! These decrees between the Department of Justice and the two organizations, ASCAP and BMI, continue to govern music performance licensing today.

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\* ABBA, THE ALBUM (Polar 1977).

Like so many of you, I love music, and it has played a special role in my life. When I came to the United States as a refugee from Iran as a child, I didn't speak a single word of English. The music on the radio nonetheless spoke to me. *The Jazz Singer* was the first movie I saw in the United States. When Neil Diamond sang about people coming to America "without a home, but *not* without a star," he was singing about me. And I am sure many Americans respond similarly to that song.

That is the magic of music. It speaks a universal language. It can make us feel joy and can make us feel pain. Like nothing else, it can spark our imaginations and our memories. To this day, hearing Neil Diamond floods me with memories of my early days in America as a child. Each of us here has a song that transports us to a magic moment, evokes a feeling, or simply inspires us to carry on. Music, perhaps most profoundly of all, has the extraordinary capacity to inspire hope and bring us together in times of division.

Many consumers of music today wouldn't recognize 8-track tapes, cassettes, or vinyl records, or perhaps even CDs. Technology continues to evolve how we enjoy our music. Digital streaming technology now gives us all access to almost any song, anytime, anywhere.

Some may recall the Spanish ship that sailed to discover America, the Santa Maria. It carried the flag of Queen Isabella that bore the words, "Nothing Further," because they believed Spain to be the furthest point west in the world. When they discovered the New World in America, the Queen ordered the flag repainted to read "More Beyond." With new technology and new business models, we know there is more beyond for music.

Congress has responded to various innovations with new laws, such as the Digital Millennium Copyright Act in 2000, and the Music Modernization Act of 2018. Some of the

rules that govern the music industry today, however, are quite old. The Justice Department's consent decrees with ASCAP and BMI, for example, first went into effect in 1941, the year the United States entered WWII with the bombing of Pearl Harbor. In that year, a gallon of gas was 12 cents, and the average cost of a new house was a little over \$4,000. Americans listened to music on the radio or on phonograph players, which were becoming more affordable, and there was a robust market for sheet music sales. Much has happened in the way we listen to music since then. As Winston Churchill famously said, "To improve is to change; so to be perfect is to have changed often."

While I suspect that no one would accuse the Antitrust Division of being perfect, we have, periodically, revisited and changed our views on antitrust enforcement based on new market realities or new economic discovery. After the Division's most recent review of the music consent decrees, in 2016, we issued a closing statement signaling that we might revisit the decrees after resolution of, among other things, uncertainty surrounding fractional licensing.<sup>1</sup> About a year later, the Court of Appeals for the Second Circuit concluded that the BMI decree allowed for fractional licensing.

After the Second Circuit's ruling, I began meeting with all interested parties about the decrees, and we invited public comment on the decrees again in 2019. As part of this process, we received over 800 comments, from members of the public, academics, and many of the organizations represented by panelists here today. This workshop is part of our effort to ensure a vigorous public dialog about the state of competition in music licensing, and specifically, the ASCAP and BMI consent decrees.

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<sup>1</sup> <https://www.justice.gov/atr/file/882101/download>

This inquiry into the ASCAP and BMI decrees also is part of a broader effort across the Antitrust Division that began when I became Assistant Attorney General to systematically revisit old consent decrees and determine whether they continue to serve their original purpose of protecting competition. Since 1979, the standard practice of the Antitrust Division has been to limit the period of consent decrees to no more than ten years. Prior to that, decrees were often perpetual. Thus, when I became Assistant Attorney General in 2017, consent decrees from as far back as the 1890's remained on the books.

Among these many decrees, one of the oldest involving the music industry was a 1921 decree enjoining Oscar Kern and five co-defendants from operating the Retail Music Roll Dealers Association of Philadelphia. The Retail Music Roll Dealers Association provided music rolls for player pianos. At the time, it represented a big bet against a rival technology that was starting to gather steam—the radio. In Mr. Kern's words: "People will not be satisfied to hear music coming out of the air. They want the music right out of a piano or a talking machine in their own homes." Video might have killed the radio star, but the player piano consent decree was alive and well for nearly a century. We finally terminated it last April, about thirteen years after Apple introduced the iPhone.<sup>2</sup>

Another set of decrees involved coin-operated phonographs. A 1957 judgment, for example, prohibited a distributor of coin operated phonographs from restricting their resale to certain people or in certain geographic areas. We successfully terminated that decree last year as well.<sup>3</sup>

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<sup>2</sup> <https://www.justice.gov/atr/page/file/1270166/download>

<sup>3</sup> <https://www.justice.gov/atr/page/file/1184016/download>

Through our decree review process, we have given decrees like these a fresh look. As a result, nearly 800 outdated judgments are now history thanks to the hard work and dedication of the Antitrust Division staff and the courts that have acted on our requests.

As we think about the ASCAP and BMI decrees during this workshop, we are mindful of the priorities underscoring the Judgment Review Initiative—that the free market, not enforcement by government decree, should be the default. Where consent decrees are necessary, they must be justified by the current competitive landscape, or by tomorrow's, and not allowed perpetually to regulate an industry simply because they are the status quo.

We are also mindful of valuable lessons we have learned through our enforcement actions. For example, Ticketmaster and Live Nation entered into a consent decree in 2010 in which they promised not to retaliate against concert venues for using competing ticketing companies. When they broke those promises, we enforced the 2010 decree. We also strengthened the decree in multiple ways so that it would be easier to deter and detect violations going forward.<sup>4</sup> These developments benefit American consumers and music fans. They also prove that consent decrees, when they are justified and well-defined, can be a valuable enforcement tool.

We recognize that the ASCAP and BMI decrees affect the lives of many Americans, from those in the music industry to those who simply love listening to music. We also understand that the current music ecosystem has grown and evolved over many years in an

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<sup>4</sup> <https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live>

environment in which the decrees have been in place. We therefore approach these decrees in an open-minded and balanced way, inviting comment and engaging with all stakeholders.

These decrees deserve the utmost in careful consideration, but we also must recognize that consent decrees do not conduct music . . . , but the market for music is conducted by these consent decrees.

Ultimately, it is critical that songwriters, composers, and musicians enjoy the fruits of a free market for their creativity, as the U.S. Constitution provided through Article I, clause 8, and as intended by the Sherman Act. As ABBA put it, “nothing can capture a heart like a melody can,” and “without a song or a dance, what are we?” Artists who give us those melodies and songs deserve economic liberty. They deserve the opportunity to pursue recognition and compensation consistent with the value of their work. That is the system our Founders envisioned in drafting our Constitution when they provided copyright protection for creative works.

I thank the artists and composers and the executives who will share their views over the next two days, and I thank all creative artists for enriching our lives and our souls with their music each and every day. We must ensure that America’s unique combination of free expression and free enterprise can be an incubator for songwriters and musicians everywhere. We are all better for their creations. As Alicia Keys counseled in her song “Underdog”:

Keep on keeping at what you love . . .

Now, it is my privilege to introduce one of the greatest musical innovators of our time,  
Grammy award-winning singer, songwriter and global sensation who needs no introduction,  
LeAnn Rimes!