Comments of the Society of Composer & Lyricists

The Society of Composers & Lyricists ("SCL") respectfully submits these comments in response to the U.S. Department of Justice's (the "DOJ") Antitrust Consent Decree Review as pertaining to ASCAP and BMI.

The Society of Composers and Lyricists is an organization whose membership is made up primarily of composers and songwriters who find work in the field of writing music for audiovisual works. As such, unlike songwriters, we are usually employed via contract under the copyright concept of Work made For Hire ("WFH"). Under this concept - which is somewhat unique to the US - a creative contributor to an audiovisual work may sign away his or her copyright ownership to a third party for consideration, usually payment. Consequently, though we write the music, we rarely retain copyright ownership of our work. However, despite our loss of ownership, by contract and precedent the Work For Hire composer has been entitled to collect the so-called "writer share" of performing rights – one half of the performing rights income generated by our work, with the other half going to our employer and copyright owner who retains the "publisher share". This arrangement has worked well for decades but may indeed be upended by the online distribution of our work.

WFH composers' and songwriters' performance royalties are collected and distributed to us by our respective performing rights society ("PRO" – i.e. ASCAP, BMI and SESAC). It should be noted that the amount of performance income generated by audiovisual works represents, for example, in the case of ASCAP just over 50% of all of their distributions to members. This amounts to a very substantial revenue source for AV music creators and publishers. In fact, this royalty stream has, for many of us, become the most important part of our income and without which, we would find it difficult to make a living.

Therefore the Society of Composers and Lyricists strongly urges the DOJ to either eliminate or modify the Consent Decrees that oversee both ASCAP and BMI. We believe that in their current form, the Consent Decrees place the PROs at a

competitive disadvantage when it comes to negotiating with licensors, artificially devaluing our work and, perhaps most alarmingly, are leading major publishers (e.g. Sony/ATV and Universal Music Group) to threaten withdrawal of their entire catalogues from the PROs – vast portions of which contain music from audiovisual works - and directly licensing those works thereby denying the transparency of accountability currently afforded us by the PROs and the collective licensing model.

If publishers - over whom we have no influence by virtue of the WFH contract - withdraw our works from the PROs we may well find ourselves in the impossible position of trying to collect our share of performing rights royalties from a multitude of companies, many of whom will bundle together a host of rights, leading to obfuscation of our legitimate performance revenues. Moreover, many of these companies with little or no incentive to set up large service centers necessary to properly distribute our share of the royalty income, will rather be inclined to keep as much money as they can, simply to offset the loss of income brought about by the decline in sales of physical product – mechanical royalties.

In principle, the SCL does not take issue with a more open and progressive form of licensing, provided the AV music creator's PRO maintains the ability to collect the "writer share" on his/her behalf. But while ever the Consent Decrees remain in place and rate courts arbitrarily determine the value of music, it's disingenuous to suggest that the publisher ultimately has the best interests of the AV creator at heart.

When evaluating the effects of the Consent Decrees in their current form and the implications that portend for composers and songwriters of music for AV works should the system collapse due to catalogue withdrawals from the PROs by the major publishers, we also need to consider the issue of ***reciprocity***.

Reciprocity, as defined herein, is a copyright term used in the Berne Convention international copyright treaty first agreed to in 1886 (the US is a signatory) and has included the concept in every update since. In a nutshell, signatory countries are required not only to treat foreign authors equally to their own nationals with respect to copyright, but must also meet minimum agreed to standards with respect to those authors rights.

The SCL fears that, should the current performing rights collection and distribution system disintegrate (as a direct result of the Consent Decrees forcing publisher withdrawal from ASCAP and BMI), we could find US authors being discriminated against. Foreign collecting societies may well determine the lack of reciprocity that this situation creates means their authors are not being remunerated as before and retaliate against US composers.

One example of this occurred in the 1980s and 90s. For a period of time some foreign territories would take US AV works and "strip" out the music replacing it with that of local composers and, in so doing, depriving the original US composers and songwriters of foreign performing royalties – often a considerable amount of

money. Aside from the creative damage done to these productions, this pernicious practice was almost entirely ended when the US performing rights societies successfully persuaded foreign societies, using the argument of reciprocity, to refuse to pay the composer whose music was used in lieu of the original US composer's score. We fear such arguments will not only fall on deaf ears in the future but that the practice of stripping may be encouraged. This will be a creative and financial disaster for US composers and songwriters of AV scores. We can imagine enumerable other ways that US composers may find our work being discriminated against as foreign societies respond to the breakdown of the US performing rights system.

The Consent Decrees have outlived their usefulness and no longer serves the purpose for which it was originally intended. Rather, they have become impediments to the open market negotiations demanded by today's delivery services and licensees. It is generally acknowledged that the rate courts to which ASCAP and BMI are subjected are keeping the fair market value of music artificially low. This has created a disparity in the marketplace because of unfair restrictions on the two PROs subject to the Consent Decree and their subsequent rate courts. Commercial entities like SESAC, start-ups like Azoff-MSG Entertainment and a variety of foreign PROs are all competing for the opportunity to collect the revenues on behalf of the music creators but unlike ASCAP and BMI, are not constrained by antiquated regulations in their efforts to do so.

Many of the foreign PROs are merged with their mechanical collection agency counterparts in an effort to make licensing simpler and more cost-effective for its rights holders. The SCL believes that all music creators will be best served by rights collection organizations having the ability to negotiate any and all rights, the clearance thereof creating a simpler, more cost-effective and streamlined 'one-stop shop' for end users, the Licensees.

As the responsibility for delivery of entertainment programming moves rapidly to digital services, it is of dire importance that creators of the music embodied in those AV programs are fairly compensated for the fruits of their labors and unless there are reforms made to the Consent Decrees under which ASCAP and BMI are currently bound to operate the future of that compensation, for those who earn their living under the terms of Work For Hire, is anything but assured.

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THE SOCIETY OF COMPOSERS & LYRICISTS