Via Electronic Mail (CompReg2@usdoj.gov)

April 25, 2018

Douglas Rathbun
Competition Policy and Advocacy Section
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 3413
Washington, DC 20530

Re: *Roundtable on Antitrust Consent Decrees*

Dear Mr. Rathbun:

On behalf of the Computer & Communications Industry Association ("CCIA"),[1] we write in response to the Justice Department's inquiry regarding its roundtable on antitrust consent decrees.[2] CCIA previously filed comments with the Justice Department during their review of the ASCAP and BMI consent decrees ("the Decrees") in August 2014 and November 2015, and these comments are as relevant today as when they were filed.[3] CCIA's comments noted that the Decrees have been instrumental in preventing anti-competitive behavior in the music marketplace, and that eliminating or weakening these decrees would risk stifling innovation and competition in an industry that already faces substantial barriers to entry. In this submission, CCIA focuses on how the Decrees are unique from other consent decrees, in that they create a structural solution to a transaction cost problem, and enable the coordination of important activity in the marketplace which increases efficiency, but is otherwise unlawful. The fact that

[1] CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 750,000 workers and generate annual revenues in excess of $540 billion. A list of CCIA members is available at http://www.ccianet.org/members.
[2] Available at https://www.justice.gov/atr/roundtable-antitrust-consent-decrees-thursday-april-26-2018.
[3] *See* CCIA Comments (Aug. 2014), http://www.ccianet.org/wp-content/uploads/2014/08/CCIA-Comments-on-DOJ-ASCAP-BMI-Consent-Decree-Review.pdf; CCIA Comments (Nov. 2015), http://www.ccianet.org/wp-content/uploads/2015/12/CCIA-Comments-on-ASCAP-BMI-Antitrust-Consent-Decree-Review-2015.pdf.

this system has been undermined by a recent decision of the U.S. Court of Appeals for the Second Circuit, permitting so-called "fractional licensing", only increases the need for the continuing operation of the Decrees.[4]

Unlike other consent decrees, the Decrees authorize the performing rights organizations ("PROs") to engage in economically valuable but unlawful activity, by sanctioning what would otherwise be *per se* prohibited horizontal coordination between competitors. By virtue of the Decrees, collective licensing entities regularly enter into transactions that would otherwise be illegal under antitrust law, and in various contexts this coordination functionally allows for the operation of a music marketplace that would otherwise be paralyzed by transaction costs. That these transactions may be efficient, however, does not exempt them from the law. If the Decrees were to be narrowed or dissolved, the efficiency-promoting activities of PROs would either cease, or precipitate antitrust litigation over the coordination that was previously conducted under the Decrees' indulgence. Neither outcome is in the public interest.

By enabling transaction-cost reducing functions, the Decrees serve an important structural role, and enhance consumer welfare. However, the same underlying market power and distribution problems that existed in music licensing in the 20th century still persist today. As valuable as the Decrees are in reducing transaction costs, PROs' licensing practices are "inherently anti-competitive," demonstrating their "disproportionate power over the market for music rights."[5] As courts have repeatedly emphasized, there is not—and never has been—a fair, competitive market for music performance rights.[6] This is because the ASCAP and BMI repertories do not substitute for one another; music services typically must secure licenses for

[4] *United States v. Broadcast Music, Inc.*, No. 16-3830-cv, 2017 WL 6463063 (2d Cir. Dec. 19, 2017).
[5] *United States v. Broad. Music, Inc.*, 426 F.3d 91, 93 (2d Cir. 2005); *United States v. Am. Soc'y of Composers, Authors and Publishers*, 627 F.3d 64, 76 (2d Cir. 2010).
[6] *See, e.g.*, *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 354 (S.D.N.Y. 2014) (quoting *ASCAP v. Showtime/The Movie Channel*, 912 F.2d 563, 577 (2d Cir. 1990)).

both of them (and, indeed, may require a license from other PROs as well). If a service lacks what users are looking for, it will not succeed in the market. In the face of this extraordinary leverage, the consent decrees limit PRO misconduct, and thus remain essential to a competitive music marketplace.

In conclusion, the Decrees provide a structural solution to marketplace coordination problems which—when not utilized improperly—contributes to the U.S. music licensing landscape. Altering this framework without another system ready to take its place could cause significant economic harm.

Respectfully submitted,

Matt Schruers
VP, Law & Policy
Marianela López-Galdos
Director of Competition & Regulatory Policy
Computer & Communications
Industry Association
655 15th Street NW, Suite 410
Washington, DC 20005