BEFORE THE
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
WASHINGTON, D.C.

PUBLIC WORKSHOP ON COMPETITION IN LICENSING MUSIC PUBLIC PERFORMANCE RIGHTS

PUBLIC COMMENTS OF DIGITAL MEDIA ASSOCIATION

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The Digital Media Association ("DiMA") is pleased to provide these comments in advance of the virtual public workshops to be hosted by the Department of Justice's Antitrust Division on July 28 and 29, 2020. DiMA is a non-profit trade group representing the most significant participants in the digital music industry (including Amazon, Apple, Google, Pandora, and Spotify). DiMA previously submitted comments in connection with the Antitrust Division's review of the ASCAP and BMI consent decrees on August 9, 2019.[1]

DiMA presents this additional submission to emphasize two points in response to the workshops' stated goals of discussing "competition issues relating to the various types of public performance licenses currently offered in the marketplace, [and] competition between performing rights organizations (PROs)." ***First,*** although PROs compete with each other *for members*, they do not compete with each other *for licensees*. That essential dynamic, which is not and cannot reasonably be contested, must be the shared starting point for any sound discussion of "Competition in the Licensing of Public Performance Rights in the Music Industry," as the Division has titled the present workshops. ***Second,*** the protections afforded by the ASCAP and BMI consent decrees have historically been, and continue to be, essential to fostering competition between services that offer music to the public in new and innovative ways.

In response to the Division's request for public comments regarding the ASCAP and BMI consent decrees in the summer of 2019, a number of submissions by prominent groups of rights owners and rights aggregators touted the purported pro-consumer benefits of what they called the "free market." As the National Music Publishers Association wrote, "[f]ree markets … guarantee

[1] *See* Joint Public Comments of Radio Music License Committee and Digital Media Association (Aug. 9, 2019) ("DiMA's August 9, 2019 Comments"), *available at* https://media.justice.gov/vod/atr/ascapbmi2019/pc-619.pdf.

consumers the widest variety of music options."[2] ASCAP advocated that the decrees be terminated outright after a sunset period, in order to allow ASCAP and BMI to "compete in a free market."[3] BMI made a similar proposal.[4]

DiMA certainly shares the view that unfettered competition is a vital mechanism, as a matter of both law and policy, for serving and enhancing consumer welfare.[5] It is axiomatic that "[c]ompetition … fosters innovation and tends to lower prices for consumers[.]"[6] And it does indeed appear to be the case that PROs compete with each other for publisher affiliates or songwriter members, at least to some degree. A music publisher or a songwriter can choose whether to license his or her public performance rights through ASCAP, BMI, another PRO, or directly.[7] But competition between PROs for rightsowner-affiliates is not competition for end-user customers; it is competition for inputs that, irrespective of who wins, get bundled and sold as a package to PROs' end-user customers, *i.e.*, their licensees.

And ASCAP and BMI do not compete with each other *for licensees*. The enterprises that deliver music to the public—whether digital streaming services like DiMA's members, radio stations, television stations, concert promoters, wineries, restaurants, or anyone who buys a license

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[2] NMPA Submission at 2 (Aug. 9, 2019), *available at* https://media.justice.gov/vod/atr/ascapbmi 2019/pc-550.pdf.

[3] ASCAP Submission at 1 (Aug. 9, 2019), *available at* https://media.justice.gov/vod/atr/ascapbmi 2019/pc-043.pdf.

[4] BMI Submission at 45, *available at* https://media.justice.gov/vod/atr/ascapbmi2019/pc-077.pdf ("The Music Licensing Marketplace Needs a Free Market[.]").

[5] *See, e.g.*, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) ("The primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms.").

[6] *See Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 489 (2d Cir. 2004).

[7] Under the consent decrees, rights owners may not grant ASCAP and BMI *exclusive* licenses, and so remain free to directly license their rights even after affiliating with one of these PROs. In rare instances, rights owners do not license through a PRO at all.

to publicly perform musical compositions—do not and cannot choose *between* a license from ASCAP and a license from BMI. They need both. In economic terms, ASCAP and BMI—and the other two prominent PROs in the United States, SESAC and GMR—thus sell products that, from the perspective of their buyers, are *necessary complements*, not *alternative substitutes*.[8]

The Antitrust Division has historically agreed. As it wrote in a brief to the U.S. Court of Appeals for the Second Circuit in 2000, "BMI does not compete with ASCAP in the sense that users will purchase licenses from one or the other; since their repertoires are different, most bulk users take licenses from both."[9] In today's world, the PROs' newfound insistence that they may license only *fractional* interests in songs—which are essentially useless without the remaining fractions of the works supposedly necessary to authorize any actual performance—only exacerbates and exaggerates the imperative to treat each of their licensed repertoires as inadequate

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[8] This is the reason why every court to have confronted the question—and there have been many—has concluded that PROs do not compete with each for licensees in the same product market. *See, e.g.*, *Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180, 196 (S.D.N.Y. 2014) ("[T]he Court … holds that the relevant market is fairly defined as that for performance licenses of the music in SESAC's repertory[.]"); *Radio Music License Comm., Inc. v. SESAC Inc.*, 2013 WL 12114098, at *15 (E.D. Pa. Dec. 23, 2013) ("[T]his Court finds that RMLC has produced sufficient evidence to make a prima facie showing that the relevant product market is the market for SESAC's blanket license."); *Broadcast Music, Inc. v. Hearst/ABC Viacom Entm't Servs.*, 746 F. Supp. 320, 327 (S.D.N.Y. 1990) ("[T]he relevant product market is apparent: copyrighted musical compositions in BMI's repertoire."). More recently, the Radio Music License Committee ("RMLC") sued GMR alleging, *inter alia*, a violation of Sections 1 and 2 of the Sherman Act based on its unlawfully exploiting market power derived from assembling a "can't avoid" repertoire (notwithstanding GMR's relatively small size) that GMR contends must be licensed in addition to other PROs' offerings. The RMLC also alleged a *per se* violation of Section 1 based on GMR's having orchestrated the concerted exodus of multiple songwriters from other PROs for the specific purpose of raising the prices of pre-existing licenses. On February 18, 2020, the court denied GMR's motion to dismiss and held that RMLC's "rule of reason" and *per se* claims were both predicated on allegations that, if proven true, would indeed violate the Sherman Act. *See* Order Den. Mot. to Dismiss, *Radio Music License Committee, Inc. v. Global Music Rights, LLC*, Case No. 19-03957 TJH (C.D. Cal. Feb. 18, 2020), at 2.

[9] Br. for the United States, *United States v. BMI (In Re Application of AEI Music Network, Inc.)*, Case No. 00-6123 (2d Cir. June 26, 2000), at 25 (internal citation omitted).

to any commercial purpose standing alone.[10] There is accordingly, so far as DiMA is aware, no evidence in the voluminous record of public comments in response to either of the Division's recent consent decree reviews of a single instance in which a prospective licensee was able to treat ASCAP and BMI as "either/or" alternatives, rather than "both/and" necessities.

Whatever the effects, then, of the "free market" touted by NMPA, ASCAP, and BMI, there is no reason to believe that it would result in PROs vying with each other to offer lower prices, more innovation, or better terms to the buyers of their products. These are the predictable fruits of "[c]ompetition, which … directly pits one producer against another."[11] No economist contends that those effects are generated by sellers of complementary must-have inputs extracting serial tolls from their buyers.[12] Even NMPA, ASCAP, and BMI's public comments in the most recent consent decree review cycle do not suggest otherwise—and certainly not with any arguments or

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[10] *See* DiMA's August 9, 2019 Comments at 13-15 ("[A]s the PROs see it, a digital service that wants to stream [the hit song] 'Old Town Road' today needs a license from both ASCAP and BMI."). There is reason to believe that irrespective of whether the consent decrees permit ASCAP and BMI to offer fractional rather than whole work licenses, in some cases the licenses they grant effectively do authorize the performance of whole works, even if only one share is represented by the PRO. This would be consistent with the underlying copyright law principles, which dictate that for co-authored songs (formally known as "joint works" under the statute), any single co-author/co-owner of a joint work may grant a non-exclusive license to the work as a whole without the consent of the other co-authors. *See, e.g.*, *Greene v. Ablon*, 794 F.3d 133, 151 (1st Cir. 2015) ("Joint authors share 'equal undivided interests in the whole work—in other words, each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint author for any profits that are made.'" (internal citation omitted)); *Brownstein v. Lindsay*, 742 F.3d 55, 68 (3d Cir. 2014) ("With respect to licensing a joint work, each co-author is entitled to convey non-exclusive rights to the joint work without the consent of his co-author."); *Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007) ("'The authors of a joint work are co[-]owners of copyright in the work … [and] are to be treated generally as tenants in common, with each co[-]owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co[-]owners for any profits.'" (internal citations omitted)).

[11] *See Geneva Pharms.*, 386 F. 3d at 489.

[12] *Cf.* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2013 (2007) (describing the "Cournot complements" problem known to plague this scenario, in which the aggregate price of inputs *exceeds* the price that a single monopolist would charge).

examples of how competition between PROs *for licensees* could potentially produce any of the consumer-welfare-enhancing effects that are the currency of contemporary antitrust analysis. No such explanation is possible.

A hypothetical example illustrates the point in the present context. Consider a scenario in which ASCAP and BMI were no longer bound to offer "through to the audience" licenses,[13] but could instead seek to require that each actor in the chain of a given transmission be independently licensed (*e.g.*, TV networks, cable and satellite operators, regional cable networks, edge servers, and so on). And imagine that BMI chose to do so—without a corresponding royalty decrease—insisting that the license it sold to a DiMA member did not insulate from liability a "CDN" (content delivery network) engaged to reduce latency (*i.e.*, the time an end-user must wait to hear a track after hitting "play"), or a third-party platform through which the stream was accessed by the end-user, and that each of those other actors thus also required a BMI license. If BMI made that choice, nothing that ASCAP or any other PRO could do would discipline BMI, because no licensee could threaten BMI with substituting away to an alternative (and not taking a BMI license) in the event that BMI did not back down. From the perspective of licensees, such a diminution in the scope of rights granted would of course be tantamount to a price increase. And that increase would predictably be passed on to end-users, as each of the players in the chain passed it on to their own customers, one intermediary to another, until it reached the consumer.

This is the foundational dynamic of the economic relationship between PROs with respect to the buyers of their products (licensees), as opposed to the sellers of the inputs that they aggregate (songwriters and songs). Any sound discussion of antitrust or public policy considerations around

[13] *Cf.* the provisions of the existing decrees that do impose such a requirement: AFJ2 § V; BMI decree § IX.A.

performance rights licensing must reflect and address the reality that competition alone does not and will not constrain PROs in the commercial terms that they offer licensees.

Importantly, the same considerations apply in the same way to other large licensors in this space, including major music publishers. For all of the NMPA's touting the virtues of a "free market," there is no sense in which one major publisher *competes* against another to offer music users access to the performance rights for works in their catalogues, at least with respect to the primary channels through which listeners hear music today. For interactive services, for radio stations, and for essentially all of the other platforms commonly used for music delivery in 2020, a license to the performance rights that one major publisher controls is a complement to, rather than a substitute for, a license to the performance rights that another controls.[14] There is no "competition" to speak of, much less competition that would redound to the benefit of "consumers" if publishers could selectively withdraw digital rights from PROs, as NMPA suggests. Doubly so if the vision is that withdrawal would apply only to the *publisher's* "share" of a given song, and not the *writer's* "share" as well.[15] In that world, far from creating competition between rights aggregators for customers, withdrawal of digital rights would simply double (or worse) the number of licenses required to play the same songs as before, further exacerbating the holdout problems already posed by the PROs' position on fractional licensing.[16]

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[14] *Cf.* Federal Trade Comm'n, Statement of Bureau of Competition *In the Matter of Vivendi, S.A. and EMI Recorded Music* at 2 (Sept. 21, 2012) (*available at* https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-vivendi-s.a.emi-recorded-music/120921emifeinsteinstatement.pdf) (clearing transaction consolidating ownership of large record labels partly on the basis that music catalogue licenses are *complements* not substitutes).

[15] These terms refer to interests in musical compositions and/or royalties they generate that are held, respectively, by music publishing companies on one hand, and individual songwriters on the other.

[16] *See supra* n.8 (discussing district court's denial of motion to dismiss *per se* and rule of reason claims against GMR).

All of that said, competition does in fact play an essential role in the music-licensing ecosystem more broadly. It incentivizes music *services* to offer better products, lower prices, and innovative features. Incumbents are routinely threatened by new entrants, and those challengers have, in recent history, been able to thrive by virtue of what Judge Learned Hand famously called "superior skill, foresight and industry."[17]

But the ability of music services to innovate depends on their ability to license public performance rights on fair and reasonable terms, and without threat of being walled out of the market altogether. The ASCAP and BMI consent decrees have historically worked as essential backstops that (in conjunction with other features of the U.S. music-licensing framework) have allowed start-ups to develop new, lawful ways of delivering music to users on a large scale, and without the threat of anticompetitive hold-up by large blocs of horizontally-related individual rights owners. In that regard, the decrees are quintessentially *pro-competitive*.

Again, the Antitrust Division itself has recognized as much. It did so, for example, in the course of defending the need for the most recent modifications to the ASCAP consent decree, which afforded a variety of additional protections specifically for new and innovative digital licensees. As the Division wrote at the time, "[u]sually, in the early days of an industry, music users are fragmented, inexperienced, lack … resources," and are otherwise vulnerable to the exercise of ASCAP's "market power."[18] The resulting safeguards in the decree, DOJ argued, would "advance[] the public interest in free and unfettered competition."[19]

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[17] *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

[18] *See* Mem. of United States in Supp. of Joint Mot. to Enter Second Am. Final J., *United States v. American Society of Composers, Authors and Publishers*, Case No. 41-1395 (S.D.N.Y. Sept. 4, 2000) at 35, 27 n.27.

[19] *Id*. at 46.

While the streaming industry has matured since 2000, when the Division advocated these positions, the need to enable "free and unfettered competition" among music services remains as strong as ever. Depriving prospective challengers of the use of licensing mechanisms that existing incumbents were able to invoke when they broke into the market would create significant barriers to entry for the *next* disruptive technology. The real-world effects of any such change in policy would be bad for competition, innovation, and consumers alike.

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DiMA thanks the Antitrust Division for the opportunity to provide these comments. Having requested the opportunity to participate in the coming workshops, and having had that request denied, DiMA respectfully requests an opportunity to provide follow-up comments within a reasonable time period after the workshops take place.