

**Comments of The Music Artists Coalition Regarding
Public Workshop on Competition in Licensing Music Public Performance Rights**

July 22, 2020

The Music Artists Coalition (“MAC”) is dedicated to protecting the rights of artists and speaks solely and exclusively on behalf of those who create music: songwriters and performers.

Thank you for sponsoring the “Public Workshop on Competition in Licensing Music Public Performance Rights.” MAC appreciates the Division’s focus and, in particular, its diligence in reviewing the consent decrees which govern ASCAP and BMI. MAC appreciates the invitation to submit comments, and notes that the brevity of our comments is a reflection on the relatively short submission deadline, not on the importance of the issue to the creative community. MAC would respectfully request a comment period after the workshop to address any issues raised by the workshop participants. In particular, MAC would ask for a meaningful comment period on any proposed modifications to the consent decrees.

Consistent with MAC’s prior comments, MAC submits that now is not the appropriate time to terminate, alter, or sunset the consent decrees. There are significant, recent developments in the marketplace including the passage of the Music Modernization Act, the growth in digital consumption and the entry of a new PRO. These market forces should be allowed to mature naturally. A removal or modification of the decrees is premature and may disrupt this nascent competitive trend.

In addition to the evolving landscape, the current, global pandemic makes this the wrong time to disrupt music licensing. Artists are deprived of income from touring due to restrictions around large gatherings. Altering the licensing protocol at this time of unprecedented hardship would lead to uncertainty in the marketplace at a time when songwriters need stability more than ever.

However, should the Division decide to propose modifications to the consent decrees, MAC would most certainly appreciate the opportunity to comment on any proposed modifications. In considering modifications, MAC believes it is vital that the existing protections for songwriters in the decrees be maintained, and in some cases, strengthened.

Maintain Essential Songwriter Protections

If the consent decrees are modified, it is imperative that the protections for songwriters be maintained. ASCAP and BMI’s market dominance gives them tremendous leverage over songwriters. Any revisions to the consent decrees must prevent ASCAP and BMI from abusing their market power with respect to songwriters.

MAC believes it is crucial that core protections for songwriters in Second Amended Final Judgement in *U.S. v. ASCAP*, and the Amended Final Judgement in *U.S. v. BMI*, are maintained, or strengthened, including the following:

1. ASCAP and BMI must maintain the ability to issue fractional licenses and, to avoid confusion, must be explicitly prohibited from granting a license to percentages of compositions which are not specifically granted to ASCAP or BMI by the author of such percentages.

Lack of clarity on this issue will inevitably subject any revised consent decrees to challenges and cast a shadow of uncertainty over the market. Songwriters' ability to control the licensing of their shares of songs is of paramount importance to the songwriter community.

2. ASCAP and BMI must continue to be required to accept all songwriters to membership.
3. Songwriter and publishers affiliated with ASCAP and BMI must be allowed to withdraw simultaneously on an annual basis. Writer and publisher affiliation terms should be co-terminus and staggered withdrawal windows should be prohibited.

MAC understands and appreciates that certain of our writer members receive advances from ASCAP or BMI; however, these advances should not be used as a means to keep the songwriter captive beyond the recoupment of those advances. Accordingly, the term of a contract with a writer may be extended only until recoupment of that advance, and up to a maximum of five years. If the advance is unrecouped within five years, the writer must be allowed to repay any outstanding balance and move to another PRO if they choose.

4. If ASCAP and BMI are allowed to continue to impose "licenses-in-effect" as discussed below, the term of music licenses should not be more than three years. Given the changing landscape of the market, it is appropriate that the maximum term for music licenses be reduced from five years to three years.

The maintenance of these songwriter protections is incredibly important to protect songwriters and promote competition within this sector.

Eliminate or Modify Harmful Provisions

Certain aspects of the existing consent decrees fall short of supporting a functioning and free market and should be modified. In particular:

1. When a songwriter terminates their affiliation with ASCAP or BMI, their songs are held for indeterminate, often undisclosed periods of time due to the imposition of "licenses-in-effect" by ASCAP and BMI. Licenses-in effect limit a songwriter's ability to obtain market value for their compositions and discourage withdrawal from ASCAP and BMI. While MAC believes it would be most beneficial to songwriters if ASCAP and BMI were

prohibited from imposing “licenses-in-effect”, MAC appreciates that an abrupt termination of this practice would be disruptive, particularly to the music licensee community.

Accordingly, assuming that “licenses-in effect” remain in place, MAC urges the Division to limit the term of music licenses to three years (as discussed above) and to require ASCAP and BMI to provide transparency regarding the term of licenses to which compositions remain subject. Today, both ASCAP and BMI fail to provide resigning writers with the term of these licenses despite the imposition of “licenses-in-effect”. Transparency regarding the term of licenses will provide creators, and licensees, with clarity regarding which compositions remain licensed by ASCAP and BMI.

2. The rights of withdrawal, resignation, and removal reflected in (XI)(B)(3) of the *U.S. v. ASCAP* and (V)(C) of *U.S. v. BMI* consent decrees should be enhanced and clarified, in particular:
 - a. ASCAP and BMI must eliminate opaque and draconian termination procedures which are hurdles to resignation and removal of compositions;
 - b. Writer and publisher affiliation terms should be co-terminus (as stated above) so that writers are entitled to resign and remove their compositions simultaneously; and
 - c. If “licenses-in-effect” remain, resigning writers whose compositions remain licensed by their prior PRO should be paid at the same rates, and at the same times, as writers who remain affiliated with that PRO.

Add Additional Songwriter Protections

Any revised consent decrees should require greater transparency from ASCAP and BMI. In particular:

1. ASCAP and BMI should be transparent with licensees and songwriters about the compositions which they license.
2. ASCAP and BMI must immediately reflect the loss of an ability to license a song.
3. Songwriters should have the right to audit ASCAP and BMI and if dissatisfied with an audit, songwriters should be entitled to judicial review of disputes with ASCAP and BMI.

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MAC again thanks the Division for providing an opportunity to hear from industry stakeholders about the antitrust implications of the BMI and ASCAP consent decrees. On behalf of MAC members, we appreciate your time and attention to this important matter.