Songwriters Guild of America

Songwriters Guild of America, Inc.
210 Jamestown Park Road Suite 100
Brentwood, Tennessee 37027-750
615-742-9945

July 22, 2020

Comments to the Antitrust Division of the United States Department of Justice Submitted by the Songwriters Guild of America, Inc., Joined by the Society of Composers & Lyricists, Regarding DOJ Review of the ASCAP and BMI Consent Decrees

These Comments are respectfully submitted at the request of the Antitrust Division of the United States Department of Justice (USDOJ), which has invited interested parties to submit non-duplicative comments on the ASCAP and BMI music consent decrees currently undergoing USDOJ review. Both the **Songwriters Guild of America, Inc. (SGA)** and the **Society of Composers & Lyricists (SCL)** have separately submitted prior comments to USDOJ on the subject of the decrees, and hereby repeat and reaffirm their individual prior statements in full, underlining particularly the vital importance of a music creators' sacrosanct right of choice to select his or her own performing rights organization.[1]

I. Statements of Interest

SGA is the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are reasoned and formulated solely in the interests of music creators, without financial influence or other undue interference from parties whose interests vary from or are in conflict with those of songwriters, composers, and other authors of creative works. Established in 1931, SGA has for 89 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world.

SGA's organizational membership stands at approximately 4500 members, and through its affiliations with both Music Creators North America, Inc. (MCNA) (of which it is a founding member) and the International Council of Music Creators (CIAM) (of which MCNA is a key Continental Alliance Member), SGA (along with SCL) is part of a global coalition of music creators and heirs numbering in the millions. Of particular relevance to these comments, SGA is also a founding member of the international organization Fair Trade Music, which is the leading

[1] See comments of SGA dated August 9, 2019, and comments of SCL dated August 9, 2019.

US and international advocacy group for the principles of transparency, equitable treatment, and financial sustainability for all songwriters and composers.

The Society of Composers & Lyricists (SCL) is the premier US organization for music creators working in all forms of visual media (including film, television, video games, and musical theatre), with a distinguished 75-year history in advancing and defending the rights of those engaged the fine art of creating music for visual media. Current SCL members include the foremost professionals in their fields whose experience, expertise and advocacy is focused on the many artistic, technological, legislative, legal and other issues related to audiovisual music creators and their work.

As a co-member of MCNA along with SGA, SCL joins in submitting these Comments on behalf of its more than 1700 members.

II. The Alden-Rochelle Case and the So-called Movie Theater Exemption

The purpose of these new comments is to draw USDOJ's attention to one additional, consent decree-related issue of significant concern to the music creator community in the United States, about which neither SGA nor SCL had sufficient data to adequately cover in their original submissions. While research concerning the issue still remains incomplete, continuing efforts to collect data concerning the licensing of music performing rights and payment of royalties by movie theaters pertaining to the films they exhibit compel us at this point to briefly outline the concerns of our members regarding the unfair and inequitable practices in the United States connected to this issue.

October 27, 2020 will mark the seventy-second anniversary of the decision by a single federal district court sitting in New York to change for the worse the landscape of royalty earnings for songwriters and composers in regard to the use of their works in films, the effects of which are still very much being felt. In that 1948 case, *Alden - Rochelle, Inc. v. ASCAP,*[2] the court found that ASCAP had violated antitrust laws by prohibiting its members from directly licensing performance rights to motion picture producers in competition with ASCAP itself. According to the Memorandum of the United States filed fifty-two years later in *US v. ASCAP:*

> The Court also found that, because copyright holders could directly negotiate with movie producers to license performance rights at the same time that they negotiated with those producers to license synchronization rights, there was no efficiency justification for allowing ASCAP to collectively license movie producers or theaters. Accordingly, the Court issued an injunction prohibiting ASCAP from licensing theaters *at all*. As a direct result of *Alden-Rochelle*, ASCAP and the government entered into discussions to modify the 1941 ASCAP decree. The parties consented to substantial amendments to the decree,

2 80 F.Supp. 900 (SDNY 1948)

> *including addition of provisions enjoining ASCAP from licensing movie theaters for performances of compositions in motion pictures.* (Emphasis added). [3]

In comments submitted just one year ago to the USDOJ by the National Association of Theatre Owners, the group admitted that not only had nothing changed in the intervening 72 years since the decision in *Alden-Rochelle*, but also that the Movie Theater Exemption had actually been expanded over the years and now likewise encompassed BMI:

> The Movie Theater Exemption is embodied in Sections IV(E) and (G) of the ASCAP Consent Decree, and is underpinned by Sections IV(A)-(B) and VI of the ASCAP Decree, which require that ASCAP engage in non-exclusive licensing. Although this specific exemption is absent from BMI Consent Decree, the general provision in the BMI Consent Decree requiring BMI to engage in non-exclusive licensing, plus the industry practice that has built around source licensing of theatrical performance rights, have achieved the same result. *See e.g., Nat'l Cable TV Ass'n v. Broad. Music, Inc.*, 772 F. Supp. 614, 620 n.12 (D.C. 1991) (following the Decrees "neither ASCAP nor BMI licenses movie theaters for music in the pictures they exhibit"). [4]

In applauding these seven decade-long results, the world's largest movie theater trade organization went so far as to assert in its comments:

> The Decrees benefit consumers by helping to keep the moviegoing experience affordable, and ensuring that it retains the variety of programming consumers expect. Movie theaters already struggle to keep ticket prices low in the face of increased regulation and costs of doing business. Unchecked PRO license fees, combined with the licensing fees paid to movie distributors, would come right off the theaters' bottom lines to the detriment of consumers, songwriters, and filmmakers.[5]

Based upon anecdotal research currently pending confirmation on a broader basis through data analysis, SGA and SCL take a highly skeptical view of the conclusory statements made above on behalf of the movie theater industry. Few things, in fact, appear to be further from the facts. In referencing the concept that direct "source licensing" by film producers of movie theater performing rights from music creators and their music publishing administrators has long since alleviated any problems stemming from the Music Theater Exemption, the principle "evidence" offered by the movie theater trade organization was, in fact, a forty-five year old case in which a mid-level employee of a third-party music licensing agent testified that she thought the forced combining of synchronization and movie theater performing rights was not an obstacle to her productivity. Citing *CBS v. ASCAP*, 400 F. Supp. 737, 760 (S.D.N.Y. 1975), the movie theater trade group stated:

---

[3] Civil Action No. 41-1395 (WCC) (SDNY 9/5/2000)

[4] Comments of the National Association of Theatre Owners, US Department of Justice, Antitrust Division Review of ASCAP and BMI Consent Decrees (July 24, 2019) at 1.

[5] Ibid. at 2-3.

> In *CBS*, Albert Berman, managing director of the Harry Fox Agency, Inc. and Marion Mingle, the Fox employee who handled music rights, gave testimony describing the simple process they use to license both synchronization and performing rights for use in a theatrical motion picture—which can be completed roughly simultaneously most of the time. Mingle and her assistant were able to license "several hundred movies each year" this way.[6]

Much has changed in the past half-century in regard to the licensing of musical works in films, but both SGA and SCL have little doubt one aspect of the process has not evolved in favor of music creators since the days of Ms. Mingle: that the Music Theater Exemption has by default artificially relegated the value of US performing rights in motion pictures exhibited in US movie houses to at or near zero. According to licensing administrators contacted by SGA, on an anecdotal basis over the past several decades the issue of assigning value to movie theater performing rights in the vast majority of cases simply does not come up in negotiations as a separate right to be secured through payments by a film producer to a music creator or copyright administrator. It is apparently assumed to be "included" in the overall package of rights, if the issue is addressed at all.

Thus, whether songwriters --or film composers employed on a work-for-hire basis-- are realizing any value at all for the right of movie theater performances of their works in films (for example by having remuneration "baked in" to the overall licensing fees secured and shared by contract) is extremely difficult to discern without more robust, and unfortunately expensive and time-consuming research. SGA and SCL, however, are rapidly seeking to amass more such data, including information concerning the amounts of royalties earned in foreign territories from the collection of performing rights royalties from movie theaters. Such facts should shed further light on this difficult and potentially very damaging problem in the US for songwriters, composers and their rights administrators.[7]

In sum, performance royalties are generally regarded as one of the most reliable and important income stream for music creators. The continued exemption of an entire category of copyright users from contributing to this value chain is an unfair, arbitrary relic of the past, and one that is very likely causing great harm to American and global music creators. SGA and SCL well understand that the movie theater sector is loath to diminish its profits in order to accept the responsibility of ensuring that those who provide the music for the product its industry sells to the public are fairly compensated. For the sake of expanding both free market competition and supporting the advancement of culture as underlined in the intellectual property clause of Article 1 Section 8 of the US Constitution, however, the undersigned respectfully request that USDOJ

---

[6] Ibid. at 7 n. 16.

[7] Information recently received by SGA from reliable sources concerning the German performing rights organization GEMA, for example, indicates in that nation of approximately 80 million people, GEMA's gross royalty collections from German movie theaters for performance of music within exhibited films amounted in 2019 to approximately 8 million euros. SCL is in the process of collecting data on other territories, which so far seems to indicate similar ratios of analogous collections based upon population (as roughly also reflected in average annual box office receipts). Once such data collection is completed and verified as accurate and analogous, SGA and SCL currently believe that gross US collections in this category of performance should by extrapolation equal over US$30 million annually in a free market context.

place this issue on the list of those aspects of the consent decrees it is seeking to review and reform.

III. Conclusion

As Makan Delrahim, the chief of the Antitrust Division of USDOJ, stated so succinctly in a speech to the American Bar Association in November, 2019, "we cannot pretend that the business of film distribution and exhibition remains the same as it was 80 years ago."[8] SGA and SCL request that USDOJ apply that same rational to evaluating the Movie Theater Exemption, in light of the longstanding, changed circumstances noted above. As always, our organizations stand ready to assist in any ways we can to provide details and information that may make USDOJ's task of effectively re-considering and reforming the decrees easier, more efficient, and ultimately to the greater benefit of all.

Respectfully submitted,

Rick Carnes
President, Songwriters Guild of America, Inc.

July 22, 2020

Ashley Irwin
President, Society of Composers & Lyricists

July 22, 2020

cc: Charles J. Sanders, Outside Counsel, SGA

[8] https://deadline.com/tag/makan-delrahim/

Members of the SGA Board of Directors
Members of the SCL Board of Directors

CFC:sga
Encl.