

Music Creators North America, Inc.

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July 15, 2016

Principal Deputy Assistant Attorney General Hesse
United States Department of Justice, Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Re: Review of ASCAP/BMI Consent Decrees and Related Issues

Dear Principal Deputy Assistant Attorney General Hesse:

The following comments are submitted by Music Creators North America, Inc. on behalf of a global coalition of half a million songwriters and composers from the United States, Canada and our global sister organizations, in response to the request from your Division for reaction to its oral report to us regarding the ASCAP and BMI consent decrees.

We begin by stating once again that we strenuously object to the timetable set by the DOJ for the submission of these comments. Unlike the many multi-national, billion-dollar corporations identified by your Division as “interested parties” concerning this matter (including one of the world’s richest, most powerful and influential corporations, Google), our coalition of music creators does not have and cannot afford to maintain an army of antitrust attorneys and experts to immediately prepare a detailed analysis and refutation of the solely telephonic report we were given by DOJ.

We have asked several times for a reasonable extension of time to research and comment, made even more crucial by the fact that many of our individual members are on concert tours during the summer months and unable to be reached or canvassed. Your Division has offered as the explanation that because DOJ has received such intense criticism over its leaked comments in the press, it desires to get its official comments on the record as soon as possible. We do not consider that a valid reason for refusal.

Nevertheless, we were given just a few days to prepare a critique on conclusions that it took the DOJ two years to reach, and to which we have been given no written access. We have been forced therefore, to make our comments brief and to the point:

1. We regard the announced intentions of the DOJ (a) not to amend the ASCAP and BMI consent decrees in ways that would allow us to receive fair market value for the performance of our works, and (b) to impose mandatory “full work licensing” on a copyright co-owner or co-administrator if is so requested by a copyright user, as serious injustices that will further damage the ability of songwriters and composers to earn a living through our chosen profession. In the digital age, no group of creators has suffered more severe income devaluation (despite a substantial *increase* in the public consumption of our works) than songwriters and composers. The DOJ appears poised to add to these miseries.
2. Moreover, damage to individual music creators is not the only problem that the DOJ will be exacerbating. Its contemplated conclusions are likely to cause serious damage to the future of American and global musical culture, and thus to future public access to and enjoyment of new music. By erecting hurdles that may substantially hinder collaboration among music creators in the future, and by adopting positions that drastically reduce the financial incentive to create in favor of driving royalty rates well below fair market value to serve the interests of corporations whose music distribution businesses have been built principally on our creative works, the DOJ is acting in ways that are inconsistent with principles of fairness and common sense. Its contemplated actions, in fact, fly directly in the face of the US Constitution’s celebrated recognition of the importance of motivating and protecting creators and inventors for the betterment of the community.
3. We are also compelled to express deep concern that the DOJ did not give adequate consideration to international issues that impact on its pending recommendations (including World Trade Organization rules and protocols and US international treaty obligations), or to the recommendations of the US Copyright Office and other departments of the US Government more expert in intellectual property matters. The reasons underlying these seemingly willful omissions are unsettling to our community, and deserve further scrutiny.

As noted in our public statement (attached), the ONLY solace that may possibly be taken by music creators from the DOJ’s articulated intentions has been its decision not to approve so-called “partial withdrawal” by music publishers from ASCAP and BMI. Allow us to be clear that we do not regard this narrow point as negating in any way the damage inflicted on our community as described in the numbered points above. We simply acknowledge that the DOJ took the time to understand that granting such a privilege to music publishers would eviscerate the abilities of creators to defend themselves against an increasing lack of royalty transparency, resulting in serious additional losses to songwriters and composers.

We have addressed the insidious dangers of permitting partial withdrawal in our more formal past submissions, and see no reason to repeat those specific admonitions in these brief comments. We do take this opportunity to reiterate, however, that permitting partial withdrawal would make a grave situation for music creators infinitely worse, and we urge the DOJ not to change its position on this crucial issue at any time in the future, absent the imposition of extraordinary safeguards acceptable in advance to the music creator community.

In closing, we are disappointed, frustrated, and frankly bewildered by DOJ's positions, and believe that they will further compound the indignities, unfairness, and financial losses that songwriters and composers have faced in recent years. We therefore ask that the DOJ fully and carefully reconsider its positions, including its position vis-a-vis whole work licensing, prior to publicly announcing them in final form.

Sincerely,



Rick Carnes
Co-Chair,
Music Creators North America



Eddie Schwartz
Co-Chair,
Music Creators North America

ES/RC: CJS

Encl.

cc: Charles J. Sanders, Esq.

The international coalition of music creators, for the purposes of this letter, consists of the following groups:

Music Creators North America (MCNA):

The Songwriters Guild of America (SGA)

The Council of Music Creators (CMC)

The Screen Composers Guild of Canada (SCGC)

The Society of Composers & Lyricists (SCL)

The Songwriters Association of Canada (SAC)

The International Council of Music Creators (CIAM)

The European Composers and Songwriters Alliance (ECSA)

A Statement From Music Creators North America

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International Coalition of Music Creators Expresses Dire Concern Over “Unworkable” DOJ Solutions

July 7, 2016, Washington, DC: Following two, hour-long telephonic briefings on July 5 and 7, 2016 by the US Department of Justice, a large international coalition of songwriters and composers is expressing bafflement and frustration over the DOJ’s apparent decision to leave unchanged the antiquated, WWII-era ASCAP and BMI consent decrees. After the briefings, the coalition, which represents nearly a half a million American, Canadian and other music creators from around the world, was left with far more questions than answers.

“The DOJ has refused to address the issue that these consent decrees are needlessly perpetuating the inability of songwriters and composers to earn a viable living, artificially driving performing rights royalty rates downward toward zero rather than upward toward fair market value,” said a group spokesperson. “Our economic viability is imperiled, which threatens to deeply harm the future progress of musical culture and the arts as encouraged under the US Constitution. Are these results really acceptable to DOJ?”

The songwriter and composer groups also made explicitly clear to the DOJ that they consider inexplicable its decision to require ASCAP and BMI to engage in “full work licensing,” if so demanded by copyright users like YouTube, Google and Spotify. “This is an unworkable solution to a problem that does not exist,” said the coalition spokesperson. “It’s an arbitrary and capricious mandate that could cost music creators tens of millions of dollars in administrative costs, and might destroy their ability to collaborate with one another unless they are affiliated with the same performing rights society. It is ill-conceived, ill-considered, and leaves us with nothing but confusion and concerns that even DOJ acknowledges have legitimacy.”

The songwriter and composer groups, however, did note their agreement with the DOJ's decision not to extend to music publishers the requested ability to partially withdraw catalogs from ASCAP and BMI in order to directly license musical works in the digital realm. "As we repeatedly stressed to the DOJ throughout two years of dialog, partial withdrawal without guarantees of upstream transparency and other protections would be a complete catastrophe for songwriters, composers, and small publishers. We take some solace in the fact that the DOJ at least understands the vital importance of this issue to creators, and urge that it continue to do so in the future."

The coalition's intention to submit written comments to DOJ is complicated by the Department's unwillingness to release its preliminary determinations in writing or to extend the deadline for such submissions until the end of the summer, a period in which creators on concert tours would be especially hard-pressed to participate in the process. "It took over two years for the DOJ to come to a decision that it informed us by telephone," said the coalition spokesperson, "and yet it insists that we submit our written concerns within an arbitrary two week window."

Coalition members also vowed to continue to actively reserve the right of every music creator to oppose any action taken by music publishers to withdraw works from ASCAP or BMI without the explicit authority of the songwriters and composers of those works. "For over a century, individual songwriters and composers have had the right --unless explicitly agreed otherwise-- to independently determine who represents the performing rights in their works," said the groups. "That right is generally the source of our most important income stream, and we are not going to let this crisis be used to take it away."

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Songwriters of North America, LA Branch (SONA)

The International Council of Music Creators (CIAM)

The European Composers and Songwriters Alliance (ECSA)