



August 9, 2019

The Honorable Makan Delrahim
Assistant Attorney General
U.S. Department of Justice Antitrust Division
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Dear Assistant Attorney General Delrahim:

The National Apartment Association (NAA) and the National Multifamily Housing Council (NMHC) jointly submit these comments in response to the request from the Antitrust Division of the U.S. Department of Justice for public input on the Consent Decrees governing the *American Society of Composers, Authors and Publishers (ASCAP)* and Broadcast Music Inc. (BMI). Specifically, the Antitrust Division wants to know whether the Consent Decrees continue to protect competition; which provisions may be ineffective in protecting competition; what modifications would enhance competition and efficiency; whether termination would serve the public interest; and do the performance rights organizations (PROs) that are not subject to consent decrees adversely affect competition.

I. Overview

For almost 30 years, NAA and NMHC have partnered as advocates on behalf of America's apartment industry by providing a single voice for developers, owners and operators of multifamily rental housing. Together we represent thousands of apartment communities across the country where millions of Americans call home. It is on their behalf that we write to express our concern that the current paradigm for the licensing of public performances is broken and continues to worsen. However, until a better model can be implemented, we urge the Antitrust Division to preserve the Consent Decrees because they continue to provide important competitive protections. Their termination would not serve the public interest, but instead, would exacerbate the difficulties our members face under the current system.

The fundamental concern our members have expressed to us is that the fees they have been forced to pay to publicly perform music at their properties are not correlated to the value derived from those performances. Our members must then choose to either pay outsized and arbitrary fees or turn off the radios and televisions to the detriment of their residents. Moving to an unregulated system will not solve this problem. Entities that collect royalties like the PROs are necessary for the marketplace to function efficiently, but those entities must be regulated to ensure prices are in line with the value of what is being licensed.

II. Music Usage and Licensing at Apartment Communities

Apartment communities, like many American businesses that are consumer-facing and end-users of music, play musical works in common areas open to the public, such as lobbies and parking garages. The vast majority of this music is from radio and television transmissions from broadcast stations licensed by the Federal Communications Commission. In the current licensing paradigm, the producers and distributors of the programming in those broadcasts obtain the copyright licensing necessary to broadcast the programming, but do not secure the public performance rights to the copyrighted music therein. If apartment communities want to play radio or TV stations in common areas, they must procure the public performance rights from the PROs. With the threat of statutory damages for even innocent infringement, the PROs have market power in setting the fees for those rights. As explained below, this has resulted in our members paying outsized license fees that are untethered to the value of the music actually being publicly performed at their properties.

Apartment communities are unique from most American businesses because the majority of the common areas are accessible only to residents and their invited guests, such as resident lounges, rooftop spaces and fitness centers. These resident-only areas are an extension of residents' leased units and provide residents access to private space that extends beyond the walls of their apartment units. Our members have expressed frustration that the public-performance license fees they are paying are the same regardless of whether the speakers playing the broadcasts are located in public or resident-only spaces. With no meaningful opportunity to negotiate over the actual value being provided to the communities, they end up paying the same amount whether the speakers are located in truly public areas or in resident-only areas. In addition, many of our members pay for a subscription music service and only need a license from the PROs for the



televisions located at their properties. Yet, the license fee they must pay does not reflect this. The PROs are essentially getting paid twice—once by the music service and again by the apartment communities. To avoid actually getting paid twice, rather than reduce the amount they receive, the PROs simply exclude from their blanket license any music performed at a property that is already licensed.

An additional problem arises from the fact that our members have no control over the music that is including in broadcast radio and TV played in common areas, yet they must pay for a blanket license to the entire repertory of music from the PROs, rather than pay an amount that reflects the music actually performed at their properties. If a radio or TV station includes a single song from a PRO's repertory, the apartment community must pay for that PRO's entire repertory. Because BMI and ASCAP have so many compositions in their repertories, an apartment community cannot avoid the need to take a license from both. In addition, they must also obtain a blanket license from *Society of European Stage Authors and Composers* (SESAC), even though it has a much smaller repertory. While BMI and ASCAP are subject to the Consent Decrees, SESAC is not and so there is no restriction on SESAC's ability to raise its prices. As a result, other than choosing to turn radios and televisions ON or OFF, our members have no practical option but to enter into blanket license arrangements with ASCAP, BMI, and SESAC even though the pricing structure of these blanket licenses is not tied to an apartment community's actual use of a given PRO's music.

The fees our members have been paying to ASCAP, BMI, and SESA have steadily increased each year and now a fourth PRO, Global Music Rights (GMR), has joined the mix. Most songwriters represented by GMR used to be represented by ASCAP or BMI, but these songwriters have withdrawn from ASCAP and BMI and joined GMR in order to increase the amounts that they are paid for the songs that they have written. Presumably, as the list of PROs expands, the repertories of the existing PROs shrink, yet the fees they charge have not decreased to account for this diminution in value. This fundamental unfairness will only worsen as the number of PROs our members must pay expands.

As a result, apartment communities around the country have chosen to eliminate music from their public spaces rather than be held hostage by the PROs. If this trend continues, it has the potential to negatively impact the more than 39 million Americans that live in apartment homes.

III. Fixing the Problem

The fundamental guidelines contained in the Consent Decrees were intended to ensure fair and efficient licensing of musical works. Indeed, until a few years ago, performance rights in the United States were relatively straightforward. Although having three PROs in the US is two more than most other countries, at least there was certainty. As long as a music-user paid royalties to ASCAP, BMI and SESAC, they were free to play almost any song they wanted. Although there was no one-stop shop to which royalties were paid for public performances, the three legacy PROs effectively provided a statutory license system. To preserve this stability until the necessary broader legislative reforms can be implemented, the Consent Decrees should be preserved.

While a free market with less government regulation would be a good thing, that is simply not the reality. Free markets only work when one side doesn't have an inherent monopoly. As we have seen with GMR, a PRO representing even a single artist can demand outsized license fees from American businesses as soon as that one artist is played on a radio or television broadcast. The copyright monopoly being licensed by the PROs creates the unique situation where more government regulation is the only solution that will ensure a fully functional music marketplace.

While licenses from ASCAP and BMI offer the right to publicly perform a very large number of songs, they do not offer the right to publicly perform all songs. SESAC and GMR, private, for-profit entities, also license public performance rights and there is nothing to stop the number of PROs from growing over time. Since artists, songwriters, and publishers are able to switch PROs or even withdraw their catalogs altogether, end users have no certainty that the money they are paying the PROs will get them all the rights they need. If the recent activities of GMR are any indication, it is highly likely that American companies will end up having to negotiate with far more than just the current four PROs in order to get rights to all of the songs played at their businesses.

For the reasons outlined in this letter, the DOJ should take this opportunity to address the difficulties and inequities American companies face under the current public performance licensing paradigm. Congress recognized these difficulties in the context of mechanical royalties and passed the Music Modernization Act (MMA) to simplify the licensing process for the digital music services that stream songs to consumers across the country. That simplification was accomplished through the creation of a new collective—essentially a one-stop shop—to facilitate royalty payments.



As Congress recognized, obtaining the necessary rights for musical compositions was difficult without a statutory license and a one-stop collective. As important as it was to simplify the process for the limited number of streaming music services, it is even more so for the countless apartment communities that play music for the benefit of their residents. The question we hear most often from our members is why they have to pay three (now four) different organizations for what they perceive as the same right—the right to play music. As difficult and frustrating as music licensing is under the current system, compliance will be near impossible if performance rights further fracture. Thus, we encourage the DOJ to look to the MMA for guidance.

Under the MMA, the DOJ must first notify Congress before recommending any changes to the Consent Decrees so that Congress can decide if it wants to take action to block or modify those changes. We feel that Congress could create a better system for the benefit of both licensors and licensees, but comprehensive reforms of that magnitude are only achievable when all stakeholders reach consensus. Any determination by the Antitrust Division to terminate the decrees must be preceded by enactment and implementation of a viable alternative framework. Therefore, we urge the DOJ to leave in place the important protections in the Consent Decrees that help maintain efficient licensing for music users and fair compensation to music creators. These pro-consumer efficiencies are the very rationale that underpins the Consent Decrees. For the sake of consumers and the integrity of the nation's antitrust laws, preserving the consent decrees is paramount.

IV. Conclusion

The Consent Decrees governing the activities of ASCAP and BMI are critical to the apartment rental industry for the same reason they are critical to other communities of end-users. They help to ensure competitive markets for musical works, facilitate delivery of licenses in a predictable manner and provide for fair treatment of end-users in the application of licensing fees. Removing the Consent Decrees will create an unpredictable environment that fails to provide businesses the assurance that licensees are being treated equally or fairly. Ultimately, many apartment owners and operators will be incentivized to stop playing music altogether to avoid these complications and potential exposure to infringement claims.

NAA and NMHC support music licensing and copyright reforms that aim to improve efficiency, transparency and reduce burdens for apartment communities caused by a duplicative licensing administration system. We also encourage reforms to clarify that music requires licensing in areas that are for the general public, as opposed to areas designated as resident-only spaces. Removal of the Consent Decrees on ASCAP and BMI raises significant concerns for our members and the apartment industry broadly. We look forward to working with regulators and lawmakers on how best to improve the current system to the benefit of licensors and licensees alike. Thank you for considering our views.

Sincerely,

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