



August 8, 2019

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Barr:

On behalf of National Taxpayers Union (NTU), I write concerning the Department of Justice's 2019 Antitrust Division review of consent decrees with the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). NTU is the nation's oldest taxpayer advocacy organization, and has long taken an active interest in the antitrust activity of the Department of Justice as well as the Federal Trade Commission (FTC). Taxpayers have a stake in this issue not only because of the potential government costs in administering antitrust policy, but also because of the important balance that policy must strike between encouraging innovation and fostering stability for market actors. A properly maintained balance can deliver cost-efficient products and services that governments can adapt for their own uses, while providing steady economic growth that likewise benefits government treasuries.

NTU understands that the longstanding ASCAP and BMI consent decrees have attempted to reflect a delicate balance of their own in the music market: songwriters and publishers rely on ASCAP and BMI for royalties when their music is played in a public setting, while music users must weigh the convenience of 'one-stop shopping' at ASCAP and BMI with the market power these two performance rights organizations (PROs) exercise.

Some have made the case that the consent decrees should be removed or significantly altered. Both ASCAP and BMI have argued that their consent decrees are outdated, and that the Department should "modernize music licensing to better reflect the transformative changes in the industry."¹

In general, NTU believes that consent decrees between federal antitrust authorities and private entities must be thoughtfully negotiated, rather than imposed with harsh terms the government might not otherwise be able to extract through formal litigation governed by stricter evidentiary rules. This has been especially pervasive (and to NTU troubling) in FTC's actions toward high-tech firms. That said, stakeholders across the country have come to rely on the Department's decades-old consent decrees with ASCAP and BMI. Removing or significantly altering these consent decrees without stakeholder input and a detailed, comprehensive replacement plan would disrupt the marketplace and negatively impact consumers' access to their favorite musicians. In fact, many in Congress and across the music-licensing ecosystem have called for Congress to

¹ "BMI President & CEO Mike O'Neill and ASCAP CEO Elizabeth Matthews Issue Open Letter to the Industry on Consent Decree Reform." ASCAP, February 28, 2019. Retrieved from: <https://www.ascap.com/press/2019/02/02-28-ascap-bmi-announcement> (Accessed August 6, 2019.)

establish an alternative framework prior to any significant modification or termination of these decrees, including Senate Judiciary Committee Chairman Lindsey Graham (R-SC).² Even ASCAP and BMI have acknowledged: “all sides agree” that “suddenly getting rid of [the consent decrees] would provoke drastic changes to the current system that would cause chaos in the marketplace.”³

More importantly, the Department should keep Congress fully informed of its plans, and give members the opportunity to weigh in on proposed changes to the consent decrees. As you are well aware, the Department is required by the Music Modernization Act (MMA) to “provide timely briefings upon request of any Member of the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives regarding the status of a review in progress of a consent decree between the United States and a performing rights society.”⁴

The Department is also required to notify Congress “a reasonable time before” it plans to terminate the consent decrees with ASCAP and BMI. Former Sen. Orrin Hatch (R-UT), who played a key role in shepherding the MMA into law, noted that he considered “a reasonable time” to be 90 days before a motion to terminate is filed.⁵ We believe this advance notice is critical to allowing stakeholder input on the Department’s decision-making.

Overall, NTU believes any alterations that the Department of Justice makes to the consent decrees should reflect a “light-touch” approach to antitrust enforcement. Heavy-handed government interference in the private sector inhibits investment as well as reduces consumer (and in some cases taxpayer) access to innovative products. NTU noted as far back as 2000 that:

“The greatest threat to free competition comes not from aggressive businesses, but from government intrusions into the marketplace. By undermining competition through antitrust enforcement or subsidies for failing industries, government uses tax dollars to make consumers pay higher prices. ... If any party is guilty of engaging in ‘conspiracies in restraint of trade’ that keep costs high for consumers, it is government.”⁶

We encourage the Department of Justice to exercise its antitrust authority with prudence and restraint, keep Congress fully apprised of its review of the ASCAP and BMI consent decrees, and preserve the delicate balance that has afforded American consumers widespread, affordable, and easy access to millions of songs new and old. In so doing, the Department’s policy can become a model for other evaluations of long-term consent decrees between the federal government and private entities as well as pave the way for a more thoughtful approach toward future consent decrees.

Thank you for your consideration, and should you have any questions, I am at your service.

² Letter from Senate Judiciary Chairman Lindsey Graham (R-SC) to DOJ, Antitrust Division Assistant Attorney General Makan Delrahim, (February 12, 2019).

³ Ibid., 1.

⁴ 132 Stat. 3726 (October 11, 2018). Retrieved from: <https://uscode.house.gov/statviewer.htm?volume=132&page=3726> (Accessed August 6, 2019.)

⁵ Government Publishing Office. (September 26, 2018.) “MUSIC MODERNIZATION ACT” (Congressional Record Volume 164, Number 159). Retrieved from: <https://www.govinfo.gov/content/pkg/CREC-2018-09-26/html/CREC-2018-09-26-pt1-PgS6334-3.htm> (Accessed August 6, 2019.)

⁶ Schmidt, Mark. “Antitrust Law: Affirmative Action for Uncompetitive Businesses.” National Taxpayers Union Foundation Policy Paper No. 132, December 11, 2000.

Sincerely,

Andrew Lautz

Policy and Government Affairs Associate