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S. HRG. 114–830

HOW MUCH FOR A SONG?: THE ANTITRUST DECREES THAT GOVERN THE MARKET FOR MUSIC

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

MARCH 10, 2015

Serial No. J–114–6

Printed for the use of the Committee on the Judiciary

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HOW MUCH FOR A SONG?: THE ANTITRUST DECREES THAT GOVERN THE MARKET FOR MUSIC

TUESDAY, MARCH 10, 2015

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY
AND CONSUMER RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Michael S. Lee, Chairman of the Subcommittee, presiding.

Present: Senators Lee, Hatch, Perdue, Tillis, Klobuchar, Franken and Coons.

OPENING STATEMENT OF HON. MICHAEL S. LEE, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman LEE. Welcome. This is the first hearing in this Congress of the Subcommittee on Antitrust, Competition Policy and Consumer Rights.

I would like to begin by thanking my friend and colleague, Senator Klobuchar, for the tremendous job she did in chairing this Committee before me. And I will note that she and I both always had a very good working relationship and we share the same basic goals for this Subcommittee, which involves ensuring, first and foremost, that consumers are protected from those who would abuse the marketplace and, second, that we perform effective oversight of the Department of Justice's Antitrust Division and of the competition side of the Federal Trade Commission.

I look forward to continuing that bipartisan work in this Congress and I would like to thank Senator Klobuchar and her staff for their hard work in preparing for this hearing.

I would also like to thank the Chairman of the full Committee, Senator Grassley, for supporting this hearing. Senator Grassley was planning to be here today, but he is stuck on the floor managing some human trafficking legislation that is pending this week.

A few housekeeping matters before we begin that I would like to address. After Senator Klobuchar give some opening remarks about the hearing, we will hear from our panel of witnesses, who I will introduce a little bit later on, and then we will have 5-minute question rounds with our panelists.

Today's hearing deals with a serious issue and I trust that members of the public who are here will act accordingly.

I want to note at the outset that the rules of the Senate prohibit outbursts, clapping or demonstrations of any kind and this would include blocking the view of people around you. So please be mindful of the rules as we conduct this hearing. I do not think this will be necessary, I certainly hope it will not, but I will ask the Capitol Police——

Senator KLOBUCHAR. Well, it depends on what you say, because they could be allowed to clap.

Chairman LEE. Exactly, yes. I guess we have some rule on that. But if it becomes necessary, I will ask the Capitol Police to remove anyone who violates the rules.

If you will indulge me, I want to provide some background on this complicated issue, an issue that perhaps could be familiar to some in the room, but is not familiar to most Americans.

This hearing is about the market for music. Specifically, it is about the market for licenses to publicly perform copyrighted musical compositions.

What does this mean? Well, every song has an author, the person who wrote it, not necessarily the person who performed it or the person who recorded it, and that author has a copyright in that song, meaning that anyone who wants to perform it in public has to get a license from the author in order to do so, which turns out to be a lot of people.

Lots of businesses play music for customers, radio stations and Internet streaming services like Pandora or iHeart Radio are the obvious examples. But there are all sorts of other examples. You have got bars and restaurants that play music to set an ambience. You have got retail stores that do the same thing.

Television networks and cable companies that air college football games where there is a marching band in the background and that marching band tends to play music and that music tends to be copyrighted.

All those people need a license for every song they play or else they have to pay enormous damages to the copyright-holder. But the market could not function if every neighborhood restaurant had to go look for every author of every song it wanted to play and negotiate with each one of those authors for license fees nor do individual copyright-holders have time to contact every bar in America and ask them for license payments.

As a result, for more than 70 years, publishers and songwriters have relied on performing rights organizations, or PROs as they are known in the industry, to license music on their behalf and then collect and distribute the royalties.

The two largest PROs are called ASCAP and BMI, and we are pleased to have representatives of both of those organizations here today as witnesses.

Well, ASCAP and BMI sell blanket licenses to all works in their inventories and between the two of them, those licenses will cover most every song, roughly speaking and the number is debatable. ASCAP and BMI each control approximately 45 percent of the market. The remaining roughly 10 percent belongs to two other PROs, SESAC and Global Music Rights.

So what does this have to do with antitrust law? Well, it turns out that virtually the entire market for the licenses we are talking

about is governed by a pair of antitrust consent decrees from a long time ago.

In the 1940s, the Department of Justice separately sued ASCAP and BMI over concerns that they had violated the Sherman Act through aggregating control of the music license market. DOJ settled these cases and entered into separate consent decrees with ASCAP and BMI in 1941.

The consent decrees are somewhat unusual. They are perpetual in duration and they essentially function as a kind of regulatory system for the price of these music licenses.

The decrees contain requirements that look very much like a compulsory license and royalty scheme. Specifically, they require that the PROs offer a fair rate on a non-exclusive basis to any user requesting a license and that they not discriminate among similar licensees.

Any disputes about the rates are to be resolved by the judge in the Southern District of New York who oversees the degree, a process that has come to be know as rate court.

For almost 75 years, the consent decree-ruled ASCAP and BMI blanket licenses have allowed consumers of music to have access to virtually the entire catalog of written music by negotiating with just a few entities. The system has allowed innovative distribution methods to arise while enabling individual songwriters to get royalties from thousands of bars, restaurants and radio stations across the country.

Then came the Internet and things changed. In 1995, after the advent of Web streaming, Congress decided to require Internet companies who publicly perform music, but no one else, to pay royalties to recording artists and record labels and all the guys who play the songs rather than the people who write them in exchange for requiring the record labels to license their works.

In other words, Congress set up a scheme on the sound recording side that looks very much like the scheme the consent degrees set up on the musical composition side. The major difference, however, is that the price of royalties for composers is ultimately controlled by judges, judges applying antitrust law, and the price of royalties for recording artists is controlled by the Copyright Royalty Board, which is a panel of administrative judges housed in the Library of Congress.

These two groups of people do not agree about the price of a license to play music on the Internet. The Royalty Board sets rates for sound recordings played on Internet radio that were substantially higher than those the rate court had set for the underlying compositions.

For example, in 2013, Pandora paid approximately 48 percent of its revenue to recording artists and record labels and only about 5 percent of its revenue to songwriters and to publishers.

This disparity in rates led publishers to believe that they would be able to achieve better rates outside the consent decrees. So they made a request of ASCAP and BMI. They asked ASCAP and BMI to change their membership rules to allow something called partial withdrawal, meaning the right to exclude digital services from the blanket licenses that they normally sell.

That would require companies like Pandora to separately negotiate with publishers for public performance licenses at whatever price the market would bear.

All of that led to litigation that is still pending. It also led to allegations that the music publishers who think that their judge-set royalty rates are too low were colluding to keep Pandora's prices high instead of competing with each other to drive consumer prices down.

In a lengthy opinion, Judge Denise Cote of the Southern District of New York ruled that publishers had no right to partially withdraw their digital rights from the blanket license under the ASCAP consent degree.

Judge Cote also rejected publishers' attempts to use the prices they negotiated with Pandora while they tried partial withdrawal as benchmarks for setting prices generally, noting evidence that the publishers had cooperated instead of competing in those negotiations.

That case is now pending on appeal and even as we speak, a different judge in the U.S. District Court for the Southern District of New York is now conducting a trial concerning similar questions under the separate BMI consent decree.

Meanwhile, the Department of Justice's Antitrust Division is currently considering an effort to modify the consent decrees to allow partial withdrawals, among other things. That would have a number of important consequences that today's panel can discuss.

On the one hand, the publishers say that partial withdrawal will allow them to negotiate prices with Internet companies in a free market, and surely the most striking feature of the current system is that there is no free market at work.

On the other hand, others believe that after partial withdrawal, the market will not really be free because a few music publishers control most of the licenses and they have been accused in the past of colluding to drive up prices for consumers.

In short, what to do about these consent decrees is a hard problem and it is one ultimately that affects many millions of Americans.

Today we will hear from a variety of parties affected by the consent decrees, each with a slightly different place in the market. Here we have an opportunity to discuss openly the topics that DOJ is discussing privately.

As we listen today, we must remember that we have both a responsibility to encourage creativity by recognizing the value of copyrights and we also have a duty to ensure that prices for music remain competitive for consumers.

Chairman LEE. Senator Klobuchar.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I congratulate you on taking over the Subcommittee. We do not really have a formal passing of the gavel at the Subcommittee level, but it is exciting and we have worked—yes, here you go. There are you. Thank you.

[Laughter.]

Senator KLOBUCHAR. And we have worked very well together, as Senator Lee noted, and I know the majesty—the majesty—and I know that is going to continue.

This hearing focuses on an important and timely topic, the state of competition in the music industry and a pair of antitrust consent decrees that govern licenses for the public performance of musical works.

Now, we are not here to talk about the sound recording side of musical licensing. That set of copyrights is governed by a different structure and a different set of rules.

Today's hearing is about the underlying musical works, the lyrics and the composition that songwriters create, music publishers work to get out into the world, and that licensees like broadcasters and digital music services help us all enjoy.

As Senator Lee noted, the consent decrees under which ASCAP, which is the American Society of Composers, Authors and Publishers, and BMI, which, outside of this room, refers to body mass index, for anyone that has gone on a diet.

[Laughter.]

Senator KLOBUCHAR. But inside of this room refers to the Broadcast Music, Inc. Those consent decrees under which they operate have been modified several times in their history. It is appropriate from time to time for the Department of Justice to review these consent decrees to ensure that they are meeting their intended goal of preserving and promoting competition.

There are some who argue that the consent decrees have run their course and should be sunsetted, while others maintain that the consent decrees serve a role in protecting against competition concerns and should be strengthened.

The DOJ's review of the consent decrees is also informed by recent activity in the courts both in enforcing the consent decrees and through private antitrust litigation.

As Chairman Lee mentioned, there is recent litigation in the U.S. District Court for the Southern District of New York, which includes some of the parties who are witnesses here today.

It is against this complicated backdrop that DOJ is taking a fresh look at the consent decrees. Our focus today is on striking the right balance between the impacts on consumers, main street businesses, and those broadcasting content through radio, TV, satellite, and new digital services, and respecting the rights and value owed to the creators of the music that we all enjoy.

When the consent decrees first went into effect, noone imagined the Discman or the boom box, much less the iPod and digital streaming over the Internet.

In addition to innovations, restructuring, and new players entering the market, Congress has also acted throughout this time to recognize new rights in music. We have acted to recognize new copyrights for sound recordings, production and distribution, and, most recently in 1995, for public performance of digital sound recording.

Although this area is at the intersection of antitrust and copyright law, our hearing today is going to focus on the antitrust side and any competition issues in the present day market for licensing musical works.

I look forward to hearing from all of our witnesses today about the ongoing DOJ review and your recommendations on the best path forward.

Thank you.

Chairman LEE. Thank you, Senator Klobuchar.

Before we introduce and swear in our witnesses, I want to note at the outset that we have received some letters from members of the public concerned about this issue. Unless there is objection, this will be entered into the record.

[The information appears as a submission for the record.]

Chairman LEE. Now I would like to introduce our witnesses and then we will swear them in. We will move from this side of the table over.

First, we have got Beth Matthews, who is the CEO of ASCAP, the full title, of course, being the American Society of Composers, Authors and Publishers.

To her immediate left is Chris Harrison, the vice president of business affairs for Pandora Media, Inc.

Then we have Matt Pincus, who is the founder and CEO of SONGS Music Publishing.

Next, we have Mr. Mike Dowdle, who is from my home State of Utah. Mr. Dowdle is the vice president of business affairs and also the general counsel for Bonneville International.

Lee Thomas Miller is with Broadcast Music, Inc., Songwriter Affiliate, and also the president of the Nashville Songwriters Association International.

Finally, we have Jodie Griffin, who is a senior staff attorney with Public Knowledge.

Will each of our witnesses please stand and be sworn?

[Witnesses are sworn in.]

Chairman LEE. Thank you.

We will now hear from each of our witnesses, beginning with Ms. Matthews and then continuing to her left until we get over to Ms. Griffin. After that, we will proceed to questions.

Ms. Matthews.

STATEMENT OF BETH MATTHEWS, CHIEF EXECUTIVE OFFICER, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, NEW YORK, NEW YORK

Ms. MATTHEWS. Good morning, Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee.

My name is Elizabeth Matthews and I am the chief executive officer of the American Society of Composers, Authors and Publishers, which was formed 100 years ago by songwriters.

ASCAP is a membership association operating on a not-for-profit-basis. We are comprised of more than 525,000 songwriters, composers, lyricists, and music publishers, and we represent over 10 million musical compositions.

Songwriters are the unsung heroes behind American music. Every song you hear comes from the hearts and minds of a songwriter. Songwriters create the notes and the lyrics on the page. This is the copyright in the musical composition that any artist may record.

Unlike recording artists, however, songwriters do not earn money from selling merchandise or touring. Many songwriters do not have salaries, benefits, or other reliable sources of income. They rely on public performance royalties to earn a living, to feed their family, and pay the rent.

ASCAP's job is to ensure that songwriters can make a living creating the music that we all love, because music matters. Music is not just a business. It is an important and continual contribution to our society and to our day-to-day lives.

ASCAP licenses the right to publicly perform our members' music to over 700,000 licensees in the United States and we work with over 100 public performance societies globally who, in turn, license our members' works outside the United States.

In 2014 alone, we processed payment for over 500 billion public performances, more than double the year before, and we are only one of several market actors.

In 1941, ASCAP entered into a consent decree with the Department of Justice because ASCAP did not have significant competition. Fast-forward 74 years and today, competition with ASCAP is alive and well. We compete directly with BMI and with unregulated competitors, including SESAC, new licensing companies, the foreign PROs, and even with our own music publisher members whom are always free to directly license their works.

The barriers to entry for new market competitors are quite low, and yet we are still governed by a World War II era consent decree which was last updated before the invention of the iPod.

There have been seismic changes in the music landscape. People no longer buy the music they love. The stream it. Streaming services offer more choice and more consumer control. As a result, they require access to a massive variety of songs in order to provide users with an optimally tailored content experience. This means that the use of music has increased exponentially, but the payments have not followed. For a songwriter, this is a terrifying trend.

New and innovative market players require experimentation and novel approaches to music licensing, and yet the consent decree restricts our ability to adapt because it is still stuck in 1941.

Some digital music services are unwilling to pay songwriters a fair market rate, making it impossible for songwriters to earn a sustainable living. As a result, major music publishers are threatening to resign from ASCAP and BMI entirely, which would be a devastating blow to collective licensing and to songwriters.

In response, we have proposed a number of changes to the ASCAP consent decree, including the following. First, rate disputes with businesses that use music should not be decided in an expensive, time-consuming Federal rate court litigation. We propose a faster, less expensive process.

Second, our membership have the flexibility to grant ASCAP the right to license their music for some uses, while retaining the right to license the other uses directly. ASCAP fully supports transparency for licensees in this regard. That approach is both pro competitive and consistent with the U.S. copyright law.

Third, we need to simplify the music licensing by allowing ASCAP to license more than just the right of public performance.

ASCAP may facilitate one-stop shopping, a single destination where businesses may secure every right that they need, if the consent decree is changed.

The Department of Justice is undertaking a review of our consent decree and we look forward to working with them to make these pro competitive changes. We have also engaged with Congress in our efforts to modernize the current music licensing system. In that regard, we applaud the leadership of Senator Hatch and others who are introducing the Songwriter Equity Act, which represents an important first step in reform.

If the consent decrees are not changed and major music publishers resign from ASCAP and BMI, then the system of collective licensing may collapse and everyone loses. Copyright owners, licensees, music fans everywhere, and, most importantly, the songwriters, who are the heart and the soul of the music industry.

Thank you.

[The prepared statement of Ms. Matthews appears as a submission for the record.]

Chairman LEE. Beautifully timed, by the way. You closed that out just as the final second ticked off the clock.

Mr. Harrison.

STATEMENT OF CHRIS HARRISON, VICE PRESIDENT, BUSINESS AFFAIRS, PANDORA MEDIA, INC., OAKLAND, CALIFORNIA

Mr. HARRISON. Chairman Lee, Ranking Member Klobuchar, a distinguished Members of this Subcommittee, thank you for inviting me to testify.

My name is Christopher Harrison. I am the vice president of business affairs at Pandora Media.

Launched less than 10 years ago, Pandora is now the most popular Internet radio service in America, reaching more than 80 million participants—80 million listeners each month.

The mission of Pandora and our more than 1,400 employees is to unleash the infinite power of music by being the effortless source of personalized music enjoyment and discovery for millions of listeners.

Where others may see a music industry in turmoil, Pandora sees abundant opportunities for new leadership to create a music industry that benefits the entire ecosystem.

The recent launch of Pandora's artist marketing platform, which gives free access to artists to see how their music performs on our platform is the first of many initiatives intended to unlock the power of Pandora to enable music-makers to grow their audience.

In addition, Pandora represents a significant new revenue stream, with world the payments approaching $450 million last year alone and more than $1.2 billion since we launched in 2005.

Ensuring a vibrant and growing music industry in the years to come requires a marketplace that is open, transparent, and vigorously competitive. Unfortunately, there are a number of significant obstacles that threaten this future and require the attention of this Subcommittee.

It has been nearly 3 years since this Subcommittee reviewed competition in the music industry, with its hearing on Sony ATV's

acquisition of EMI, which reduced the number of major music publishers from 4 to 3.

Among the most important obstacles is an alarming lack of transparency. As I describe in my written testimony, this lack of transparency was a key factor in Pandora's inability to obtain competitive market agreements with the music publishers who had allegedly withdrawn their digital performance rights from ASCAP and BMI.

I commend Mr. Pincus for making the repertory of songs available publicly and I hope that other publishers and PROs follow his example. In order to foster competition, we recommend the creation of a publicly available data base of record to house all relevant music copyright ownership information.

By enabling services to quickly ascertain who owns which work, a single data base of record would enable services to identify on a catalog-by-catalog basis the owners of the songs they perform, which would encourage true competition among copyright owners for distribution on digital platforms.

While the transparency provided by such a data base would mitigate the anticompetitive behavior Pandora recently experienced, transparency alone is insufficient to solve the problems that Pandora faced over the past few years.

As this hearing takes place, the largest music publishers and PROs are demanding changes to the very decrees designed to forestall their now well documented into the competitive conduct.

In the past year, four different Federal district court judges found evidence of the same types of egregious anticompetitive conduct that gave rise to the original consent decrees 70 years ago. Pandora directly experienced some of that anticompetitive behavior, which I detail in my written remarks.

While we are open to sensible modifications to the consent decrees, any modification must ensure a competitive vitality and independent pricing activity that does not exist at this time.

To amend the decrees in the manner the PROs and publishers seek would seriously harm competition by turning a blind eye to harmful misconduct, permitting publishers and PROs to artificially inflate prices and ultimately harm consumers' access to the music they love.

While we remain optimistic about the future of music streaming, the Government has a critical role playing to guarantee a functionally competitive music licensing ecosystem.

As evidenced by the coordinated behavior I described previously, there is a continued need for Government oversight to ensure that certain participants in this highly consolidated industry cannot leverage the market power run your game.

Thank you for your consideration of this important issues. I look forward to answering any questions.

[The prepared statement of Mr. Harrison appears as a submission for the record.]

Chairman LEE. Thank you, Mr. Harrison.

Mr. Pincus.

STATEMENT OF MATT PINCUS, CHIEF EXECUTIVE OFFICER, SONGS MUSIC PUBLISHING, NEW YORK, NEW YORK

Mr. PINCUS. Good morning, Chairman Lee, Senator Klobuchar, and Members of the Subcommittee.

I am honored to provide my perspective as a music publisher and a small business owner. The fundamental question of today's hearing is simple. Why are the property rights of songwriters and publishers subject to perpetual, heavy-handed Government regulation?

I am the CEO of SONGS Music Publishing. I represent 350 contemporary songwriters. The current environment is very hard on songwriters and perpetual Government regulation is making it worse.

I am an avid user of many digital music services. Somewhere in the many models out there is the answer to future growth for my company.

I started SONGS in 2004 to transact with the digital market freely and easily. However, as I detail in my written testimony, the current consent decrees are artificially depressing the performance royalties that digital services pay, because I am unable to negotiate for my property rights in a free and free market.

Three successful songwriters I represent wrote a song for the recording artists, Jason Derulo. The song went number one. It was streamed 124 million times on Pandora.

As a songwriter, it does not get any better than this, and yet their 50 percent interest in this song generated only $3,158.05 in royalties to be shared among the three of them.

If streaming music is the future, then it is clear that all songwriters and publishers should be very concerned. This rate of monetization is not fair for my songwriters.

Like any businessman, I am best suited to determine the fair price for the property rights I represent and to say no when I feel unfairly compensated for them. Instead, I am compelled to allow anyone to use my songs, no matter what the terms, because of perpetual Government regulation.

Those lobbying for continued regulation often cite the high earnings of the top 1 percent of recording artists. While I represent the creators of some of the most recognizable songs in the world, the reality is that many of the creators I represent are struggling to make the minimum wage from their music.

Like the acclaimed indie rock songwriter, a husband and father who has been plagued by illness and unable to afford proper medical treatment, his sole income comes from creating music. Despite achieving notoriety for a song streamed over 11 million times on Pandora, he was paid only $642.

I have a responsibility to secure fair compensation for the talented songwriters I represent and I am unable to do so due to perpetual regulation, because under the current consent decrees, I have only two very bad choices in seeking fair rates for my songwriters: Accept unfair Government regulation that depresses property value or withdraw entirely from the collective licensing system and incur tremendous costs and terrible inefficiencies.

To the benefit of both rights-holders and businesses that use our music, our songs are licensed collectively through performing rights organizations such as ASCAP and BMI. However, despite radical

changes in how music is used and consumed, today's songwriters and music publishers continue to be highly regulated by consent decrees imposed during World War II.

In my written testimony, I identify modifications to the decrees that I believe will allow for a more competitive, free and fair market for all copyright owners and music users.

Critical changes to the consent decrees include amending rate-setting procedures to allow for negotiations and payments that more closely reflect the free market; allowing direct licensing of performance rights; establishing a formal mechanism for sunset or at least periodic review of the decrees; and, providing music publishers and their agents the flexibility to license digital services seeking multiple rights.

I believe the Department of Justice has an important role in enforcing antitrust laws against any real anticompetitive actions of specific parties, but that role should not be used to regulate small business owners and prevent a free market development of an entire industry rose 75 years.

As a music publisher, my livelihood depends on widely licensing my songs. That is the reality in a free market. If given the freedom, like any other music publisher, I will exercise it responsibly to the benefit of my songwriters.

Thank you again for the opportunity to share my views with you today.

[The prepared statement of Mr. Pincus appears as a submission for the record.]

Chairman LEE. Thank you, Mr. Pincus.

Mr. Dowdle.

STATEMENT OF MIKE DOWDLE, VICE PRESIDENT, BUSINESS AFFAIRS AND GENERAL COUNSEL, BONNEVILLE INTERNATIONAL, SALT LAKE CITY, UTAH

Mr. DOWDLE. Good morning, Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee.

My name is Mike Dowdle and I am vice president of business affairs and general counsel for Bonneville International Corporation, which owns television and radio stations in Salt Lake City, Los Angeles, Seattle, and Phoenix.

I am pleased to testify today on behalf of the National Association of Broadcasters and its thousands of free local radio stations throughout the Nation.

My testimony will focus on the continued necessity of the ASCAP and BMI consent decrees. Absent these consent decrees, no fair competitive market would exist for the licensing of musical works. This would harm not only broadcast audiences whose access to our programming would be jeopardized, but customers of the countless businesses that publicly perform music every day, including restaurants, bars, retailers, and sporting venues in your local communities.

To illustrate the issue, let me provide an example. KSL-TV, Bonneville's NBC affiliate in Salt Lake City, has music interwoven throughout its programming. These musical performances take place in the background of its movies and television shows and live

sporting events and local news, during transitions between programs and even within commercials.

For its locally produced content, KSL-TV has editorial discretion over which specific songs it airs. So in the event that it could not obtain the rights to a certain song, KSL could likely take steps to ensure that the song is not performed.

But for a significant portion of its content, namely, network and syndicated programming, live events, and commercials, it has no editorial control. If KSL lacks the right to publicly perform a song, it runs the risk of significant penalties under Federal copyright law.

Our radio stations that air syndicated programming, commercials, and live events run the same risks. They simply must have the public performance rights to the full catalog of musical works in order to operate lawfully.

Even the right to a single musical work gives the copyright-owner significant market power. The risk of anticompetitive abuse is compounded when these rights are aggregated, which is exactly what the performing rights organizations or PROs do.

ASCAP and BMI control more than 90 percent of the public performance rights to musical works in the United States. Aggregate those rights into blanket licenses, and then fix a single price roll music within that license, irrespective of which songs are actually used.

In any other industry, this would constitute per se violation of the antitrust laws. But the consent decrees entered into between the DOJ and both organizations more than 70 years ago serve as antitrust lifelines that allow ASCAP and BMI to continue to operate in spite of their anticompetitive nature.

Absent the protections and framework afforded by the consent decrees, ASCAP and BMI would have unfettered ability to extract above market prices and terms for the rights and those works from broadcasters and other licensees.

Let me be clear. Broadcasters would cease operations without the ability to clear these rights and the consent decrees are critical to that end.

Before I conclude, I want to touch on two specific points that are central to today's hearing. First, in an attempt to circumvent the consent decrees, large music publishers have sought to selectively withdraw from ASCAP and BMI to directly negotiate with certain digital services.

Two Federal courts interpreted the consent decrees to prohibit such partial withdrawals, and now the PROs are asking both DOJ and Congress to amend them. Such a modification for partial withdrawals should not be allowed. The fact is any music publisher with sufficient size and scale to consider direct negotiations for selected rights, such as digital rights, would have essentially the same power in the market as the PROs and raise the same antitrust concerns.

Relaxing the consent decrees in this way would enable music publishers to engage in the same behavior that prompted the consent decrees in the first place and that has been condemned by the courts cents.

Second, this Subcommittee need look no further than the recent antitrust actions brought against the third major PRO, SESAC, to glimpse the anticompetitive licensing practices undertaken by an unregulated collective. These practices, which resulted in a $58 million settlement between SESAC and the television industry just a month ago are detailed in my written testimony and provide a real world example of the antitrust abuses that would be unavoidable outside of this consent decree framework.

In conclusion, this Subcommittee has long recognized the important role that the antitrust laws play in ensuring free and competitive markets for the benefit of consumers. The ASCAP and BMI consent decrees remain vital to television and radio broadcasters' ability to fairly, efficiently, and transparently license musical works to the benefit of their audiences and your constituents.

Thank you for inviting me to testify today. I look forward to answering any questions.

[The prepared statement of Mr. Dowdle appears as a submission for the record.]

Chairman LEE. Thank you, Mr. Dowdle.

Mr. Miller.

STATEMENT OF LEE THOMAS MILLER, PRESIDENT, NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, NASHVILLE, TENNESSEE

Mr. MILLER. Good morning. My name is Lee Thomas Miller. I am an American songwriter.

I grew up on a small tobacco farm in Kentucky. When I was 11, and started playing piano, then guitar, then violin. Music has a way of kind of taking you over.

I knew early on that it was not just a hobby. I went to college and instead of studying something sensible like business, as my mother wished, I studied classical music composition, which basically just meant I was over qualified for my job, singing and playing in the bars at night. But there I was, classically trained and writing honky tonk songs on the side.

Then I learned about Broadcast Music, Incorporated. I was always looking for an excuse to visit Nashville. So I took a trip to BMI. I met with a songwriter representative who explained to me what BMI did.

When your song plays on the radio, we collect the money, he said. And I said sign me up. Then I played him my self-made recordings of the songs I had been writing, and he was very blunt. You are not much of a singer and guitar players are a dime a dozen. But I believe you can be a songwriter.

So I graduated college, said $1,000, and moved to Music City. For years I wrote songs, hundreds of songs. I played in bands and took temporary jobs to pay the bills. I studied the songs I heard on the radio and began meeting and learning from the songwriters who wrote them.

At the time, the music business was healthy and music publishers could take chances. A prominent publisher took a chance on me, and then the real work began.

My first cuts were not memorable. When BMI sent me my first performance royalty check, it was for $4.69. Today it is framed and

hanging on my office wall. That check meant everything. That check meant that I was a professional songwriter.

All in all, it took 11 years after I moved to Nashville to have a hit on the radio. In 2003, I received my first BMI award, an award given to the 50 most played songs of the year. It was a song titled, "The Impossible."

Ironically, the song was about overcoming insurmountable odds through faith and determination and believing anything is actually possible. To me, earning that first BMI award was like a ballplayer going from AAA to the major leagues.

In today's music industry environment, songwriters count on their performing rights societies. The one thing keeping us afloat is that performance royalty check. We do not tour. We do not sell tee shirts. We write songs all day every day. And when we succeed, we pay self-employment income tax. With what remains, we buy gas and bread and white picket fences.

But since the year 2000, the National Songwriters Association, where I serve as president, estimates that America has lost between 80 and 90 percent of its professional songwriters, whose primary income is from royalties.

I am talking about creators, and what we create is not some obsolete, irrelevant cultural product of days gone by. It is music.

What we create is there when you fall in love. It is there when your heart breaks. It heals. It inspires. It time travels. It crosses party lines.

So how does the BMI consent decree impact me? Well, I feel that it puts BMI and songwriters at a disadvantage in several important ways. For instance, if rate disputes could be resolved by arbitration rather than expensive litigation, that would feel like a win for everyone. New services could launch and songwriters could get paid quickly without spending lots of money on lawsuits.

Songwriters also worry that BMI is not allowed to license rights other than the performance right. Most new services need several rights. a one-stop license from BMI would be a quick and efficient way to get those services off the ground.

These aspects of the BMI consent decree, in my view, have devalued the musical composition to the point where the songwriters are being crushed. It is bad enough that it is so easy to steal the music today, but a legal framework that allows songs to be streamed for nearly free will destroy the livelihood of the American songwriter if it is allowed to continue.

The U.S. Department of Justice is presently undertaking a comprehensive review of the ASCAP and BMI consent decrees and we hope that they will recommend substantial changes that will allow us the flexibility we need to operate in the free market.

I am America's smallest small business. I sit down and make stuff up. I can make you laugh, I can make you cry. I can make you do both with one 3-minute story. That is the power of music and it all begins with a song. But I am here to tell you there are not many of us left.

Thank you, Chairman Lee, Ranking Member Klobuchar, and Members of the Committee.

[The prepared statement of Mr. Miller appears as a submission for the record.]

Chairman LEE. Thank you, Mr. Miller.
Ms. Griffin.

STATEMENT OF JODIE GRIFFIN, SENIOR STAFF ATTORNEY, PUBLIC KNOWLEDGE, WASHINGTON, DC

Ms. GRIFFIN. Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee, thank you for inviting me to testify today. And I would like to thank you, Mr. Chairman, for your remarks emphasizing that competition policy is, first and foremost, about protecting consumers.

My name is Jodie Griffin and I am a senior staff attorney at Public Knowledge, an organization that advocates for policies that promote freedom of expression, affordable communications tools, and the public's ability to create and access creative works.

Before Public Knowledge, I was a musician and helped launch and worked for the five-time Grammy-nominated independent label, BMOP/sound.

The Department of Justice's review of its antitrust consent decrees with ASCAP and BMI comes at a pivotal time for the music business. Now more than ever, it is crucial that policymakers promote competition and innovation in music distribution to benefit listeners and artists alike.

New music services give consumers convenient ways to legally access music at reasonable prices and they have the potential to give artists greater control over their own careers. However, this market is still new and it is still growing and it is crucial that we encourage competition and innovation or consumers and artists will only be left with fewer options and less leverage in the marketplace.

Antitrust and copyright policies should promote a robust and competitive music marketplace, where artists can get their music out on the market and receive a fair price for it and users have competitive choices among legal music services.

Yet all of the middlemen in the music business, from publishers to labels to distributors, are facing robust competition that forces them to be accountable to musicians and their audiences. But if an intermediary can leverage a large catalog of copyright acquisitions to dominate the market, it has the power and the incentive to use that leverage to raise prices for consumers, pass less revenue on to artists, and prevent new services that would challenge its dominance.

For example, on the sound recording side of the music business, when the major labels negotiate licenses directly, they have been able to use their market power to obtain large lump sum cash advances and equity in the new companies, the benefits of which are not passed on to artists and independent labels argue that the majors can demand royalties disproportionate to their actual market share because they have enough market power to veto new services.

The very act of creating large collective licensing organizations concentrates market power and the market for public performance rights and compositions is very concentrated. This has been the case for decades, and so for decades we have had antitrust settle-

ments, ensuring that the largest performing rights organizations offer reasonable licenses despite their market power.

This does not mean it is inappropriate to periodically review and update the consent decrees to encourage a more competitive market, but at this moment we can already see multiple warning signs that dismantling the protections in the consent decrees would result in a less competitive and innovative market with fewer choices for consumers.

In recent years, the music publishing industry has only gotten more consolidated as the biggest publishers buy up smaller firms. Ironically enough, some of those mergers were even justified by the argument that post-merger publishers could not possibly act anticompetitively because we can rely on the market protections in the consent decrees and in statutory licenses.

And even more recently, a Federal judge has found that when the major publishers attempted to license their digital rights directly to the Pandora, they chose collusion over competition. They could have used that opportunity to compete with each other and with ASCAP, but instead they chose to coordinate with each other, despite the objections of some songwriters and independent publishers within ASCAP.

A Federal judge later examined these negotiations and found that the publishers' behavior magnified their already very considerable market power, so much so that the resulting licenses could not even be honestly considered free market benchmarks.

Again, this does not mean that we must always have consent decrees nor that they can never change, but the evidence shows that at this moment in time, we need to protect competition more than ever.

As the Department of Justice and Congress review competition in the music licensing marketplace and the antitrust consent decrees in particular, it is crucial that we continue to support policies that encourage a competitive market in which no company has the power to pick winners and losers. A marketplace that allows new entrants to compete, whether among copyright-holders or distribution services, ultimately benefits consumers and artists alike.

Thank you and I look forward to your questions.

[The prepared statement of Ms. Griffin appears as a submission for the record.]

Chairman LEE. Thanks to all of you for your opening statements. Those were very helpful.

We will now begin our question-and-answer period with 5-minute rounds. I will go first, and then Senator Klobuchar, and then we will alternate on each side of the aisle.

Ms. Matthews, we will start with you. So your consent decree has been around since the early 1940s. So I guess it is the second oldest of the two consent decrees.

When we look at the music market today, we can see that it has changed a lot over the last 75 years. We certainly see that delivery methods, in particular, have changed a great deal since the early 1940s.

What can you tell me about this, about how the market has changed over the last 75 years, and how those changes, in your

opinion, bring about the need for some kind of modification of the status quo?

Ms. MATTHEWS. The competitive market has increased dramatically since the 1940s. We compete both with regulated competitors, such as BMI, and several unregulated new market entrants have shown up on the scene in the last several years.

The most important change I think that has happened, though, in the past decade has been consumer behavior. Because people are no longer buying music, a major source of revenue related to mechanical reproductions has steeply declined for songwriters. So as a result, the reliance on public performance is increasing.

Digital services are becoming increasingly more customized and personalized with the proliferation of wireless device adoption, broadband penetration rates with high-speed services to the home, more music is being played than ever before.

So while the volume of music has increased in terms of overall public performances, the revenue is simply not tracking in terms of increase. And at the end, the songwriters are being harmed.

As a result, major music publishers are threatening to resign. If they resign, collective licensing will collapse.

Chairman LEE. Thank you.

Mr. Harrison, I am presumptively always supportive of free market solutions to competition issues. Now, you have suggested that these very old consent decrees are not outdated all.

What evidence in the market leads you to believe that the consent decrees that we are talking about today, as they are written, are necessary even in the digital age and even in the digital sector?

Mr. HARRISON. Well, I think there are two—two things I would point—I would point you to. First is just the structure of ASCAP and BMI. They are horizontal joint sales agents. The take works from otherwise competing publishers, aggregate those catalogs together, and then fix a single price across all of their members' catalogs.

As Mr. Dowdle indicated earlier, that is normally viewed as a per se antitrust violation and the consent decrees provide—because of the protections they provide have immunized ASCAP and BMI to prior private antitrust claims.

More contemporaneously, Pandora over the last 2 years has experienced what happens when publishers attempt to partially withdraw. You alluded to Judge Cotes' opinion in which she found that when given the opportunity to compete against each other, the publishers and ASCAP chose not to and instead chose to coordinate their behavior, use their market power and drive rates above the competitive market rate.

Chairman LEE. And speaking of that litigation and speaking of Judge Cote, I want to turn back to you for a minute, Ms. Matthews.

In the *Pandora v. ASCAP* litigation, the rate judge discussed several examples of this behavior that she found to be questionable. As this issue continues to arise, I would like to give you a chance to respond to some of those.

Now, if the publishers are permitted to partially withdraw, will ASCAP view them as competitors in the market for music licenses; and, if so, do you think that will result in competitive pricing?

Ms. MATTHEWS. It is counterintuitive, I know, but ASCAP views the major publishers and independent publishers as competitors today. We only accept a non-exclusive grant of right, meaning that they are always free to direct license with any music service, including Pandora.

If they were allowed to, I will say, grant us a partial grant of rights, which is supported by the U.S. copyright law, because copyrights are divisible, they would simply remove those rights from ASCAP in their entirety. So we would not be competing for them with respect to that particular license, but it would be pro-competitive in the sense that it would create more choice for music licensing services.

Chairman LEE. I will probably want to follow up on that a little bit later, but my time has expired and I will turn it over to Senator Klobuchar.

Senator KLOBUCHAR. I think I will start with where you left off there, Senator Lee.

So a significant amount of the attention has been placed on the partial withdrawal of certain rights from the performance rights organization. As discussed, a recent letter of the DOJ filed with the second circuit on Friday indicates that the department believes the consent degrees, as currently written, do not permit partial withdrawals.

Ms. Matthews you answered that in part. But, Mr. Pincus, why do we not start with you? Why are the partial withdrawals needed, in your view?

Mr. PINCUS. Well, the current system works quite well with respect to most aspects of collective licensing. I think there is broad satisfaction with the radio licensing system, the television licensing system, the bars, restaurants, stadiums' licensing system.

But with respect to the additional rights, I believe that the rates are artificially suppressed.

If you look at market comparative rates, they have been up to three to four times higher in multiple situations. There are many companies that are doing business in an unregulated way in the digital market that are functioning just fine without Government oversight, and that puts us in a position where we feel like if we are earning—if our earnings are going down and the listenership of radio is migrating to the lower-paying rate, then our businesses are going to suffer over the long term.

And what we would rather be able to do, like in any other small business, is to be able to negotiate directly for those rights.

Senator KLOBUCHAR. Mr. Dowdle, do you want to respond to that, this idea of the partial withdrawal?

Mr. DOWDLE. Yes. Thank you, Senator Klobuchar. There is an old adage—as a young lawyer, I was a litigator and there is an old adage, time honored in that profession that says that facts made bad law, hypothetical situations make worse law.

In this case, I would just urge the Members of this Committee not to make a decision based on hypothetical threat. That is first.

Second of all, the very fact that the music publishers we are talking about are big enough to make a threat that scares ASCAP and BMI should raise a lot of eyebrows on this Committee and at the Department of Justice.

Those withdrawals are best put in—as has been mentioned here, the possibility of those withdrawals are best put in the light of what might happen if you take a look at what happened when they threatened them.

They engaged immediately inclusive in anticompetitive activity. If you want to see what will happen, that gives you a pretty good idea of what should happen. That, I think, should really raise some eyebrows and raise a question of whether or not they ought to have their own consent decrees, frankly.

Senator KLOBUCHAR. Do you want to respond at all, Mr. Harrison?

Mr. HARRISON. I agree with what Mr. Dowdle said. The concern is not partial withdrawals, in theory. The concern is partial withdrawals in practice. And what we experienced over the last 2 years, when given an opportunity to compete, when they actually believed they had partially withdrawn, the publishers chose not to. And to the extent that the department is looking into this issue, I think it is wise for this Subcommittee to be mindful of actual behavior, not what folks might say they want to do.

Senator KLOBUCHAR. My last question. There are a number of different ways that licensing rates are set throughout the industry. Some have argued that rate should be set in the free market rather than being subject to terms administered and regulated by the Government.

Mr. Pincus, in your written testimony, you talk about the right of public performance is, quote, "inherently a free market right." What do you mean by that? And if you could just answer briefly so I can get some other comments on that.

Mr. Pincus, if it were not for the consent decrees governing ASCAP and BMI, the negotiation would be between publishers and licensees directly.

Senator KLOBUCHAR. Do you think that is a good idea then?

Mr. PINCUS. I do. I think that while I understand that there are anticompetitive concerns, I, for one, have never been accused of acting anticompetitively. My business is not scale enough and yet I am regulated broadly by a system that is meant to protect against anticompetitive behavior on a blanket basis.

Senator KLOBUCHAR. Ms. Griffin, do you want to respond to that?

Ms. GRIFFIN. I think—so when I think of what a true free market is, it is one that has competition, one that brings more choices and lower prices to consumers.

When we look at the publishing market right now, it is hard to know what a true free market rate is because we do not have examples of negotiations where the licensee can say no and still stay in business. And that is why we still need the competition protections, like a statutory license or here the consent decrees.

Senator KLOBUCHAR. Does anyone else want to respond to that, this idea? Ms. Matthews?

Ms. MATTHEWS. I would just like to point out that under the current consent decrees for both ASCAP and BMI, the license is compulsory, meaning that there is no negotiation whatsoever in order to have access to the assets.

It is the antithesis of a free market negotiation. A licensee applies for a license. They immediately can exploit those copyrights.

Senator KLOBUCHAR. All right. Thank you very much. I will turn it over to my colleagues.

Chairman LEE. Mr. Tillis.

Mr. TILLIS. Mr. Dowdle, if the partial withdrawal is allowed, how is this going to affect broadcasters that simulcast through digital channel?

Mr. DOWDLE. Well, we will be faced with having to negotiate, if you can call it a negotiation, with people who we do not know how much of their product may be used in our programming. Therefore, we have to have those licenses.

Our hands are tied. We have to come to an agreement with them. That gives them an uneven field on which we have to play immediately. We do not have a choice. We have to sit down. We cannot say no.

Second of all, we have already seen how they behave in a, quote-unquote, "free and open marketplace." They collude. They will immediately go to the conduct, we believe, that they have already proven they go to. That is, they will tend to conduct themselves in an anticompetitive way.

That is what we will be faced with—a gun to hour head and no market power.

Senator TILLIS. Ms. Griffin, what is the consumer interest here? How do consent decrees help consumers?

Ms. GRIFFIN. Thank you, Senator. Consumers benefit when they have choices for different services that give them different types of offerings and different price points. And so here, the role of the consent decrees in creating that market is allowing prospective new licensees to enter the market, pay artists, and then launch a service and give consumers a new choice.

Senator TILLIS. I have, I guess, a general question for anyone that would like to speak on it. I am trying to get a sense, in each of your view, what fair market value means, from your perspective. And I am happy to have anyone, but I am really just trying to understand how the consent decree stands in the way of achieving it, as well.

But to anyone. We can start down here with Ms. Matthews.

Ms. MATTHEWS. So a free market would encompass a willing buyer and a willing seller negotiating openly. And in an instance where they do not agree, either party can simply walk away. When they do agree, presumably they would reach a free market rate.

Conversely, under the consent decrees, that negotiation does not happen because the right is compulsory. ASCAP and BMI do not have the right to say no.

Senator TILLIS. Mr. Harrison?

Mr. HARRISON. I would agree with Ms. Matthews' first characterization of fair market value. It is the value that clears a market when you have a willing buyer and a willing seller, without an information asymmetry and with the ability to walk away.

I would also agree with Mr. Dowdle's characterization of services and certainly the experience of Pandora that when publishers will not tell you what they own and then threaten willful copyright infringement, which comes along with $150,000 damage potential for each work infringed, services do not feel they have the ability to walk away either.

Senator TILLIS. Mr. Pincus?

Mr. PINCUS. As a small businessperson, I think a free market is a place where I can decide what is most appropriate for my business and in this context, I do not feel like I can do that.

Mr. DOWDLE. Senator, with all due respect to our discussion about a free market, we have actors that their very existence would not exist in a true free market. We have collectives that are sanctioned in their activity. Their very existence does not allow a free market as such to really operate. And so you have to come outside of this sort of theoretical free market immediately when you give the right to collectives to bargain in the way that they do.

There has to be a construct to govern that sort of activity. I agree that if one seller and one buyer are talking, that would work. When you are talking about a seller of the size and magnitude of large music publishers or collective societies, you do not have a free market.

Senator TILLIS. Mr. Miller?

Mr. MILLER. Well, free market is something that the songwriters can only dream of. We have never had this. We have been told what our copyright was worth since the beginning of writing songs and it has got us to the place today where it is quickly becoming unsustainable.

The thought of being able to sit down and have a negotiation in 2015 of what our craft may be worth would be life-changing to our profession. We are the ultimate player that cannot say no. We are handcuffed to the bottom of the ocean and we are just looking for some relief.

Senator TILLIS. Ms. Griffin?

Ms. GRIFFIN. I would agree with Ms. Matthews that a free market is one where either side can walk away without going out of business entirely. And I would note, I think Mr. Miller mentioned how songwriters feel that they have to go through these licenses and I think part of the reason that songwriters feel that way is that the PROs dominate the business so much that you do have to go through them, and that is what makes it so dangerous from a competitive perspective.

Senator TILLIS. Thank you. Thank you, Mr. Chair.

Chairman LEE. Senator Coons.

Senator COONS. Thank you, Chairman Lee.

Ms. Matthews, if I might, just to go back to your opening statement that the competitive environment that ASCAP faces today has become more and more challenging.

How does ASCAP compete with the other PROs? Just give me a little more detail on how that competition today actually plays out. And in answering my question, do not licensees really end up needing a license from all the PROs?

Ms. MATTHEWS. Well, the current business practice is most licensees obtain a blanket license agreement from the three largest PROs, SESAC, BMI and ASCAP. They are always free, however, to license around, meaning they can program around those assets purposely because they have complete creative control over their programming, except in an instance where, as Mr. Dowdle pointed out, that perhaps they are licensing programming from other sources.

The barriers to enter the space, however, today are so low, an individual could simply buy one catalog of copyrights and compete with a PRO. Publishers are directly competing with PROs. International foreign societies are competing with PROs. And I would not be surprised if technology companies enter the space and start competing with PROs.

Senator COONS. Mr. Dowdle, your view on that same comment, on how the competitive marketplace looks to broadcasters and others in your role?

Mr. DOWDLE. Thank you, Senator. Yes. First of all, I am a member of ASCAP and have been for over 20 years. I am a very unimportant member of ASCAP, but I am a member of ASCAP and still have publishing interests, as well, in musical works.

These are friends of mine. So I am not trying to say anything personal about their personal behavior. But they do not really compete as to a particular work because they do not allow people to license with both societies.

As to the works in their catalog, they deal exclusively. I do not think that is competition, frankly.

Senator COONS. Ms. Griffin, could I just ask you what risks do we run if DOJ were to disband the consent decree wholesale and then address any subsequent antitrust violations just as they arise, if we really got to a free market and relied on antitrust statutes? And how does partial withdrawal mitigate or aggravate those risks?

Ms. GRIFFIN. So if we were to disband the consent decrees entirely, I think the three major publishers would have the market power to demand whatever they want for licenses. They may or may not be able to efficiently license the non-digital pieces of the market, like restaurants and bars and cafes, and that could be a big mess, as well.

But just looking at the digital side, I think the issue is that—you know, I come from the recording side of the business and we see that there in the major labels when they license uses that are not governed by statutory licenses.

We have seen them demand equity stakes in new companies so they can get vertically integrated. We have seen them get large lump sum advances, which they will—it is reported that they will often say that that is not attributable to their artist contracts, so it does not go down to the artist at the end of the day.

And then the independent labels say that the majors get royalties that are more than their share of the market, so much so that some of the independent labels are asking for more statutory licenses, which is a pretty telling example of what the state of competition is there.

So I think that the publishers would be able to begin to act like that because they have similar levels of market concentration.

And for partial withdrawals, I think the danger with partial withdrawals over just disbanding the consent decrees entirely is that we have seen how the PROs and ASCAP act when they think that they can partially withdraw and it resulted in a lot of competition problems. And my concern is that if the DOJ was to then say having seen that, now you can partially withdraw, it could be, even

inadvertently, seen as giving the imprimatur of the Government to that kind of behavior in the market.

Senator COONS. Let me ask a last question, if I might.

Mr. Miller, I really appreciated your testimony. Just as a reminder of the creative individuals who are, in many ways, at the beginning of this conversation, although Ms. Griffin also reminds us consumers are also a critical piece, there are a lot of different folks involved in this at a lot of different stages.

Mr. Miller, not all songwriters want to have some of their performance rights pulled out of PROs. Why is that and do you agree or disagree with that perspective?

Mr. MILLER. Well, that does create a lot of hypotheticals in a complicated music relicensing situation. My take on partial withdrawal is if that is the only way that songwriters can achieve higher rates, then, yes, it makes sense.

But we are accustomed to our share being paid directly to us through our PROs, mine being BMI. That, for me, has worked efficiently and stable. The copyright office has recommended that the services pay the songwriters directly under partial withdrawal.

So I think that from that standpoint, it makes sense. Again, if the end game is we find a way to revalue the copyright and get out from under the Government restrictions that say it is worth micro pennies in the digital space, then I think that it is a win for the songwriters, because we are in a situation now where millions of spins in the digital space equals tens of dollars, and that is what it comes down to at the end of the day at my house for my family.

Senator COONS. Thank you. Thank you all for your testimony today.

Chairman LEE. Thank you, Senator Coons.

It is now my honor to recognize my friend and distinguished colleague, who happens to be an actual songwriter, Senator Hatch.

Senator HATCH. Do not hold it against me.

We are happy to have all of you here and I am pleased that our leaders are holding this hearing.

Let me just ask this to the panel. Last June, Senator Whitehouse and I wrote to Attorney General Holder about the consent decrees that govern ASCAP's and BMI's licensing practices.

In the letter we encouraged the Department of Justice to modify the consent decrees to allow for competitive benchmarks and rate-setting, licensing flexibility, arbitration as an alternative to litigation, and bundled rights.

Now, some of you have argued that modernizing the consent decrees would be a bad thing and that the decrees need to be preserved in their current form in order to prevent anticompetitive conduct by PROs.

But tell me, why would allowing for arbitration in lieu of expensive litigation trip the so-called antitrust wire? I would really like to know that. Or why would allowing all performance rights organizations to bundle rights disturb the free market? These seem like common sense changes to me.

Maybe we can start with you over on that end.

Ms. MATTHEWS. Thank you, Senator Hatch. We agree with you. These are common sense changes.

To be clear, we are not asking to terminate the consent decree. We are merely asking for the changes that Senator Hatch just referenced.

Our request for alternative dispute resolution seems to be a win-win for everyone. We should be able to reach consensus without time-consuming, incredibly costly Federal litigation that gets repeated again in a second rate court proceeding with our competitor, BMI, with a different Federal judge, which oftentimes leads to inconsistent decisions.

Bundling also seems to be a win-win for people. Services often require more than one right, not just the right of public performance. If we could offer to be a one-stop-shop for them, that seems to have a pro-competitive and an efficiency benefit for everyone.

Partial grant of rights, I am hearing concerns regarding transparency and you should know that ASCAP fully supports transparency. We believe licensees have the right to know what they are licensing and from whom.

Senator HATCH. All right.

Mr. HARRISON. Senator, I think the concern I would have about arbitration, at least the way it has been characterized so far, is that it would be mandatory and binding. There is often significant sums at issue. When the Radio Music License Committee settled its disputes with ASCAP and BMI in 2012, the Radio Music License Committee estimated that that agreement was going to save them $1 billion over the following 7 years.

While—as someone who has litigated rate cases against ASCAP and is currently in a rate vetting with BMI, I understand how expensive they are. But the protections of the Federal Rules of Civil Procedure and the Federal Rules of Evidence is what allowed Pandora to discover the behavior that Judge Cote ultimately concluded was coordinated and that the benchmarks that ASCAP had introduced as allegedly competitive benchmarks were not.

Without those protections, my concern is that we choose the cheap answer, not the right answer.

Mr. PINCUS. Well, I am not a lawyer or a litigator, but as a small businessperson, I know enough to know that when lawyers and litigation enter the business process, things slow down and get very costly.

So anything that moves us away from that environment makes it easier for me to plan for my business for the long term.

Mr. DOWDLE. Senator Hatch, thank you.

We—our experience has been, through the license committees that we have, that arbitration, which we have had to resort to with regard to SESAC from time to time prior to the antitrust suits that have been filed, is really not any less expensive or less time-consuming, frankly. And what you give up is the expertise that the rate courts have on these issues.

There is deep and broad experience in these rate courts with these issues and they understand the lay of the land.

It has also been brought up by Mr. Harrison, you have protections within the Federal court system. These are proven venues and have been relied upon for a long time by both parties as they have resorted to them. ASCAP and BMI have gone to these rate courts themselves many times over the years.

And I do not think that throwing the baby out with this particular bath water would be a very good thing to do. It is probably under the scenario of be careful what you wish for.

Mr. MILLER. Sir, first, thank you for your championing of our Songwriter Equity Act. Speaking as a songwriter and, like Matt, not a lawyer, all I can say is these issues just show how our back is against the wall. We have very little say. We had no say in what got us to where we are today as far as the way the rules are written and it seems like—certainly, when we get into lawsuits and we need all the relief we can get as far as that goes, because we get pounded pretty quick because we are the smallest guy in the room.

So I think that, yes, these do seem like common sense asks. It also seems like common sense that we are asking for something to be done about 1941 regulations. I do not know what other businesses in America are as constrained as we are by something that happened during World War II.

Senator HATCH. Thank you.

Ms. Griffin?

Ms. GRIFFIN. I think for—especially considering bundling and arbitration, my concern is that both of those would ultimately increase the power of the largest players at the expense of the smaller ones, including the smaller rights-holders.

For example, for bundling, if the PROs were allowed to require mandatory bundling for licensees, that would make it harder for smaller rights-holders to license those mechanical rights separately. And for arbitration, there are a lot of transparency concerns for me on that side.

In order to have a true free market, we have to know what you are buying in order to figure out how much it should cost. And, also, I would note that on the songwriter side, Songwriters Guild, the Future Music Coalition, they have brought up concerns about transparency because arbitration might lead to issues where the artists themselves do not necessarily know what the rate is or how it was decided.

Senator HATCH. I think my time is up, Mr. Chairman.

Chairman LEE. Thank you.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, for this hearing.

Mr. Harrison, you talked about this $150,000 fine that could be imposed for infringing. Have you ever paid such a fine?

Mr. HARRISON. No, sir.

Senator FRANKEN. How many times has that fine, in your experience, to your knowledge, been imposed?

Mr. HARRISON. Well, in the context of Pandora, I mean, it was not——

Senator FRANKEN. Just in the whole eco system of this.

Mr. HARRISON. Oh, there are hundreds, if not thousands of copyright infringement cases going on right now. Pharrell Williams is involved in a lawsuit with Marvin Gaye's estate over "Blurred Lines," where statutory damages and willful infringement are being sought by—by the plaintiffs.

Senator FRANKEN. I go back to the question. How many times has this $150,000 fine been imposed?

Mr. HARRISON. The maximum $150,000, I cannot give you an actual number.

Senator FRANKEN. Because it was brought up as a—you brought that up.

Mr. HARRISON. Yes. We were—Pandora was threatened by—by music publishers, by their outside counsel.

Senator FRANKEN. I want to know how real a threat that is.

Ms. Matthews, in your testimony, you say, "Section 114(i) of the Copyright Act prohibits the rate court from setting fees for the performance of musical works from looking at fees paid by those same services to the recording industry for the performance of sound recordings, leading to rate disparities in favor of sound recordings on the order of 12–to–1."

I think this is why Mr. Miller is saying that in the digital area, there is just an imbalance. And I do not want to get into this is about PROs today, but it seems very ironic that in terrestrial, which is what we have been living with since 1941, the performers get nothing and the copyright holder—the songwriters and publishers, there is an imbalance for them, obviously. And here we have just got the exact reverse, where the performers do very well and the songwriters get next to nothing.

I mean, this is why we are here is what is going on in the digital space. That is why I think we are here, big reason why we are here, because in digital space, it is nothing, practically nothing. I mean, it adds up after billions of plays to a little something, but this ain't no way to earn a living.

If you want to use that, Mr. Miller, this ain't no way to earn a living.

[Laughter.]

Mr. MILLER. It will be demo'd by the end of the week.

[Laughter.]

Mr. FRANKEN. And I would get, what, half.

[Laughter.]

Mr. MILLER. Would you like to know what that is going to equate on a stream?

Mr. FRANKEN. Yes. On a stream, I would like to know, three plays.

Can I talk to the whole panel here about this issue? And I know it gets into something we are not really discussing, which is the right of the performer. But what would it entail to try to address this where you would sort of equalize—and I know that the performers would go, like, "Oh, great, we have been doing radio for 70 years and now you want to equalize this."

But what would that entail besides looking at these consent decrees? What would this all entail? If anyone wants to handle that. How would you sort of—knowing that we are going more and more and more into digital and this is going to kill the songwriter, how would you equalize this more? Anybody?

Mr. HARRISON. Mr. Franken, if I may. You should recall that the largest record label in the world owns the second largest publisher in the world and the second largest record label in the world owns the world's largest publishing company.

At the end of the day, if rights-holders believed that there was a different distribution of the royalties, the $450 million in 2014

that I referenced Pandora paying, if the rights-holders themselves wanted to distribute that money differently, they are controlled by the same corporate parent and could make that—are, frankly, in the best position to understand the relative value of the inputs for our—to our service.

Senator FRANKEN. Does that sound right to you guys?

Mr. PINCUS. If I may.

Senator FRANKEN. First, Mr. Pincus, and I am sorry, but——

Mr. PINCUS. I am a music publisher who does not share a corporate parent with a record company.

Senator FRANKEN. Right.

Mr. PINCUS. And what I would say is that in one very good example of where there is a free market for these two rights, the rights are 50/50. They are equal.

Ms. MATTHEWS. Mr. Pincus is referring to the market for audiovisual synchronization. And I would also like to point out anecdotally that outside of the United States, oftentimes those two copyrights, the copyright and the sound recording versus the copyright and the musical composition, are equally valued.

So our proposal would be as part of copyright reform, we have platform-neutral, technology-neutral laws, and we let the free market decide what the allocation of value should be between those two rights.

Senator FRANKEN. Thank you, Mr. Chairman.

Chairman LEE. Thank you, Senator Franken.

Senator Hatch is the Chairman of the Finance Committee and he has to get back to a meeting. So we are going to let him take a few more minutes before he has to leave us.

Senator HATCH. Well, I appreciate that, Mr. Chairman. I am in the middle of a big hearing on taxes, and all of you will be very interested in that, I am sure.

Let me ask Ms. Matthews this. The notion that copyright law prohibits the rate court judge from taking into account evidence of what other rights-holders are paid for the same piece of music, that does not make much sense to me.

That is why last week, together with Senators Whitehouse, Alexander and Corker, I introduced the Songwriter Equity Act to remove this evidentiary barrier. The Songwriter Equity Act would authorize the rate court judge to consider rates paid to other rights-holders, such as performers, as part of determining a fair market rate.

Now, do you believe this reform makes sense and how will it help the rate-setting process?

Ms. MATTHEWS. I do believe that this reform makes sense. I think it is a step in the right direction. We believe it would be helpful and directionally incredibly important for a judge to be able to have all of the information about how the money flows.

Senator HATCH. Thank you.

Mr. Harrison, in your testimony, you express support for the creation of a single data base for record of all music copyright information to enable services to identify on a catalog-by-catalog basis the owners of the songs they perform.

Now, this sounds like a good idea, but how much would that cost and who would pay for it and who would manage the data base?

Mr. HARRISON. All excellent questions, Senator. I think the best answer I could is Pandora and services like Pandora would certainly be willing to bear their share of that burden in creating such a data base, because it is vitally important for the transparency that currently lacks in the system. And so we would be more than happy to contribute to its creation.

Senator HATCH. Thank you.

Mr. Dowdle, the ASCAP and BMI consent decrees are over 70 years old and have been amended only twice. In light of the significant technological advancements in the music industry over the last 70 years, do you support making any modifications to the decree?

Mr. DOWDLE. Thank you, Senator Hatch. I think we have to be a little bit more mindful of the fact that the nature of the music services and the distribution models may change. There may be modifications that could be undertaken to address those types of issues.

But the actual anticompetitive nature of the PROs and the market power that they wield in this space does not change and the nature of the rights really that they are administering does not change.

So even if you have to address new technology, the actual underlying problems still remain. And so any changes that would be proposed have to keep in mind that it has to be within a construct that allows and enables the market to function.

If you take it outside of that construct, you are going to have a difficult time having an efficient system.

Senator HATCH. Thank you.

Ms. Matthews, again, can you tell me what your experience has been with the rate court process and how does that process impact songwriters?

Ms. MATTHEWS. Since 2001, ASCAP has spent approximately $86 million on rate court litigation. In the Pandora litigation alone, we discovered more than 75,000 documents. We deposed more than 35 individuals.

These rate court proceedings sometimes last years and sometimes require an appeal process to the second circuit.

We think any other form of alternative dispute resolution is better than the process that we have now. For every dollar that we spend that goes to outside counsel, to lawyers, those are dollars coming out of the pockets of the songwriters.

Senator HATCH. Let me go to Mr. Harrison again. Compared to the 48 percent of revenue that you pay for performances of musical works, is paying 1.7 percent to songwriters, the amount you proposed to the rate court judge, is that really an equitable rate for songwriters?

Mr. HARRISON. So that 1.7 percent that Pandora proposed in the ASCAP rate proceeding is actually the rate that terrestrial radio pays for—to songwriters to publicly perform their works.

We compete most closely with terrestrial radio both for listeners and for ad dollars. So if we are going to have a distribution-neutral royalty structure, the 1.7 percent of revenue was the—would be appropriate.

Senator HATCH. Thank you.

Mr. Chairman, could I ask just one more question? I apologize to my fellow Senators, but I have got to get back to the income tax matter.

Some songwriter groups have expressed concern over the lack of transparency in direct licensing deals, the terms of which are often subject to nondisclosure agreements.

Under these confidential arrangements, songwriters and composers do not even know the details of the agreements under which they are supposed to be paid.

Do any of you have any ideas about how to address that particular problem, because it is a big problem, as far as I can see? Does anybody want to take a crack at that?

Mr. PINCUS. One of the roles that the PROs play for people like me who would have a hard time replicating the scale of what they do is providing transparency in the market in the same way.

So I think having the PRO play a constructive role in administering digital agreements would be a very good way to handle withdrawn rights.

Mr. HARRISON. Senator Hatch, one of the things that Pandora did last year was launch its artist marketing platform. Now, admittedly, it is geared toward recording artists, but it allows any recording artist to sign onto the service and see how their music is performed, the number of times it is performed, who their audience is, where their audience is.

There is nothing that would prevent us, other than the lack of transparency into music publishing ownership, for Pandora to provide the same kind of visibility. It may not allow a songwriter to track the dollars that come from the service into their checking account, but it would certainly enable them to see how their music is performed on the service and whether they are actually getting the money they believe they deserve.

Mr. DOWDLE. Senator Hatch, if I might. I think the one thing, given that Ms. Matthews has already opined on this and I appreciate her statement, the one thing I think all of us on this panel could agree with is that if the consent decrees are modified at all, they should be modified in a way to create better transparency throughout the system, both for licensees, for songwriters, for the PROs, for that matter.

We ought to know what it is that we are licensing, how much is being paid, by whom and to whom so that this is all public. It is all available to those who are a participant in the system.

I think we can all agree that transparency is a really big issue and anything comes out of this hearing, it should be that.

Senator HATCH. Thank you, Mr. Chairman. I appreciate that courtesy.

Chairman LEE. Thank you, Chairman Hatch, and we wish you the best of luck as you reform our tax code.

Senator HATCH. It is going to take a lot of luck.

[Laughter.]

Chairman LEE. Senator Perdue.

Senator PERDUE. Thank you, Mr. Chairman. I would like to thank you and the Ranking Member for raising this meeting.

Thank you, panelists, for being here.

This is an important topic here today in our free enterprise system. In recent years, Georgia has played an increasingly important and prominent role in our Nation's music industry.

As one that moved from Nashville to Atlanta, I can tell you that there is a lot of music activity in Atlanta.

But I think every one of you agree that the music marketplace has really changed and undergone radical changes in the last few decades, since the BMI consent decree was in made in 1994, a year in which, by the way, the Billboard Top 100 Singles had singles by Bryan Adams and Boyz II Men. Only my two kids know who they are.

I would like to start with a threshold question today. It is a policy question about both consent decrees.

In 1979, the Department of Justice revised the consent decree policy and mandated that except in extraordinary circumstances, all DOG consent decrees would contain a sunset provision, as you are well aware.

These sunset provisions would terminate the decree within 10 years. This was in response to congressional action that strengthened the penalties for Sherman Act violations.

So for more than 35 years, it has been DOG policy that consent decrees should not be perpetual and should terminate in under a decade, unless exceptional industry-specific circumstances are present.

The policy was, of course prospective, but I think the rationalize underlying it is worth considering in the context of the consent decrees we are looking at today.

My question is this. I would like to get each of you to respond to this. For those witnesses who support continuation of the consent decrees in their present form, can I get a quick description from each of you regarding the characteristics of the music licensing market that trumped DOJ's presumption favoring a 10-year sunset? And for witnesses who favor the elimination of this sunset provision or amendment of the consent decrees, do you believe the sunset presumption applies here?

Would you like to start, Ms. Matthews?

Ms. MATTHEWS. So today ASCAP is not requesting a termination of the consent decree. While I do think it is appropriate to have some reasonable pathway to consider regular modifications to the consent decree, possibly eventual sunset, today we are only asking for a few discreet changes to save collective licensing.

The hypotheticals of publishers leaving ASCAP is not a hypothetical. This will happen if we do not make these changes and it is our greatest fear for the songwriter that we are running out of time.

Mr. HARRISON. Senator, I think the key issue, what makes this exceptional and suggests that sunset is not appropriate is most of the time, when a consent decree is entered, the behavior that gave rise to the consent decree goes away and so the consent decree is no longer needed.

At the end of the day, what ASCAP and BMI are are horizontal sales agencies. They take otherwise competing publishers, aggregate them together and then fix a single price for what otherwise would be competing catalogs.

Unless that behavior changes, it does not seem appropriate to do away with the protections that are provided licensees for there to be abusive market power and super-competitive rates.

Mr. PINCUS. In the market today, there are many, many digital music services that operate without the kind of regulation that music publishers operate under and the market is thriving.

As to transparency, for example, my understanding is that the majority of publishing data is currently available on a voluntary basis by private actors.

So I think where the market is more free in this particular area, it becomes more competitive.

Mr. DOWDLE. Senator Perdue, thank you for the question. As Mr. Harrison said, these are very unusual decrees. The Department of Justice entered into these decrees not as it usually does to prevent and deter anticompetitive conduct, they actually entered into these decrees to enable anticompetitive product within a construct that it could be regulated.

That makes them very unique and it makes them necessary. If we are going to continue in the world and have ASCAP, BMI, SESAC, Global Rights and all of these others, plus the large publishers they represent, if they can operate as a collective the way they do, there has to be a construct or they will engage in anticompetitive activity.

Mr. MILLER. Well, in a perfect world, I think that the consent decrees could go away. What we do not want to see happen is we do not want to destabilize our collective agencies, mine being BMI, because it is just too important.

So we would hope that we could find ways to modify it to give us some relief. It is just crucial to what we do now. And the relationship with the PROs, by and large, and the writers is good.

My wife of 23 years, as I was running some of these technicalities by her looking for a little bit of wisdom, she says, "I don't know what any of that means, but I do know this. The only days I circle on my calendar every year are the 4-days your BMI check is coming. Do whatever you have got to do to keep that."

Senator PERDUE. Thank you.

Ms. GRIFFIN. Senator, I agree that the consent decrees have been in place for an unusually long time, because these are unusual circumstances here. And I wold say I do not think anybody at this table would be happier than I would be if we found the silver bullet that created competition in the marketplace and made the consent decrees unnecessary.

But that is not the world we are living in right now. So especially given that we have seen increasing consolidation among the publishers, some of which was justified because we had the consent decrees as a backstop, and we have this Federal court case where a judge found that the publishers had the opportunity to compete and they coordinated with each other, that sunsetting the consent decrees at this time would be unnecessary.

But we should, of course, always be reevaluating as we go forward.

Senator PERDUE. Thank you all. Thank you, Mr. Chairman.

Chairman LEE. I think I would like to start with Mr. Dowdle in this round.

Mr. Dowdle, I think, as has been mentioned today, a distinguishing characteristic of any free market system is that two parties negotiating have the ability to walk away from the negotiation if they cannot achieve a mutually agreeable outcome.

Yet it has been suggested that music services and broadcasters in particular cannot—they literally cannot walk away from license negotiations with the publisher or with a PRO, because they do not have total control over what music they publicly perform.

So let me just ask you that question. Can a broadcaster remove a specific licensor's catalog from its service? Is that possible?

Mr. DOWDLE. Theoretically possible, not practically possible, and here is why. We have various types of programming that we put out over our airwaves. Some of that we produce. For that that we produce, we identify the music. We are able to do that exactly. But for a very large——

Chairman LEE. If you identify the music, you can then figure out who holds the copyright and whether or not——

Mr. DOWDLE. Exactly. And if we cannot come to an agreement with them, we can cut that music out, the music—the program that we produce, such as our local news, local magazine shows, things like that. But for a large portion of our programming, we do not have the ability to do that.

Now, part of that programming, which is network programming, is cleared through to the viewer. So we do not have to worry about that. The networks worry about that. But all of our syndicated programming, all of our commercials, and a lot of the stuff that comes in between, we do not have that editorial control. We could not do it if we tried.

Therefore, we are at the mercy literally of these PROs. Everybody that is going to come to us and say if you do not license for me, I am coming after you, we have no way to avoid it.

Chairman LEE. Would any of that change if the broadcaster were provided with a continuously updated list of songs in the catalog at issue? Would that change?

Mr. DOWDLE. It would not change in the sense that the producers of syndicated programming or the commercials, they do not identify for us whose music they are using. I do not know that that is within the realm of possibility to have every single producer that is going to provide music to us in our programming identify music.

If you could do that, it is theoretical possible. It is just not practically going to happen.

Chairman LEE. Right. You would basically have to have the ability to see the future.

Mr. DOWDLE. Yes.

Chairman LEE. If you had that superpower, then a lot of other things would be better, too.

Mr. DOWDLE. If we were king, it would be a different place.

Chairman LEE. Ms. Griffin, I believe much of the pressure on the Department of Justice to make changes to the consent decrees may well stem from the threat of full withdrawal by the publishers, which would seriously threaten the current blanket license scheme that we have in place today.

If the blanket license framework is truly at risk of falling apart, what, in your view, is the best alternative to the consent decree

system when it comes to ensuring robust competition in the marketplace for performing rights licenses?

Ms. GRIFFIN. In terms of alternative structures, other than an antitrust consent decree, we do have statutory licenses for certain uses in copyright law. If we can come up with a statutory license that also protects competition and provides transparency, helps artists get paid directly, we would support that.

But at the time, we do not have that for these kinds of uses. So I would be concerned about dismantling the protections in these consent decrees until we have the new structure set up.

Chairman LEE. Can you tell us whether you think it makes sense to have this quasi-regulatory system—it is essentially a regulatory system—administered by a handful of DOJ regulators and a couple of judges or should Congress consider legislation setting up some other type of regulatory structure and, if so, what would that legislation look like?

Ms. GRIFFIN. So we do have other structures. As I think was mentioned earlier, we have the Copyright Royalty Board for statutory licenses. But in terms of the consent decrees as they are now, I would say that the Department of Justice has very deep antitrust expertise and expertise evaluating how markets are working, which is very important here.

And for the Federal judges, they are impartial, they understand the law, and they, through the discovery process, are able to obtain all the facts.

So I would say that I do not view that as a bad system, but it is not that we cannot consider new ones.

Chairman LEE. Thank you. My time has expired.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you.

Ms. Griffin, one of the things that we know is that regardless of the consent decree review, you were talking about some other things with Senator Lee that are possibilities if we did not have the consent decrees, and I think you said that there would be a problem not to have it, from your perspective, from a consumer standpoint.

But how about private enforcement of the antitrust law? Even if DOJ is not pursuing competition issues, private parties can still seek to address the issues in the courts. Do you see downsides to relying on private enforcement?

Ms. GRIFFIN. Yes, Senator. My concerns with private enforcement would be that the parties bringing the cases could likely be much smaller or at least it would make it relatively easier for a very large company, like a Pandora or a large broadcaster to bring a suit, although that itself wold be burdensome, but the little guys, it would be near impossible for them because of the expense.

And, also, I would say that transparency is an issue here because part of the problem is that it is difficult to bring an antitrust lawsuit against somebody if you do not know that they are coordinating.

Senator KLOBUCHAR. Very good. Mr. Dowdle, do you want to weigh in on that at all? Mr. Dowdle. Frankly, I do not know if there is a construct that we can come up with. Certainly, it is problematic for a small broadcaster like us. We are not very big, frank-

ly. For us to be left with a private antitrust enforcement against an entity such as ASCAP and BMI is not very appealing.

Talk about expense, and that is not an expense spread over an industry, that is our expense and I just do not think that we could do it, not even talk the little broadcasters that are much smaller than we are. It is not even a practical possibility for them.

And so I just do not think that is a really workable solution.

Senator KLOBUCHAR. I just wondered. I want to get people's views, because that has been thrown out.

Mr. DOWDLE. Of course. Thank you, Senator.

Senator KLOBUCHAR. And do you see any changes to the consent decrees that you think would work with the concerns that have been raised here?

Mr. DOWDLE. I mentioned transparency. I think that is huge. It has been mentioned by everyone and I think agreed upon by everyone. Transparency in the process has been historically a real problem. I know that because I used to license all of the music used in the Intel commercials before I came to Bonneville, among other things.

Finding the songwriter and finding the record label that actually controls the rights was a real problem and without better use—availability of data and use of that data across all the system, I just do not think it is workable.

Senator KLOBUCHAR. Thank you.

Mr. Pincus, do you want to weigh in on this?

Mr. PINCUS. Well, a couple of things. First, to transparency, I agree, like all of the other panelists, that that is a very important issue. I think the market is solving that issues. There is more data available on music publishing copyrights now than there ever has been and it is getting better on almost a daily basis, not only at the independent level, but also at the major level.

And just quickly, to another point about the blanket licensing system. Many of the arguments that are being put forth here are a very good reason to preserve the blanket licensing system. I agree with Mr. Dowdle that the television licensing system should operate on a blanket basis. The problem is that it is attached by the cords to the digital licensing problem.

Digital licensing is much easier done on a direct basis than, for example, television licensing. So that is a very good argument for why partial withdrawal of digital rights ought to be allowed to occur.

Senator KLOBUCHAR. Mr. Miller?

Mr. MILLER. Well, that is one of the million technical questions that is probably beyond my pay grade. I will say, as far as things such as transparency, that I think would be relevant to maybe part of your question.

If I have a hit song, a million plays on terrestrial radio is kind of a threshold. They send us a plaque at a million plays. Okay. If I have one of those every now and then, you now, I am raising a family and we are doing okay. And now we get into a situation where we see these numbers on digital of 50 million and 100 million spins, and the songwriters are shaking our heads going, "What are you talking about?" We cannot even comprehend.

I understand it is a different medium and we can talk about the Internet and we talk about technology, but a million plays, we are smiling and taking the kids to movies; 100 million plays is worth a few thousand dollars.

Now, we get transparency on that. We see those numbers quite clear. So I think that is what we cannot emphasize enough. How is that fair and where is the middle ground?

Under those numbers, if you move that ledger around just a little bit, doing what I do is a very profitable business potentially because apparently music is more popular than it has ever been, and I think everyone will tell you that.

Mr. HARRISON. Senator Klobuchar, I think it is important, and as Mr. Miller talks about a million spins on terrestrial radio versus the Internet and noted that it is a different technology, Internet deliver is a one-to-one delivery mechanism. It is not a one-to-many like broadcast.

So if you look at—if you wanted to do a real apples-to-apples comparison, if you were to take a million spins on Pandora to reach a million people on, for example, Z100, the largest radio station in New York City, you would only have to play that song 16 times.

If you wanted to reach that same million person audience in Los Angeles, KISS-FM, the largest radio station in Los Angeles, you would only need to play that song 21 times.

So it is important that we contextualize what a million spins on Pandora means relative to spins on a terrestrial radio broadcast.

Senator KLOBUCHAR. Thank you.

Chairman LEE. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Senator Lee.

I have a question for Mr. Dowdle. In your testimony, you talked about, I think, both the value of the consent decrees generally and about the harm that would be caused if composers and publishers could withdraw from some of their rights without withdrawing all of their rights.

You did not address, I do not believe, the two changes that ASCAP and BMI have proposed to the content decree, bundling of additional rights and arbitration.

Would you give us your view of those proposals?

Mr. DOWDLE. Yes, Senator Blumenthal. Thank you.

I gave my—I think you were out of the room. I did address arbitration. Arbitration is a poor, if even a second choice, a very poor second choice to the system that we have now for these reasons.

With an arbitrator, you do not know who you are going to end up with, whether they even know anything about the industry, and what you do know, with the rate courts that we have, is that these courts have deep experience and a lot of history with these consent decrees. They understand the underlying dynamic that is going on. That is first.

Second, in the Federal courts, you have a lot of tools available. Mr. Harrison talked about this—in discovering information and getting that information in front of the tribunal, having both sides able to engage in that process freely and openly so that the full panoply of information is in front of the tribunal.

With an arbitrator, you do not necessarily have that. And I think substituting arbitration for what we have now is not really a very good solution, in my opinion.

As to other licenses, from my standpoint, I mentioned earlier I am a member of ASCAP and have been for over 20 years, owned music companies, and I think there is maybe something to look at there in allowing these PROs to administer additional rights.

Their competitors are certainly doing that. SESAC is able to, Global Rights is able to. If ASCAP and BMI are going to compete going forward, we should take a look at that.

Senator BLUMENTHAL. Let me ask, Ms. Matthews, if you had your choice, would you abolish the consent decree or just make reforms to it?

Ms. MATTHEWS. I am sorry. If I had my choice, would I abolish the consent decree or——

Senator BLUMENTHAL. Would you eliminate the consent decree or just reform it?

Ms. BLUMENTHAL. So in a perfect world, I would eliminate the consent decree. Sadly, we do not live in that perfect world. So our immediate concern is keeping high value writers and high value publishers in the system, because if the system goes away, everybody loses. Licensees lose because they will not have access to millions of copyrights to clear at once through a blanket license agreement. Consumers lose because once the money stops flowing or once the songs stop flowing, the money will stop flowing.

But we are mostly concerned about songwriters, because they are simply not going to be capable of licensing 700,000 establishments in the United States and millions of establishments outside of the United States, which means they will not get paid and their works will be infringed.

Senator BLUMENTHAL. And why do you think—I think I know the answer, but why would eliminating the consent decrees be preferable in a perfect world?

Ms. MATTHEWS. Because ASCAP believes the free market works. Without regulation, we think you get to the right results. And as copyright owners, we believe at the core of our law is this principle that you should control your assets, whether it is a real property asset or an intellectual property asset. You should have control as that owner. The consent decrees take that control away.

Senator BLUMENTHAL. Thank you. Thanks, Mr. Chairman.

Chairman LEE. Thank you.

Senator Tillis.

Senator TILLIS. Mr. Harrison, you made an interesting point about the one-to-one relationship of streamers versus broadcast. In your opinion today—and I think that Mr. Miller's concern about being justly compensated—in your opinion today, when you normalize in that way, do you feel like the streamers are justly compensating?

Mr. HARRISON. Pandora is the highest paying form of radio there is. We pay more in total royalties than terrestrial radio or satellite radio.

I think the best performing song by Mr. Miller on Pandora is "Country Girl," which I believe was recorded by Tim McGraw. Last year, 2014, Pandora would have paid around $7,000 to Mr. Miller,

his two co-writers, and the six publishers that are listed on that song.

Candidly, Pandora would have paid close to $90,000 to Mr. McGraw and his record label. I understand that the disparity is a motivating factor for Mr. Miller, Mr. Pincus, and Ms. Matthews to seek to modify the consent decrees, but at the end of the day, if Pandora is paying 50 percent of its revenue to the record labels and the solution is to pay 50 percent of the revenue to the publishers, I cannot make that up on volume.

If there is going to be a—if the disparity is going to be solved, it is going to have to be solved by the copyright owners themselves, not on the back of services like Pandora.

Senator TILLIS. I have a general question for anyone that would like to speak up.

Mr. Harrison was talking about this data base to increase transparency and Senator Hatch mentioned it. In your opinion, is that a good idea or a bad idea? What are your concerns or what are the merits? We can just start with Ms. Matthews and run down the line.

Ms. MATTHEWS. So as I stated earlier, ASCAP fully supports transparency. We most recently made modifications to our own proprietary system, which is available to the public.

Senator TILLIS. Ms. Matthews, would you have a concern with the concept of what Mr. Harrison has proposed or you feel like you are already achieving it through existing—I am trying to get a sense for this net new idea and whether you have a specific concern with it and for what reasons, if you do.

Ms. MATTHEWS. So my specific concern would be practically how one would require cooperation through the entire sector, especially with unregulated actors, our competitors. I know that ASCAP and BMI are fully willing to cooperate, but I worry that if others do not completely cooperate, licensees will never have access to the full picture of data that is required.

Senator TILLIS. Mr. Harrison, you mentioned it in your opening comments. Do you have anything you would like to add in terms of your rationale for it?

Mr. HARRISON. I think it is the transparency and certainly there—we know that the data bases exist. We know that the publishers and the PROs assign unique identifiers to all the works in their catalog. Mr. Pincus has made his catalog publicly available. I have already downloaded it and sent it to our engineers to have them ingest it into our system so that we can understand what songs are controlled by songs.

But the transparency piece has to go far enough to allow us to understand that not just the owner of the song, but also what sound recordings have been made of that song.

Senator TILLIS. Mr. Pincus?

Mr. PINCUS. I think this is one of the issues on which Mr. Harrison agree in terms of the open availability of data.

My position, however, is that the market is taking care of that problem and where the market can take care of that problem, it is better than regulation taking care of that problem.

One area, if I may, where we disagree is that I understand Mr. Harrison's comment about not being able to pay 50 percent to each

party, but I would also say that I am not sure that I feel, as a small business owner, that it is my responsibility to subsidize a public company.

Senator TILLIS. Mr. Dowdle?

Mr. DOWDLE. Thank you, Senator. Yes. I think it is problematic. I believe that Ms. Matthews is correct. It is problematic to get everybody involved. But with ASCAP and BMI controlling 90 percent, let us start there. Let us start at 90 percent. That is a pretty good place to start. And if you can get the other actors in piecemeal, well, that is okay, but let us start with 90 percent and see where it goes.

Senator TILLIS. Mr. Miller?

Mr. MILLER. Mr. Pincus and Ms. Matthews can speak to that much better than me on the technicalities.

I will clarify Mr. Harrison's comment. It's called "Southern Girl," not "Country Girl." That is important. Words matter. By his own numbers, that would be $7,000 split six ways. I got a sixth of $7,000—that is on a number one song in the United States on Tim McGraw.

Senator TILLIS. Ms. Griffin?

Ms. GRIFFIN. On the issue of a data base, I agree that moving forward, I am trying to figure out what that would look like and how to get as much information as possible is important. There are a lot of details that a lot of actors have been talking about there, including the Copyright Office who has looked into this issue.

I would say I do not think that the market is handling that right now. Right now, if you look at the biggest licensors, you may be able to, at most, download a list of all of the songwriters or all the songs in the catalog, but there is not a guarantee that that is what they currently control. It is more of at some point this was our catalog, but we will not promise you that that is what is in it on the day that you license, which brings up huge liability concerns for somebody who is trying to enter the market.

Senator TILLIS. Mr. Pincus?

Mr. PINCUS. Well, with respect to my business, that is actually not the case. We are approximating open data on as close to a real-time basis as practical. And my understanding is that at least one of the majors has disclosed all the information, including shares.

Senator TILLIS. Thank you all for testifying. Thank you, Mr. Chair.

Chairman LEE. Thank you, Senator Tillis.

Senator Blumenthal.

Senator BLUMENTHAL. I do not have any additional questions. Thank you.

Chairman LEE. Great.

Mr. Harrison, we have got two different types of royalties that end up getting paid in some circumstances, one established under the consent decrees and another established under the CRB, under the Copyright Royalty Board.

Those established under the latter, a I understand them, are substantially higher than those established under the former. So you have got one set of royalties that go to those who wrote the song, another set of royalties that go to those who recorded the song.

Why should there be a substantial difference between these two rates?

Mr. HARRISON. Well, Senator, I think as I mentioned earlier, I do not believe Pandora is in the best position to value the relative contributions of the song versus the recording. I think that is probably better left to publishers and songwriters and artists and labels.

Having said that, if you go back to the early Royalty Board proceedings, what you had was executives of companies that owned both record labels and music publishers who argued that the rates that should be paid to perform a sound recording should be higher than the rate that was paid to a music publisher, because according to these executives, the record labels invest significantly more in bringing new music to market.

As I said, I am not in a good position to make those relative value judgments. At the end of the day, the copyright owners themselves have made those arguments.

Chairman LEE. Now, if the Department of Justice decides to allow partial withdrawal, it will likely impose other requirements on the PROs, including increased transparency, changes to board membership, some of these things that have been mentioned earlier in the hearing.

In your opinion, will additional safeguards be sufficient to ensure a competitive market if publishers can partially withdraw?

Mr. HARRISON. Well, without seeing the details of all of—not just of what the suggestions are, but actually the language that is intended to be used, it is hard to judge prospectively. But I remain confident that the department is not going to do things that result in less competition in the market.

Chairman LEE. I certainly hope they would not do that. But do you think those things would be sufficient?

Mr. HARRISON. As I said, without seeing a full list of what the department would propose and then actually read what language is used to implement them, it is tough to have an informed opinion.

Chairman LEE. Mr. Dowdle, whenever we consider the potential increase in prices in one market, it is important to consider its potential effect on related markets. In this case, related markets might include not only other music licenses, but such as performance rights for sound recordings, but also prices at restaurants and bars and at stores that play music.

What effect might increased rates have on prices for other music licenses or for goods associated with music?

Mr. DOWDLE. I think as we take a look at what is really happening, in those fairly rare instances where actors in the market are negotiating with each other, and there are a couple of those that have been reported in the last couple of years. You have at least on major label who has entered in to an agreement that—where prices have been at play for many of those things.

We do not know all of them because they are not particularly transparent with all that information. But if the reports that have been received are true, there has been an equalizing in those deals of different prices for different rights throughout that deal, and I think that is very instructive.

The market itself, as Mr. Harrison has alluded to, the market itself, when allowed to operate, in those rare instances, is able to equalize those rates. There will be an effect, but I just do not know—I cannot foresee in the future what that effect will be. There clearly will be an effect.

If you unpeg one rate, there will be an effect on other rates. It is ironic that the provision in the Copyright Act that ASCAP has complained about at this point was actually placed in that regime at their request. Now they want to unpeg it because they do not like the way that it is operating presently.

But I think if you do unpeg it, be careful what you wish for.

Chairman LEE. I understand you are a songwriter. You had a long career in music before your time in broadcasting. In that respect, you come with a unique set of perspectives to this panel.

Let me just ask you, do you think the consent decrees, as written, are necessary to preserve the benefits of our system or do you think they could be achieved outside of the decrees?

Mr. DOWDLE. What I can say is I believe that the system has worked. Now, all the parties have taken their turn in various scenarios coming to the tribunals as they are set up now and taking advantage of those forums and arguing whatever issues they had on the consent decrees.

Those consent decrees have been proven, more or less, to work over a period that now spans more than 70 years. Playing with taking those systems down or fundamentally changing them we ought to be looking at very carefully, very cautiously. It is a system that has been working. I do not know what we would be looking at. It is hard to say hypothetically whether something that would be replacing them would be better or not.

All I can say is they are working and I hesitate to change something that has historically been working.

Chairman LEE. It is not just unknown, it is unknowable whether that could be achieved outside the decrees until we know what the "it" is, what the other "it" is.

Mr. DOWDLE. Exactly right, Senator.

Chairman LEE. Thank you. I am going to keep the record for this hearing open for 1 week and that will include keeping it open for written questions.

I want to thank all of our witnesses for coming today. This has been a very helpful hearing and you testimony has brought a lot of insight to the table on this important and pretty complex issue.

I thank Senator Klobuchar, also, for her help in putting this together.

This hearing stands adjourned. Thank you.

[Whereupon, at 12:07 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

Additional Material Submitted for the Record

Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

On

"How Much For a Song?: The Antitrust Decrees that Govern the Market for Music"

Tuesday, March 10, 2015
Dirksen Senate Office Building, Room 226
10:00 a.m.

Mike Dowdle
Vice President of Business Affairs and General Counsel
Bonneville International

Jodie Griffin
Senior Staff Attorney
Public Knowledge

Chris Harrison
Vice President of Business Affairs
Pandora Media, Inc.

Beth Matthews
CEO
American Society of Composers, Authors and Publishers (ASCAP)

Lee Thomas Miller
President
Nashville Songwriters Association International

Matt Pincus
CEO
SONGS Music Publishing

Hearing on
"How Much For a Song?: The Antitrust Decrees that Govern the Market for Music"

United States Senate
Committee on the Judiciary

Subcommittee on Antitrust, Competition Policy and Consumer Rights

March 10, 2015

Statement of Mike Dowdle
Bonneville International Corporation

On behalf of the National Association of Broadcasters

I. Introduction

Good morning, Chairman Lee, Ranking Member Klobuchar, and members of the Subcommittee. My name is Mike Dowdle and I am the Vice President of Business Affairs and General Counsel at Bonneville International Corporation. As a constituent of both Chairman Lee and Senator Hatch, I am pleased to testify today on behalf of the National Association of Broadcasters (NAB) and its members, the thousands of free and local radio and television stations across the nation.

Founded in 1964, Bonneville traces its early roots to KSL Radio, which first went on the air in May of 1922 (originally as KZN) in Salt Lake City, and to KSL-TV, an NBC affiliate which had its on-air debut in 1949. We continue to own KSL Radio and TV, as well as KRSP and KSFI radio in Salt Lake City, where our corporate headquarters resides. In addition, Bonneville owns and operates radio stations in Los Angeles, Seattle, and Phoenix.

My testimony today will focus on the continued importance of the Department of Justice (DOJ) consent decrees governing ASCAP and BMI to radio and television broadcasters, and their audiences in your communities. Simply put, without the legal protections afforded by these consent decrees, our stations' radio listeners and television viewers would not receive our unmatched breadth of programming as they do today – whether free over-the-air, over the Internet, or through a cable or satellite provider. Neither would the customers of the countless businesses that publicly perform music every day, including restaurants, bars, retailers, sports venues or streaming services.

In spite of technological advances in how music is publicly performed, the ASCAP and BMI consent decrees necessarily ensure and maintain a fair and efficient music licensing marketplace for the benefit of consumers. This Subcommittee need look no further than the recent antitrust actions brought against the third major Performing Rights Organization (PRO), SESAC – which is unregulated – to glimpse the anticompetitive practices undertaken by entities licensing outside of the consent decrees' framework.

II. The Consent Decrees Are Necessary Because The Performance Rights Organizations And The Marketplace For Musical Works Are Inherently Anticompetitive And Have A History Of Antitrust Abuses

ASCAP and BMI control more than 90 percent of the public performance rights to musical works in the United States. They aggregate those rights into blanket licenses, and then fix a single price for all music within that license, irrespective of the whether the song is actually used. In any other industry, this conduct would be considered *per se* violations of the antitrust laws. The consent decrees entered into between DOJ and both organizations more than 80 years ago serve as antitrust lifelines, enabling ASCAP and BMI to continue to operate, subject to certain conditions.

The very grant of exclusive rights to copyright owners of musical works carries with it the inherent potential of anticompetitive activity. Aggregating works from many owners into a PRO exponentially compounds this potential, as does the fundamental character of the licensing marketplace for musical works, wherein even the right to a single musical work gives the owner unfettered market power. Many music licensees either lack the capacity to identify and license rights in the thousands of musical works needed to operate their business, have no editorial control over which works they perform, or are businesses that – by definition – require public performance rights in certain specific works in order to successfully operate.

Given the ever-present, overlaying threat of substantial penalties under Federal law for unauthorized performances of musical works, absent the consent decrees, broadcasters would be at the mercy of the PROs in any negotiation for public performance rights of those works. A licensing framework able to bring together owners of most or all musical works and potential licensees, on relatively equal ground, with transparency of licensing and use information, and mechanisms for setting, paying and distributing fees, is critical to the function of the music licensing marketplace.

Recognizing this reality, and following complaints of and investigations into anti-competitive activity, the DOJ entered into consent decrees with both ASCAP and BMI in 1941. These consent decrees both facilitated the smooth operation of the marketplace and erected barriers to anticompetitive activity. The DOJ has periodically reviewed and amended these consent decrees, but their fundamental protections remain in place for good reason: there is simply no market-based substitute for the consent decrees' ability to facilitate operation of the market, while constraining supra-competitive pricing and other anticompetitive activity.

III. Broadcasters Could Not Operate Lawfully Absent Licenses From The PROs – Compounding Their Exposure To Anticompetitive Harm

Most radio stations, including Utah's Classic KRSP 103.5 FM The Arrow and L.A.'s KSWD 100.3 The Sound, play music as their primary programming. Our stations and DJs control the selection of this music and tailor it to the interests of our listening audience. But in addition to that primary programming, KRSP and KSWD (and every other station format, including news and talk, like Washington's own WTOP) also publicly perform the music contained within their commercials, coverage of live events, or broadcasts of syndicated programming. Even though they do not and can not choose the music in this programming, they remain responsible under the copyright laws for the content they perform publically and must clear rights for those important musical works. Broadcasters would cease operations without the ability to clear these rights. Thus, absent the protections afforded by the consent decrees, ASCAP and BMI (or the owners of the underlying musical works) would have unfettered ability to extract supra-competitive prices and terms for the rights in those works should they choose.

The same rules apply for television. Stations like KSL-TV play music as part of their audio-visual programming. These musical performances may be part of a feature presentation, such as a concert, in the background of movies or television shows, as part of their local news, as a transition between programs, or as part of the broadcast of live events. Television stations

are even less able to control the music they broadcast, as music in all of their syndicated programming, non-locally produced commercials, and live events are not under a station's control. Often, it is not even possible to know what music is contained in a particular television program. Nevertheless, the television broadcaster must clear the rights to publicly perform all the music that is included in its programs.

Because of this lack of full editorial control over all of the music in the programming they broadcast, and the resulting inability to avoid any individual repertory, radio and television broadcasters – like Bonneville – must obtain licenses from each of the three PROs – ASCAP, BMI, and the currently unregulated SESAC or face the potential consequence of significant statutory damages.

To avoid these risks, television broadcasters currently avail themselves of industry-wide licenses negotiated with ASCAP, BMI, and SESAC by the Television Music Licensing Committee (TMLC), and the National Religious Broadcasters Music license Committee (NRBMLC) under the framework of the consent decrees. Radio broadcasters avail themselves of similar industry-wide licenses negotiated with ASCAP and BMI by the Radio Music Licensing Committee (RMLC).

The PROs, and even some inside the DOJ, have suggested that the consent decrees should be "sunsetted", or allowed to expire. In support, they have pointed to similar sunsetting provisions in other consent decrees. Sunsetting the decrees may make sense in cases where decrees are intended to stop current and prevent future anticompetitive activity. Once the activity is stopped, and future activity deterred, sunsetting makes sense. In the case of the ASCAP and BMI consent decrees, however, the decrees themselves enable anticompetitive activity within a carefully controlled framework. They actually promote efficient function of the music licensing marketplace. Without such a construct, the marketplace could well grind to a halt.

IV. Broadcasters' Experience With SESAC – A Third Unregulated PRO – Further Validates The Need For The Consent Decrees

The blanket licensing of performance rights is inherently anticompetitive. Left unchecked, PROs have the power and motive to withhold licenses to extract supra-competitive rates, terms and conditions from licensees. That is why the broadcast music license committees have spent years, and millions of dollars, litigating in the rate courts against ASCAP and BMI to secure reasonable rates, the rights to "per program" licenses, and to validate the right granted in the consent decrees to directly license public performance rights from songwriters and music publishers.

Despite the fact that it is significantly smaller than either ASCAP or BMI, SESAC has engaged in negotiating behavior akin to the activities that prompted the government to sue ASCAP and BMI decades ago. These activities include: (i) extracting supra-competitive rates for its blanket license; (ii) refusing to offer viable alternatives to its all-or-nothing blanket license; (iii) eliminating opportunities to secure performance rights through direct negotiations with rights holders; and (iv) refusing to provide up to date information on works in its repertory. In spite of substantial increases in SESAC's rates, broadcasters were forced to take SESAC's licenses.

Recent antitrust cases brought by the RMLC and TMLC against SESAC, detail these allegations and illustrate how unregulated PROs can and do abuse market power.

- In the TMLC case, the court found that the "evidence would ... comfortably sustain a finding that SESAC ... engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." [*Meredith Corp., et. Al. v. SESAC, LLC*, 09 CIV. 9177 (PAE), 2014 WL 812795, at *10 (S.D.N.Y. Mar. 3, 2014).]
- The court further determined that the evidence was "more than sufficient" to support findings that "SESAC's conduct harmed competition, and that this harm outweighed any pro-competitive benefits of that conduct." [*Id.* at *34.]
- Similarly, in the RMLC case, the judge concluded that "the challenged conduct has produced anticompetitive effects in the relevant market," and that "SESAC

> has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no real alternatives but to purchase their licenses . . . ." [*Radio Music Licensing Committee, Inc. v. SESAC Inc.*, No. 12-cv-5087, at *29, *33 (E.D. Pa. Dec. 20, 2013).]

The TMLC case was recently settled and requires SESAC to pay broadcasters $58 million and agree to negotiate present and future licenses subject to many conditions similar to those contained in the ASCAP and BMI consent decrees. This result was only achieved after five years of expensive litigation, including over fifty depositions, and the production of over a million documents.

As a result of the ongoing RMLC litigation, there is currently no industry-wide license available to local broadcasters. Bonneville, like many of its fellow radio broadcasters, is currently in discussions with SESAC over terms of a license of its repertory. These terms are dictated by SESAC. The negotiating dynamic is extremely one-sided, and can hardly even be called a negotiation.

V. Amending The Consent Decrees To Allow Music Publishers To Selectively Withdraw Their Catalogs From The PROs With Respect To Some Licensees But Not Others Would Invite Antitrust Abuses

In an attempt to circumvent the consent decrees, large music publishers have sought to selectively withdraw parts of their catalogs from the ASCAP and BMI repertories, affecting only certain licensees but not others. Both the ASCAP and BMI rate courts interpreted the consent decrees to prohibit such partial withdrawals. The consent decrees should not be amended to allow them.

Allowing the PROs to facilitate discrimination against licensees would undermine not only the principle of nondiscrimination – a hallmark of the consent decrees, but also the very purpose of the consent decrees: to prevent anticompetitive conduct. Such an amendment to the consent decrees would actually enable anticompetitive activity. Any music publishers with

sufficient size and scale to consider direct negotiations for selected rights, such as digital rights, would have essentially the same market power as the PROs. By their nature, music publishers' catalogs do not compete with one another. Each large publisher has aggregated a large enough number of songs from individual songwriters so as to make the licensing of their catalogs indispensable to broadcasters.

Music publishers who have catalogs of a sufficient size and scope to make partial withdrawals attractive to negotiate licenses outside of the consent decree framework pose the same potential antitrust harm that the consent decrees were created to prevent. Left unfettered, even in select rights, publishers would engage in the same behavior condemned by the courts in the SESAC cases, and that prompted the consent decrees in the first place.

To illustrate the point, when Sony and Universal Music Publishing Group (UMPG) attempted to partially withdraw their digital rights from ASCAP, the rate court found that:

> The evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying the AFJ2 ... Because their [ASCAP, Sony, and UMPG's] interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified. [*In re Petition of Pandora Media, Inc*, 12 CIV. 8035 DLC, 2014 WL 1088101, at *35 (S.D.N.Y. March 18, 2014).]

This decision provides ample evidence that, unrestrained by the consent decrees, large music publishers will abuse their market power to extract supra-competitive rates, terms, and conditions from broadcasters, who will have no choice but to accept them.

VI. <u>If The Consent Decrees Are Amended At All, They Should Require Greater Transparency With Respect To The PROs' Repertories</u>

The ASCAP and BMI consent decrees could be improved by requiring the PROs to provide licensees more accurate and comprehensive information about their repertories. Lack of meaningful access to this information has increased transaction costs and hindered licensing activities – both direct and collective. While far from a panacea, repertory transparency would allow licensors, licensees, and the rate courts to better understand the rights that are being

licensed, and their value. This information will aid development of real alternatives to the blanket licenses, and help lessen their anti-competitive effects.

VII. Conclusion

This Subcommittee has long recognized the important role that the antitrust laws play in ensuring free and competitive markets for the benefit of consumers. To that end, the ASCAP and BMI consent decrees remain vital to radio and television broadcasters to fairly, efficiently, and transparently license musical works to the benefit of their audiences.

While new digital technologies and the growth of the Internet may change the nature of music performances requiring licensing, they do not change the underlying reality that unconstrained collective licensing of musical works runs afoul of the antitrust laws, and would lead to supra-competitive pricing and terms. As broadcasters' experience with SESAC and music publishers' own recent actions illustrate, if publishers fully withdraw or if the consent decrees are amended to permit partial withdrawal of digital rights, alternative antitrust or Congressional action will still be required to ensure a competitive and functioning music licensing marketplace.

Testimony of Jodie Griffin
Senior Staff Attorney, Public Knowledge

Before the
U.S. Senate
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on: How Much For a Song?
The Antitrust Decrees that Govern the Market for Music

March 10, 2015

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The Antitrust Decrees that Govern the Market for Music

March 10, 2015

Chairman Lee, Ranking Member, Klobuchar, Members of the Subcommittee, thank you for this opportunity to testify before you today about preserving competition in music licensing and the consent decrees that resulted from the United States' antitrust cases against ASCAP and BMI. My name is Jodie Griffin and I am a Senior Staff Attorney at Public Knowledge, a nonprofit public interest organization that promotes the public's access to information and culture through open, competitive, accessible, and affordable communications networks.[1]

The consent decrees, which have been regularly updated over the years, have long acted to prevent anticompetitive behavior by ASCAP and BMI and promote competition in music distribution. Without the consent decrees, these two performing rights organizations and the largest publishers could leverage their market power against online music services, individual songwriters, and small publishers, ultimately to the detriment of consumers. Because of this, any changes to the consent decrees must ensure that consumers continue to have access to a competitive, innovative market for music.

I. The Consent Decrees Protect Against Anticompetitive Behavior and Promote Competition in Online Music Distribution.

The ASCAP and BMI consent decrees exist because the collective licensing models used by the largest PROs are in necessary tension with antitrust law. While collective licensing can create certain efficiencies in the market, it can also create the risk that collective licensing organizations will be able to wield market power anticompetitively.[2] When collective licensing organizations or companies that aggregate copyrights, like publishers, acquire enough market

[1] I would like to thank Sherwin Siy, Martyn Griffen, Chris Lewis, and John Bergmayer for helping me prepare this testimony.

[2] *See* Jonathan Band and Brandon Butler, *Some Cautionary Tales About Collective Licensing*, 21 MICH. ST. INT'L L. REV. 687 (2013).

share, they can use that power to extract supra-competitive prices and term from licensees, making it more difficult for new distribution services and independent copyright holders to survive. That market power, incidentally, also gives those companies less incentive to treat artists fairly if the largest publishers can use their leverage to disadvantage competing independent publishers.

The problems the consent decrees were designed to combat still exist today. Although many things have changed in the music marketplace since the consent decrees were first drafted, ASCAP and BMI's substantial market power has not. Indeed, consolidation in the music publishing market has only increased since ASCAP and BMI entered into the consent decrees (and since the consent decrees were last revised), making them even more necessary today. The consent decrees are therefore an important tool in place to promote competition in what is in reality a non-idealized market.

Additionally, the goals of the consent decrees have not changed: then, as now, we wanted to ensure a better music marketplace that can support a large and diverse economic ecosystem of publishers, labels, independent musicians, and distributors, because such a market benefits both musicians and consumers—the ultimate beneficiaries of our copyright system.

Perhaps most importantly, the ASCAP and BMI consent decrees ensure that music users will have access to reasonable, non-discriminatory licenses for the PROs' repertory. The consent decrees prevent ASCAP and BMI from discriminating between similarly situated licensees.[3] By ensuring licensees have access to reasonable, non-discriminatory licenses, the consent decrees allow new digital music platforms to launch and legally perform songs without becoming beholden to ASCAP or BMI. New services are allowed to operate on a level playing field with existing services, encouraging competition among music distributors and giving market entrants the opportunity to succeed or fail on the merits of their offerings to consumers.

As a result, the market has seen digital music services launch and compete without, for example, needing to give equity, partial advances, or disproportionate royalties to ASCAP, BMI, or the largest publishers as a condition of obtaining licenses. This has helped digital music services survive based on the quality and price of their offerings instead of their connections to rightsholders, and it has ensured independent musicians need not worry that ASCAP or BMI will employ certain licensing tactics that could disadvantage independent writers or smaller publishers. The consent decrees have also supported reasonable licensing for online video and other television providers, who often must secure licenses for musical works included in finalized video programming, without the option of removing specific songs if licensing negotiations fall through.

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[3] *United States v. ASCAP*, Civ. No. 41-Civ-1395, § IV.C (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree"); *United States v. BMI*, Civ. No. 64-Civ-3787, § VIII.A (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree").

The consent decrees have also brought transparency to ASCAP and BMI's practices, to the benefit of consumers and songwriters alike. For example, ASCAP must publicly list the works in its repertory.[4] It is, of course, impossible to know the market value of a rights catalog if you do not actually know what works are *in* that catalog. Although there continue to be complaints regarding whether ASCAP always meaningfully makes its repertory list available to licensees, the requirement to do so helps licensees value ASCAP's repertory and determine a reasonable license fee. By helping licensees understand exactly what they are licensing, the ASCAP consent decree increases efficiency in negotiation and prevents ASCAP from artificially inflating its fees through uncertainty and confusion.

For its songwriter and publisher members, ASCAP's consent decree requires it to objectively distribute the money it collects (minus its costs) to members, and to disclose its distribution formula to members.[5] Similarly, BMI must make its performance payment rates available to members.[6] These transparency provisions help songwriters by giving them access to the rates being paid to the PRO and to themselves. This information helps members decide which PRO offers them the best deal and prevents at least one area of artist compensation from being shrouded in secrecy.[7]

The consent decrees also benefit songwriters and small publishers by requiring ASCAP and BMI to accept writers who have at least one work regularly published and publishers whose works have been used or distributed on a commercial scale for at least one year.[8] Without this provision, ASCAP and BMI could adopt practices similar to SESAC, which does not accept all applicants and uses a subjective application process.[9] In contrast, the consent decrees offer songwriters and publishers at least two definite options for PRO membership, which especially benefits newer songwriters and publishers that may not yet have the largest or most valuable catalogs but could benefit the most from centralized licensing and administration.

The consent decrees also protect songwriters' and publishers' ability to license their works directly. Under the ASCAP consent decree, members only grant ASCAP non-exclusive rights and retain the right to individually license their works.[10] BMI must, upon request, allow

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[4] ASCAP Consent Decree § X.

[5] ASCAP Consent Decree § XI.B.1-2.

[6] BMI Consent Decree § VII.A.

[7] *See also* Casey Rae, *Transparency: Why It Matters to Songwriters and Fans*, Future of Music Coalition (Jan. 14, 2015), https://www.futureofmusic.org/blog/2015/01/14/transparency-why-it-matters-songwriters-and-fans.

[8] ASCAP Consent Decree § XI.A; BMI Consent Decree § V.A.

[9] *See How to Affiliate With SESAC*, SESAC (last visited Mar. 7, 2015), http://www.sesac.com/WritersPublishers/affiliate.aspx.

[10] ASCAP Consent Decree § IV.B.

the writers and publishers of a song to grant a non-exclusive license directly to a music user.[11] These provisions protect songwriters' ability to strike their own deals in addition to the licensing opportunities they gain access to through ASCAP or BMI.

By ensuring more fair and open practices, the consent decrees encourage competition. When companies at every point in the distribution chain face competition (including disruptive competition), that competition pushes service providers to better answer the needs of users and creators alike. Rightsholders that face competition will be motivated to strike deals with new distribution channels and to offer more artist-friendly contract terms to the musicians they provide services to. Similarly, music streaming services that face competition from new upstarts will be pressured to find better ways to serve audience demand.

With technologically neutral competition policies, new music distribution platforms will have a fair shot at thriving in a sustainable way, which could encourage a robust online distribution market that benefits everyone. From the consumer's perspective, online music services allow users to access, discover, and re-discover music more easily than ever before. New digital music services also decrease the costs of manufacturing and distribution, which in a competitive marketplace would be passed on to consumers as cost savings or improved service.

Artists also stand to benefit from the emergence of online music services. Online music services can begin to level the playing field to help unsigned and independent artists remove unnecessary middlemen and reach fans directly, if they so choose. On a very basic level, new music platforms help artists by providing pathways to reach new audiences. Although the appropriate royalty levels will always be subject to some level of debate, it is undeniable that online music distributors now collect a significant portion of many artists' royalties. For example, Spotify alone has paid out $1 billion to copyright owners in its first seven years.[12]

Digital distribution services also have the potential to give artists more control over their own careers. New services can make it easier for musicians to bring their works to market without necessarily relying on a publisher or record label to handle marketing, promotion, and distribution. For example, while it was traditionally near-impossible for musicians to convince a large record store to carry their albums without being signed to a record label, unsigned artists can now use iTunes, CD Baby, or Bandcamp, among others, to sell copies of their recordings to the public. Artists can use these powerful distribution technologies to reach diverse global audiences while maintaining control over the timing, length, and musical content of their professional projects.

When new technologies help break down barriers for independent artists, a songwriter need not give up her copyright to be distributed through the most popular platforms and, with

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[11] BMI Consent Decree § IV.A.

[12] Bruce Houghton, *Spotify Shows Strong Growth: 40 Million Active Users, 10 Million Paid Subscribers*, HYPEBOT (May 21, 2014), http://www.hypebot.com/hypebot/2014/05/spotify-shows-strength-growth-40-million-active-users-10-million-paid-sunscribers.html.

effective consent decrees, she will be paid transparently and fairly compared to a songwriter using a major publisher. Encouraging the sustainable and independent development of new services should be of concern to parties on all sides of the music business.

II. Without the Consent Decrees, the PROs and Largest Publishers Could Leverage Their Market Power Against Online Music Services, Songwriters, and Small Publishers.

The reasons for creating the consent decrees are still valid today. ASCAP and BMI are still by far the dominant players in the market for public performance rights. Without the consent decrees, these two PROs would have the ability to leverage their market power against competitive new services. If anything, consolidation in the music industry as a whole has only increased significantly since ASCAP and BMI entered into the consent decrees, and they are if anything only more necessary to protect competition today than when they were created.

Together, the three PROs control almost all of the market for public performance rights, and ASCAP alone has a market share of 45-47%.[13] Last year, the revenue ASCAP collected from licensees increased 6% to more than $1 billion, and its payouts to artists increased just under 4% to $883 million.[14] Among music publishers, Sony/ATV Music Publishing alone controls over 29.4% of the market, making it 30% larger than its nearest publishing competitor, Universal Music Publishing Group, and more than twice the size of Warner/Chappell Music.[15] Together, these three companies hold a combined three-firm market share of more than 65%. In recorded music, the market is dominated by three major labels—Universal Music Group (UMG), Sony Music Entertainment, and Warner Music Group—which control a combined 75% of the market, with UMG alone controlling 36.7% of the market.[16] Concentration among rightsholders

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[13] It is difficult to be certain of the current market shares based on currently available sources, but these are the number most commonly quoted for the PRO market. *See In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395 (S.D.N.Y. Mar. 18, 2014).

[14] Ben Sisario, *ASCAP Topped $1 Billion in Revenue Last Year, Lifted by Streaming*, N.Y. Times (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/business/media/ascap-topped-1-billion-in-revenue-last-year.html.

[15] *UMG and WMG See Gains in Recorded-Music Market Share in 2013, While Sony/ATV Dominates Music Publishing,* MUSIC & COPYRIGHT, INFORMA TELECOMS & MEDIA (May 6, 2014), https://musicandcopyright.wordpress.com/2014/05/06/umg-and-wmg-see-gains-in-recorded-music-market-share-in-2013-while-sonyatv-dominates-music-publishing/#more-1166.

[16] *Id.* These numbers do not, however, include sound recordings owned by independent labels or musicians but distributed through one of the major labels. To the extent that the major labels' distribution contracts with smaller labels allow them to set (or refuse to set) prices and rates with digital distributors for those labels' recordings, those contracts increase the majors' leverage over digital distributors. During the last major record label merger, members of this committee expressed concern over the impact that greater consolidation would have on competition. *See* Letter from Herb Kohl and Mike Lee, Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to Jonathan Leibowitz, Chairman, FTC (Aug. 3, 2012), https://www.publicknowledge.org/files/UniversalEMILettertoFTC20120803.pdf.

is particularly threatening to emerging competing distributors, because ownership of a huge catalog of copyrights makes it impossible for new distributors to launch without a license from those rightsholders.

Concentration on the distributor side has also created competition concerns. In 2014, Pandora had over 77% of the online radio market (and over 9% of the overall U.S. radio market),[17] while Apple dominated the digital download market with nearly 800 million users.[18] This concentration also threatens consumer choice, reduces incentives to lower prices and improve services for consumers, and increases incentives to strike tougher deals with independent artists (or threaten to cut them out completely). This is why Public Knowledge supports licensing mechanisms that encourage new market entrants to offer more choices for consumers.

Not only is there tremendous horizontal consolidation within the music industry, there is increasing vertical integration as well. An online music market dominated by vertically integrated firms gives companies the ability and incentive to make it more difficult for new services to gain entry, raise prices for consumers, and strike deals with the other largest market players, leaving independent artists out in the cold.[19] We have already witnessed the major labels increase their own vertical integration through licensing deals, particularly where there is no statutory license or consent decree to protect competition, and dismantling the protections of the consent decrees could very well enable the major publishers to do the same.

A. Weakened Consent Decrees Could Result in Coordination Between PROs and Publishers to Raise Prices for Music Services.

It is clear that policymakers must be wary of the major publishers and largest PROs coordinating to magnify their market power without the protections in the consent decrees, because that is exactly the behavior a federal judge recently found when certain publishers attempted to partially withdraw their rights from the PROs.[20]

These attempts illustrate how concentration in the industry has given the largest publishers and the PROs the incentive and ability to leverage their catalogs against new music

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[17] Pandora, *Historical Financial Results* (Feb. 5, 2015), http://investor.pandora.com/phoenix.zhtml?c=227956&p=quarterlyearnings.

[18] Bruce Houghton, *One New Stat from Apple Shows Why iTunes is [Almost] Unbeatable*, HYPEBOT (Apr. 24, 2014), http://www.hypebot.com/hypebot/2014/04/one-new-stat-from-apple-shows-why-itunes-is-almost-unbeatable.html.

[19] For example, at one point Bloom.fm reported it had been banned from Apple's iAd network because it competes with Apple's iTunes Radio service. Bruce Houghton, *Apple Bans 'iTunes Radio Competitor' Bloom.fm*, HYPEBOT (Apr. 11, 2014), http://www.hypebot.com/hypebot/2014/04/apple-bans-itunes-radio-competitor-bloomfm-.html.

[20] *In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 2014 WL 1088101 *35 (S.D.N.Y. Mar. 18, 2014).

services, absent guidance from structures like the consent decrees. In 2011, ASCAP attempted to allow publishers to withdraw new media rights from ASCAP. As the district court noted in ASCAP's subsequent litigation with Pandora, "Large publishers were in general enthusiastic about such a change, but the songwriters and independent publishers were less so."[21] Songwriters and at least some independent publishers expressed concern that withdrawing new media rights from ASCAP would make songwriters vulnerable to less transparent accounting and potential payment disputes with their publishers and would contribute to the overall problems caused by consolidation in the industry.[22]

As it turns out, smaller publishers' concerns about partial withdrawals from ASCAP may have been entirely justified. After all, when certain publishers similarly tried to withdraw new media rights from BMI, reports indicate that Sony/ATV and Universal were able to use their market share to strike advantageous deals with Pandora, while the smaller publisher BMG Chrysalis, with a market share around 4.5%,[23] initially sought a pro-rata share of 10% of revenue but seems to have eventually accepted a royalty even lower than what it could have obtained through BMI.[24] The incident is a stark example of how market concentration in music publishing can enrich the major publishers at the expense of the smaller competing publishers.

Courts have since denied both ASCAP and BMI's plans to allow publishers to withdraw their public performance rights for new media services while keeping those publishers' public performance rights for other uses. The episode does, however, demonstrate the major publishers' incentive and willingness to coordinate with each other and with the PROs to use their increased market share to raise their own license prices regardless of their impact on smaller artists and consumers.

As policymakers now consider dismantling the protections of the consent decrees, we must remember that we already have a strong warning of the harms this could cause. When the ASCAP and the major publishers had the opportunity to compete with each other, they chose to coordinate. As a result, a federal judge had to conclude that the resulting licenses could not even be characterized as true marketplace benchmarks to inform licensing under the consent decrees. Having already allowed the market to grow so concentrated, our music licensing system must

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[21] *In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395 (S.D.N.Y. Mar. 18, 2014). Notably, this could have also allowed affiliated record labels and publishers to combine their leverage by offering public performance rights and sound recording rights to digital music services in the same negotiations.

[22] *Id.*

[23] Ed Christman, *First-Quarter Music Publishing Rankings: SONGS Surges Again*, Billboard (May 12, 2014), http://www.billboard.com/biz/articles/news/publishing/6084783/first-quarter-music-publishing-rankings-songs-surges-again.

[24] Ed Christman, *Pandora v. BMI's Court Battle Reveals Long-Term Strategies, Licensing Aims*, Billboard (Feb. 17, 2015), http://www.billboard.com/articles/business/6473027/pandora-vs-bmg-strategies-licensing-aims.

now account for this fact and ensure parties can nevertheless achieve reasonable licensing terms in the market.

B. Weakened Consent Decrees Could Allow Publishers and PROs to Leverage Their Market Power Similar to Negotiations Between Major Record Labels and Digital Music Services.

The recent state of the recorded music licensing market provides a telling example of what might happen in a publisher licensing system that lacks protections against unreasonable and discriminatory licensing. The major record labels do not operate under consent decrees like the PROs, and even with statutory licenses available for some (but not all) streaming services, rates remain high enough to give the major labels significant leverage over licensees. This has resulted in the major labels demanding license terms that prevent new services from launching or burden them with heavy advances, disproportionate royalty fees, or partial equity sales.

In order to launch a download or streaming service a company must obtain a license from sound recording copyright owners, which are often record labels. For many services today, users demand a comprehensive selection of songs, so it is especially critical to obtain licenses from the three largest record labels, which together control the vast majority of the market for sound recordings. As a result, when music licensing structures give the major labels the right to deny access to their catalogs, the labels have been able to make extraordinary demands of services that need their permission to launch new music offerings.

The major record labels have the incentive to stifle or seize control of new digital distribution platforms because those platforms begin to level the playing field among major labels, independent labels, and unsigned artists. Digital platforms are more likely to include unknown or niche music because they are not constrained by strict time limits (like AM/FM radio) or space limits (like physical stores). As a result, the emergence of new digital platforms largely abolishes the physical scarcity of brick-and-mortar marketplaces and causes major record labels to lose one of their main selling points to musicians—namely, that they alone have the connections and influence that a musician absolutely needs to get his or her music out in the marketplace. Thus, the dominant incumbent labels are particularly incentivized to use their leverage to create artificial distribution scarcity by stifling or controlling digital platforms that will decrease their influence as compared to smaller competitors or unsigned acts.

The major labels have that power to stifle and control new platforms, too, since the platforms ultimately may never succeed if a single major label can withhold a significant percentage of the recorded music market even after other labels have started working with the service. Even in today's marketplace, a major label can wield sufficient power to demand that potential new digital music services pay the label hefty advances and a high percentage of future revenue, or give the record label an equity stake in the new company.[25] This sort of control puts

[25] These practices also hurt independent labels, which are left with a smaller slice of the pie after online services have acquiesced to the major labels' demands. Recently, the CEO of Merlin, an organization that

the major labels in a position to "make or break" any new service, allowing them to hamper innovation and/or demand exorbitant terms and conditions. As a result, consumers must either miss out on potential new services or pay excessive fees for those services.

Finally, a large record label can use its ability to deny licenses as leverage to gain partial ownership in new digital music services.[26] These deals only serve to entrench incumbent power structures and stifle innovation in the online music business, and music licensing structures should certainly not force this result on the industry by making new services choose between unsustainably high compulsory license rates and private deals with the dominant copyright owners. Spotify, for example, is partially owned by all of the major record labels, and has been dogged with accusations of giving independent and unsigned musicians a lower royalty rate than major label musicians for the same number of streams. Even where major label ownership of distribution platforms does not lead to claims of direct discrimination, systematic vertical integration only contributes to a highly concentrated market where a new service must obtain the permission of its largest competitors in order to launch. For example, the music identification service Shazam has sold Warner Music Group's owner Access Industries, Universal Music Group, and Sony Music Entertainment each a $3 million stake in the company.[27] Access Industries also owns the music subscription service Deezer.[28] Since the acquisition of EMI by Universal Music Group, yet more online music services have sold partial equity to the major labels as part of obtaining licenses.[29] Increased vertical integration among the largest copyright owners and distribution and processing services only create new barriers to competition at each point in the supply chain, to the detriment of musicians and their fans alike.

The bottlenecks created when a small number of corporate copyright holders control most of the market, if left unattended, can thwart promising new music services and prevent competition among online music distribution companies. When the largest copyright aggregators

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represents independent labels, voiced concern that the major labels' practice of demanding disproportionately high royalties and enormous advances squeezes out independent labels' royalties while making it harder for new online services to enter the market. Janko Roettgers, *Merlin CEO: Major Labels are Setting New Music Services Up to Fail*, GIGAOM (Oct. 12, 2013), http://gigaom.com/2013/10/12/merlin-ceo-major-labels-are-setting-new-music-services-up-to-fail/.

[26] *See* Mark Cooper & Jodie Griffin, *The Role of Antitrust in Protecting Competition, Innovation, and Consumers as the Digital Revolution Matures: The Case Against the Universal-EMI Merger and E-Book Price Fixing* (June 14, 2012), http://publicknowledge.org/case-against-umg-emi.

[27] Hannah Karp, *Warner, Universal, Sony Buy Stakes in Music app Shazam*, WSJ DIGITS (May 14, 2014), http://blogs.wsj.com/digits/2014/05/14/warner-universal-sony-buy-stakes-in-music-app-shazam/.

[28] *Id.*

[29] *See* Paul Resnikoff, *Artists Will Receive Nothing from the $3 Billion Beats Acquisition, Sources Say...*, DIGITAL MUSIC NEWS (June 9, 2014), http://www.digitalmusicnews.com/permalink/2014/06/09/artists-will-receive-nothing-3-billion-beats-acquisition-sources-say; Adam Satariano, *SoundCloud Said to Near Deals With Record Labels*, BLOOMBERG (July 10, 2014), http://www.bloomberg.com/news/2014-07-10/soundcloud-said-to-near-deals-with-record-labels.html.

can wield outsized leverage against distribution services, those licensors can use their market power to demand high royalties, advance payments that squeeze out independent musicians, and partial ownership in new companies. When distribution companies must accept these kinds of terms as a price of entering the business, investors who might have otherwise contributed to more competing independent companies are discouraged from entering the space. Those distribution services that do launch may then not only be affiliated with the largest copyright owners in the industry, but will have few meaningful direct competitors. This only further entrenches the dominance of the companies that already have the upper hand.

III. Any Changes to the Consent Decrees Must Continue to Ensure a Competitive, Efficient Market.

The consent decrees have provided substantial benefits to the music licensing market and to consumers and artists. In contrast, the publishers' attempted partial withdrawals and the lessons we can learn from the major record labels' use of their market power are stark warnings of the consequences of dismantling the protections in the consent decrees at this point in time. Ultimately, the PROs and the publishers continue to control large enough market shares to behave anticompetitively against licensees, and their recent actions demonstrate that they are willing to do so when given the opportunity. Therefore policymakers must ensure the consent decrees continue to protect competition in music licensing.

Any changes to the consent decrees must be carefully designed to continue to protect competition, and must be adequate to handle the increasing concentration among music publishers. Provisions that would allow the PROs to undermine competition or transparency in the market would threaten the development of new music service, leaving consumers with less choice, more limited services, or higher prices. Any proposal to alter the consent decrees in a way that could threaten the still relatively nascent online music market must therefore be approached with great caution.

Conclusion

The ASCAP and BMI consent decrees have served an important role in promoting competition and encouraging a robust music composition licensing market despite the dramatic market concentration among the PROs. Additionally, the increased market power of the largest PROs and publishers, and the recent attempt of the major publishers to partially withdraw their rights from the PROs only emphasize that the licensing market at this particular time seems especially vulnerable to anticompetitive practices. It therefore falls on our antitrust authorities to ensure any changes in the consent decrees continue to promote competition and innovation to the benefit of consumers.

Statement of Christopher S. Harrison on Behalf of Pandora Media, Inc.

Before the

U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights

How Much for a Song?: The Antitrust Decrees that Govern the Market for Music

March 10, 2015

Chairman Lee, Ranking Member Klobuchar, and distinguished members of the Subcommittee.

Thank you for inviting me to testify. My name is Christopher Harrison, and I am the Vice-President, Business Affairs at Pandora Media, Inc. The mission of Pandora and our more than 1400 employees is to unleash the infinite power of music by being the effortless source of personalized music enjoyment and discovery for our 80+ million listeners.

Summary

Where others may see a music industry in turmoil, Pandora sees abundant opportunities for new leadership. We are helping to create a music industry that benefits the entire ecosystem. We do this by making the enjoyment of music more effortless, personal, and rich with discovery for listeners, while simultaneously giving music-makers more resources and information for connecting with fans. Just as importantly, we are a significant new revenue stream for music makers, incurring nearly $450 million in royalties in 2014 alone and having paid over $1.2B in royalties since we launched in 2005.

Key to securing that bright future for all is putting an end to the short-sighted and misguided zero sum dialogue that sometimes permeates the music industry. Let me be clear: Pandora believes it is essential for all constituents in the music ecosystem to work together to find win-win-win solutions that benefit listeners, music makers, and distributors alike. We are eager to work constructively with all involved to make that happen. Creating the thriving industry we all desire requires a market that is open, transparent and competitive.

Unfortunately, there are a small but significant number of obstacles that threaten this future and require the attention of this Subcommittee and other policymakers. Among the most significant obstacles is an alarming lack of transparency. There is no authoritative database of

copyright ownership information to which a service such as Pandora could turn if it had to license directly these millions of copyrights owned by tens of thousands of copyright owners. Those databases that are available (e.g., ASCAP, BMI and some music publishers maintain online databases) can only be searched on a song-by-song basis and often contain conflicting information. In order to foster greater competition, we recommend the creation of a single, publicly available, database of record that would house all relevant music copyright ownership information. By enabling services to quickly ascertain who owns which rights to a work, a single database of record would also enable services to identify, on a catalog-by-catalog basis, the owners of the songs they perform, which would encourage true competition among copyright owners for distribution on digital platforms. While the transparency provided by such a database would mitigate the anticompetitive behavior Pandora recently experienced, transparency alone is a necessary, but not sufficient, solution to the problems that Pandora has faced over the past few years.

I. Pandora and Licensing Musical Works Through PROs

Launched in 2005, Pandora is the most popular Internet radio service in the United States. Over eighty million people actively listen to Pandora each month, where they enjoy the music of more than 100,000 recording artists, 80% of which are not performed on terrestrial radio.

Pandora achieved this success by investing heavily in what we call the Music Genome Project, a sophisticated taxonomy of musical information.[1] For 15 years our trained music analysts have been manually cataloging songs along up to 450 distinct musical characteristics per recording to power Pandora's service. Our large team of data scientists has similarly invested years in developing and perfecting cutting edge algorithms to optimize our song selection. Our listeners can create stations based upon a "seed" that is either an artist name or song title, and the station will deliver a stream of music that is based upon that original seed. We also allow listeners to click "thumbs up" or "thumbs down" when listening to a particular song, and we use individual feedback and the collective feedback amassed from over 50 billion responses to further refine the song selection for listeners. The result is a radio experience that responds to an individual's tastes.

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[1] *See* About the Music Genome Project, *available at* http://www.pandora.com/about/mgp.

Like all radio services, Pandora must secure copyright licenses in order to operate. Among the rights Pandora must secure is the right to publicly perform musical works. Authors and composers create musical works, with the rights typically assigned to music publishers, who further authorize the PROs to license performance rights. These PROs aggregate the rights to works from hundreds of thousands of writers and publishers, and then offer "one stop" licensing of public performance rights for a wide variety of uses, such as for radio, television and in hundreds of thousands of commercial locations, including offices, schools, bars, restaurants, gyms, etc.

Pandora supports the critical role that PROs play to support the music ecosystem. The PROs benefit songwriters and publishers by saving them the administrative headache of licensing the many thousands of licensees directly. The PROs also benefit licensees such as Pandora by providing an efficient means of securing performance licenses to millions of works through a single transaction. But the efficiency of the PROs carries risks. In aggregating the rights to otherwise competing catalogs of works under a single umbrella, the PROs create a significant risk of achieving supra-competitive prices. To ameliorate the risk of above-market pricing, both ASCAP and BMI operate under consent decrees that they entered into to resolve antitrust charges leveled by the Department of Justice in the 1940s. While the decrees have been subject to some modifications, the core provisions of the decrees have remained in place because the antitrust risks inherent in the PRO business model persist even after decades of DOJ oversight.

II. Marketplace Consolidation in Music Publishing

An open, transparent and competitive music marketplace cannot exist without the continuation of a sensible and efficient legal framework to promote competition and prevent market abuses. One key feature of this legal framework is the subject of this hearing: preventing anti-competitive behavior through the enforcement mechanism of consent decrees. I thank the Subcommittee for reviewing the ASCAP and BMI consent decrees that provide essential protections and are integral to forging this bright future. While we are open to sensible updates to the consent decrees, any modification must ensure a vibrantly competitive market characterized by independent pricing activity, which the record evidence demonstrates does not exist at this time.

During your review of the decrees, I believe that you will find that excessive consolidation among publishers and coordinated activity among PROs and publishers severely harms competition, discourages new entrants into the music distribution business, and ultimately diminishes access to diverse voices and music for the tens of millions of Americans that listen to Pandora, as well as other internet radio services every month.

Over the past 20 years both the House and Senate Judiciary Committees have devoted significant time and effort to examining the importance of copyright protections in the music licensing space. This hearing is one of the few that will focus on the competitive health (or glaring lack thereof) of the music rights licensing marketplace. Pandora welcomes this revived interest in antitrust scrutiny because we have arrived at a critical crossroad that will have a dramatic impact on music distributors, users and ultimately, consumers.

As this hearing takes place, the largest music publishers and PROs demand changes to the very antitrust consent decrees designed to forestall their well-documented anticompetitive conduct. In the past year, four different federal district court judges found evidence of the same egregious misconduct that gave rise to the original consent orders over 70 years ago:

- In December 2013, in the rate setting involving Pandora and BMI, Federal District Court Judge Louis Stanton found that music publishers attempts to deny a license to Pandora violated BMI's consent decree: "BMI cannot combine with [music publishers] by holding in its repertory compositions that come with an invitation to a boycott attached."

- Two different federal District Court judges found sufficient evidence that SESAC, another PRO that does not operate under a consent decree, engaged in monopolistic behavior and likely violated the Sherman Antitrust Act.

- In a rate court case involving Pandora and ASCAP, federal District Court Judge Denise Cote found: "the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying [the ASCAP consent decree, as amended]."

The Department of Justice has opened its own investigation into the conduct of the PROs and the music publishers as well as the appropriateness of modifying the consent decrees. Pandora welcomes the Department of Justice's review of both the ASCAP and BMI consent decrees as well as its investigation into the anticompetitive behavior of the music publishers and the PROs in their dealings with digital music services such as Pandora. This Subcommittee's effort in this regard provides a critical oversight function to ensure that the marketplace for music licensing is open, transparent and competitive.

The sort of anticompetitive behavior found by these federal district court judges has long been condemned as unlawful under the Sherman Act, for our economic system demands that competitors actually compete, not collude to increase prices. Incredibly, the publishers and PROs now demand the elimination of these rules so that they can be *rewarded* for their conduct by having the consent decrees amended to gut many of their core protections. Pandora believes this demand, if accepted, would seriously harm competition by allowing anticompetitive behavior to go unchecked, permitting publishers and PROs to artificially inflate licensing rates, and ultimately harm consumers by degrading music services and increasing costs for access to music.[2] Moreover, Pandora believes that industry practices that have become ingrained over the years make it likely that the kind of anticompetitive behavior found in the four decisions that I cited will be repeated.

III. The Role of the Consent Decrees

The consent decrees are in place to provide essential protections – supported by federal court enforcement authority – to all players in the music licensing space from the collective power of the PROs and their publisher members. In brief, they: require the PROs to provide licenses to willing licensees on non-discriminatory terms; ensure that the songwriters and

[2] The partial withdrawals proposal may even harm songwriters by increasing large publishers' leverage over them as well as over users. *See* Songwriters Guild of America, Inc., "Response of the Songwriters Guild of America, Inc. to the Solicitation of Public Comments by the United States Department of Justice Regarding the Question of the Continued Efficacy of the Consent Decrees to Which the Performing Rights Societies Known as American Society of Composers, Authors and Publishers ('ASCAP') and Broadcast Music, Inc. ('BMI') Remain Subject," at 5 (Aug. 6, 2014) ("SGA has determined that allowing partial withdrawal would be devastating to creators[.]"), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307845.pdf.

publishers working through the PROs cannot improperly inflate the price of public performance rights through collusive price-setting; and provide for the right for a fair royalty rate to be established by a federal judge when free market negotiations between the PROs and prospective licensees break down.

In recent years, the concern about the undue concentration of power exerted by the PROs and large publisher members has increased in the wake of further merger activity, such as Sony ATV's acquisition of the right to administer the world's largest music publisher EMI, effectively reducing the number of major publishers from 4 to 3.

Despite this dramatic industry consolidation, the PROs and publishers are mounting a major campaign to substantially weaken the protections of the consent decrees. Dramatic claims are made that, absent these modifications, songwriters will be unable to earn a living wage. An unjaundiced review of the financial performance of the PROs and music publishers, however, belies such claims. The PROs have increased their collections and distributions of royalties dramatically over the last ten years. In fact, ASCAP just announced it collected more than $1 billion in royalties in 2014.[3] Incredibly, these record royalty receipts come after ASCAP and BMI agreed to *lower* the fees paid by terrestrial radio by a billion dollars.[4] Universal Music Publishing, the world's second largest music publisher, just announced its revenue *increased* by more than 4% last year.[5]

Given this increasing revenue of the PROs and music publishers is improving, what is motivating the efforts to gut the protections of the consent decrees? What seems to be behind this effort is the music publishers' objections to the even higher rates Pandora pays to record labels to publicly perform sound recordings by digital audio transmissions. Yet these objections

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[3] *See* Ben Sisario, "ASCAP Topped $1 Billion in Revenue Last Year, Lifted by Streaming," N.Y. Times, Mar. 4, 2015, at B3, *available at* www.nytimes.com/2015/03/04/business/media/ascap-topped-1-billion-in-revenue-last-year.html.

[4] Inside Radio, *New deals with BMI and ASCAP end two years of negotiations* (Aug. 29, 2012).

[5] In fact, Universal Music Publishing's revenue grew by 4.2% in 2014. *See* Tim Ingham, *Universal Music Group Sales Fell 6.7% in 2014 – As EU Income Overtook America*, Music Business Worldwide (Feb. 27, 2015), *available at* http://www.musicbusinessworldwide.com/universal-revenue-drops-6-7-in-2014-as-eu-overtakes-america/.

ring hollow when one considers that it is the affiliated companies of the largest music publishers – the major record labels – that have advocated for this very discrepancy based on the significantly greater investments record labels make to bring music to market. Pandora and other digital music services are caught in a fight between affiliated entities where the goal of the common owner is to extract ever-increasing fees from licensees.

While music publishers and the PROs cloak their requests for increased royalties in the rhetoric of free-market capitalism, what they really seek is a licensing regime that is structured to insulate publishers and PROs against the forces of competition. In a workably competitive market, publishers would compete with each other on price for performances on Pandora's service. It is worth noting that consent decrees have always permitted any publisher to negotiate a direct license with any user; indeed, the legitimacy of ASCAP and BMI depends on the ability of publishers to enter into individual licenses. Yet, through the years, the PROs and publishers have resisted direct licensing. Today, they take the perverse position that it is the PRO license itself that impedes their ability to deal directly with users, and will only offer direct licenses if the PRO license does not include their works. But their proposal will harm users. The public statements and behavior of the PROs and certain major publishers evidences intent to raise prices without risk. Rather than a competitive market with "winners" and "losers," the PROs and publishers apparently seek an environment in which coordination among them can be accomplished with little to no risk and where competitive forces can be avoided – so that every copyright owner gets paid more, devoid of the pressures of the healthy forces of free market pressures.

Below I describe the specific conduct Pandora has experienced, and then explain why Pandora believes the consent decrees, if modified, should be subject to significant protections for licensees so as not to harm competition.

IV. Pandora's Recent Experience With the PROs and Music Publishers

Pandora's recent rate court trial against ASCAP resulted in a decision by Judge Cote full of important factual findings, which I commend in its entirety.[6] In brief, Sony/ATV ("Sony") and Universal Music Publishing Group ("Universal"), two of the world's largest music

[6] *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014).

publishers, frustrated with the consent decree supervision of PRO pricing practices, pushed ASCAP to amend its rules to allow publishers to only withdraw ASCAP's rights to license "new media" users like Pandora, while including provisions to "eliminat[e] any risk to the publisher if the withdrawal proved to be a bad idea."[7]

When Pandora filed a petition to have its ASCAP license rate determined by the rate court in September 2012, Universal and Sony (both members of the ASCAP Board) acted to thwart an agreement between Pandora and ASCAP that ASCAP management had already all but accepted.[8] Sony then claimed to partially withdraw from ASCAP, and created a "hold up" situation premised on its ability to "shut down Pandora" through threat of massive infringement liability.[9] Sony both denied Pandora's request for a list of its withdrawn works and prevented ASCAP from giving Pandora that information, using the fear, uncertainty, and doubt created by the lack of information and the time crunch to extract a 25% rate increase.[10] Universal followed Sony's lead, and relying on confidential information improperly leaked by Sony about its own deal, made similar threats to Pandora and conditioned providing information about its withdrawn works on Pandora's on not using the information to take down those works—essentially demanding that Pandora enter a separate license or be subject to massive infringement damages if it – without knowledge – played Universal's music.[11]

Believing that Universal's proposal was unreasonable, Pandora sought and obtained partial summary judgment in the ASCAP rate court that the selective withdrawals could "not affect the scope of the ASCAP repertoire subject to Pandora's application for an ASCAP license."[12] Judge Cote further found that ASCAP could not show that license rates generated by the negotiations between Pandora and the withdrawing publishers were appropriate benchmarks, explaining that Sony and Universal "each exercised their considerable market power to extract supra-competitive prices."[13] She also found that "the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern

[7] *Id.* at 337.
[8] *Id.* at 341-43.
[9] *Id.* at 343-44.
[10] *Id.* at 344-47.
[11] *Id.* at 347-49.
[12] *Id.* at 350.
[13] *Id.* at 357.

underlying [the ASCAP consent decree] and casts doubt on" whether the licenses were the product of a competitive market because ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora," and the fact that "they coordinated their activities with respect to Pandora" meant that "the very considerable market power that each of them holds individually was magnified."[14]

At the same time that Pandora was negotiating a license with ASCAP, Pandora was also negotiating with BMI, which had similarly agreed with the large publishers to allow partial withdrawals. Pandora sought a ruling in the BMI rate court invalidating the selective withdrawals on the same grounds that Judge Cote had invoked against the ASCAP withdrawals, but Judge Stanton held that the BMI consent decree's prohibition on partial withdrawals actually meant that a publisher's new-media withdrawal effectively removed that publisher's works from BMI for *all* purposes. The large publishers turned Judge Stanton's ruling to their advantage, telling Pandora immediately after the December 18, 2013 ruling that they would be completely withdrawn from BMI as of January 1, 2014, and that Pandora therefore needed to negotiate direct agreements with them in the waning days of 2013 or risk infringement liability. Incredibly, at the very same time Sony and Universal were also negotiating "suspension" agreements with BMI that would *retroactively* return the publishers to BMI. This allowed them to extract higher license rates from Pandora as 2013 came to an end without actually risking their ability to license other users through BMI. Unaware of these "suspension" agreements and faced with threats of massive copyright infringement liability, Pandora entered into a covenant not to sue with Sony and a license with Universal — both at supra-competitive rates.

V. Creating a Truly Competitive Market

As Judge Cote found, there is significant evidence of coordination among publishers and the PROs for the right to publicly perform musical works. A competitive market must be transparent, where sellers are vying against each other to achieve sales to buyers. The key to this is the ability of customers to substitute various sellers' products for one another: if one seller raises its prices, buyers can shift their purchases to other sellers. In the market for music, if one publisher requests too high a fee, a licensee should be able to substitute other works at a lower

[14] *Id.* at 357-58.

price. This is possible in a competitive market, because sellers in competitive markets are transparent about what they are selling, and buyers know what they are getting when they choose to buy. In a competitive market, sellers compete on price in order to achieve greater market share in order to sell more products than their competitors and generate higher total revenue. Because of this, competitive markets have winners and losers: some sellers compete well and are rewarded with more business, while other sellers may do poorly and achieve less success.

Pandora welcomes this kind of competitive market in music licensing, where music publishers compete to increase market share by competing on price – i.e., the fees charged to publicly perform the musical works controlled by individual music publishers. But publishers have shown time and time again that they are not trying to establish a competitive market where users have the ability to substitute among competing offerings. Rather, they are working in unison to avoid competition so every publisher gets to benefit from higher prices without having to compete for business.

The market as it exists today gives monopolistic market power to multiple entities (including those with small ownership interests) and allows the holders of fragmented rights to engage in hold up, thus limiting competition.

As we experienced with ASCAP and may be experiencing with BMI, moreover, rights holders and PROs are more than willing to coordinate to increase their leverage. Publisher coordination further increases the power of the large publishers by ensuring they will not be undercut by the PROs or by other publishers. In a free market, one would have expected each of ASCAP and BMI to seek market share at the expense of any withdrawing publisher to increase the total royalties collected by such PRO. Yet such competition never occurred. In fact, the leaders of both ASCAP and BMI testified that each never even considered competing on price with withdrawn publishers.[15]

The ASCAP and BMI consent decrees serve an important function: they limit the impact of both the structural non-competitiveness of the music licensing marketplace and restrain the

[15] Paul Williams Dep. Tr. at 36:7-16 (Sept. 10, 2013), *In re Pandora Media, Inc.*, 6 Supp. 3d 317 (S.D.N.Y. 2014); Trial Tr. at 229:7-11 (Feb. 11, 2015), *Broadcast Music, Inc. v. Pandora Media, Inc.*, No. 13 CV 4037 (S.D.N.Y. 2015); Mike Masnick, *Surprise: ASCAP and Music Labels Colluded to Screw Pandora*, Techdirt (Feb. 12, 2014), *available at* https://www.techdirt.com/articles/20140209/01061226149/details-come-out-about-how-ascap-colluded-with-labels-to-screw-pandora.shtml.

long-standing anticompetitive conduct of market participants. They also ensure the efficiency of "one-stop" licensing while limiting the PROs' (and their members and affiliates') ability to harm competition through collusive behavior. The consent decrees have been so effective that the antitrust agencies have permitted multiple mergers in this space premised on the protections afforded to users by the consent decrees (amongst other reasons), and there has been little need for further enforcement actions despite any number of conditions that could raise competitive concerns. The consent decrees are thus an essential aspect of competition in this market.

VI. Ensuring a Vibrant Music Publishing Marketplace for the Future

While we continue to remain optimistic about the future of music streaming, the government has a critical role to play to guarantee a functionally competitive music ecosystem. Over seventy years of abuses, including the coordinated behavior I described above that occurred last year, require continued regulation to ensure that a hugely consolidated industry cannot leverage their market power for unfair gain. This Subcommittee's examination of the consent decree review is critical to ensuring a positive result. The key consideration for Congress should be: how to make the system work for the benefit of all stakeholders—consumers, musicians, distributors, publishers, and labels. There is no reason that one entity must lose for the other to win. We encourage policymakers to examine ways to make the system work for everyone in a way that moves this debate and industry forward.

Thank you again for your consideration of these important issues. I am available to answer any questions the Subcommittee may have.

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Written Statement of Elizabeth Matthews
Chief Executive Officer
American Society of Composers, Authors and Publishers
on
Performance Rights Organization Consent Decrees
Before the
United States Senate
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
March 10, 2015

Mr. Chairman, thank you for this opportunity to present testimony before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the U.S. Senate Committee on the Judiciary on the important subject of performance rights organization consent decrees and the challenges they present in the current music licensing marketplace.

I am the Chief Executive Officer of the American Society of Composers, Authors and Publishers ("ASCAP"), the oldest and largest performing rights organization ("PRO") in the United States. For over 100 years, ASCAP has defended and protected the rights of songwriters and composers, and kept American music flowing to millions of listeners worldwide. Today, our 520,000 songwriter, lyricist, composer and music publisher members depend on ASCAP for their livelihoods, relying on ASCAP to negotiate licenses, track public performances, distribute royalties and advocate on their behalf. Through a century of innovation, ASCAP's collective licensing model has served as the primary gateway to music for businesses seeking to perform copyrighted music, ensuring that they may efficiently obtain licenses to perform the millions of works in ASCAP's repertory. As we look forward to our next 100 years, I firmly believe that ASCAP's collective licensing model is the most effective, efficient and compelling

model to serve the needs of music creators, businesses that perform music, and music fans everywhere, and a necessary component of the music licensing marketplace.

By way of background, each musical recording encompasses two distinct copyrighted works: (1) the musical work, which is the underlying composition, including the lyrics and musical composition; and (2) the sound recording, which is a specific recorded version of a musical work. ASCAP licenses the right to perform publicly the musical works. It does not license any rights inherent in sound recordings.[1]

New technologies have dramatically transformed the way people listen to music, a transformation that, in turn, is greatly changing the economics of the music business, particularly for songwriters and composers, who do not receive the same revenue streams – such as concert and merchandise revenue – that recording artists receive. Streaming music through services such as Pandora and Spotify is growing at a fast pace as physical music sales and digital downloads decrease in popularity. This growth is spurred on by the increasing availability of broadband internet – as of 2013, 93% of Americans had access to broadband speeds of at least 3 megabits per second[2] – and the proliferation of handheld wireless technologies, such as smartphones and tablets. These streaming services perform virtually wall-to-wall music for their users with limited commercial interruptions, and provide each user with a personalized stream, using music with much greater intensity than traditional broadcast platforms. Music is now enjoyed by more people, in more places and over more devices, and ASCAP and our members embrace

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[1] For more detail on the intricacies of the music licensing marketplace, *see* U.S. Copyright Office, COPYRIGHT AND THE MUSIC MARKETPLACE (February 2015) (hereinafter "Copyright Office Report").

[2] *See* Nat'l Telecommunications & Information Administration, U.S. BROADBAND AVAILABILITY: JUNE 2010 – JUNE 2012 at 4 (May 2013), *available at* http://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf.

these new services as means to bring our music to the public. But the regulatory system that governs how ASCAP can license such new services has failed to keep pace, making it increasingly difficult for songwriters and composers to realize a competitive return for their creative efforts and for PROs such as ASCAP to appropriately serve the needs of their customers (music licensees), the music listening public, and the songwriters and composers who depend on the income from collective licensing for their livelihoods.

As the Copyright Office recognized in its recent Report on Copyright and the Music Marketplace, "the time is ripe to question the existing paradigm for the licensing of musical works and sound recordings and consider meaningful change."[3] We agree that time for change has come.

In my testimony, I will describe how collective licensing by PROs such as ASCAP and Broadcast Music, Inc. ("BMI") plays a valuable function in the music marketplace and continues to do so in the face of a digitally transformative economy. I will then describe how regulatory oversight through outdated consent decrees has failed to meet those changes in the marketplace, threatening the future of collective licensing and depriving songwriters and composers of a competitive return on their labor. Finally, I will suggest modifications to the ASCAP consent decree that will address such shortcomings and emphasize how Congress may assist in ensuring that ASCAP's songwriter, composers and music publisher members realize competitive prices that reflect the true value of their music.

I. Collective Licensing Is Crucial to the Music Licensing Marketplace

On February 13, 1914, a group of visionary songwriters convened to address the problem facing songwriters and composers of that day – how to efficiently obtain

[3] Copyright Office Report at 1.

compensation for the widespread use of their copyrighted music by thousands of businesses performing their music countrywide. The solution was the creation of ASCAP, the first U.S. PRO. ASCAP would negotiate and administer blanket licenses for the non-dramatic public performance rights in its members' works on a collective basis, monitor music usage by and collect fees from licensees, and distribute royalty payments to its members. A blanket license offered by ASCAP would provide efficiencies for both songwriters, composers and publishers who would otherwise struggle to individually license or enforce the millions of performances of their works by thousands of individual businesses that publicly perform music, and licensees, who would otherwise find it impossible to clear efficiently the rights for their performances if required to negotiate separately with each individual copyright owner. Most crucial to its success, ASCAP's collective licensing would permit its members to spread the costs of licensing and monitoring music usage among the entire membership, thereby reducing costs to a manageable level and ensuring that more of the money collected is paid to songwriters and publishers as royalties. As a testament to ASCAP's collective efficiencies, ASCAP – *which operates on a not-for-profit basis*, distributing all license fees collected, less operating expenses, as royalties to its members – today distributes to its members as royalties approximately 88% of all fees it collects, on account of over 500 billion performances made annually by over 700,000 different entities, making it the most efficient PRO in the world.

Moreover, PROs like ASCAP offer their members another crucial benefit – transparency. Every dollar that ASCAP receives is essentially divided into two – fifty cents is allocated to songwriters and composers and fifty cents to music publishers. After

subtracting overhead expenses, ASCAP distributes separately each allocation directly to our songwriter and composer members and to our music publisher members, regardless of their separate contractual agreements. This direct relationship provides much needed transparency and is crucially important to songwriters and composers, who believe it helps ensure they earn a competitive return for the use of their music.

A century ago, ASCAP's efforts were directed towards the performance venues of that day – public establishments that played music, such as bars, restaurants, hotels and retail stores. With the progression of technology over the years, ASCAP innovatively met the demands of the marketplace, ably negotiating licenses on a non-exclusive basis for the public performance rights in the musical works in our repertory of millions of works, as well as the repertories of over 100 foreign PROs with which ASCAP has reciprocal agreements, to a wide range of licensee industries. Considering the importance of U.S. music around the world, ASCAP's ability as a PRO to negotiate these reciprocal agreements with foreign PROs provides a substantial benefit to the U.S. economy. For example, in 2013, ASCAP paid foreign PROs $66 million, but ASCAP received payments from foreign PROs of approximately $330 million, or almost one-third of its total revenue, for the performance of ASCAP members' music abroad.

In the 1920s through the 1940s, ASCAP met the needs of the radio marketplace, devising licenses that today serve thousands of radio stations. In the 1950s through the 1970s, ASCAP engineered licensing for the developing local and network television industry. In the 1980s and 1990s, ASCAP provided solutions to the emerging cable and satellite industries. In each decade, despite challenges posed by new technologies and business models, ASCAP was able to work with user industries to provide efficient

licensing solutions that would provide a much needed stream of income to ASCAP's members for the use of their works – royalties that songwriters and composers would otherwise likely be unable to collect. The consent decree did not impede ASCAP's ability to serve our members, who for decades were able to earn a living writing and composing music, largely due to the royalties collected by ASCAP on their behalf.

Today, ASCAP's role remains unchanged, despite the seismic changes confronting the music industry by virtue of the advent of the Internet and other digital technologies. If not for PRO collective licensing, the billions of performances made by digital music services such as Pandora, Spotify and Apple's iTunes Radio would require clearance on a copyright-owner-by-copyright-owner basis – exactly the problem faced by ASCAP's founders years ago, but on a magnitude far greater. Indeed, such services herald PRO collective licensing as a model of licensing efficiency to be emulated throughout the market, without which licensing – and their businesses – would suffer.[4] In fact, the U.S. Copyright Office and its current and past Registers of Copyright have repeatedly attested to the success and critical importance of the PRO collective licensing model.[5]

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[4] *See, e.g.,* Comments of Sirius XM Radio Inc., U.S. Copyright Office, In the Matter of Music Licensing Study: Notice and Request for Public Comment, Docket No. 2014-3 ("Music Study") at 5 ("[T]he efficiencies of the blanket licenses and one-stop shopping may justify the PROs' existence"); Comments of the Digital Media Association, Music Study at 27 ("[T]he blanket licenses (among other forms of licenses) offered by ASCAP, BMI and SESAC provide a framework that promotes licensing efficiencies and reduced transaction costs for both licensors and licensees alike.")

[5] *See* Copyright Office Report at 150 ("Since the first part of the twentieth century, ASCAP and BMI have provided critical services to songwriters and music publishers on the one hand, and myriad licensees on the other, in facilitating the licensing of public performance rights in musical works."); U.S. Copyright Office, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT 32 (2011); Maria Pallante, Remarks at the Copyright Matters program of February 25, 2014 ("Pallante Remarks") ("[I]t is clear there will always be an important role for the collective licensing paradigm, which was innovative when ASCAP was founded 100 years ago and remains innovative today."); Statement of Marybeth Peters, The Register of Copyrights, Before the Subcommittee on Intellectual Property, Committee on the Judiciary, United States Senate 109th Congress, 1st Session, July 12, 2005, Music

Today's robust marketplace for performing rights is built on the foundation provided by collective licensing. Indeed, competition in the collective licensing marketplace has expanded widely. ASCAP now competes with numerous other PROs and licensing entities in the U.S., including BMI and SESAC, Inc. (a private unregulated PRO), as well as new for-profit market entrants, such as Global Music Rights ("GMR"), which are also unregulated.

The role of the PRO remains vital to the future of the music marketplace. ASCAP's songwriter, composer and publisher members depend on the performing right royalties collected by ASCAP as a major source of income. This is especially so as digital music streaming services account for an increasingly larger portion of music revenues in the U.S. and other sources of royalties (such as those from the sale of compact discs and digital downloads) decline. Indeed, between 2012 and 2014, publisher revenues attributable to performance royalties increased from 30% to 52%, as revenue attributable to mechanical royalties fell from 36% to 23%, and revenue attributable to synchronization licenses declined from 28% to 20%.[6] Digital content services also rely on the efficiencies of PRO collective licensing to compete in the market. However, it has become clear – as I explain below – that the consent decree regulating ASCAP has failed to properly adjust to meet those changes, leaving songwriters and composers in much the same place as they were a century ago – searching for a solution to the problem of how to achieve a competitive return for the widespread use of their copyrighted music. And,

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Licensing Reform ("The United States also has collective licensing organizations, such as ASCAP, BMI and SESAC, which appear to function quite successfully. These performing rights organizations license the public performance of musical works – for which there is no statutory license – providing users with a means to obtain and pay for the necessary rights without difficulty. It seems reasonable to ask whether a similar model would work for licensing of the rights of reproduction and distribution.")

[6] Copyright Office Report at 71 (citing data from the National Music Publishers' Association).

much like its forbearers concluded then, the solution is a vibrant ASCAP that provides collective licensing in an efficient manner. However, to maintain the feasibility of that solution, the consent decree must, too, adapt.

II. The ASCAP Consent Decree Requires Modification

In 1941, ASCAP settled a lawsuit brought by the Department of Justice and entered into a consent decree (the "Consent Decree" or "Decree") that prohibited ASCAP from receiving an exclusive grant of rights from its members and required ASCAP to charge similar license fees to licensees that are "similarly situated." The ASCAP Consent Decree has been amended only twice – first in 1950 and subsequently in 2001, prior to the biggest developments of the digital music era, including the introduction of Apple's iPod and cellular devices that enable consumers to stream music anywhere there is a wireless signal or cell coverage.

In its current form, the Decree requires that ASCAP, after receiving a request for a license from a music user, negotiate a reasonable license fee or seek judicial determination of such fee from what is commonly called the "rate court" – the court with ongoing jurisdiction over the Decree. Pending the completion of any such negotiations or rate court proceeding, the Decree grants the music user the right to perform any or all of the musical works in the ASCAP repertory without having to pay a single penny. Additionally, among other things, the Decree prohibits ASCAP from acquiring or licensing rights other than for the public performance of musical works, such as mechanical or synchronization rights.

As I discuss below, it is now apparent that the Decree has failed in these and other respects to accommodate the rapid and dramatic changes in the music licensing

marketplace brought about by the extraordinary evolution in the ways in which music is now distributed and consumed. As a result, the collective licensing model that has, for the past century, benefited music creators, licensees and consumers alike, and which is necessary for a viable music licensing system in the future, is at risk.

A. The Automatic License Requirement

Under the Decree, a music user is entitled to begin performing any or all ASCAP music as soon as a written license application is submitted, before fees are negotiated by the parties or set by the rate court. However, the Decree does not currently compel either ASCAP or an applicant to commence a rate court proceeding in the absence of agreement on final license terms, nor does it establish a definite timeline for the negotiation of a final fee – elements of the licensing process that certain applicants have begun to exploit as a dilatory tactic to avoid paying competitive prices to perform the ASCAP repertory. In other words, under the current Decree, applicants can perform songwriters' and composers' works without making a single payment for months and, in many cases, years.

For many years, the license application process was merely a procedural step leading to eventual final licenses for established industries. ASCAP traditionally negotiated licenses with industry committees or associations representing entire classes of licensees. For example, ASCAP negotiates with the Television Music License Committee to reach license agreements for the entire local broadcast television industry. Established relationships and courses of conduct, as well the development of traditional media business economies – such as the radio and television broadcast economies – led generally to continued payment of fees, even without a negotiated final license in place.

In today's marketplace, however, digital services without a history of negotiating licenses and paying fees, and often without any proven business model, exploit the Decree licensing process to their benefit. As ASCAP licenses are compulsory and fees can be set retroactively, certain music applicants and licensees have strategically delayed or extended the negotiating process, choosing to remain applicants or interim licensees indefinitely – in some cases a decade or longer – without paying fees to ASCAP or providing ASCAP with the information necessary to determine a reasonable final fee. In some cases, licensees have decided that interim license rates are more favorable than anticipated rate increases, and have made strategic choices to stay on interim terms for as long as ASCAP permits. In other cases, new applicants have applied for a license – claiming the shelter of the Consent Decree's guarantee of a right to perform ASCAP members' music while an application is pending – while simultaneously disclaiming the need for such a license and refusing to provide the information ASCAP needs to formulate a fee proposal.[7] In sum, it is a system that is profoundly unfair to the songwriters and composers dependent upon the public performance royalties that ASCAP collects on their behalf.

In the scenarios above, ASCAP has limited choices. It can do nothing and permit applicants and interim licensees to remain in that status longer than would be preferred without paying any fees. Or, it can accept what it believes is a sub-optimal outcome and open the door for other licensees to argue that ASCAP must offer to them the same sub-optimal license due to the Decree's mandate to offer the same license rates and terms to

[7] *See id.* at 157-58 (noting that current licensing process allows licensees to "pay nothing or greatly reduced fees for years as negotiations drag on" and "significantly increases the leverage of licensees at the expense of the PROs and their members"). As the Copyright Office Report goes on to note, this situation is highly anomalous, as "commercial entities do not typically receive a steady supply of product for months or years based on a mere letter request. But such is the case with music." *Id.*

similarly situated licensees. Or, ASCAP can decide whether to use its limited resources to pursue a lengthy, expensive and arduous rate court proceeding, which, as I describe below, can result in below-market rates. ASCAP's members consequently often find themselves placed between a rock and a hard place.

This problem is particularly pronounced with regard to new digital services or other new media services that are particularly susceptible to changing market conditions. As compared to traditional music licensees, such as terrestrial radio stations or television broadcasting networks, the potential scale and type of music use can now vary widely among new media licensees, complicating the process through which ASCAP values the requested license. Moreover, the speed with which new media licensees enter and exit the market has increased. As a result, ASCAP's need for information from an applicant regarding the applicant's plans for a particular service has increased, both for the purpose of calculating a reasonable fee, but also – in the event that the applicant refuses to provide information – to assess the potential costs and benefits of petitioning the rate court to set a reasonable fee. When applicants ignore ASCAP's requests for information, ASCAP can lack even the basic information necessary to determine whether rate court litigation is justified. These problems might be mitigated somewhat if the new media services were amenable, and able, to negotiate on an industry-wide basis like other industries do. However, as these new media services elect not to (or simply cannot) negotiate collectively, ASCAP is forced to attempt to license each service separately at a huge cost to ASCAP's members.

B. The Rate Court Process

Until the advent of the digital era, ASCAP and licensees rarely found it necessary to invoke the rate court process to determine final license fees. Established industry groups and ASCAP were generally able to reach agreement on license terms outside of the rate court. However, as I described earlier, the compulsory license application process under the Decree has led to licensing deadlock with many digital services, requiring more frequent resort to the rate court. Indeed, of the 30 or so rate court proceedings to date over the past half century, more than half were initiated since 1995.

While the ASCAP rate court was meant to provide a forum for the efficient and timely determination of rate disputes, in practice, rate court litigation has resulted in great expense and prolonged uncertainty for both ASCAP and license applicants. The Decree mandate to commence the trial within one year of the filing of the initial petition is rarely met, largely because the parties are permitted the full range of costly pretrial motion practice and discovery afforded by the federal procedural rules. Also, post-trial appellate proceedings or possible proceedings on remand further delay the determination of a final fee even beyond the original expiration date of the license at issue.

Rate court proceedings have proven to be extremely expensive for the parties involved. In addition to enormous internal administrative and labor costs, ASCAP and applicants have collectively expended many tens of millions of dollars on litigation expenses related to rate court proceedings, much of that incurred since only 2009. Of course, each licensee bears only the expense of its own ASCAP rate court proceeding; ASCAP – and our songwriter, composer and publisher members – must bear the expense of them all.

C. Rate-Setting Standards

In addition to making the rate-setting process administratively faster and less expensive, there is a dire need to establish a clear rate-setting standard that looks to competitive free-market benchmarks. Under the Decree, the rate court must set a "reasonable fee." However, the Consent Decree does not define "reasonable"; thus, ASCAP and our members are burdened by the lack of clarity regarding what factors the rate court should consider when setting a reasonable fee and the weight given to those factors. The rate court has often looked to the concept of fair market value, looking at the price that a willing buyer and a willing seller would agree to in an arm's length transaction, and finding that this value can best be determined by the consideration of analogous licenses or benchmark agreements from a competitive market. However, many of the licenses presented as benchmarks – those between ASCAP or BMI and various licensees – are inherently different from the licenses that would be obtained in a competitive market. This is because a seller's ability to refuse to sell is a key requirement for a true market transaction, and neither ASCAP nor BMI are free to refuse to license their repertories under their respective consent decrees.

But the last few years have seen an increase in the number of direct licenses negotiated outside the compulsory licensing regime imposed by the ASCAP and BMI consent decrees – licenses that can be used as a measure of competitive pricing in the market for public performance rights. As certain publishers withdrew their digital rights from ASCAP and BMI and negotiated licenses in the free marketplace outside of the constraints of consent decrees (a phenomenon I will describe below), the rate court was, for the first time, supplied with actual competitive market benchmarks. However, the

rate court signaled in its most recent decision that it would not rely on the most recent licenses negotiated by copyright owners in the free market – rates that were widely known to be higher than what applicants were willing to pay the PROs – a result that means that our songwriters and composers will be paid lower rates than those other copyright owners are receiving from the same licensee.[8]

In addition, the rate court is not permitted to look to other relevant marketplace indicia when it sets rates. Section 114(i) of the Copyright Act prohibits the rate court in setting fees for the performance of musical works from looking at fees paid *by those same services* to the recording industry for the performance of sound recordings, leading to rate disparities in favor of sound recordings on the order of 12 to 1. This problem would be addressed by the introduction of the Songwriter Equity Act, which I discuss below.

It is clear that the legal and regulatory restrictions imposed on ASCAP by the Consent Decree and the Copyright Act severely limit ASCAP's members from achieving competitive market rates for their works. Indeed, as the Copyright Office noted in its recent report on Copyright and the Music Marketplace, "[t]here is substantial evidence to support the view that government-regulated licensing processes imposed on publishers and songwriters have resulted in depressed rates."[9]

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[8] This problem may be exacerbated by the intertwining of antitrust oversight and rate-setting in the rate court context. *See id.* at 155. Leaving antitrust oversight appropriately with the federal courts, and moving rate-setting to an expedited arbitration process, as proposed in Part III *infra*, would help ensure that the focus in rate setting is on "empirically based economic analyses of the proper rate for" the licensee. *Id.* at 154.

[9] *See id.* at 159.

D. Flexibility in Licensing Is Imperative

The option for copyright owners to directly license works has long been a key feature of ASCAP membership. Because ASCAP can accept grants of rights only on a non-exclusive basis, ASCAP's members are free to issue licenses directly, and many have done so over the years. Of course, due to the efficiencies afforded through ASCAP's collective licensing system, most ASCAP members have licensed all of their works through ASCAP all of the time. However, certain ASCAP publisher members recently expressed concerns that, due to the constraints imposed by the Decree and the inability to achieve competitive market rates through the rate court process, licensing their songs through ASCAP in the new media marketplace did not allow them to realize the full value of their copyrights. Moreover, some ASCAP members wanted increased flexibility to manage their own rights and negotiate contractual scope and license terms directly with particular licensees (terms which the Decree might prohibit). These members questioned whether their only option to achieve these licensing goals was to withdraw their membership from the PROs altogether.

To ensure that our members would be able to exercise the rights granted to them under the copyright law as copyright owners, but not be forced to surrender all of the benefits of PRO collective licensing by withdrawing from ASCAP completely (after all, licensing tens of thousands of entities individually is practically impossible for any copyright owner), ASCAP struck a balance: we decided to permit our publisher members to withdraw rights on a limited basis, giving such members the flexibility to license digital services on their own in the free marketplace while retaining the blanket efficiencies afforded by collective licensing for all other uses for the benefit of copyright

owners and licensees alike. BMI took a similar approach. However, the ASCAP and BMI rate courts both denied copyright owners this flexibility, ruling that the ASCAP and BMI respective consent decrees did not allow for a partial grant of rights, but instead require copyright owners to be either "all in" as PRO members or "all out."

As a result, copyright owners are currently forced to choose to either remain PRO members and reap the benefits of PRO collective licensing, but through a regulated system that does not compensate them for the true value of the performances of their works, or leave the PRO system altogether, achieving competitive rates in the marketplace, but losing the efficiencies of collective licensing and leaving unlicensed performances by thousands of entities that they cannot affordably license on an individual basis. The crucial problem with this second choice is that the efficiencies of collective licensing depend on the PROs' ability to spread the costs of licensing and monitoring music usage among the entire membership, thereby reducing costs to a manageable level; the loss of major members from the PROs would severely limit such efficiencies for the remaining members, perhaps so much so that the PROs could not efficiently operate anymore. If that happens, and the collective system consequently collapses, we all lose – songwriters, music services and consumers alike.

The Copyright Office raises this same concern in its recent report on Copyright and the Music Marketplace, noting "the possibility of wholesale defections by major (and perhaps other) publishers from ASCAP and BMI if government controls are not relaxed, and the potential chaos that would likely follow."[10] And it is not just the publishers – several prominent songwriters have already left ASCAP for GMR, which is unregulated and not constrained by a consent decree.

[10] *Id.*

The Decree also denies ASCAP the flexibility to construct the licenses its digital music services seek. The public performance right licensed by ASCAP on behalf of its members is only one of several exclusive rights provided to copyright holders of musical compositions. Others include the right to reproduce and distribute musical works as phonorecords (the "mechanical right"); the right to use a recording of a musical work in timed relation with visual images, such as part of a movie or television program (the "synchronization" or "synch right"); and the right to print or display a composition's lyrics (the "print right"). Each of these rights are licensed separately; at the moment, services typically license performance rights through a PRO and mechanical rights and synch rights directly from the copyright owner, administrator or a designated agent, often on a song-by-song basis.

This division of licensing was sufficiently convenient in the traditional analog world in which licensees rarely needed licenses for multiple rights. The introduction of digital technology, however, has changed the traditional licensing environment, requiring digital services to often clear multiple rights for the same use. Digital music services that stream music on an on-demand basis need a public performance license as well as a mechanical license. A wide variety of digital music services display lyrics as songs are streaming, necessitating both public performance and print licenses. Services utilizing audiovisual content are now required to clear synchronization rights on a large scale basis, which must be obtained from the publishers directly, again generally on a song-by-song basis. Separate licensing of these rights is inefficient and may discourage digital music services from properly licensing their services.

These complexities inherent in a multiple rights clearance system have led some to express their desires for multi-right collective licensing solutions. ASCAP, of course, offers that collective blanket licensing solution, but is prohibited under the Consent Decree from licensing rights in musical compositions other than public performance rights. Other PROs in and outside of the U.S. are able to do so. Indeed, many foreign PROs are already engaged in the process of licensing multiple rights. ASCAP's inability to offer licenses for multiple rights not only creates licensing inefficiencies for licensees to the detriment of consumers who ultimately bear the transactional costs, but it also places ASCAP's members at a competitive disadvantage in the licensing marketplace if other organizations can license those rights.

The Copyright Office specifically recognizes these inefficiencies and competitive disadvantages in its recent report on Copyright and the Music Marketplace, and concludes that it is time for the government to "pursue appropriate changes to our legal framework to encourage bundled licensing, which would eliminate redundant resources on the part of both licensors and licensees."[11] We wholeheartedly agree.

III. Proposals for Change

Maintaining ASCAP as the effective licensing solution it has been for the past century requires changes to update the Consent Decree. Maria Pallante, current Register of Copyrights and Director of the U.S. Copyright Office, stated recently that "the time has come to review the role of the consent decrees governing ASCAP and BMI."[12] That time is now. In order to alleviate the significant limitations placed on ASCAP and our

[11] *Id.* at 161.
[12] *See* Pallante Remarks.

members by the Consent Decree, ASCAP has proposed a number of modifications to the Consent Decree, including the following:

1. Expedited Rate-Setting Process. The Consent Decree's rate-setting process should be replaced with an expedited arbitration process with focused discovery that would be significantly faster and substantially less costly than the current process, which involves full-scale discovery and litigation in federal court. Expedited arbitration proceedings would serve two purposes. First, both music creators and applicants would benefit from a more definite timeline and cheaper resolution of license fee disputes. Second, it would discourage applicants for automatic Decree licenses from indefinitely resting on mere license applications or remaining on interim licenses, and impose on applicants an obligation to pay for their use of ASCAP members' music.[13]

2. Permitting Limited Grants of Rights. The Decree should also be modified to permit ASCAP to accept partial grants of rights from copyright holders. This would preserve the benefits of collective licensing for licensees and copyright owners in many situations, while allowing copyright owners to pursue direct non-compulsory licenses when they felt it was economically efficient and beneficial to do so. This approach would also afford greater latitude in structuring license arrangements, ultimately benefiting copyright owners and licensees alike. Further, by encouraging the negotiation of direct licenses by truly willing buyers and willing sellers who are not under any compulsion to grant licenses, this approach would result in competitive market

[13] The Copyright Office agrees that the rate-setting process should no longer take place before the designated rate court, but suggests that such proceedings instead "migrate" to the Copyright Royalty Board. *See* Copyright Office Report at 155. ASCAP notes, however, that rate-setting proceedings before the Copyright Royalty Board – which tend to be equally (if not more) expensive and time-consuming as rate court proceedings – would not achieve the same efficiencies that would result from expedited arbitration proceedings.

transactions that would then provide informative benchmarks for the rate-setting tribunal. Finally, members would be encouraged to remain within the PRO system, thereby effectuating collective efficiency for, and benefiting, all other members, licensees and consumers alike.

The Copyright Office agrees that ASCAP should be permitted to accept partial grants of rights from its members, which would permit those publishers and songwriters to license their works directly in the free marketplace as owners of the sound recording are entitled to do.[14]

3. Licensing Multiple Rights. The Consent Decree should also be modified to permit ASCAP to license mechanical, synchronization and print rights in addition to public performance rights when requested to do so by its members. This would enable ASCAP to better serve licensees that may seek to negotiate with ASCAP for multiple rights in a single transaction, creating at last a "one-stop shop" for musical work rights. Modifying the Consent Decree in this way would respond to licensee demand for simplification of the licensing process and administration of multiple rights. In addition, the flexibility to structure licenses that aggregate rights would greatly reduce transactional costs and administrative expenses for owners and licensees, which would benefit their customers, and ultimately provide music creators with a greater monetary return for the use of their works. This would also allow ASCAP to compete more effectively in both the domestic and international licensing marketplace with owners or

[14] *See id.* at 159. We respectfully disagree with the Copyright Office's suggestion that this "opt out" right should be limited to interactive streaming services such as Spotify, but not extend to personalized streaming services such as Pandora.

PROs that can, and do, aggregate rights. As I noted earlier, the Copyright Office specifically supports ASCAP's ability to license multiple rights.[15]

IV. Conclusion

For 100 years, PRO collective licensing has served as the solution to an efficient licensing marketplace, and it remains the solution today. However, new innovations in the marketplace demand that the outdated regulations governing the ability of the PROs to license on behalf of their songwriter, composers and publisher members evolve to meet those changes in order to provide competitive remuneration for the use of those members' musical works. Without those changes, copyright owners may abandon the collective PRO system in hope of achieving competitive rates on their own, potentially tearing apart our collective licensing system. If that were to occur, everyone loses. Withdrawing copyright owners lose the efficiencies offered by the PROs, leaving unlicensed many performances of their works. Other copyright owners lose the ability to license their works on a blanket basis. Songwriters and composers lose the transparencies and services provided by the PROs. Music services lose the ability to license on an efficient and transactional cost-saving basis. And the ultimate losers would be those for whom the music is intended – the consumers.

Mr. Chairman, ASCAP and I thank you for your interest in these very important issues affecting hundreds of thousands of U.S. songwriters, composers and music publishers and look forward to working with your committee to ensure that the musical works licensing marketplace works for all.

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[15] *Id.* at 161.

Statement of

Lee Thomas Miller
Broadcast Music, Inc. Songwriter Affiliate
And
President, Nashville Songwriters Association International

before the

Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights

on

How Much For a Song?: The Antitrust Decrees that Govern the Market for Music

March 10, 2015

My name is Lee Thomas Miller. I am an American songwriter. I grew up on a small tobacco farm in Kentucky. When I was 11, I started playing piano, then guitar, then violin. Music has a way of kind of taking you over. And I knew early on that it wasn't just a hobby.

I went to college and instead of studying something sensible like business, as my mother wished, I studied classical music composition (which basically just meant I was overqualified to play in the bars I worked at night). But, there I was - classically trained and writing honky-tonk songs on the side.

Then I learned about "Broadcast Music, Incorporated". I was always looking for an excuse to visit Nashville so I took a trip to BMI. I met with a "songwriter representative" who explained to me what BMI did. "When your song plays on the radio we collect the money," he said. And I said sign me up. Then I played him my self-made recordings of the songs I had been writing. He was very blunt. "You're not much of a singer and guitar players are a dime a dozen. But I believe you can be a songwriter".

So I graduated college, saved $1000 and moved to music city.

For years I wrote songs. Hundreds of songs. I played in bands and took temporary jobs to pay the bills. I studied the songs I heard on the radio and began meeting and learning from the songwriters who wrote them. At the time the music business was healthy and music publishers could take chances. A prominent publisher took a chance on me. Then the real work began. My first cuts were not memorable, when BMI sent me my first performance royalty check it was for $4.69. Today it is framed and hanging on my office wall. That check meant everything. That check meant that I was a professional songwriter.

All in all, it took eleven years after I moved to Nashville to have a hit on the radio.

In 2003, I received my first BMI award, for a song titled "The Impossible". Ironically, this song was about overcoming insurmountable odds through faith and determination and believing anything is actually possible.

To me, earning my first BMI award was like a ball player going from Triple A to the major leagues.

In today's music industry environment songwriters count on their performing rights societies. The one thing keeping us afloat is that performance royalty check. We do not tour. We do not sell t-shirts. We write songs - all day. Every day. And when we succeed we pay self-employment income tax. With what remains we buy gas and bread and white picket fences.

But since the year 2000, the Nashville Songwriters Association International, where I serve as president, estimates that America has lost between 80-90% of its professional songwriters whose primary income is from royalties.

I'm talking about creators. And what we create is not some obsolete, irrelevant, cultural product of days gone by. It's music. What we create is there when you fall in love, it is there when your heart breaks. It heals. It inspires. It time travels. It crosses party lines.

So how does the BMI consent decree impact me? I feel that it puts BMI—and songwriters—at a disadvantage in several important ways:

- For instance, if rate disputes could be resolved by arbitration, rather than expensive litigation, that would feel like a win for everyone. New services could launch, and songwriters could get paid, quickly without spending lots of money on lawsuits.

- Songwriters also worry that BMI is not allowed to license rights other than the performance right. Most new services need *several* rights. A "one-stop" license from BMI would be a quick and efficient way to get those services off the ground.

These aspects of the BMI consent decree, in my view, have devalued the musical composition to the point where the songwriters are being crushed. It is bad enough that it is so easy to steal the music today. But a legal framework that allows songs to be streamed for nearly free *will* destroy the livelihood of the American songwriter if it is allowed to continue.

The US Department of Justice is presently undertaking a comprehensive review of the ASCAP and BMI consent decrees. And we hope that they will recommend substantial changes that will allow us the flexibility we need to operate in the free market.

I am America's smallest small business. I sit down and make stuff up. I can make you laugh. I can make you cry. I can make you do both with one 3 minute story.

That's the power of music, and it all begins with a song. But I am here to tell you there are not many of us left.

Thank you Chairman Lee, Ranking Member Klobuchar and Members of the Subcommittee.

Testimony of Matt Pincus
Founder and Chief Executive Officer
SONGS Music Publishing
Before the Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"How Much for a Song?: The Antitrust Decrees that Govern the Market for Music"

March 10, 2015

Introduction

Good morning, Chairman Lee, Senator Klobuchar and members of the Subcommittee. My name is Matt Pincus and I am the founder and Chief Executive Officer of SONGS Music Publishing, a music publishing firm located in New York, Los Angeles, and London. I also currently serve as a member of the Board of Directors of both the National Music Publishers' Association (NMPA) and ASCAP.

I am honored to appear before you today to provide my perspective as a music publisher and small business owner on the ASCAP and BMI consent decrees and the current review of these decrees being conducted by the Justice Department.

Anyone who looks at the complicated music licensing landscape and the many interests involved can quickly lose sight of what is fundamentally at the heart of the hearing today: creators' intellectual property rights that are protected by the Constitution of the United States.

The public performance right of songwriters and music publishers – the right for our songs to be played publicly in bars and restaurants, over broadcast and internet radio, or through digital music services – is inherently a free market right. And, to the benefit of both rights-holders and music users, most of our songs have historically been licensed collectively through performing rights organizations such as ASCAP and BMI. However, because of cases of alleged anticompetitive conduct that took place more than 70 years ago, these rights are not negotiated in a vibrant, free market, but are instead licensed in an environment highly-regulated by government imposed consent decrees.

The music industry today is not the same as when the consent decrees were entered into in 1941, before every song could be enjoyed on your computer, on your phone, or in your car. Advances in digital technology have dramatically changed the way music is consumed and how music publishers license our rights. It has become clear that the ASCAP and BMI consent decrees have failed to adjust properly to meet these changes, leaving songwriters and music

publishers unable to negotiate freely and fairly public performance licenses either collectively or directly in a marketplace. Ultimately, the consent decrees have made it impossible for songwriters and publishers to negotiate the true market value of their creative property because we cannot say "no."

Further, although the music industry is one of constant change and growth, the consent decrees do not sunset and there are no formal mechanisms to ensure that they are regularly reviewed. They continue to inhibit the development of a fair, working free market. I applaud the Department of Justice for initiating this long-overdue review of these consent decrees and am hopeful that today's hearing will help to underscore that meaningful changes are imperative in order for licensing performance rights to work in today's ever-evolving digital environment.

Today, there are many large technology companies who have been able to use the consent decree provisions to benefit financially and competitively under the current licensing system. These companies oppose reforms that would increase competition, transparency, and flexibility and would allow copyright owners such as SONGS to negotiate in a fair and unfettered market place. Ironically, many of these entities are large companies that hold an overwhelming share of their own market. For example, Pandora has 78% of the Internet radio market.[1] Apple has 63% of the music download market.[2] Google, the company that owns the largest music service in the world – YouTube, boasted $66 billion in revenue for 2014[3]. The music publishing industry is a small player in a world of global, billion dollar corporations. I understand that these companies may believe they can only grow and maximize profits through the continued regulation of songwriters and music publishers. But, as a small business owner, I should not be required to subsidize global corporations to the detriment of my own business and the songwriters I represent.

The ability of songwriters and music publishers to license performance rights unencumbered by government regulation, whether collectively or directly, is critical to the ongoing viability of our businesses and the continued creation of the songs we all love. Licenses for the intellectual property rights of movies, books, video games, magazines, television shows and recorded music are all negotiated in the free market while songwriters and music publishers remain subject to heavy regulation under antiquated consent decrees. In its recent Music Licensing Study, the Copyright Office acknowledged that the "consent decrees impose significant government-mandated constraints on the manner in which ASCAP and BMI may operate" and it recommended "productive reconsideration" of the decrees by the Justice Department.[4]

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[1] Pandora Media, Inc., Form 10-K for fiscal year ended December 31, 2014.
[2] *Apple's iTunes rules digital music market with 63% share*, Kevin Bostic, April 16, 2013, http://appleinsider.com/articles/13/04/16/apples-itunes-rules-digital-music-market-with-63-share.
[3] *Google Inc. Announces Fourth Quarter and Fiscal Year 2014 Results*, January 29, 2015, http://investor.google.com/earnings/2014/Q4_google_earnings.html.
[4] *Copyright and the Music Marketplace*, pp. 150, Copyright Office Report, February 5, 2015.

In my testimony, I will explain how the current regulatory oversight of the ASCAP and BMI consent decrees is unfairly burdening and devaluing the rights of music publishers and songwriters. And, I will also identify modifications to the decrees that I believe would allow for a more competitive, free and fair market for all copyright owners and music users.

Changes to Consent Decree Favored by Music Publishers

As a music publisher, the consent decrees directly, negatively impact my business and I believe it is necessary to modify several specific provisions that are harming competition and inhibiting development of a fair, free performance rights market.

Although music licensing has changed drastically since ASCAP and BMI were created in 1914 and 1939, respectively, the PROs continue to play important roles for music publishers. As the numbers and categories of services continue to expand, PROs play a vital function in facilitating licensing for the public performance right where it would otherwise be inefficient and difficult for publishers to license those rights. This was and continues to be the case, especially for independent publishers, many of which do not have the resources to enter into direct license agreements with every potential music user.

ASCAP's and BMI's ability to represent effectively music publishers and songwriters depends on modifications that permit them to negotiate fairly and more freely with services and allow licensing, rate setting and payment of royalties in an expeditious manner that keeps up with the pace of digital innovation and new technology.

Rate setting procedures must be amended to allow for negotiations and payments that more closely reflect a free market

The existing rate setting procedures must be reworked to address a number of problems. Music publishers, like SONGS Music Publishing, are by every measure small businesses that rely on fast, cost-efficient licensing and timely and accurate payment of royalties. However, the consent decrees have instead resulted in an inflexible, time-consuming and costly rate court procedure.

First, users can obtain a license upon request and begin using songs before a rate has been negotiated or payments are made for those music uses. Second, where the parties cannot agree on a rate, the rate is determined by a rate court. The rate court process is expensive and long, often taking years to resolve. The royalty rates determined by the court are not required to be based on or reasonably tied to rates negotiated in the free market.

When a music user can obtain a license simply upon request and begin using musical works immediately without having to pay or set funds aside for payments in the future, there is no incentive for that user to negotiate a fair rate or to bargain in good faith. And, often there is a good chance that a digital service will use musical works and then go out of business before ever compensating songwriters or music publishers for that use. The consent decree structure

of allowing immediate use of musical works without requiring corresponding royalty payments for that use is harmful to music publishers, because as small businesses we are especially dependent on performance revenue sources and face significant financial harm when our content is used without compensation. Music publishers who represent up-and-coming songwriters with contemporary hits, like SONGS, are particularly harmed by the delay in setting and payment of rates and lack of revenue flow. Any ASCAP and BMI consent decrees must require that where a royalty rate has not been negotiated, applicants begin paying an interim default rate as soon as that music user obtains the benefits of a collective license. This will ensure that publishers and songwriters get paid for works licensed as those works are used and not years later – or never.

Further, any consent decree necessary should be modified to provide for rate setting through binding arbitration that would be faster, less expensive and more efficient for all parties. Songwriters and music publishers are particularly harmed by the cost and length of the current rate court proceedings, the costs of which are passed on through high ASCAP and BMI administrative fees. As part of the arbitration process, arbitrators should be required to consider any rates agreed to in the free market through direct licensing. Arbitrators applying the presumption that rates agreed to in the free market by willing buyers and willing sellers represent the best benchmarks for rate setting would ensure that these proceedings result in rates that reflect competitive market license negotiations. The introduction and consideration of free market rates is especially important for independent music publishers because, although some independent publishers may have the ability to directly license some categories of rights, the consideration of these direct license rates will ensure that those independent publishers that do not have this ability will benefit from competition and benchmarks developed in the free market.

Public performance rights are unregulated under Copyright Law and direct licensing of performance rights should be allowed under the Consent Decrees.

Under the Copyright Act, publishers have the ability to exploit rights, including performance rights, in the free market. Historically, there have been many benefits for both music owners and music users to collectively license performance rights. However, as the recent attempt by certain publishers to directly license digital performance rights has highlighted, the collective licensing system is broken. For music publishers, government regulation has led to an untenable collective licensing structure that is inefficient and costly, and has resulted in the devaluation of our rights and musical works.

The consent decrees have effectively left music publishers with two harmful, all-or-nothing business decisions. The first is to avail themselves of the benefits of collective licensing for all performance rights and accept the high costs, inefficiencies and below-market royalty rates that result from government regulation. The second is to fully withdraw all performance rights from collective licensing, thereby destroying longstanding licensing efficiencies and business relationships that have proven beneficial to all parties. Neither choice is economically

beneficial to my business as a music publisher and both result from the regulation of my performance rights through the consent decrees.

Moreover, for some music publishers, the complete withdrawal of performance rights may not be a feasible option. The prohibition on withdrawing certain categories of rights is not only an imposition on publishers' rights to control their content. It is also contrary to the original intent behind the consent decrees, which were designed to prevent PROs from demanding exclusivity in licensing performance rights and to ensure that direct licensing could occur between publishers and users.

Although smaller music publishers are less likely to withdraw their catalogs for all categories of users, even those publishers may be capable of withdrawing their catalogs for specific categories of users where it is more efficient and economically beneficial to conduct individual license negotiations in the free market. The consent decrees should be modified to allow publishers to engage in direct licensing for some categories of users as technology improves and make it easier for publishers to work directly with music users. As a result, the potential for anticompetitive collective action would be greatly reduced or eliminated.

While allowing publishers to withdraw licensing rights for certain categories of users would help prevent anticompetitive collective action and allow for greater competition and efficiency in the performance rights market, it would also economically benefit music publishers in a number of ways.

Music publishers able to withdraw certain categories of rights would benefit from retaining more control over the exploitation of rights and avoiding paying sometimes significant administrative fees. Further, allowing publishers to withdraw selectively certain categories of rights would allow them to bundle various types of licenses to their works, creating a more efficient and streamlined licensing process that benefits both publishers and music users.

Finally, while some publishers may prefer not to withdraw any rights from ASCAP or BMI, granting other publishers the ability to do so would provide for the development of a true performing rights market that would better illustrate the value of publishers' performance rights and provide benchmarks for rate setting processes.

Periodic Review

It has become clear to me—and to every music publisher—that the consent decrees and the regulated system they impose upon the licensing of performance rights have not kept pace with the rapid technological development of music use. It is my understanding that the current, stated position of the Justice Department is that consent decrees that do not include a sunset provision are against public policy. This makes sense, and the ASCAP and BMI decrees should be modified to include an automatic sunset provision or, at the very least, a provision requiring regular review and reconsideration of the continuing justification of regulating songwriters and music publishers. Given that music has been at the heart of much of the technological change

surrounding the distribution and monetization of intellectual property and that many of the users that currently license public performance rights did not exist at the time of the last decree modifications, a sunset clause or required period review is critical to preventing harm and encouraging a fair and competitive market. Business models and license terms are changing at an ever-increasing speed and music publishers need the flexibility to change and adapt – a flexibility not afforded by the current regulatory scheme.

Music Publishers and their agents should have the flexibility to license digital services seeking multiple rights

If there is one concept that songwriters, music publishers and music users can agree on, it is that music licensing in the digital age is inefficient and overly complicated. All parties are looking for an effective way to license today's digital music services that, unlike traditional services such as radio, may require a number of rights in order to use music content legally. For example, digital services like Spotify, Rhapsody or Beats require both performance and mechanical rights. In order for a service to become properly licensed, it is required to enter into separate agreements with ASCAP and BMI for performance rights, as well as either the publisher itself or another third party authorized to administer mechanical rights. Due to the restrictions imposed by the consent decrees, ASCAP and BMI are unable to provide the products and services that these music services increasingly demand. The inability of ASCAP and BMI to offer customized agreements for unique users disincentivizes new services and results in the loss of potential revenue for publishers.

The consent decrees should be modified to allow publishers to authorize, at their exclusive discretion, ASCAP and BMI to license as the publisher's agent digital services that require mechanical rights, as long as the PROs do so in a non-discriminatory manner. Mechanical rights, unlike other rights of music publishers that are negotiated in a free market, are currently subject to government set compulsory rates, which could allow efficient licensing by the PROs without expanding government regulation to publisher rights currently negotiated in the free market. While publishers must be allowed to maintain absolute control over their content, they should be able to grant PROs the right, on a case-by-case basis, to license mechanical and performance rights to particular services that require both rights to operate.

An open, competitive performance rights market is a transparent market

Some digital music services have asserted the lack of transparency in the licensing of performance rights of songs as justification for continued government regulation through the consent decrees. I disagree with this assertion and believe that this argument is a red herring being used to continue regulation of songwriter and music publisher performance rights. Whether collectively licensing performance rights through a PRO or directly licensing other copyrights in the free market, SONGS Music Publishing has always been fully transparent in our license negotiation and administration. In fact, yesterday my company made publicly available full metadata on our entire repertoire – including represented shares and, where available recording (ISRC) codes – in prevailing data formats, including the Google XML

standard and raw CSV data. But, just as importantly, I believe that consent decree modifications that bring musical work performance licensing closer to a competitive, free market, can only benefit and improve transparency.

Conclusion

Now is the time to ask why songwriters and music publishers should continue to be subjected to onerous government regulation while other creators negotiate rights in a vibrant and effective free market. I would submit that regulating songwriters and music publishers makes no more sense than dictating how much music services can charge consumers.

I believe that the Department of Justice has an important and necessary role in enforcing antitrust laws against the anticompetitive actions of specific parties. But, that role should not be used expansively to regulate small business owners and prevent the free market development of an entire industry for almost 75 years.

As a music publisher, my livelihood depends on licensing to anyone and everyone who wants to use my songs. That is the reality in a free market. If given freedom, I, like other music publishers, will exercise it responsibly to the benefit of my company and the songwriters with whom I work.

Thank you again for the opportunity to share my views with you today.

Appendix A

Background on Matt Pincus and SONGS Music Publishing

Matt Pincus is the founder and CEO of SONGS Music Publishing, the leading US contemporary independent music publisher. A 100% internally owned enterprise with its headquarters in New York and offices in Los Angeles, London and Nashville, SONGS represents 350 songwriters across the spectrum of contemporary music. SONGS writers include Grammy Award winner and Golden Globe nominee Lorde, R&B superstar The Weeknd, super-producer DJ Mustard (the leading urban producer in the world with 21 Top 20 Pop and R&B hits since 2012), EDM superstar Diplo (Usher, Madonna, Justin Bieber, MIA, Sia, Major Lazer), and many more. SONGS has registered in the top 10 of Billboard's Publisher Quarterly for the past 6 quarters, claiming as much as 5% of overall US radio airplay.

As the collective profile of SONGS writers has grown, the company has begun to define best practices in the evolving digital music business. The company is one of a small handful of independents to deal directly with major digital concerns like YouTube, Google Play, Amazon, and others.

As SONGS breaks ground in the digital market, Matt has become a leading voice in today's music publishing industry. He is currently the only frontline independent publisher to serve on the board of directors of both the National Music Publishers Association (NMPA) and The American Society of Composers, Authors, and Publishers (ASCAP). On behalf of NMPA, Matt served on the committee negotiating the successful 2012 settlement of the Copyright Royalty Board process setting compulsory mechanical rates. Matt is now a recognized public voice on digital music issues, in particular in the debate over payments to music publishers for online videos, where his advocacy helped bring about landmark agreement securing payments from major record labels to independent music publishers, and in settlements providing payments to music publishers from the leading YouTube Multi-Channel Networks.

Matt is also a member of the board of directors of Community Impact, Columbia University's undergraduate community service program, and a member of the board of trustees of the Wooden Nickel Foundation, a non-profit organization benefitting cultural arts and other institutions.

Background on Music Publishing

A music publisher is a company or individual that represents the interests of songwriters by promoting and licensing the use of their songs. Music publishers are often involved at the very beginning of a songwriter's career. After signing a writer to a publishing deal, a publisher will do everything from helping the writer find co-writers to securing artists to record the writer's songs. Frequently, when a songwriter enters into a relationship with a publisher, the publisher will advance desperately needed money to the writer to help pay living expenses so the writer can focus on what he or she does best: write music.

Songwriters and music publishers attempt to earn a living through three primary means of utilizing their separate copyright – mechanical reproductions, public performances, and audio-visual synchronizations. The ratio of how much each contributes to the bottom line has been in flux in recent years as listeners move away from ownership models such as CDs and downloads toward streaming and video as their preferred mode of music consumption.

It is important to note that songwriters and publishers depend on royalties for their livelihood. Unlike recording artists, most songwriters cannot supplement their income through touring, merchandise sales, or endorsements.

To understand the role of music publishers it is critical to first recognize that every recorded song contains two copyrights: 1) the musical composition – the notes and lyrics of the song – which is owned by the music publisher/songwriter, and 2) the sound recording – the recording artist's recorded version of the song – owned by the record label/recording artist. Even if the recording artist is the songwriter, two copyrights are created – one for the sound recording and one for the musical composition.

Music publishers partner with songwriters to promote and license their musical compositions by issuing 4 different types of licenses:

- **Reproduction (Mechanical) Licenses**
  Music distributed in physical form (CDs, Records) and digital form (includes downloads, interactive streaming, ringtones, and several other categories). The royalties are generally collected and paid by the Harry Fox Agency. This represents about 25% of a music publisher's income.

- **Public Performance Licenses**
  Music broadcast on radio (terrestrial, satellite and Internet streaming), in live venues, and other public places such as bars and restaurants. The royalties are collected and paid by public performance societies (ASCAP, BMI, and SESAC). Each user receives a blanket license from each performing rights society, in exchange for a royalty fee. This represents about 50% of a publisher's income.

- **Synchronization Licenses**
  Music used in film, television, commercials, music videos, etc. Publishers enter into direct licenses with users. This represents about 25% of a publisher's income.

- **Folio Licenses**
  Music published in written form as lyrics and music notation either as bound music folios or online lyric and tablature websites. Publishers enter into direct licenses with users. This represents <5% of a publisher's income.

Statement of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing on
"How Much For a Song?: The Antitrust Decrees That Govern the Market for Music"
March 10, 2015

Music has long been one of our nation's greatest artistic and cultural contributions. Today, there are more ways than ever for consumers to enjoy their favorite songs and for songwriters and recording artists to reach old fans and make new ones. The Internet has transformed few industries as much as the music industry. Many of these transformations have been undeniably positive for consumers, such as the ability to walk around with your entire music collection loaded onto your smart phone. Other developments have been negative for songwriters and recording artists, such as the ease with which a song can be unlawfully distributed online. A third development—the emergence of a wide variety of legitimate digital music services—has renewed questions about the proper compensation for songwriters and recording artists and the efficiency of a music licensing system that, in some respects, is almost a century old.

Music copyright is complicated, involving separate copyrights over the underlying composition and the final recording of a work, and a licensing landscape that treats different rights, works and services differently. When listening to music, consumers do not generally give much thought to how the song was created, how the creators are being paid, whether those payments are sufficient to help the creators make another song, or the efficiency of the process through which the service playing the song licensed the performance. Yet these questions are fundamentally important to the music ecosystem listeners know today.

In this complicated landscape, performing rights organizations (PROs) play a valuable role in how music is licensed to a wide variety of businesses, including radio and television stations, bars and restaurants, and now online and mobile music services. By representing songwriters and their publishers in licensing the public performance of musical compositions to businesses through a collective licensing approach, the PROs create efficiencies both for creators and for users.

For more than 70 years, two consent decrees between the Department of Justice and the two largest PROs in the country, the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), have helped regulate this market. The consent decrees have been adjusted to respond to new marketplace realities on several occasions, but the last such revision was well over a decade ago. Now, recent changes in technology and the music marketplace warrant renewed attention to the consent decrees to ensure the decrees' purposes are still being met.

Last spring, I sent a letter to the Attorney General, encouraging the Department to undertake any review of the consent decrees expeditiously. This review is important for consumers and the many participants in the music marketplace, including songwriters, music publishers, and licensees like broadcasters, digital music services, and restaurants. No matter your views on whether or how the consent decrees should be amended, all participants will benefit from the increased certainty that will come from swift completion of the review.

The ongoing review of the consent decrees takes place in the context of a large and complex music licensing ecosystem. Recently, Register of Copyrights Maria Pallante issued a comprehensive report on the state of the music licensing marketplace and set out a blueprint for reform of a system that virtually all participants believe is broken in some manner.

Although the vast majority of those issues lie beyond the scope of today's hearing, I am hopeful that the Register's report will spark renewed interest in comprehensive solutions to improve the functioning of the music marketplace for all participants. We must work to ensure that all music creators are fairly compensated for all of their works; that innovative, legitimate delivery methods can continue to benefit consumers and marginalize illegitimate alternatives; and that technology can bring increased transparency to the data that is essential to an efficient licensing system.

Senator Lee and Senator Klobuchar have assembled a thoughtful panel of witnesses with a wide range of views on the consent decrees and the role they play in this landscape. I look forward to today's discussion.

# # # # #

Questions Posed by Senator Orrin G. Hatch

1. Question for all panel members:

   With respect to transparency of license agreements negotiated directly by publishers, I am concerned about one situation in particular: a publisher striking a deal to license its works under which a licensee pays an upfront fee to the publisher—not disclosed to or shared with the songwriters affiliated with the publisher—in exchange for the licensee paying to the publisher directly a lower royalty rate.

   How can we make certain that all payments by licensees for musical works pursuant to agreements negotiated directly by publishers are fully disclosed to songwriters and shared with them?

   Additionally, how could such requirements be enforced?

2. Question to Ms. Jodie Griffin, Public Knowledge:

   Ms. Griffin, in your prepared testimony, you note "[w]ith technologically neutral competition policies, new music distribution platforms will have a fair shot at thriving in a sustainable way…"

   How do you reconcile this statement with the fact that there is not a performance right for terrestrial radio?

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Questions of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
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"How Much For a Song?: The Antitrust Decrees That Govern the Market for Music"
March 10, 2015

Question for the Record for All Witnesses

The ASCAP and BMI consent decrees with the Department of Justice exist in the context of a larger and complicated music licensing ecosystem that many say is in need of reform. I believe strongly that any comprehensive music licensing improvements must ensure: that all music creators are fairly compensated for all of their works; that innovative, legitimate delivery methods can continue to benefit consumers and marginalize illegitimate alternatives; and that technology can bring increased transparency to the data that is essential to an efficient licensing system.

Q: Please share your thoughts on what elements are critical to any efforts to improve the music marketplace.

Questions for the Record

How Much for a Song?:

The Antitrust Decrees that Govern the Market for Music

Senator Lee

Beth Matthews

During the hearing, the potential coordination among the publishers and ASCAP referenced in Judge Cote's opinion in Pandora v. ASCAP came up repeatedly.

- What is your response to the allegations mentioned in the hearing and in Judge Cote's opinion?

ASCAP argues that modifying the Consent Decree to allow for partial withdrawals by its members will help promote a competitive market.

- Why is that the case?

I understand that ASCAP is making significant investments in transparency. Transparency is important for two reasons: first, it allows potential licensors to properly assess the value of the catalog they are acquiring a license for; second, it allows them to avoid costly infringement suits.

- What do your transparency efforts look like?
- Will potential licensors be able to rely on the information you provide to protect them from infringement suits?

Chris Harrison, Pandora

The publishers have threatened to fully withdraw from the PROs if DOJ does not allow partial withdrawals. The PROs believe that such full withdrawals would seriously damage the blanket license system.

- Is the threat of full withdrawal sufficiently compelling to justify amending the consent decree?

Matt Pincus, SONGS Music Publishing

As one of the largest independent publishers, SONGS benefits greatly from the administrative efficiencies offered by collective licensing.

- How would a full withdrawal of the major publisher catalogs from the PROs affect smaller publishers like SONGS?

Mike Dowdle, Bonneville

I understand that you are a songwriter yourself and had a long career in music before your time in broadcasting. Your background gives you a particularly helpful perspective on these issues.

- In what ways do the PROs and their blanket licenses benefit both songwriters and broadcasters?
- Do you believe the consent decrees as written are necessary to preserve those benefits, or can they be achieved outside the decrees?

RESPONSES OF MR. MIKE DOWDLE TO QUESTIONS SUBMITTED BY SENATOR LEE

Mike Dowdle, Bonneville

I understand that you are a songwriter yourself and had a long career in music before your time in broadcasting. Your background gives you a particularly helpful perspective on these issues.

- In what ways do the PROs and their blanket licenses benefit both songwriters and broadcasters?

  The PROs serve an essential purpose in today's music licensing market to the benefit of both songwriters and licensees, including broadcasters. The consent decrees preserve the licensing efficiencies afforded by these PROs, while providing necessary protection against anti-competitive conduct and effects inherent in the collective licensing of public performance rights. The PROs' collective and blanket licensing of performance rights remains essential to the functioning of the market because it creates numerous efficiencies in licensing, enforcement, and administration of rights. These efficiencies benefit both songwriters and music licensees. Without collective licensing, the sheer difficulty to both individual rights owners and licensees of identifying, negotiating with and paying and collecting from each other, and the transaction costs associated with all of these functions, would grind the market to a standstill.

  At the same time, the blanket licensing of performance rights is inherently anti-competitive because the very nature of PROs' collective licensing involves the fixing of a single price for all music, irrespective of which songs are actually used. This aggregation of rights gives the PROs tremendous market power, which in the absence of the consent decrees would allow the PROs to extract supra-competitive prices for their licenses. Absent the consent decrees, radio and television broadcasters are particularly susceptible to an abuse of this market power, since they lack editorial control over a significant percentage of the musical works that they publicly perform on their platforms. Thus, in the event that a broadcast station fails to successfully clear the rights to perform a given work, it can't reasonably ensure that it won't play that work on its station. Because each of the PROs has been allowed to aggregate such a large repertory, there is often no practical way to avoid playing music licensed by a given PRO, even in programming that broadcasters themselves create.

- Do you believe the consent decrees as written are necessary to preserve those benefits, or can they be achieved outside the decrees?

  The consent decrees are essential to preserve the benefits of collective licensing while protecting broadcasters and other music users from antitrust harm. ASCAP and BMI possess sufficient market power to extract supra-competitive rates, terms, and conditions

from licensees, absent the protections afforded by the consent decrees. This is particularly the case for broadcasters, who lack editorial control over many of the works they publicly perform, and would be subject to devastating penalties for infringement under Federal law should they fail to obtain performance rights licenses from each of the PROs.

*The inherent anti-competitive effects of collective, blanket licensing are clearly demonstrated by the conduct of a (as of yet) unregulated PRO, SESAC. Recent rulings in two antitrust cases brought against SESAC by the TMLC and RMLC, respectively, illustrate the abuse of the market power inherent in collective licensing. In the TMLC case, the court found that the "evidence would ... comfortably sustain a finding that SESAC . . . engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." Meredith Corp. v. SESAC LLC, 09 CIV. 9177 PAE, 2014 WL 812795, *10 (S.D.N.Y. Mar. 3, 2014). The court further determined that the evidence was "more than sufficient" to support findings that "SESAC's conduct harmed competition, and that this harm outweighed any pro-competitive benefits of that conduct." Id. at *34.*

*Similarly, in the RMLC case, after the presentation of extensive evidence in a preliminary injunction hearing, the magistrate judge concluded in her Report and Recommendation (which the District Court subsequently adopted) that "the challenged conduct has produced anticompetitive effects in the relevant market," Radio Music License Committee, Inc. v. SESAC Inc., No. 12-cv-5087, Report and Recommendation, *30 (E.D. Pa. Dec. 20, 2013), and that "SESAC has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no alternatives but to purchase their licenses," id. at 33.*

Among the most important protections afforded by Consent Decrees are (1) the mandatory license upon request; (2) the protection of the rate courts if the PROs and licensees cannot agree on reasonable rates; and (3) the guaranteed availability of real alternatives to the blanket license, including the per program license.

RESPONSES OF MR. MIKE DOWDLE TO QUESTIONS SUBMITTED BY SENATOR HATCH

Senator Hatch, I appreciate the question and your concern for ensuring that songwriters receive the significant royalties paid by broadcasters and other music licensees for the performance of musical works. Today, the vast majority of broadcast licensing of public performance rights of musical works happens through the Performance Rights Organizations (PROs). The market power possessed by these PROs, as well as the large music publishers, lends itself to potential anticompetitive conduct to the detriment of both licensees and songwriters. The efficiency and fairness of this licensing process could be vastly improved to the benefit of not only licensees, but the songwriters of the underlying works, if enhanced requirements were placed on the PROs to increase transparency as to the works in its repertories and its functions.

Broadcasters strongly support ASCAP and BMI consent decree modifications that would enhance the efficiency of this marketplace and thereby inject more competitive forces by: (i) requiring ASCAP and BMI to provide up-to-date *(i.e.,* "real time"), computer-readable databases of the works in their repertories containing complete and accurate information identifying all ownership interests and their respective shares of ownership in works; (ii) requiring ASCAP and BMI to provide up-to-date contact information for each of their affiliated rightsholders for users who wish to make direct licensing inquiries; and (iii) prohibiting ASCAP members and BMI affiliates from enforcing copyrights against users who reasonably relied on the ownership information in the databases. Such transparency would benefit both licensees and the songwriters of the works licensed by the PROs.

Television broadcasters also support decree modifications that would require ASCAP and BMI to share in computer-readable form the databases each maintains of music cue sheet information, *i.e.,* the databases of information they maintain about the music content of the programs broadcast on television. The secrecy with which ASCAP and BMI shroud the information they collect and maintain about the music in television programs (which they obtain and maintain in order to distribute the hundreds of millions of dollars that television broadcasters and cable networks pay to them each year) frustrates both further inroads to direct licensing and negotiations for licenses, at least as to local television broadcasters.

RESPONSES OF MR. MIKE DOWDLE TO QUESTIONS SUBMITTED BY SENATOR LEAHY

Questions of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing on
"How Much For a Song?: The Antitrust Decrees That Govern the Market for Music"
March 10, 2015

Question for the Record for All Witnesses

The ASCAP and BMI consent decrees with the Department of Justice exist in the context of a larger and complicated music licensing ecosystem that many say is in need of reform. I believe strongly that any comprehensive music licensing improvements must ensure: that all music creators are fairly compensated for all of their works; that innovative, legitimate delivery methods can continue to benefit consumers and marginalize illegitimate alternatives; and that technology can bring increased transparency to the data that is essential to an efficient licensing system.

Q: Please share your thoughts on what elements are critical to any efforts to improve the music marketplace.

Last year, NAB provided comprehensive recommendations to the Copyright Office in response to its music licensing study. Those comments and reply comments can be found here http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/National_Association_of_Broadcasters_MLS_2014.pdf and here http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/National_Association_Broadcasters_NAB.pdf (referencing NAB's joint CRB notice and record keeping comments), respectively. Two of the most critical improvements needed to ensure a fair music licensing framework to the benefit of consumers are increased transparency in copyright ownership, and decreased barriers to entry for music streaming services.

Transparency. *Today, there is no accurate and complete source of copyright ownership information for musical compositions and sound recordings. Lack of access to such information has increased transaction costs and hindered licensing activities – both direct and collective. The terms of any statutory music license should require that copyright owners provide sufficient identifying data to any licensing collective authorized pursuant to the license, as a condition of receiving royalty distributions, and that any authorized collective make that information available to licensees in a usable electronic form, as a condition of receiving royalty payments. With respect to musical composition performance rights, which are not subject to any statutory license, the government should facilitate the creation of a database of copyright ownership information, including the identification of any PROs authorized to collectively license each musical composition.*

Streaming. *The cost and administrative burdens resulting from the current legal framework governing streaming have suppressed the adoption of streaming by terrestrial broadcasters. Today's extraordinarily inflated sound recording rates prevent broadcasters from making any profit from streaming. This neither maximizes revenues for recording companies and artists, nor benefits listeners.*

Indeed, lower, fair, and reasonable rates could actually increase revenues to those parties. Under the current state of affairs, nobody wins. And the most regrettable part is that a moderate sound recording royalty would allow broadcasters to increase their simulcasting (and webcasting) activities and "grow the pie," resulting in substantially higher overall payments to record companies and recording artists, as well as increased promotional effects for their other revenue streams. This would truly be a win for all: broadcasters, record companies, recording artists, even songwriters and music publishers, and the listening public.

The history of broadcasting comprises over one hundred years of innovation. If the sound recording royalty rates were lowered to fair and reasonable rates, instead of the supra-competitive rates currently in place, broadcasters would be encouraged to enter the market in greater numbers and would have both the incentive and ability to increase their innovation in that market. As noted above, the result of such increased activity and innovation would be a vibrant and sustainable digital music market and a significant net increase in revenues paid to record companies and recording artists. Everybody would gain from such a result.

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Question for the Record

Responses of Jodie Griffin[1]
Senior Staff Attorney
Public Knowledge

1. *Question for all panel members:*

With respect to transparency of license agreements negotiated directly by publishers, I am concerned about one situation in particular: a publisher striking a deal to license its works under which a licensee pays an upfront fee to the publisher—not disclosed to or shared with the songwriters affiliated with the publisher—in exchange for the licensee paying to the publisher directly a lower royalty rate.

How can we make certain that all payments by licensees for musical works pursuant to agreements negotiated directly by publishers are fully disclosed to songwriters and shared with them?

Additionally, how could such requirements be enforced?

Structural, revenue, and repertoire transparency is an important part of any fair and efficient licensing system.[2] Existing structures, such as the ASCAP and BMI consent decrees and the Copyright Act's statutory licensing system, are designed to provide transparency in an otherwise opaque marketplace.

However, direct deals struck outside of these frameworks are substantially less transparent for all parties. This lack of information extends to the artists themselves, who, although ostensibly represented by publishers or labels, often find themselves entitled to only a

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[1] I would like to thank Meredith Rose for her help preparing these responses.
[2] *See* Casey Rae, *Transparency: Why it Matters to Songwriters and Fans*, Future of Music Coalition (Jan. 14, 2015), https://futureofmusic.org/blog/2015/01/14/transparency-why-it-matters-songwriters-and-fans.

small fraction of the revenue paid out by streaming services.[3] The problems caused by non-transparent negotiations are widely acknowledged within the music industry. For example, the Songwriters Guild of America (SGA) and other songwriters' groups have recently pointed out the legal and policy problems with allowing publishers to partially withdraw their rights from ASCAP and BMI and license digital performance rights directly.[4] As the SGA pointed out, partially withdrawals would risk making the licensing process more opaque, and thus more vulnerable to abuse by major publishers.[5] In non-transparent direct deals, we could very well see major publishers strike agreements with streaming companies that include the kinds of provisions we already see major record labels obtain in their direct deals, particularly for uses, like interactive streaming, that do not qualify for statutory licenses. Major record labels have reportedly been able to use their copyright catalogs as leverage to receive non-cash compensation like advertising time, promotional plays, and equity in the service itself, in addition to cash revenue that could be structured as a lump sum that may not be attributable to individual artist's contracts. These kinds of compensation can allow publishers to extract value in return for licensing their copyrights without passing that value on to the songwriters who actually created the works being licensed.

And for streaming services, a lack of transparency in licensing can mean that a service is negotiating with a publisher without even knowing exactly what is in that publisher's catalog. A market cannot function if buyers cannot know what they are buying, especially when that buyer faces infringement penalties up to $150,000 per work. When a lack of catalog transparency puts new upstart streaming services at a disadvantage, the result is a less robust, competitive market.

Policymakers can take steps to ensure transparency by establishing robust options, like statutory licenses, with built-in transparency protections, and also ensure that antitrust actions, like the settlements in the ASCAP and BMI cases, provide sufficient protections in markets where the largest rightsholders have the incentive and ability to use their leverage to raise costs for consumers, stymie new market entrants, and pass less revenue on to artists.

One method to ensure transparency would be to implement a system for licensing sound recording rights and setting rates that is similar to the consent decrees currently in place for

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[3] *See, e.g.*, Tim Ingham, *Major Labels Keep 73% of Spotify Premium Payouts – Report*, Music Business Worldwide (Feb. 3, 2015), http://www.musicbusinessworldwide.com/artists-get-7-of-streaming-cash-labels-take-46/.

[4] *Open Letter from Songwriters: Dear American Music Publishing Community, Let's Talk*, Billboard (Mar. 26, 2015), http://www.billboard.com/articles/business/6516486/open-letter-from-songwriters-to-american-music-publishing-community.

[5] Songwriters Guild of America, Inc., *Response of the Songwriters Guild of America, Inc. to the Solicitation of Public Comments by the United States Department of Justice Regarding the Question of the Continued Efficacy of the Consent Decrees to which the Performing Rights Societies Known as American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") Remain Subject* (Aug. 6, 2014).

PROs. The PRO decrees provide crucial, systemic safeguards to protect transparency. Although they are by no means perfect in their implementation, the decrees ensure rate transparency; provide for open, public rate-making proceedings; provide guidelines for negotiated deals; and require that rightsholders publicly disclose the contents of their catalogs, so prospective licensees have full information about what they are paying for.

Another method to promote transparent licensing is a robust and sustainable statutory licensing system. However, as a practical matter, it would be ill-advised to dismantle the transparency protections in the consent decrees before a replacement system like a statutory license has actually been implemented.

2. *Question to Ms. Jodie Griffin, Public Knowledge:*

   Ms. Griffin, in your prepared testimony, you note "[w]ith technologically neutral competition policies, new music distribution platforms will have a fair shot at thriving in a sustainable way..."

   How do you reconcile this statement with the fact that there is not a performance right for terrestrial radio?

Public Knowledge supports the principle that competition will benefit if the law treats like uses alike, regardless of the underlying technologies companies use to deliver their services. Consistent with this, we support the implementation of a sound recording public performance right for terrestrial radio.[6] As we recommend for cable, satellite, and digital services, Public Knowledge recommends that public performance rights for AM/FM broadcast should have a statutory licensing option, with a rate set under the standard established in § 801(b) of the Copyright Act.

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[6] *See* Comments of Public Knowledge and the Consumer Federation of America, Copyright Office Docket No. RM-2014-3, at 23-24 (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Public_Knowledge_and_Consumer_Federation_of_America_MLS_2014.pdf.

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Responses of Jodie Griffin
Senior Staff Attorney
Public Knowledge

The ASCAP and BMI consent decrees with the Department of Justice exist in the context of a larger and complicated music licensing ecosystem that many say is in need of reform. I believe strongly that any comprehensive music licensing improvements must ensure: that all music creators are fairly compensated for all of their works; that innovative, legitimate delivery methods can continue to benefit consumers and marginalize illegitimate alternatives; and that technology can bring increased transparency to the data that is essential to an efficient licensing system.

Q: Please share your thoughts on what elements are critical to any efforts to improve the music marketplace.

Public Knowledge agrees that music licensing structures should result in a music distribution system that offers competitive, innovative choices to consumers and fair payment for artists. The ASCAP and BMI antitrust consent decrees have been and continue to be an important tool to ensure new services can obtain reasonable licenses efficiently, pay artists, and compete against established companies. In addition to the consumer benefits antitrust law has provided, copyright law's statutory licenses, while not perfect, have similarly helped licensees pay reasonable fees while limiting the ability of the largest rightsholders to use their catalogs as leverage to limit consumers' options or gain control over new distributors. In addition to consent decrees that continue to protect consumers and competition, stronger statutory licensing structures would level the playing field for smaller rightsholders and digital music services while helping artists get paid directly.

Currently, the music licensing marketplace is dominated by a handful of corporate rightsholders, which each control large shares of the market. Together, the three largest performing rights organizations (PROs) control almost all of the market for public performance rights, and ASCAP alone has a market share of 45-47%.[1] Among music publishers, Sony/ATV Music Publishing alone controls over 29.4% of the market, making it 30% larger than its nearest publishing competitor, Universal Music Publishing Group, and more than twice the size of

[1] *See In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395 (S.D.N.Y. Mar. 18, 2014).

Warner/Chappell Music.[2] Together, these three companies hold a combined three-firm market share of more than 65%. In recorded music, the market is dominated by three major labels—Universal Music Group (UMG), Sony Music Entertainment, and Warner Music Group—which control a combined 75% of the market, with UMG alone controlling 36.7% of the market.[3] Concentration among rightsholders is particularly threatening to emerging competing distributors, because ownership of a huge catalog of copyrights makes it impossible for new distributors to launch without a license from those rightsholders. Bottlenecks among rightsholders can also create market concentration among distributors, because it becomes that much more difficult for a new service to launch and compete for listeners.

In today's music marketplace, some legal structures—like the consent decrees—can counter the threat of market concentration by promoting efficient and reasonable licensing, but the music licensing marketplace is still plagued with existing or potential bottlenecks that allow dominant companies to stifle competition and entrench their own gatekeeper positions without adding new value for musicians or their fans. When one company, like a major label, major publisher, or performing rights organization, controls up to 25-45% of the relevant market, that company has the power to leverage its copyright holdings to prevent digital music services from launching or gain control over them through equity shares.[4] In other cases, the largest rightsholders might demand large cash advances or disproportionate royalty shares, which disadvantage independent rightsholders and artists. But, legal protections like a statutory license or an antitrust settlement that requires reasonable licensing can ensure that services can obtain fair licenses on a level playing field even in the face of a heavily concentrated content industry.

A music licensing system that counters the harms of market consolidation, promotes efficient licensing, and treats like uses alike, will help create a robust and competitive market for

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[2] *UMG and WMG See Gains in Recorded-Music Market Share in 2013, While Sony/ATV Dominates Music Publishing,* MUSIC & COPYRIGHT, INFORMA TELECOMS & MEDIA (May 6, 2014), https://musicandcopyright.wordpress.com/2014/05/06/umg-and-wmg-see-gains-in-recorded-music-market-share-in-2013-while-sonyatv-dominates-music-publishing/#more-1166.

[3] *Id.* These numbers do not, however, include sound recordings owned by independent labels or musicians but distributed through one of the major labels. To the extent that the major labels' distribution contracts with smaller labels allow them to set (or refuse to set) prices and rates with digital distributors for those labels' recordings, those contracts increase the majors' leverage over digital distributors. During the last major record label merger, members of this committee expressed concern over the impact that greater consolidation would have on competition. *See* Letter from Herb Kohl and Mike Lee, Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to Jonathan Leibowitz, Chairman, FTC (Aug. 3, 2012), https://www.publicknowledge.org/files/UniversalEMILettertoFTC20120803.pdf.

[4] The extraordinarily high statutory damages available under copyright law only exacerbate this problem. For music services that offer consumers the broadest possible choice of songs to listen to—which have proven very popular among listeners—being found out of compliance with a license could subject that a service to damages of $150,000 per work infringed, even for songs that were only actually played a handful of times. *See* 17 U.S.C. § 504. Even just the threat of damages so disproportionate to the actual harm caused by infringement is enough to give the largest rightsholders enormous bargaining power.

music services that give consumers choices while paying artists. For these reasons, Public Knowledge has recommended a number of changes to existing licensing structures to level the playing field and encourage new market entrants. AM/FM radio should pay for publicly performing sound recordings, just as cable, satellite, and webcasting services do. Interactive services should be able to pay rightsholders and artists directly under a statutory license, as non-interactive services do.

The specific rates an interactive service should pay may be different than what a non-interactive service pays, but the rates should all be set under the standard established in § 801(b) of the Copyright Act.[5] The § 801(b) standard emphasizes making works available to the public and giving both copyright owners and licensees a fair return on their investments—exactly what the goals of our music licensing system should be. In contrast, the "willing buyer/willing seller" has proven unworkable in an industry that is so concentrated licensees do not actually have the option of foregoing licenses from the largest rightsholders and still staying in business. That is not to say that statutory licensing under the § 801(b) standard cannot be improved. Specifically, Public Knowledge urges Congress to consider adjusting the § 801(b) factors to include a fair return for *artists*, not just copyright owners, and increasing the artist's share of the statutory royalty splits between copyright owners and performers. By creating statutory licenses that put everyone on a level playing field, Congress would promote more innovative choices for consumers while ensuring artists are paid for their work.

Additionally, Congress can use other copyright mechanisms to counter extraordinary market concentration that harms listeners and artists alike. For example, provisions in copyright law that empower artists to reclaim their rights after a certain number of years allow artists to regain control over their life's work with actual information about how their work has performed in the market. Artists may choose to negotiate better contracts with existing business partners or may choose to control their rights themselves or move them to new intermediaries. Either way, the copyright reversion and termination provisions have the potential to empower artists to make the largest rightsholders accountable—major labels and major publishers will have to prove the value of their services to retain artists. Public Knowledge urges Congress to ensure artists are not deprived of this benefit, and to consider ways to make the termination process easier for artists, like providing a form for notifying rightsholders when an artist wants to terminate a transfer.

For these reasons, Public Knowledge recommends that policymakers protect the benefits that flow from the ASCAP and BMI consent decrees, while also promoting a robust and competitive online music market through antitrust law, statutory licenses set under Section 801(b) of the Copyright Act, and laws that empower artists to reclaim their copyrights and renegotiate their contracts after an appropriate period of time.[6] Each of these pieces is critical to ensuring competition and innovation at every link in the distribution chain between artists and their fans.

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[5] 17 U.S.C. § 801(b).

[6] *See* 17 U.S.C. §§ 203, 304.

March 31, 2015

The Honorable Mike Lee
Chairman
Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights
316 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Amy Klobuchar
Ranking Member
Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights
302 Hart Senate Office Building
Washington, DC 20510

Re: **Responses to Questions for the Record for Chris Harrison, Vice President of Business Affairs, Pandora Media, Inc.**

Dear Senator Lee and Senator Klobuchar:

Thank you again for the opportunity to testify before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Right at the hearing "How Much for a Song?: The Antitrust Decrees that Govern the Market for Music" held on March 10, 2015.

Pandora greatly appreciates the Subcommittee's inquiry into this important subject and its effort to ensure a properly functioning and competitive market for the licensing of musical works.

Below please find my responses to the questions for the record posed to me by Senators Lee and Leahy.

Sen. Lee's Question for the Record for Chris Harrison

The publishers have threatened to fully withdraw from the PROs if DOJ does not allow partial withdrawals. The PROs believe that such full withdrawals would seriously damage the blanket license system. Is the threat of full withdrawal sufficiently compelling to justify amending the consent decree?

The PROs are presenting a "lesser of two evils" argument to distract from the more germane issue of how services like Pandora can efficiently obtain all the rights they need at competitive market prices to play all the music consumers want to hear. Because partial withdrawals will *decrease* licensing efficiencies, partial withdrawals should be permitted only if they create real price competition among publishers and between publishers and PROs.

Pandora welcomes competition and we do not know, as I noted during my testimony, if the total amount of royalties that Pandora would pay to publishers would increase, decrease, or stay the same if the consent decrees permitted partial withdrawals. Given our recent experience in which publishers and PROs coordinated their behavior in an effort to artificially raise prices, what

Pandora fears are modifications of the consent decrees that give the publishers a risk-free opportunity to raise prices.

As currently proposed by the PROs, the partial withdrawal of musical works from a PRO's repertory would be at the discretion of each publisher. Large publishers with substantial market power who believe they can negotiate higher royalty rates by withdrawing (including by secreting the catalog being withdrawn) will likely opt out, while smaller publishers who believe they will not be able to negotiate higher rates will likely stay in. The PROs would then seek to use as benchmarks the rates negotiated by large withdrawing publishers to set the fees for the remaining PRO repertory, even though the repertory remaining in the PRO would be significantly diminished in value by the loss of the musical works controlled by the large withdrawing publishers. In other words, the PRO blanket license becomes a shield to protect smaller publishers from the effects of price competition, while enabling large publishers to target specific classes of licensees without risk to their remaining royalty revenue streams that continue to be licensed through the PROs.

Moreover, as discussed in my testimony and subsequent Q&A, Pandora's recent rate cases against ASCAP and BMI show that the publishers and PROs are not approaching publisher withdrawals and direct licensing as a means to inject competition into the licensing of musical compositions. Both the former CEO of ASCAP and the current CEO of BMI indicated they did not ever consider reducing the price of the blanket license in an effort to increase market share – and, potentially, total revenue – in order to compete with withdrawing publishers. If consent decrees are modified to permit partial withdrawals by publishers, then competition is only enhanced if the PROs and publishers *actually* compete on price to license their respective repertories to licensees. If the PROs and withdrawing publishers refuse to compete with one another, then there would be no pro-competitive benefit of permitting modification to the consent decrees.

Pandora believes that the consent decrees should not be modified simply to avoid the purported threat of publishers to withdraw fully from the PROs. Allowing publishers to threaten both the government and the licensee community – as well as their own songwriters – if they are not granted the right to withdraw in order to target a single segment of the music licensee community, would reward bad behavior and be harmful to a competitive marketplace for the use of musical works.

Sen. Leahy's Question for the Record for Chris Harrison

Please share your thoughts on what elements are critical to any efforts to improve the music marketplace.

Pandora believes that any reform of the Copyright Act as it pertains to music (both sound recordings and musical works) and the regimes that have grown up around them must take into consideration three overarching principles: transparency, technology neutrality, and efficient licensing mechanisms. By subjecting the corporate interests that control the licensing of music to competitive market forces, reforms undertaken in light of these principles would ultimately benefit all stakeholders in the industry, including music creators (e.g., songwriters, composers, and recording artists), broadcasters, services utilizing new distribution technologies, and, most importantly, consumers.

Transparency: During the oral testimony at the Subcommittee's hearing, all participants agreed that improved transparency is necessary for ensuring a more efficient music licensing marketplace. The importance of transparency will ensure that:

- Music distributors know exactly what works are associated with what recordings so they can obtain appropriate licenses for all of the rights in each work they use;
- Good actors can avoid infringing copyrights and the associated (potentially catastrophic) liability of statutory damages;
- Creators, including songwriters, composers, performing artists, and other royalty participants can be assured of proper attribution and payment for the use of their works;[1] and
- Copyright owners can monitor and appropriately license the works they own and/or control.

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[1] Indeed, several songwriting groups recent published an open letter opposing partial withdrawal of publishers from the PROs and arguing that "any direct performance licenses negotiated by publishers require complete transparency concerning both the full terms of any direct licensing arrangement, and complete information necessary to determine the royalties each music creator is owed." *See* Rick Carnes, *et al.*, "Open Letter From Songwriters: Dear American Music Publishing Community, Let's Talk," Billboard, Mar. 26, 2015, *available at* https://www.billboard.com/articles/business/6516486/open-letter-from-songwriters-to-american-music-publishing-community.

Any modifications to music licensing procedures should therefore be designed to ensure transparency so that a licensee can bargain with copyright owner licensors or their agents with sufficient knowledge to allow it to decline a license if mutually acceptable terms cannot be agreed upon and be confident that it is not inadvertently using a copyrighted work in a manner that exposes the user to infringement liability. The market for the licensing of musical works is currently significantly distorted because of the lack of full and complete transparency.

Technology Neutrality: Creativity in music delivery is just as important to improving the music marketplace as creativity in music creation. The past 20 years have witnessed an explosion in the development of new technologies and distribution channels that have enhanced the public's access to music and the ability of creators to bypass traditional gatekeepers to reach audiences directly. These new means of lawfully accessing music improve listeners' experiences, make music available more broadly, increase exposure of new and emerging artists, and ultimately increase the value of copyrighted works through new streams of revenues. New *legal* digital music platforms, which are generating hundreds of millions of dollars in new royalty revenue each year, have also significantly reduced digital music piracy.

Modifications to the music licensing regime should therefore be technology neutral so that new market participants are not disadvantaged vis-a-vis established market participants. Innovation must be encouraged, not discriminated against, and any reforms to the copyright system should ensure that parties compete on the basis of the value of the goods and services brought to market as measured by consumers, not based upon when a particular participant entered the market. Free-market competition among all music distributors should be encouraged without the artificial distortions imposed by disparate licensing regimes.

Efficient Licensing Mechanisms: Everyone agrees that the authors of new works deserve to be compensated for their creations. Songwriters, performing artists, and other creative professionals keep the music industry vibrant and engaging. New technologies have given artists greater opportunities to reach consumers and consumers greater choice in music.

New technologies are being commercialized by a growing number of companies that operate in a highly competitive market. In many cases, these new technologies have only arisen where efficient licensing regimes exist, such as in the case of the statutory license for the public performance of sound recordings by means of digital audio transmissions, the statutory license for the mechanical reproduction of musical works, and the statutory license-like consent decrees that have resulted in the efficient licensing of millions of musical works authored by tens of thousands of songwriters and owned by thousands of individual music publishers.

Any reforms adopted by Congress – or the Department of Justice through modifications of the consent decrees governing ASCAP and BMI – should ensure that competition flourishes among

not only licensees competing for customers but also between licensors and licensees. Any changes to the music licensing system must be structured in a way that preserves the efficiency of "one stop" licensing but also prevents abuse of market power by middlemen—whether through holdup of licensees or withholding of revenues from artists, songwriters, and other creative professionals.

Implementing the Principles: Pandora has previously participated in providing comments to the United States Copyright Office and the United States Department of Justice on ways to implement the aforementioned principles and other measures to ensure a vibrant marketplace for the licensing of copyrighted musical works and sound recordings. Pandora respectfully requests that the following documents be incorporated with this letter and included in the official record of the Subcommittee:

- The comments submitted to the DOJ by CTIA-The Wireless Association, the Digital Media Association, and Pandora in connection with the DOJ's review of the ASCAP and BMI consent decrees, which are available at http://www.justice.gov/atr/cases/ascapbmi/index.html.

- The comments submitted to the Copyright Office by CTIA-The Wireless Association, the Computer and Communications Industry Association, and the Digital Music Association in connection with the Copyright office's Music Licensing Study, which are available at http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/index.html and http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/.

These documents are appended to this letter for ease of reference.

Pandora welcomes the opportunity to meet with you, other members of the Subcommittee, and your and their staffs, to provide any further assistance to the Subcommittee.

Thank you for your consideration of these important issues.

Sincerely,

Christopher S. Harrison

Enclosures

June 5, 2015

The Honorable Mike Lee
Chairman
Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights
316 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Amy Klobuchar
Ranking Member
Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights
302 Hart Senate Office Building
Washington, DC 20510

Re: **Responses to Questions for the Record for Chris Harrison, Vice President of Business Affairs, Pandora Media, Inc.**

Dear Senator Lee and Senator Klobuchar:

Below please find my responses to the questions for the record posed to me by Senator Hatch.

Sen. Hatch's Question for the Record for Chris Harrison

With respect to transparency of license agreements negotiated directly by publishers, I am concerned about one situation in particular: a publisher striking a deal to license its works under which a licensee pays an upfront fee to the publisher—not disclosed to or shared with the songwriters affiliated with the publisher—in exchange for the licensee paying to the publisher directly a lower royalty rate.

How can we make certain that all payments by licensees for musical works pursuant to agreements negotiated directly by publishers are fully disclosed to songwriters and shared with them?

Additionally, how could such requirements be enforced?

Thank you for your question regarding the transparency that is provided to songwriters by their publishers, if any. You are correct to be concerned about the harm to songwriters and recording artists from the lack of transparency in the music industry. The industry's lack of transparency not only gives publishers and record labels substantial leverage over users (who do not have information to avoid infringing the rights-holders' portfolios); it also creates "black boxes" of revenue pools that inure to the benefit of the largest music publishers and record labels but may never be accounted for to songwriters and performers. In this way, the absence of transparency harms both music distributors and music makers. Pandora therefore strongly supports efforts to improve the transparency of the licensing process to songwriters as part of its broader support for increased transparency in the music industry.

Like many commercial contracts, license agreements between rights holders (e.g., music publishers and record labels) and licensees are ordinarily confidential. The reason for that is perfectly valid: most businesses do not want their competitors knowing the terms of their commercial relationships with their counter-parties. Pandora acknowledges, however, that confidentiality with respect to competitors is not a justification for a licensor to avoid transparency with respect to the very creators on whose behalf it is purportedly acting. Moreover, licensors often prohibit their licensees from disclosing the payments made for or the usage of a licensor's copyrighted works (sound recordings or musical works) in a manner that can cause real harm to a creator. This lack of transparency may prohibit a creator from determining whether she should commence a potentially time consuming and expensive audit of a record label or music publisher for royalties owed.

Unfortunately, the digital licensing marketplace has evolved to include many terms that permit abuse by licensors. These include licensor demands for contractual consideration that may not be easily attributable to uses of specific copyrighted works, thereby allowing a licensor to avoid accounting to creators for such consideration. For example, in addition to a per use royalty that a publisher or record label licensor may demand, the licensor may also charge a large "administrative fee" for licensing the licensee. A licensor may also charge a fee for data delivery. Publisher and label licensors also often demand up-front payments and minimum guarantees that are not conducive to easy allocation among an entire repertory of music licensed to a licensee.

Pandora also has been forced to enter into a covenant not to sue with a licensor that resulted in a substantial payment being made to that licensor. Under that covenant not to sue, Pandora was not required to provide information on its uses of copyrighted works, which likely permitted the licensor to keep that money without allocating it to creators. Similar allegations have been made against large record labels when they have entered into settlements with unauthorized file sharing services: what did they do with the millions of dollars they secured?

These various mechanisms create a system where licensees or defendants in litigation (or threatened litigation) are forced to pay enormous amounts of money for the right to play music without any confidence that such sums are shared with the very creators of the works used.

The PRO consent decrees are currently under review by the Department of Justice Antitrust Division ("**DOJ**"), and it is widely reported that DOJ is considering modifying the consent decrees to permit publishers to opt out of the blanket license process as to digital content distributors like Pandora without leaving the PROs completely.[1] Under this proposal, publishers would be allowed to partially withdraw from the PROs as to some users while continuing to rely on the PROs to license other users. This could require Pandora and other digital services to

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[1] *See* Ed Christman, "Dept. of Justice Considering Major Overhauls on Consent Decrees, Sources Say," Billboard, Apr. 7, 2015, *available at* https://www.billboard.com/articles/business/6524359/dept-of-justice-consent-decrees-overhaul-publishing-ascap-bmi.

[2] *See* Andrew Flanagan, "Artist Managers Call Out Sony Following Spotify Contract Leak, Sony

secure licenses directly from each withdrawing publisher, which would in turn allow each withdrawing publisher to craft license terms like those described above that generate revenue and significant value for the publisher that may not necessarily be accounted for to the songwriters who created the works in the publisher's repertory.

Publisher direct licensing of digital services may lead to widespread abuse of songwriters. The closest analog is the way in which record labels license sound recordings and allegedly fail to account to their recording artists. Record labels license interactive streaming services directly, and it is widely reported that they use techniques like guaranteed advances, advertising credits, and other terms to monetize their portfolios in addition to straightforward royalty payments.[2] Further, it is unclear to what extent (if any) the labels share the added revenue with recording artists.[3]

Given this experience, it is understandable that songwriters have raised concerns about the impact of partial withdrawals on their ability to monitor payments flowing to publishers and obtain their fair share. For example, a number of organizations representing songwriters recently published an open letter expressing the concern that partial withdrawals would permit publishers to hide revenue from them.[4] And similar concerns have been expressed to DOJ in public comments on the ASCAP and BMI consent decree review process by the Songwriters Guild of America and the Music Managers Forum.[5]

Pandora believes transparency for all participants in the music market is an issue of critical importance, and it would be happy to engage in further dialogue with your office and other Senators to develop policy approaches that would make the market fairer and more transparent.

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[2] *See* Andrew Flanagan, "Artist Managers Call Out Sony Following Spotify Contract Leak, Sony Responds That It Pays," Billboard, May 21, 2015, *available at* http://www.billboard.com/articles/business/6575660/immf-sony-spotify-contract-response-breakage.

[3] *Id.*

[4] *See* "Open Letter From Songwriters: Dear American Music Publishing Community, Let's Talk," Billboard, Mar. 26, 2015, *available at* https://www.billboard.com/articles/business/6516486/open-letter-from-songwriters-toamerican-music-publishing-community.

[5] *See* Comments of Songwriters Guild of America, Inc. at 4-5, Aug. 6, 2014, *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307845.pdf; Comments of Music Managers Forum (UK) Ltd. at 9-11, Aug. 2014, *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307761.pdf.

Thank you for your interest in this issue and your consideration of Pandora's views.

Sincerely,

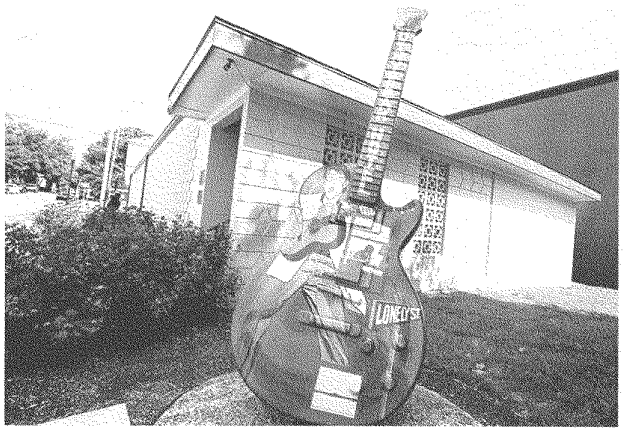
Christopher Harrison

ATTACHMENT TO RESPONSES OF MR. CHRIS HARRISON
TO QUESTIONS SUBMITTED BY SENATOR HATCH

- Photos
- Lists
- Reviews
- Artists
- Podcasts
- Pop-Shop
- The Juice
- Chart Beat
- Music Festivals 2015

Open Letter From Songwriters: Dear American Music Publishing Community, Let's Talk

March 26, 2015 2:50 PM EDT



The following is an open letter from numerous songwriter and composer guilds around the globe regarding the ongoing debate on publishing rights.

To the American Music Publishing Community,

We are an international alliance of songwriter and composer organizations representing tens of thousands of music creators throughout the world, many of whom have created musical works in which you claim rights. We recently reached out to your trade organization, the National Music Publishers Association (NMPA), hoping the Association would agree to have a discussion with us regarding unilateral withdrawal by publishers of rights and repertoire from the performing rights organizations ASCAP and BMI.

Related

- Swedish Songwriters Push for Fair Share of Streaming Music Revenues in Open Letter
- U.K. Songwriters Society Joins Chorus of Fair Digital Pay for Songwriters

While the discussion we requested was well within the bounds of applicable competition laws, the response we received from the NMPA was disappointing. In a letter from NMPA's General Counsel, we were told that the talks we were seeking would be "inappropriate" and would "prove fruitless." Because we believe there is still much to be gained from an open dialogue with publishers, we are reaching out to each of you directly seeking immediate discussion between our communities.

It is a matter of public record that some music publishers have announced they are considering withdrawing rights and repertoire from ASCAP and BMI, and licensing those rights directly to users.

These statements assume that publishers possess the legal authority to make such a unilateral withdrawal of works and rights on behalf of music creators and their families, without exception. We disagree.

While our organizations support the exploration of all opportunities that might increase royalty rates for music creators and publishers, we feel strongly that the songwriters, composers and others we represent maintain their right to decide who collects and administers performing rights royalties on their behalf.

Further, we feel that any direct performance licenses negotiated by publishers require complete transparency concerning both the full terms of any direct licensing arrangement, and complete information necessary to determine the royalties each music creator is owed.

Again, we are reaching out to discuss how we can work together for our mutual benefit. As an interim step, however, to preserve the rights of the songwriters, composers and heirs that we represent, this letter shall serve as formal notification on their behalf that each reserves the right to oppose any claims relating to alleged publisher authority to unilaterally withdraw rights and repertoire from the PROs, unless such reservations are specifically waived in writing by an individual creator. In no event should silence by any music creator represented by the members of this alliance be construed as acquiescence or waiver.

Signed,

Rick Carnes, Songwriters Guild of America (SGA)
International Council of Music Creators (CIAM)
Music Creators North America (MCNA)
European Composers and Songwriter Alliance (ECSA)
Society of Composers and Lyricists (SCL)
Songwriter's Association of Canada (SAC)
Screen Composers Guild of Canada (SCGC)
Latin American Composers and Authors Alliance (PACSA)
Société Professionelle des Auteurs et des Compositeurs du Québec (SPACQ)
Pan-African Composers and Songwriter Alliance (PACSA)

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Before the
Library of Congress
U.S. Copyright Office
Washington, DC

In re	
Music Licensing Study: Second Request for Comments	Docket No. 2014-03

COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the notice of inquiry published by the Copyright Office in the Federal Register at 79 Fed. Reg. 42,833 (July 23, 2014), and extended at 79 Fed. Reg. 44,871 (Aug. 1, 2014), the Computer & Communications Industry Association (CCIA) submits the following comments on selected questions from the notice regarding the subject of music licensing.[1]

I. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.

One of the easiest ways to facilitate the assimilation and availability of data by private actors is to encourage the creation of such data through Copyright Office processes. The Commerce Department's 2012 Green Paper[2] and 2013 public meeting[3] addressed rights

[1] CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 600,000 workers and generate annual revenues in excess of $465 billion. A list of CCIA members is available at http://www.ccianet.org/members.

[2] Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity and Innovation in the Digital Economy* (July 2013), *available at* http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf (hereinafter "Green Paper"), at 97.

[3] Transcript of United States Patent & Trademark Office, Department of Commerce, *Public Meeting: Copyright Policy, Creativity and Innovation in the Digital Economy*, Dec. 12, 2013, *available at*

management information and elicited useful feedback on this issue. A diverse group of participants on the panel entitled "The Government's Role in a More Efficient Online Marketplace: Access to Rights Information" agreed with the value of standardizing codes. As CCIA explained, we already have international standards for datasets associated with certain classes of works, like ISBN and ISRC.[4] OneHouse pointed out that although Industry Standard Recording Codes (ISRCs) have existed for more than two decades, there is still not a recorded database of them.[5] SoundExchange's representative reiterated these concerns, and suggested that the government has the opportunity to incorporate ISRC standards into recordation or registration, and in statutory licensing for the Copyright Royalty Board.[6] Several comments filed in response to the Green Paper spoke favorably about standardizing codes as well,[7] indicating that there is substantial consensus on the benefits associated with standardized identifier codes, but that the lack of universally accessible data impedes greater adoption. Comments filed with the Office last year on technical upgrades[8] are also instructive, recommending that the Office implement standardized codes into its registration process, as Forms SR and PR do not presently require an ISRC or ISWC code.[9]

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http://www.uspto.gov/ip/global/copyrights/121213-USPTO-Green_Paper_Hearing-Transcript.pdf (hereinafter "Green Paper Transcript"), at 316-74.

[4] Green Paper Transcript at 342 ("ISBN and ISRC were actually associated with ISO standards… [W]e actually do have some international standards for datasets associated with certain classes of works.").

[5] Green Paper Transcript at 355-56 ("[F]or over two decades, the music industry has been giving out ISRC codes, Industry Standard Recording Codes. And we still don't have a database of them. Literally, we did not record a single code that we handed out.").

[6] Green Paper Transcript at 338-41 (noting filings to Copyright Office suggesting that ISRCs be part of copyright registration; "that that actually be a field, and so that you can actually have this way to connect copyright records seamlessly with record company and digital service records of what sound recordings are associated with ISRC").

[7] SoundExchange Green Paper Comments at 5-6; RIAA Green Paper Comments at 11 (suggesting USG collection of ISWC and ISRC numbers for sound recordings as part of copyright registrations to help build awareness and adoption; promoting awareness and use of standard identifiers); CEA Green Paper Comments at 8.

[8] Copyright Office, Technical Upgrades Comments, U.S. Copyright Office (Mar. 2013), *available at* http://www.copyright.gov/docs/technical_upgrades/.

[9] A2IM Technical Upgrades Comments at 1 ("We believe that the Copyright Office database should become a key searchable source for copyright information so that the creators' works are easily identifiable and do not become

Thus, the Office can lead by example on the issue of improving data reliability by incorporating standardized identifiers into registration and recordation forms on a pilot basis. Once the Office has established that it can routinely ingest such data, it may eventually choose to require the use of standard identifiers. Therefore, the Copyright Office should create optional fields for these codes or similar universal identifier systems on its own registration forms. Over time, the Office could phase in mandatory universal identifiers as a requirement for registration or recordation. In the long run, such efforts would help ensure that various standardized identifiers might achieve the widespread adoption associated with ISBNs, which would facilitate the development of comprehensive and authoritative public data related to the identity and ownership of various types of works.[10]

II. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

As discussed above, there are several widely embraced standards, including ISRC, ISBNs, and to a lesser degree, ISWCs, the likes of which the Office should endeavor to promote. While other stakeholders may furnish more specific information, a pilot effort should treat identifiers inclusively, without choosing one over the other. Naturally, identifiers that are based

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Orphan Works… The key date would include the album/track name, artist/author, owning label, data of release and UPC/ISRC code, with latter data the most important as the unique identifier."); SoundExchange Technical Upgrades Comments at 2 ("One of the most meaningful enhancements that the Copyright Office can make to its registration forms for sound recordings is to collect ISRCs."), 3 ("[I]t is critical that each recording be associated with a unique identifier that is used as a worldwide standard."); ISRC Agencies Technical Upgrades Comments at 4 ("The ISRC Agencies urge the Copyright Office to enable capture of explicitly named standardized identifiers as part of its updated electronic registration and recordation functions… Given the increasing importance of both digital distribution and electronic recordkeeping with respect to all manner of copyrighted works, we believe the Office would be remiss if it failed to position itself now to collect information that will be of increasing importance in the digital age.").

[10] AAP Technical Upgrades Comments at 8; Author Services Technical Upgrades Comments at 5; County Analytics, Inc. Technical Upgrades Comments at 7.

upon the work of consensus-based international standards bodies such as the ISO would be a logical starting point.

IV. Please provide your views on the logistics and consequences of potential publisher withdrawals from ASCAP and/or BMI, including how such withdrawals would be governed by the PROs; whether such withdrawals are compatible with existing publisher agreements with songwriters and composers; whether the PROs might still play a role in administering licenses issued directly by the publishers, and if so, how; the effect of any such withdrawals on PRO cost structures and commissions; licensees' access to definitive data concerning individual works subject to withdrawal; and related issues.

Publisher withdrawal from the PROs poses a significant threat to competition. Because the demands of the marketplace effectively compel many licensees to negotiate with all PROs, the consequences of licensee-specific withdrawal of rights may be tantamount to forbidding that licensee from operating in the marketplace. Insofar as PROs under Department of Justice consent decrees operate as a form of supervised cartel, a licensor that partially withdraws from a PRO with respect to some licensees, works, or uses, but not others receives the benefits of coordinated action in the marketplace without submitting to the obligations that DOJ has attached to the privilege of coordination. As described in Judge Cote's opinion in the *Pandora* case,[11] Sony's attempts to withdraw so-called "digital" rights[12] from ASCAP, while refusing to reveal which songs that withdrawal affected, meant that it could prevent ASCAP from licensing to one user – and use its "partial withdrawal" to drive an above-market fee – while still obtaining the transaction costs savings of coordination vis-à-vis other users. Accordingly, while a rights-holder should not be compelled to license through a PRO, it must also not be permitted to selectively benefit from coordinated action in the marketplace where it chooses. This "all-in or

[11] *In re Petition of Pandora Media, Inc.*, 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014), at *24.

[12] Notably, there is no so-called "digital" right under Section 106; Congress provided a public performance right. 17 U.S.C. § 106(4). That the public performance may occur via a digital medium does not change the fact that §106(4) is what is being licensed.

all-out" obligation should apply equally to uses (*i.e.*, 'digital') and works (*i.e.*, works in the publishers' portfolios).

IX. International licensing models for the reproduction, distribution, and public performance of musical works differ from the current regimes for licensing musical works in the United States. Are there international music licensing models the Office should look to as it continues to review the U.S. system?

The experience in Europe offers an instructive example of what happens when collecting societies are empowered with broader mandates and less oversight. A 2012 impact assessment issued in a European Commission review of collective rights management stated that "the ability of CS [collecting societies] to efficiently deliver their services is increasingly being questioned, leading to a loss of trust and confidence in their services. The issue is often raised by national parliaments, the European Parliament and national competition authorities. It is the subject of complaints from rightholders and users."[13] It also observed that European societies could sit on undistributed sums for years; as of "2010 major societies had accumulated €3.6 billions worth of liabilities to rightholders."[14] A survey of collective licensing organizations in more than 30 countries found that "many unfortunately share the characteristic of serving their own interests at the expense of artists and the public," and that there was "a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, CROs [collective rights organizations] have often

[13] Impact Assessment accompanying Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing, July 11, 2012, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0204&from=EN.

[14] *Id.* at 19-20 (Box 6; "Overall, between 5 and 10% of collections are not distributed to rightholders for as many as three years after they were collected – a delay which is significant"; delays in distribution may be to "giv[e] an impression of low operating expenses").

aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system."[15]

For these reasons, overseas models that rely heavily on collective licensing models should be regarded with an appropriate measure of skepticism.

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[15] Jonathan Band & Brandon Butler, *Some Cautionary Tales about Collective Licensing*, 21 MICH. ST. INT'L L. REV. 687, 689-90 (2013), *available at* http://msuilr.org/wp-content/uploads/2013/12/516973-Michigan-State-Jnl-of-Intl-Law-21.3_R2-2.pdf.

Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress
Washington, D.C.

In the Matter of **Music Licensing Study: Notice and Request for Public Comment**	**Docket No. 2014–03**

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

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Before the
U.S. COPYRIGHT OFFICE
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In the Matter of **Music Licensing Study: Notice and Request for Public Comment**	**Docket No. 2014–03**

Comments of CTIA-The Wireless Association

CTIA-The Wireless Association® offers these comments as its initial response to the Copyright Office's March 17, 2014 Notice of Inquiry on music licensing issues. 79 Fed. Reg. 14,739 (Mar. 17, 2014) (the "NOI"). CTIA appreciates the opportunity to comment in this important inquiry.

Introduction and Summary

CTIA offers the following thoughts:

- Any analysis of music licensing issues must be conducted in light of the public interest purpose of copyright law, with an eye towards maximizing the benefit to the public;
- The market for music performance rights is not competitive, is adversely affected by competition-destroying collectives and major publishers that abuse their extensive market power, and, as a result, must effectively be regulated;
- Music publishers successfully sought a firewall insulating music performance rights fees from consideration of sound recording performance rights fees and successfully urged (through their affiliated record companies) that sound recording rights are worth multiples of music rights, and should not now be heard to seek removal of that firewall;
- The law should be amended and streamlined to eliminate double-dip rights claims by making clear that streamed performances do not require a reproduction or distribution license, downloads do not require a public performance license, and server copies used only to make licensed or exempt public performances are exempt from liability; and
- The Copyright Office should ensure that the public performance right is not expanded in a way that threatens cloud computing.

CTIA elaborates on these points below.

CTIA is an international organization representing all sectors of wireless communications – cellular, personal communication services, and enhanced specialized mobile radio. A nonprofit membership organization founded in 1984, CTIA represents providers of commercial mobile radio services ("wireless telecommunications carriers"), mobile virtual network operators, aggregators of content provided over wireless telecommunications systems, equipment suppliers, wireless data and Internet companies, and other contributors to the wireless universe. A list of CTIA's members appears at http://www.ctia.org/membership/ctia_members/.

CTIA frequently participates in administrative proceedings and coordinates efforts to educate government agencies and the public about wireless issues. CTIA also has presented its views in testimony before Congress and has filed numerous amicus briefs in the federal courts on behalf of the wireless industry on a variety of issues, including copyright issues. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

CTIA and its members have a substantial interest in the subject matter of the NOI. Wireless technology not only provides consumers with first-rate telecommunications service, but also provides a convenient and important means for wireless consumers to receive digital performances of music and to download a wide array of media products, including music, to their wireless devices. CTIA's members support the development of applications that enable users to discover new content. Among other things, CTIA's members have been instrumental in developing technologies and applications that enable their subscribers to store content in the "cloud" and access that content on a wide array of devices.

CTIA's members, either directly or through agreements with third-party service providers, offer interactive and non-interactive music streaming, access to satellite radio programming, permanent and limited music downloads, ringtone downloads, linear and on-demand video streaming, and access to games with full color graphics and embedded music. CTIA's members also transmit performances of recorded music to individuals placing calls to wireless customers in the form of "ringback tones"— sounds that replace the ringing that the caller hears when he or she calls a mobile telephone. Further, many of the media products and services that CTIA's members make available are available for preview using performances of short clip samples that are streamed over the Internet and wireless networks.

CTIA's members strive to provide their services to their customers at a reasonable cost. Thus, ready access to, and the cost of, music licenses are ongoing concerns. In light of these concerns, CTIA was an active participant in the Copyright Office's proceeding concerning whether streaming implicates the reproduction and distribution rights and may be subject to the section 115 compulsory license. Library of Congress, Copyright Office, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Docket No. RM 2000-7, 73 Fed. Reg. 66,173 (Nov. 7, 2008). CTIA also participated as an amicus before the ASCAP Rate Court and

the Court of Appeals for the Second Circuit in the case deciding that music downloads did not implicate the public performance right. *United States v. ASCAP (Application Real Networks, Inc. & Yahoo! Inc.)*, 627 F.3d 64 (2d Cir. 2010) (hereinafter "*Yahoo!*").

Moreover, CTIA's members have been litigants before the ASCAP Rate Court, where they were instrumental in resisting ASCAP's efforts to demand public performance royalties for ringtone downloads. *See In re Cellco P'ship d/b/a Verizon Wireless*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (hereinafter "*Verizon Wireless*") (holding that downloading a ringtone to a cell phone is a reproduction but not a public performance).[1] They also resisted ASCAP's attempts to discriminate in its royalty fees against new wireless means of transmitting video. *See ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012) (rejecting ASCAP's discriminatory position and adopting rates consistent with past video licenses).[2]

CTIA members support protection of the legitimate rights of copyright owners. Indeed, CTIA members are among the leading legitimate performers and distributors of recorded music, and pay for the right to do both. Music publishers, and their songwriters, earn substantial performance royalties as compensation for CTIA members' public performance of musical compositions, and substantial mechanical royalties for CTIA members' offerings of downloadable music content, whether in the form of full track downloads or ringtones.

CTIA, however, strongly opposes duplicative compensation to music publishers (or to any copyright owner, for that matter) and redundant, burdensome rate-setting and administrative systems for the same economic transaction. Public performances are subject to the performance right; any copies that may be implicated in such performances should not also be subject to licensing under the reproduction or distribution rights (*e.g.*, mechanical licensing). Copyright Office DMCA Section 104 Report at 142-46 (Aug. 2001). Similarly, downloads are digital phonorecord deliveries ("DPDs"), subject to the mechanical license; they should not also be subject to performance licensing. *Id.* at 146-48 ("It is our view that no liability should result under U.S. law from a technical 'performance' that takes place in the course of a download.") It makes no sense to make formalistic distinctions based on the technicalities of new transmission systems or to burden those wishing to provide legitimate, licensed music services with overlapping claims by different agents of the same copyright owner or multiple, expensive litigation processes in rate court and before the Copyright Royalty Board.

CTIA also supports the development of cloud-based computing services. CTIA members have invested heavily to provide such services, which offer the public

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[1] CTIA members Verizon Wireless and AT&T Mobility were parties in that case. CTIA filed an amicus brief.

[2] CTIA members Verizon Wireless and AT&T Mobility were parties in related cases that were set to be tried shortly after the MobiTV case. Those cases settled after the MobiTV decision. Verizon Wireless filed an amicus brief before the Second Circuit in ASCAP's unsuccessful appeal of the MobiTV decision.

convenient, efficient, and powerful computing and storage resources. Once an individual has lawfully acquired content, that content should be available to the individual on all of the user's devices and remotely. Moreover, individuals should be free to handle and manipulate their content as they see fit. The law should not place obstacles in the way of such uses or make the providers of cloud services the police or guarantors of user conduct.

In sum, CTIA has a direct interest in the issues raised by the NOI. Those issues will have significant ramifications for the public, the wireless industry, and CTIA's members.

I. Background: The Public Interest Purpose of Copyright

It is important for the Copyright Office to conduct its review of copyright law in light of the public interest purpose assigned to copyright law by the Constitution. The courts have made clear that copyright law does not exist to benefit authors and publishers. The law exists to benefit the public. Moreover, the Supreme Court has emphasized that dissemination of copyrighted works is as important as creation to fulfilling the constitutional goal. The interest of the public and the interest of fostering dissemination should be paramount in any report and recommendation made by the Register.

Article I, section 8, clause 8 of the Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* (emphasis added). Thus, the power to enact copyright laws exists for a specific purpose – "to promote the Progress of Science."

The Supreme Court consistently has emphasized that the ultimate goal of copyright is to serve the public interest, not the author's private interest: "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added); *accord Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) ("[T]he monopoly privileges that Congress has authorized ... must ultimately serve the public good."). "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *accord Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (observing that "[t]he primary objective of copyright is not to reward the labor of authors").

Copyright rights are granted to authors to induce them to create and to disseminate their creations. *See, e.g.*, *Paramount Pictures*, 334 U.S. at 158 ("[R]eward to the author or artist serves to induce release to the public of the products of his creative genius."); *Fogerty*, 510 U.S. at 526 (copyright is "intended to motivate the creative activity of authors"). "But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken,* 422

U.S. 151, 156 (1975). Moreover, "[e]vidence from the founding . . . suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science." *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) (emphasis in original).

Copyright rights are not absolute property rights but statutory creations subject to important limitations that further the constitutional goal. *E.g.*, 17 U.S.C. §§ 102(b), 107-122. "The limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature." *Aiken*, 422 U.S. at 156.

From the beginning, the Supreme Court consistently has held that copyright is not grounded in any theory of the author's natural right. It is solely a creature of statute, and the scope of the right is strictly limited by the statutory grant. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659-64, 667-68 (1834); *Sony Corp.*, 464 U.S. at 429 n.10 (observing that copyright law "is not based upon any natural right" of the author and describing the balance between the public benefit from "stimulat[ing] the producer" and the public detriment from "the evils of the temporary monopoly" (quoting H.R. Rep. No. 2222 (1909)). The Courts of Appeals have agreed, observing that "copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public." *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990)); *accord*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262-63 (11th Cir. 2001) ("The copyright is not a natural right inherent in authorship."). In other words, claims by copyright owners that "we created it, so it is ours" are inconsistent with law and the Constitution and should not be given weight.

Further, the goal of copyright law is not to maximize the revenues of copyright owners or the return to authors. Rather, the goal is to provide an appropriate level of incentive to induce the creation and dissemination of an amount of creative work that maximizes the overall welfare of society, taking into account other uses to which productive resources could be put. Among other things, the law should recognize that once a copyrighted work is created, maximizing consumption of the work maximizes society's welfare. Unlike tangible property, where consumption by one limits consumption by others, uses of copyrighted works do not deprive others of the ability to enjoy the work.[3]

In other words, broad use and dissemination of copyrighted works is central to the constitutional scheme. Promoting use and dissemination should lie at the core of the Copyright Office's recommendations.

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[3] In economic terms, consumption is non-rivalrous.

II. Music Performance Rights: The Law Should Ensure that the PROs' Collective Market Power Is Constrained and Provide Protection Against the Comparable Market Power of the Major Publishers. [NOI Questions 5, 6, and 7]

Questions 5, 6 and 7 of the NOI ask about the effectiveness of the current process for licensing the public performance of music generally, and about the ASCAP and BMI consent decrees specifically. The NOI specifically notes that the ASCAP and BMI decrees "were last amended well before the proliferation of digital music," and asks if the consent decrees are still justified. *See* NOI at 14,741 & Question 7. The recent decisions of the ASCAP and BMI Rate Court judges, who have extensive experience with the PROs' behavior, and the recent experience of CTIA's members in their dealings with the PROs, confirm that the decrees remain essential to foster competitive market pricing for music performance rights.

Due to the nature of the markets, SESAC and the major publishers also exercise substantial supra-competitive market power. That market power should also be controlled.

A. The Market for Music Performance Rights Is Not Competitive.

Copyright law principles and market structure coalesce to eliminate any truly competitive marketplace for music performance rights. These combined factors give the PROs enormous market power insulated from competitive forces.

First, ASCAP, BMI and SESAC aggregate enormous numbers of musical works, which would, in a competitive market, compete for use. Second, the large music publishers have been allowed to merge to the point that the publishing industry is now highly concentrated. Three major publishers control the vast majority of musical works.

Third, copyright law allows rights to be licensed separately. Thus, when programs or commercials that are intended for public performance are produced, the producers obtain only reproduction and distribution rights and need not obtain public performance rights. Indeed, the PROs typically will not grant public performance rights to program producers because they do not actually perform the programs they produce. Thus, it falls to the entity making the performance to clear the performance right.

Unfortunately, however, once a program or ad is produced, or "in the can," the entity making the performance is unable to engender competition among possible suppliers of the performance right. The performing entity must take the program as is and cannot alter it. This gives the licensor of the performance right the ability to exercise "hold up" power – the licensor can seek to charge up to the full value of the entire program or ad, unconstrained by the actual value contributed to that program or ad by the licensor's music.

Fourth, the PROs typically offer only licenses to their entire repertory. Thus, they effectively eliminate any competition that may exist among their members, among the

PROs, between the PROs and their members, or, for that matter, between the use of music and other programming matter.

Fifth, these problems are compounded by the near-impossibility of identifying the potential licensors of any particular performance right. Although the PROs offer on-line searches of their databases, they do not provide a reliable or effective means of identifying the content of each PRO's repertory. As the Magistrate Judge considering a preliminary injunction against SESAC found, SESAC's online search tool "does not provide a reliable means for determining what is SESAC's repertory." Report and Recommendation at 15, *Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5807 (E.D. Pa. Dec. 23, 2013). The court noted that the tool "expressly disclaims that it is accurate, advises stations that it could change on a daily basis, and limits the user to 100 searches per session." *Id.* at 15 n.13. ASCAP's search tool contains a similar disclaimer, stating that "ASCAP makes no representations as to its [search tool's] accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database." All of the search tools limit searches to one work at a time, making searches for numerous works impractical.

As a result, it is effectively necessary for an entity engaging in substantial numbers of public performances, such as a wireless carrier or a service making streamed performances, to obtain licenses from all three PROs. The major publishers, of course, understand the anticompetitive effects of the same behavior. Even where they seek to license their catalogs directly, they strategically withhold information about their content. *See In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2014 WL 1088101 at *35, *36, *38 (S.D.N.Y. 2014) (describing significance of publisher refusals to provide Pandora with usable lists of their catalogs).

The judges that oversee the PROs' conduct have continued to recognize the PROs' market power and to curb their abuses, long after "the proliferation of digital music," which the NOI implied, without explanation, cast doubt upon the continued validity of the ASCAP and BMI consent decrees. NOI at 14,741. In 2005, the United States Court of Appeals for the Second Circuit, which oversees the rate courts that oversee the consent decrees, recognized that the "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." *United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005). As recently as 2012, that same court stated that "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012); *see Yahoo!*, 627 F.3d at 76.

Courts examining SESAC's market power also have concluded that SESAC functions as a monopolist and that there is evidence that SESAC has acted unlawfully. *See, e.g.*, *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(PAE), 2014 WL 812795 at *36 (S.D.N.Y. 2014) ("In sum, there is sufficient evidence upon which a jury could find that SESAC took action to maintain and fortify its monopoly over licensing of its affiliates' work, by adopting licensing practices that eliminated all realistic competition

with its blanket license."); *Radio Music License Committee v. SESAC Inc.*, Report and Recommendation at 31-33 (finding that Plaintiffs had made a prima facie case of a violation of Sherman Act sections 1 and 2, and noting that "SESAC has 100% of the market power over the unique collection of works in their repertory and there are no 'real' alternatives to SESAC's blanket license").

The only protection that users have against ASCAP's and BMI's monopoly power is the protection provided by the consent decrees. Those should be retained and, as discussed below, strengthened.

B. The Recent Experience of CTIA's Members Demonstrates that the Consent Decrees Continue to Provide an Essential Check on the PROs' Abuse of Their Collective Market Power.

CTIA members have experienced first-hand the abuses of market power that the PROs continue to perpetrate. In one case, the PROs asserted the right to collect fees for activities that did not implicate the performance right. In another, they sought to impose hugely discriminatory fees on wireless service providers for the music included in video programming. In both cases, the rate courts were essential in protecting the performing entities and the public.

1. The PROs' Over-Reaching Claims Relating to Music Downloads

The PROs asserted for years that downloads of music files, including ringtones, implicated the public performance right. In other words, according to ASCAP and BMI, downloads for which music publishers were fully compensated under the section 115 mechanical license, also required a further payment for a public performance license, due to various theories, including the PROs' construction of the "transmit clause" found in the definition of "to perform or display a work 'publicly.'" 17 U.S.C. § 101.

The PROs used their market power to parlay those claims into millions of dollars of ill-gotten gain. These claims for double-dip compensation were ultimately challenged in the ASCAP Rate Court by services that offered music and ringtone downloads. *See Yahoo!*, 627 F.3d 64 (full downloads); *Verizon Wireless*, 663 F. Supp. 2d 363 (ringtones).

The rate court, and then the Second Circuit, consistently held that downloads do not implicate the public performance right. See *Yahoo!*, 627 F.3d at 71 (downloads do not implicate the public performance right); *Verizon Wireless*, 663 F. Supp. 2d at 378 (ringtones do not implicate the public performance right). In other words, the rate court process established by the consent decrees served as an essential check on the PROs' abuse of their market power.

2. ASCAP's Efforts to Discriminate Against Mobile Video Services

CTIA's members also faced ASCAP's abuse of its monopoly power when they sought a reasonable license for their mobile video services. In response to the request, ASCAP sought a radical change to its longstanding, consistent paradigm for licensing music in video programming. ASCAP eschewed the fee structure that it had long applied in the cable and broadcast television industry, where license fees varied depending on music intensity of the programming between 0.9% and 0.1375% of the programming service's revenue (which does not include the revenue of the entity distributing the content to the public). Instead, ASCAP sought to nearly triple its rates.[4]

Moreover, ASCAP sought to apply those inflated rates to the revenue earned for both the programming and its public distribution. In other words, ASCAP attempted to use its monopoly power to leverage itself into a share of revenues that were earned for the wireless carriers' technical advances and huge capital expenditures in developing and maintaining their networks, revenues that were not reasonably attributable to the music in video programming.

The combined effect of the higher rate and inflated revenue base was that ASCAP sought fees from the wireless industry that were many multiples of the fees it obtains for the same audiovisual performances in other media. ASCAP's attempt to discriminate was particularly egregious given that its cable licenses (and at least one major network broadcast license) encompassed performances of identical content over identical wireless media.

Fortunately, the ASCAP Rate Court and Second Circuit rejected ASCAP's unprecedented attempt to discriminate among media. *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010), *aff'd sub nom. ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012). The district court found that ASCAP's witnesses were not credible, 712 F. Supp. 2d at 224 n.35, and that its case lacked an "explanation of guiding economic principles or any coherent theory," *id.* at 239.

ASCAP's efforts to discriminate against mobile video services shows the lengths to which the PROs will go to exercise their collective monopoly power and the continuing need for the consent decrees and rate courts to rein in that power.

C. SESAC's Licensing Practices Provide an Example of What Music Licensing Would Be Without the Consent Decrees.

The SESAC experience provides an example of what the world would look like without the ASCAP and BMI consent decrees – unconstrained price increases charging

[4] ASCAP sought to apply a rate of 2.5% to revenue that had been adjusted by a "music use adjustment factor," which was determined by the ratio of ASCAP's traditional cable TV rate for a type of programming to 0.9%. Thus, each applicable rate equaled the corresponding cable rate multiplied by 2.5/0.9 (2.78).

disproportionate amounts for the limited music that is performed. As a result of its behavior, SESAC has been sued for antitrust violations by both the Television and Radio Music License Committees. As discussed above, early decisions in both cases confirm that SESAC possesses collective market power, takes steps to eliminate competitive licensing by its affiliated publishers, and acts to ensure that it is able to extract supra-competitive license fees. These abuses should be curbed, and SESAC should be subjected to effective regulation comparable to that imposed on ASCAP and BMI.

D. While Direct Licensing Remains an Important Check on PRO Abuses, It Cannot Replace the Consent Decrees Due to the Lack of Competition Among Major Publishers. [NOI Question 14]

NOI question 14 asks about direct performance licensing by music publishers. As the rate courts found in the DMX cases, direct licensing, particularly by smaller independent publishers, provides an important check on the PROs' market power and offers some competition. Unfortunately, however, the major publishers have been allowed to merge under the cover of the ASCAP and BMI consent decrees to the point that the industry is highly concentrated. Moreover, due to this consolidation in the industry, the major publishers offer catalogs that every user must license, so they are no longer substitutes. Thus, the major publishers do not compete with each other. Rather, as the ASCAP Rate Court found in the recent Pandora case, the major publishers exercise extraordinary market power and are willing to abuse that market power to extract supra-competitive license fees.

In the recent Pandora case, the ASCAP Rate Court found in no uncertain terms that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices" in their negotiations with Pandora. *Pandora Media*, 2014 WL 1088101 at *35. The court found that the negotiations were conducted in a manner that left Pandora with no alternative: "it could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms." *Id.* According to the court, "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." *Id.* at *35-36.

As further evidence of the flaws in a direct-license only regime, when the major publishers tried to withdraw their digital rights from ASCAP and BMI and license them directly, they found it virtually impossible to administer their own rights. Instead, they turned back to ASCAP and BMI to administer the withdrawn rights for the vast majority of users. *See id.* at *17-18. This showed the withdrawal for what it was: an effort by the major publishers to exercise enormous market power free from the constraints of the consent decrees. Accordingly, while direct licensing is an important alternative to the PRO blanket licenses under the consent, direct licensing cannot be a substitute for the consent decrees.

E. The Proposed Change to the Section 114(i) "Firewall" Is Inappropriate and Should Be Rejected. [NOI Question 6]

NOI Question 6 asks specifically about the impact on rate setting under the ASCAP and BMI consent decrees of section 114(i), which prohibits the courts from taking into account the license fees payable for sound recordings under section 106(6). The NOI refers to this preclusion as "significant," NOI at 14,741 n.7, but fails to describe the reason this provision is in the law or to provide any evidence supporting its significance.

In fact, the provision was sought by the music industry, which was concerned that (i) that the new sound recording public performance rights fees would be seen by the rate court judges as reducing the pool of money available to pay publishers, and (ii) the sound recording fees might be less than existing musical works fees, thus leading to a reduction of musical works fees. Now that the publishing industry has seen how much the recording industry has been awarded by the Copyright Royalty Board, it is questioning its prior judgment.

Unfortunately, while the ASCAP and BMI Rate Court Judges recently have performed their function well and reined in the collective market power of ASCAP and BMI, the Copyright Royalty Judges have been less successful in controlling the market power of the major record companies, allowing the rates for sound recording licenses to reach supracompetitive levels. Moreover, the digital sound recording performance right for interactive streaming is not subject to any rate regulation. Rather, the record companies are entitled to charge whatever they can. As the FTC recently found in approving the merger of Universal and EMI, "Commission staff found considerable evidence that each leading interactive streaming service must carry the music of each Major to be competitive. Because each Major currently controls recorded music necessary for these streaming services, the music is more complementary than substitutable in this context, leading to limited direct competition between Universal and EMI." Statement of FTC Bureau of Competition Director Richard A. Feinstein, In the Matter of Vivendi, S.A. and EMI Recorded Music, September 21, 2012. In other words, the major record companies do not compete with each other to license interactive services. Accordingly, sound recording performance rights are not a reasonable proxy for competitive market rates.

The publishers' new-found concern about the disparity between musical work and sound recording rates is particularly ironic because the disparity exists only because of positions taken within the music industry. From the beginning, services subject to the new sound recording performance right argued that sound recording rights fees should be roughly equivalent to the fees set by the ASCAP and BMI Rate Courts for musical work rights.[5] The recording industry opposed this position vigorously, arguing that record

[5] *See* Library of Congress, Copyright Office, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule and Order, 67 Fed. Reg. 45,240, 45,242 (July 8, 2002) ("*Webcasting I*"); *See* Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Final Rule and

companies invested more resources at higher risk than music publishers and should reap performance rights fees that were many times musical works rights fees.[6] Virtually all of the record companies making these arguments had publisher affiliates, who are now the very entities objecting to the result upon which their own affiliates had insisted.

The publishers' objections to the existing rate disparity has led some in Congress to introduce a bill misleadingly named the "Songwriter Equity Act," H.R. 4079, 113th Cong. (2d Sess. 2014). That bill would eliminate the preclusion set forth in section 114(i), allowing publishers to argue that their fees should be related in some way to sound recording rights fees. The bill, however, would do so in a one-sided manner, expressing the "intent of Congress" that sound recording rights "not diminishing in any respect" the fees payable for musical works. H.R. 4079, § 2. The bill would go further, by prohibiting the Copyright Royalty Board, when setting sound recording rights fees, to construe the enactment of the bill as a Congressional recognition that the level of musical works fees should be taken into account in setting sound recording fees. *Id.*, § 3.

In other words, the publishers want it both ways – they want the higher sound recording fees to be relevant in setting their fees, but they want to protect their affiliate record companies and ensure that sound recording fees are not dragged down by much lower musical works fees. That makes no sense. If musical works fees and sound recording rights fees are to be related to each other, the relationship logically must flow both ways. Moreover, if sound recording rights fees are relevant in setting musical works fees, Congress should not pre-determine that the direction of relevance is to increase the fees.

CTIA submits that the rate setting process of the ASCAP and BMI Rate Courts has led to license fees that are far closer to the competitive market goal than the sound recording fees set in the past by the Copyright Royalty Board. If there is a relationship between sound recording fees and musical works fees, the law should be amended to ensure that the CRB takes musical works fees into account rather than to take the opposite approach sought by the publishing industry.

Order, 72 Fed. Reg. 24,084, 24,092 (May 1, 2007) ("*Webcasting II*").

[6] *See Webcasting I*, Proposed Findings of Fact and Conclusions of Law of the Recording Indus. Ass'n of Am., Inc., at 270-309 (Dec. 21, 2001); *Webcasting II*, 72 Fed. Reg. at 24,094.

III. The Law Should Be Amended to Simplify and Streamline Digital Rights. [Related to NOI Questions 4, 8, and 24]

The law relevant to music licensing is an incoherent mess, particularly as it applies to the digital environment. Music licensors claim that public performances implicate the reproduction and distribution rights. As CTIA's members discovered, agents of those same music licensors assert that distributions implicate the public performance right. A longstanding exemption that should allow reproductions to be made when they are used solely to effectuate permitted public performances is outmoded and riddled with limitations that create substantial risk.

The problems of duplicative license claims are compounded because different representatives of the same copyright owners typically license the reproduction and the public performance rights. Moreover, virtually all participants in the market have recognized that the licensing regime for the reproduction and distribution rights, which requires specific monthly reporting and payment, is complex and burdensome.

NOI question 4 asks "[f]or uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner?" That asks the wrong question and suggests the wrong answer.

Rather, the law should be revised to eliminate these complexities. Public performances should not require a mechanical license. Distributions should not require a public performance license and should be licensed under a blanket mechanical license that is priced in a way that fosters competitive market alternatives. The server copies used for both types of transmissions should be permitted without further need for a license. To the extent that these issues are not covered in questions raised in the NOI, they should be. *See* NOI Question 24.

A. Streamed Performances Do Not and Should Not Require a Reproduction or Distribution License. [NOI Questions 4, and 24]

When a service makes digital public performances over the Internet or over wireless networks, it is required to pay the copyright owner of the musical composition and of the sound recording for the exploitation of their respective works under the public performance right. The public performance of the musical work is typically licensed by the applicable PRO. The ASCAP and BMI Rate Courts recently have done an excellent job ensuring that the licenses are priced at a level that approximates the fees that would be charged in a competitive market, taking into account the economic value of the performance. As discussed above, the sound recording copyright owners are paid license fees that far exceed the rates that would exist in a competitive market.

In other words, the copyright owners are already paid fees at or above a level that accounts for the economic value of the performance. It makes no economic sense for a service making such performances to have to pay even more for reproductions that occur

simply as an artifact of the transmission technology that is used. Any such additional payment will create a disincentive for distribution that will necessarily result in fewer transmissions being made, to the detriment of the public.

The Copyright Office recognized this reality when it wrote its 2001 Report to Congress in response to section 104 of the Digital Millennium Copyright Act. The Office stated in clear and certain terms that "Temporary copies incidental to a licensed digital performance should result in no liability." DMCA Section 104 Report at 142. As the Office recognized:

> [t]he economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance. The same copyright owners appear to be seeking a second compensation for the same activity merely because of the happenstance that the transmission technology implicates the reproduction right, and the reproduction right of songwriters and music publishers is administered by a different collective than the public performance right. The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place – to the detriment of copyright owners, webcasters, and consumers alike – or to extract an additional payment that is not justified by the economic value of the copies at issue.

Id. at 143. The Section 104 Report was correct.[7]

Moreover, there is a strong argument under current law that buffers created as an artifact of a transmission technology used to make a performance are not cognizable reproductions within the meaning of the Copyright Act. *See, e.g.*, *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008) (buffers used to effectuate a performance are not fixed and do not implicate the reproduction right); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004) (RAM buffers used to effectuate a digital transmission are not fixed). To the extent that they may be considered copies under current law, Congress should clarify the law to make clear that buffers are not cognizable copies or are exempt from copyright liability, not to find a means to double charge for an activity whose economic value is in the performance.

Unfortunately, the NOI neglects the reasoning and finding of the Section 104 Report and instead misleadingly asserts that "[t]he Copyright Office has thus interpreted

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[7] Indeed, the recommendation of the Section 104 Report in this regard did not go far enough. The same reasoning applies to performances that are exempt from liability under specific exemptions adopted by Congress. Where the primary economic activity at issue is a public performance, and Congress determined that there should be no liability for that performance, it makes no sense to undermine Congress' determination by requiring the user to obtain a license under one of the other rights that may be incidental to the technology used to make the performance.

the Section 115 [mechanical] license to cover . . . the server and other reproductions necessary to engage in streaming activities." NOI at 5. Actually, the Office declined to find that a stream was, in fact, a DPD subject to the reproduction and distribution rights. Library of Congress, Copyright Office, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries (Docket No. RM 2000–7), Interim rule, 73 Fed. Reg. 66,173, 66,174 (Nov. 7, 2008) ("The Office is not currently prepared to issue a regulation that definitively addresses whether such copies are within the scope of the compulsory license. . . . As such, the interim regulation takes no position on whether . . . and when it is necessary to obtain a license to cover the reproduction or distribution of a musical work in order to engage in activities such as streaming."). Rather, the Office held only that, if a stream resulted in a DPD, the mechanical license would cover the server and other reproductions necessary to engage in the activity.

CTIA understands that the Office was considering adopting a rule that streaming results in DPDs in order to fill a hole in the law – there is no clear exemption or means to license the server copies used by streaming services to make their performances. The Copyright Office was constrained in 2008 by the terms of existing law. Unfortunately, the solution being considered by the Copyright Office, if adopted, would have destroyed the longstanding distinction in the law among distributions, reproductions, and public performances and would have created major inconsistencies in other contexts. For example, section 114 includes a statutory license for certain non-interactive digital sound recording performances. Section 112(e) includes a statutory license for server copies used to make those licensed performances as long as no copies are made from those copies. There is, however, no license for buffer or other downstream "phonorecords" that might be created in the course of the performance, and any such copies could vitiate the section 112(e) statutory license. In other words, if the Office had decided that streaming results in the distribution of copies of musical works, it would necessarily also result in the distribution of phonorecords of sound recordings, effectively converting Congress's two sound recording statutory licenses into an absolute right to license the downstream incidental phonorecords. That would have made no sense and would have destroyed the statutory license system Congress created.

Fortunately, the NOI seeks recommendations to improve the law and is not constrained by the limitations and ambiguities of the law as it now exists. There is a better way to fix the music server copy hole, which CTIA discusses below in Part III.C.

For the reasons set forth in the Section 104 Report, the Office was right when it refused to establish the principle that streaming implicates the reproduction and distribution rights. It should recommend that Congress clarify the law to ensure that reproductions that are incidental to a licensed or exempt public performance (and that serve no other purpose) do not create liability under the Copyright Act.

B. Downloads Do Not and Should Not Require a Public Performance License.

As discussed above, it was only when challenged in the rate courts that the music PROs were forced to drop their claims for double-dip compensation for downloads under

the guise of the public performance right. These claims resulted from the arguable lack of clarity in the drafting of the transmit clause defining when a performance was public.

The inappropriateness of these claims, like the inappropriate claims relating to buffers discussed above, was addressed by the Copyright Office in its DMCA Section 104 Report. As the Copyright Office clearly stated in its heading on page 146 "[p]ublic performances incidental to licensed music downloads should result in no liability." The Office recognized that this was "symmetrical" to the difficulty of the double-dip claims relating to buffers:

> We view this issue as the mirror image of the question regarding buffer copies. We recognize that the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place is an unsettled point of law that is subject to debate. However, to the extent that such a download can be considered a public performance, the performance is merely a technical by-product of the transmission process that has no value separate from the value of the download. If it is a public performance, then, we believe that arguments concerning fair use and the making of buffer copies apply to that performance. In any case, for the reasons articulated above, it is our view that no liability should result under U.S. law from a technical "performance" that takes place in the course of a download.

DMCA Section 104 Report at 147-48.

Here, too, the Office got it right in 2001. Any revision to the definition of public performances should make clear that downloads do not implicate the public performance right to prevent abusive double-dip claims in the future.

C. Server Copies Used to Make Licensed or Exempt Performances Should Be Exempt, and Archaic Conditions on the Relevant Exemptions Should Be Removed.

Source copies that are used for no purpose other than to make a licensed or exempt performance have, traditionally, been exempt from copyright liability under a provision called the "ephemeral recording" exemption. It is contained in section 112(a) of the Copyright Act and applies both to sound recordings and the musical works contained in the sound recordings. Unfortunately, the exemption is subject to limitations that do not reflect modern realities.[8] Thus, entities making permitted public performances remain at risk for claims of copyright infringement. Both the recording industry and music publishing industry have used claims of violations of the terms of the

[8] The exemption was created during the 1976 revision of the Copyright Act and was crafted to reflect the technology of the time – namely, the use of program tapes by radio and television stations to facilitate their performances. *See* H.R. Rep. No. 94-1476, at 101 (1976) (noting that "the need for a limited exemption [for ephemeral recordings] because of the practical exigencies of broadcasting has been generally recognized.").

exemption and statutory license in litigation and legislative efforts to obtain inappropriate leverage. *See, e.g.*, *Atlantic Recording Corp. v. XM Satellite Radio*, Complaint Count IV (S.D.N.Y. May 16, 2006) (asserting willful infringement based on ephemeral recordings used for licensed performances as leverage for complaint against receiver with recording function); RIAA Demand Letter to Webcasters, June 1998 (asserting liability for reproductions used for nonsubscription webcasting, leading in part to DMCA expansion of sound recording performance right).[9]

The existing exemption fails in a number of important respects:

- First, the section 112(a) exemption is limited to a single copy. Digital services often require multiple copies. Notably, the section 112(e) statutory license permits multiple copies of sound recordings (but does not apply to musical works).

- Second, the 112(a) exemption (and the 112(e) statutory license) prohibit the making of copies from the exempt copy. Modern transmission technologies often require the making of buffers or caches, which may or may not be cognizable "copies" under existing law.

- Third, section 112 limits the performances for which the exempt ephemeral recordings are used to performances made "within the local service area" of the transmitter. It has been argued that this limitation excludes Internet streaming. Notably, the section 112(e) statutory license removes this condition with respect to ephemeral phonorecords of sound recordings, but there arguably is no similar exemption or license for musical works.

- Fourth, both the exemption in section 112(a) and the statutory license in section 112(e) require the server copy to be destroyed within six months of the first performance. That condition makes no sense in a world of digital music servers and likely is being honored in the breach, creating a substantial risk of claims of copyright infringement.

- Fifth, section 112(a) applies to "transmission programs," a confusing term that may or may not apply to digital servers storing individual sound recordings. Again, that limitation makes no sense in today's world and is not part of section 112(e).

When the recording industry and the Digital Media Association (DiMA) negotiated the expansion of the sound recording performance right in 1998, they also created a statutory license for source/server copies of sound recordings used in licensed performances in section 112(e). The Copyright Office opposed this statutory license in

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[9] Available at https://web.archive.org/web/19980703045450/ http://www.mp3.com/news/058.html.

1998 and restated its opposition and its belief that an exemption should be enacted in the DMCA Section 104 Report. In that report, the Copyright Office commented that the Section 112(e) ephemeral recording license "can best be viewed as an aberration." *See* DMCA Section 104 Report at 144 n.434. The Office went on to say that it did not "see any justification for the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license. Our views have not changed in the interim, and we would favor repeal of section 112(e) and the adoption of an appropriately-crafted ephemeral recording exemption." There is no reason that a service making a licensed (or exempt) performance should have to pay additional compensation for server copies that have no purpose other than to facilitate the performance. In other words, an exemption makes sense; a statutory license does not.

Moreover, even on its own terms, the section 112(e) statutory license fails in several respects:

- First, although the statutory license is broader than the exemption, it is still subject to some of the unreasonable limitations of the section 112(a) exemption, including the prohibition on copies from copies and the six month destruction requirement; and

- Second, Congress did not create a statutory license applicable to musical works or expand the exemption to cover server copies of musical works, leaving a gap that publishers have exploited.

Copies or phonorecords that are used solely to facilitate a licensed or exempt performance should not bear copyright liability. The copyright owner either is paid for the performance, or Congress has decided it should not be paid for the performance. Thus, the ephemeral recording exemption in section 112(a) should be broadened for both musical works and sound recordings, and the statutory license in section 112(e) should be eliminated.

The ephemeral recording exemption is designed to ensure that transmitting entities that are providing performances to the public can operate efficiently and without uncertainty and risk. These performances are already fully compensated or have been deemed exempt from copyright liability. There should be no further payment needed to make copies used only to facilitate the permitted performance.

IV. The Office Should Ensure that Unreasonable Expansions of the Public Performance Right Do Not Threaten Cloud Computing. [NOI Question 24]

CTIA members have invested heavily in cloud computing. Cloud computing refers to the practice of accessing a network of remote computers on the Internet or wireless networks to store, manage, and process data. Cloud computing unlocks enormous new value for businesses, consumers, and the economy as a whole, by making computing and storage resources available in an efficient, flexible, and secure manner. It

also gives people the ability to access their own documents, email, music collections, and other data across multiple wired and wireless devices, remotely and seamlessly.

Cloud computing depends on the proper limitation of copyright rights, most notably the public performance right. Constructions of the law that discriminate against remote activities threaten cloud computing services with potentially massive liability and would chill investment in this exciting new sector of the economy.

Cloud computing, by its nature, allows users to store content remotely and then transmit it back to themselves on demand. Under a proper construction of the law, such transmissions should be considered private performances that do not implicate the public performance right. If such transmissions do implicate the public performance right, cloud computing would be subject to the whim of an unknowable and uncountable array of copyright owners.

The following principles relating to the performance right are essential to protect the continued growth and vitality of cloud computing.

- When a user directs a computer to store a personal copy of a work, a subsequent transmission of that copy back to the same user is a private performance, not a public performance;
- In assessing whether a performance is public or private, the physical location of the devices involved is irrelevant;
- The fact that multiple users may store or transmit the same work does not transform a number of otherwise individual private performances into a single public one;
- Volitional conduct is a necessary element of direct liability.

CTIA is aware that the Supreme Court is considering the scope of the performance right in the *Aereo* case. The amicus brief in which CTIA participated in that case expands on these principles. Brief Amici Curiae of Center for Democracy and Technology, CTIA-The Wireless Association at 9-20, *ABC v. Aereo, Inc.*, No. 13-461, (U.S. Mar. 3, 2014).

The Copyright Office should be vigilant to ensure that the public performance right is not expanded in a way that threatens cloud computing. If needed, the Copyright Office should recommend to Congress that the right be clarified to protect and encourage the use of cloud computing technology. If, the right continues to be construed in a way that does not threaten cloud computing, the Copyright Office should resist calls to expand the right in ways that do.

CTIA appreciates the Copyright Office's consideration of its comments and looks forward to working with the Copyright Office on these important issues.

Respectfully submitted,

May 23, 2014

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Before the
UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C.

In the Matter of: **ASCAP and BMI Consent Decree Review**

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Introduction and Summary

CTIA-The Wireless Association® offers this initial submission in response to the Department of Justice's June 4, 2014, request for comments concerning the ASCAP and BMI consent decrees (the "Consent Decrees"). CTIA appreciates the opportunity to comment in connection with this important review.

CTIA respectfully submits that:

- The market for music performance rights is not competitive and the Consent Decrees continue today to serve important pro-competitive purposes;
- The recent experience of CTIA's members demonstrates how the Consent Decrees provide an important check on ASCAP's and BMI's Abuse of their Collective Market Power;
- SESAC possesses significant collective market power that should be subjected to effective regulation under a consent decree comparable to the Consent Decrees
- Direct licensing is an important check on performance rights organization ("PRO") market power under the Consent Decrees, but it cannot replace the Consent Decrees due to the high market concentration of the major music publishers and the lack of competition among them.

CTIA elaborates on these points below.

CTIA is an international organization representing all sectors of wireless communications – cellular, personal communication services, and enhanced specialized mobile radio. A nonprofit membership organization founded in 1984, CTIA represents providers of commercial mobile radio services ("wireless telecommunications carriers"), mobile virtual network operators, aggregators of content provided over wireless telecommunications systems, equipment suppliers, wireless data and Internet companies, and other contributors to the wireless universe. A list of CTIA's members appears at http://www.ctia.org/membership/ctia_members/.

CTIA frequently participates in administrative proceedings and coordinates efforts to educate government agencies and the public about wireless issues. For example, CTIA recently submitted comments in response to the Copyright Office's Music Licensing Study, Docket No. 2014-03, which, among other things, raised questions similar to those being evaluated as part of the Justice Department's Consent Decree review. CTIA also has presented its views in testimony before Congress and has filed numerous amicus briefs in the federal courts on behalf of the wireless industry on a variety of issues, including copyright issues. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

CTIA and its members have a substantial interest in the continued effectiveness of the Consent Decrees. Wireless technology not only provides consumers with first-rate telecommunications service, but also provides a convenient and important means for wireless consumers to receive digital performances of music in connection with their wireless devices. CTIA's members, either directly or through agreements with third-party service providers, offer interactive and non-interactive music streaming, access to satellite radio programming, permanent and limited music downloads, ringtone downloads, linear and on-demand video streaming, and access to games with full color graphics and embedded music. CTIA's members also transmit performances of recorded music to individuals placing calls to wireless customers in the form of "ringback tones"— sounds that replace the ringing that the caller hears when he or she calls a mobile telephone. Further, many of the media products and services that CTIA's members make available are available for preview using performances of short clip samples that are streamed over the Internet and wireless networks.

CTIA's members strive to provide their services to their customers at a reasonable cost. Thus, ready access to, and the cost of, music licenses are ongoing concerns. In light of these concerns, CTIA participated as an amicus before the ASCAP Rate Court and the Court of Appeals for the Second Circuit in the case deciding that music downloads did not implicate the public performance right. *United States v. ASCAP (Application Real Networks, Inc. & Yahoo! Inc.)*, 627 F.3d 64 (2d Cir. 2010) (hereinafter "*Yahoo!*").

Moreover, CTIA's members have been litigants before the ASCAP Rate Court, where they were instrumental in resisting ASCAP's efforts to demand public performance royalties for ringtone downloads. *See In re Cellco P'ship d/b/a Verizon Wireless*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (hereinafter "*Verizon Wireless*") (holding that downloading a ringtone to a cell phone is a reproduction but not a public performance).[1] CTIA's members also resisted ASCAP's attempts to discriminate in its royalty fees against new wireless means of performing video. *See ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012) (rejecting ASCAP's discriminatory position and adopting rates consistent with past video licenses).[2]

CTIA members support protection of the legitimate rights of copyright owners. Indeed, CTIA members are among the leading legitimate performers and distributors of recorded music, and pay for the right to do both. Music publishers, and their songwriters, earn substantial performance royalties as compensation for CTIA members' public performances of musical compositions. CTIA, however, believes that the market for music licenses is far from competitive, that the PROs abuse market power derived from

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[1] CTIA members Verizon Wireless and AT&T Mobility were parties in that case. CTIA filed an amicus brief.

[2] CTIA members Verizon Wireless and AT&T Mobility were parties in related cases that were set to be tried shortly after the MobiTV case. Those cases settled after the MobiTV decision. Verizon Wireless filed an amicus brief before the Second Circuit in ASCAP's unsuccessful appeal of the MobiTV decision.

their aggregation of copyrights and their blanket licensing practices, and that the Consent Decrees remain an essential means of mitigating that market power.

In sum, CTIA has a direct interest in the issues raised by the DOJ's Consent Decree review. Those issues will have significant ramifications for the public, the wireless industry, and CTIA's members.

I. The Justice Department Should Ensure that the PROs' Collective Market Power Is Constrained and Provide Protection Against the Comparable Market Power of the Major Publishers.

The Department's Notice of the Consent Decree Review (the "Notice") asks about the continued effectiveness of the Consent Decrees. The Notice specifically notes that the Consent Decrees were last amended in 2001 and 1994 and inquires whether the Consent Decrees "need to be modified to account for changes in how music is delivered to, and experienced by, listeners."

The recent decisions of the ASCAP and BMI Rate Court judges, who have extensive experience with the PROs' behavior, and the recent experience of CTIA's members in their dealings with the PROs, confirm that the decrees remain essential to foster competitive market pricing for music performance rights. Due to the nature of the markets, SESAC and the major publishers also exercise substantial supra-competitive market power. That market power also should be controlled.

A. The Market for Music Performance Rights Is Not Competitive.

Copyright law principles and market structure coalesce to eliminate competition in the marketplace for music performance rights. These combined factors give the PROs enormous market power insulated from competitive forces.

First, ASCAP, BMI and SESAC aggregate huge numbers of musical works that would, in a competitive market, compete for use. Second, the large music publishers have been allowed to merge to the point that the publishing industry is now highly concentrated. Three major publishers control the rights to vast majority of musical works.

Third, copyright law allows rights to be licensed separately. Thus, when programs or commercials that are intended for public performance are produced, the producers obtain only reproduction and distribution rights and need not obtain public performance rights. Indeed, the PROs typically will not grant public performance rights to program producers because they do not actually perform the programs they produce. Thus, it falls to the entity making the performance to clear the performance right.

Unfortunately, however, once a program or ad is produced, or "in the can," the entity making the performance is unable to engender competition among possible suppliers of the performance right. The performing entity must take the program as is and cannot alter it. This gives the licensor of the performance right the ability to exercise "hold up" power – the licensor can seek to charge up to the full value of the entire

program or ad, unconstrained by the actual value contributed to that program or ad by the licensor's music.

Fourth, the PROs typically offer only licenses to their entire repertory. Thus, they effectively eliminate any competition that may exist among their members, among the PROs, between the PROs and their members, or, for that matter, between the use of music and other programming matter.

Fifth, these problems are compounded by the near-impossibility of identifying the potential licensors of any particular performance right. Although the PROs offer on-line searches of their databases, they do not provide a reliable or effective means of identifying the content of each PRO's repertory. As the Magistrate Judge considering a preliminary injunction against SESAC found, SESAC's online search tool "does not provide a reliable means for determining what is SESAC's repertory." Report and Recommendation at 15, *Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5807 (E.D. Pa. Dec. 23, 2013). The court noted that the tool "expressly disclaims that it is accurate, advises stations that it could change on a daily basis, and limits the user to 100 searches per session." *Id.* at 15 n.13. ASCAP's search tool contains a similar disclaimer, stating that "ASCAP makes no representations as to its [search tool's] accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database." All of the search tools limit searches to one work at a time, making searches for numerous works impractical.

As a result, it is effectively necessary for an entity engaging in substantial numbers of public performances, such as a wireless carrier or a service making streamed performances, to obtain licenses from all three PROs. The major publishers, of course, understand the anticompetitive effects of the same behavior. Even where they seek to license their catalogs directly, they strategically withhold information about their content. *See In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2014 WL 1088101 at *35, *36, *38 (S.D.N.Y. 2014) (describing significance of publisher refusals to provide Pandora with usable lists of their catalogs).

The judges that oversee the PROs' conduct have continued to recognize the PROs' market power and to curb their abuses right up to the present, long after "the changes in how music is delivered" referenced in the Notice. In 2005, the United States Court of Appeals for the Second Circuit, which oversees the rate courts that oversee the Consent Decrees, recognized that the "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." *United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005). As recently as 2012, that same court stated that "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012); *see Yahoo!*, 627 F.3d at 76.

Courts examining SESAC's market power also have concluded that SESAC functions as a monopolist and that there is evidence that SESAC has acted unlawfully. *See, e.g.*, *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(PAE), 2014 WL 812795 at

*36 (S.D.N.Y. 2014) ("In sum, there is sufficient evidence upon which a jury could find that SESAC took action to maintain and fortify its monopoly over licensing of its affiliates' work, by adopting licensing practices that eliminated all realistic competition with its blanket license."); *Radio Music License Committee v. SESAC Inc.*, Report and Recommendation at 31-33 (finding that Plaintiffs had made a prima facie case of a violation of Sherman Act sections 1 and 2, and noting that "SESAC has 100% of the market power over the unique collection of works in their repertory and there are no 'real' alternatives to SESAC's blanket license").

The only protection that users have against ASCAP's and BMI's monopoly power is the protection provided by the Consent Decrees. Those should be retained and, as discussed below, strengthened.

B. The Recent Experience of CTIA's Members Demonstrates that the Consent Decrees Continue to Provide an Essential Check on the PROs' Abuse of Their Collective Market Power.

CTIA members have experienced first-hand the abuses of market power that the PROs continue to perpetrate. In one case, the PROs asserted the right to collect fees for activities that did not even implicate the performance right. In another, they sought to impose hugely discriminatory fees on wireless service providers for the music included in video programming. In both cases, the rate courts acting under the Consent Decrees were essential in protecting the performing entities and the public.

1. The PROs' Over-Reaching Claims Relating to Music Downloads

The PROs asserted for years that downloads of music files, including ringtones, implicated the public performance right. In other words, according to ASCAP and BMI, downloads for which music publishers were fully compensated under the section 115 mechanical license, also required a further payment for a public performance license, due to various theories, including the PROs' construction of the "transmit clause" found in the definition of "to perform or display a work 'publicly.'" 17 U.S.C. § 101.

The PROs used their market power to parlay those claims into millions of dollars of ill-gotten gain. The enormous risk of liability created by copyright law's statutory damages regime precluded users from challenging the PROs' position directly by refusing to take a license. Absent the Consent Decrees, the choice would have been to capitulate or risk enterprise-threatening liability.

The PROs' claims for double-dip compensation were ultimately challenged in the ASCAP Rate Court by services that offered music and ringtone downloads. *See Yahoo!*, 627 F.3d 64 (full downloads); *Verizon Wireless*, 663 F. Supp. 2d 363 (ringtones). The rate court, and then the Second Circuit, consistently held that downloads do not implicate the public performance right. See *Yahoo!*, 627 F.3d at 71 (downloads do not implicate the public performance right); *Verizon Wireless*, 663 F. Supp. 2d at 378 (ringtones do not implicate the public performance right). In other words, the rate court process

established by the Consent Decrees served as an essential check on the PROs' abuse of their market power.

2. ASCAP's Efforts to Discriminate Against Mobile Video Services

CTIA's members also faced ASCAP's abuse of its monopoly power when they sought a reasonable license for their mobile video services. In response to the license request, ASCAP sought a radical change to its longstanding, consistent paradigm for licensing music in video programming. ASCAP eschewed the fee structure that it had long applied in the cable and broadcast television industry, where license fees varied depending on music intensity of the programming between 0.9% and 0.1375% of the programming service's revenue (which does not include the revenue of the entity distributing the content to the public). Instead, ASCAP sought to nearly triple its rates.[3]

Moreover, ASCAP sought to apply those inflated rates to the revenue earned for both the programming and its public distribution. In other words, ASCAP attempted to use its monopoly power to leverage itself into a share of revenues that were earned for the wireless carriers' technical advances and huge capital expenditures in developing and maintaining their networks, revenues that were not reasonably attributable to the music in video programming.

The combined effect of the higher rate and inflated revenue base was that ASCAP sought fees from the wireless industry that were many multiples of the fees it obtains for the same audiovisual performances in other media. ASCAP's attempt to discriminate was particularly egregious given that its cable licenses (and at least one major network broadcast license) encompassed performances of identical content over identical wireless media.

Fortunately, the ASCAP Rate Court and Second Circuit rejected ASCAP's unprecedented attempt to discriminate among media. *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010), *aff'd sub nom. ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012). The district court found that ASCAP's witnesses were not credible, 712 F. Supp. 2d at 224 n.35, and that its case lacked an "explanation of guiding economic principles or any coherent theory," *id.* at 239.

ASCAP's efforts to discriminate against mobile video services shows the lengths to which the PROs will go to exercise their collective monopoly power and the continuing need for the Consent Decrees and rate courts to rein in that power.

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[3] ASCAP sought to apply a rate of 2.5% to revenue that had been adjusted by a "music use adjustment factor," which was determined by the ratio of ASCAP's traditional cable TV rate for a type of programming to 0.9%. Thus, each applicable rate equaled the corresponding cable rate multiplied by 2.5/0.9 (2.78).

C. SESAC's Licensing Practices Provide an Example of What Music Licensing Would Be Without the Consent Decrees.

The SESAC experience provides an example of what the world would look like without the ASCAP and BMI Consent Decrees – unconstrained price increases charging disproportionate amounts for the limited music that is performed. As a result of its behavior, SESAC has been sued for antitrust violations by both the Television and Radio Music License Committees. As discussed above, early decisions in both cases confirm that SESAC possesses collective market power, takes steps to eliminate competitive licensing by its affiliated publishers, and acts to ensure that it is able to extract supra-competitive license fees.

Due to the costs and burdens of private antitrust litigation, it took years of market power abuse by SESAC to provoke these suits. Those costs and burdens make it impractical for most music users to challenge SESAC's unlawful conduct. Justice Department action is needed to protect competition and the public. SESAC should be subjected to effective antitrust regulation comparable to that imposed on ASCAP and BMI.

D. While Direct Licensing Remains an Important Check on PRO Abuses, It Cannot Replace the Consent Decrees Due to the Lack of Competition Among Major Publishers.

The Notice asks whether rights holders should be allowed to limit their grant of licensing authority to ASCAP and BMI in order to license certain uses of their works directly. CTIA respectfully submits that the lack of competition among the major publishers counsels against allowing such partial withdrawals from ASCAP and BMI.

As the rate courts found in the DMX cases, direct licensing, particularly by smaller independent publishers, provides an important check on the PROs' market power and offers both some competition and an indication of the prices that would prevail in a competitive market. Unfortunately, however, the major publishers have been allowed to merge under the cover of the ASCAP and BMI Consent Decrees to the point that the industry is highly concentrated. Moreover, due to this consolidation in the industry, the major publishers offer catalogs that every user must license, so they are no longer substitutes. Thus, the major publishers do not compete with each other. Rather, as the ASCAP Rate Court found in the recent Pandora case, the major publishers exercise extraordinary market power and are willing to abuse that market power to extract supra-competitive license fees.

In the recent Pandora case, the ASCAP Rate Court found in no uncertain terms that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices" in their negotiations with Pandora. Pandora Media, 2014 WL 1088101 at *35. The court found that the negotiations were conducted in a manner that left Pandora with no alternative: "it could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms." Id. According to the court, "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their

negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." Id. at *35-36.

As further evidence of the flaws in a direct-license only regime, when the major publishers tried to withdraw their digital rights from ASCAP and BMI and license them directly, they found it virtually impossible to administer their own rights. Instead, they turned back to ASCAP and BMI to administer the withdrawn rights for the vast majority of users. See id. at *17-18. This showed the withdrawal for what it was: an effort by the major publishers to exercise enormous market power free from the constraints of the Consent Decrees. Accordingly, while direct licensing is an important alternative to the PRO blanket licenses under the Consent Decrees, direct licensing cannot be a substitute for the Consent Decrees.

Conclusion

CTIA appreciates the Justice Department's consideration of these comments and looks forward to working with the Department on these important issues.

Respectfully submitted,

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Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of:	
Music Licensing Study	Docket No. 2014-03

Comments of the Digital Media Association ("DiMA")

The Digital Media Association ("DiMA") respectfully submits the following comments in response to the above-referenced Notice of Inquiry (the "Notice of Inquiry"). DiMA commends the Copyright Office for initiating this inquiry, and appreciates the opportunity to participate.

DiMA is the leading national trade organization dedicated to representing the interests of licensed digital media services, including many of the leading players in the digital music marketplace today. DiMA's members include Amazon.com, Apple, Google/YouTube, Microsoft, Pandora, RealNetworks and Slacker, and a complete list of its membership may be found at http://www.digmedia.org/about-dima/members. Although DiMA is submitting a single response to the Notice of Inquiry, DiMA's members operate a broad array of different digital music service types and consumer offerings with different music licensing needs. However, as distributors of copyrighted sound recordings and musical works through legitimate music services, DiMA's members share many common interests, and are directly affected by existing methods of licensing music, as well as the mechanisms for obtaining music licenses that are shaped by U.S. copyright law. DiMA has been actively involved in many of the recent studies, analyses, public inquiries and roundtables conducted by the Copyright Office on various aspects of copyright law. Through the Copyright Office's efforts, we believe that Congress has already been provided with much important background on music licensing issues.

The interests of DiMA and its members are aligned with those of the rights owners in several significant respects. First, DiMA members share the belief that rights owners should be appropriately compensated for the use of copyrighted works. Second, DiMA members also share the belief that the long-term survival of the music business depends on the ability to develop profitable, sustainable digital music services that will delight consumers for generations to come. The legitimate music services represented by DiMA's members have collectively paid billions of dollars in royalties to content owners, recording artists and songwriters in a marketplace where the sale of physical products – long the content owners' primary source of revenue – has continued to decline year-over-year. In the face of this decline, digital music services, including many of the streaming services operated by DiMA's members, are generally viewed by the music business as its salvation.[1] Significantly, the delivery of engaging,

[1] IFPI Digital Music Report 2014, at 6 (2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.; *see also* Ben Sisario, *Spotify Hits 10 Million Subscribers, a Milestone*, N.Y. Times, May 21, 2014, *available at* http://www.nytimes.com/2014/05/22/business/media/spotify-hits-milestone-with-10-million-paid-subscribers.html?_r=1.

innovative music services by DiMA members is critical to the central public policy underlying our copyright system: affording the widest range of consumers access to the widest range of creative works.[2]

However, the complex process for music licensing in the digital landscape that exists today in the United States – the framework of which is based on U.S. copyright law – threatens to chill investment in legitimate music services, and the continued development and expansion of innovative services that are essential to the survival of the recorded music industry. Accordingly, we are pleased that the Copyright Office is continuing its examination of the effectiveness of existing methods of licensing music. We remain hopeful that, after evaluating the issues, Congress will consider ways to modernize U.S. copyright law in a manner that assures consumers continued access to a vibrant marketplace for music products and services in the digital era.

[2] *See, e.g., Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."); *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 558 (1985) ("the immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate the creation of useful works for the general public good." (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975))); *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[to] promote the Progress of Science and useful Arts.'").

EXECUTIVE SUMMARY

- Fragmentation of copyright rights and rights ownership. The mechanisms for obtaining music licenses in the United States are rooted in various distinct rights recognized under U.S. copyright law, where sound recordings, and the musical works embodied within them, are routinely owned by different copyright holders. In fact, the rights within the musical work rights bundle itself are routinely owned by more than one copyright holder. This fragmentation did not severely disrupt the historical business model for the sale of recorded music products because the distributors and retailers that sold and resold physical products (and promoted them) did not need to license any copyrights, and third parties (i.e., terrestrial radio broadcasters) licensed musical work public performance rights to promote the sale of these recorded music products through radio airplay.

- Shifting of licensing responsibility. In the digital environment, music services are functionally equivalent to the distributors and retailers that sold music under the historical business model, but licensing responsibility has shifted to them – a first in the history of the music industry.

- The impact of rights fragmentation and the shifting of licensing responsibility on digital music services. The above-referenced rights fragmentation and shifting of licensing responsibility to service providers under the current legal and regulatory framework established by U.S. copyright law has created formidable challenges for digital music services for various reasons unique to music licensing in the digital environment, including the following:

    - The need for licensing ubiquity, and the new legal uncertainties. As a result of the convergence of rights in the digital era, digital music services are subjected to legal uncertainties around the precise rights implicated for particular activities, overlapping claims for royalty payments, and significant potential legal exposure. Concurrently, as the music business has shifted from ownership models to access models, digital music services are confronted with the need to secure licenses from tens of thousands of rights holders, covering tens of millions of tracks, in order to offer consumers commercially viable services. Failing to secure the necessary licenses is not an option.

    - The unprecedented market power of rights owners, and the "tug-of-war" over royalties. Rights owners enjoy unprecedented market power, and because each negotiation and ratesetting proceeding occurs in parallel (at different times, in different places and before different ratesetting tribunals operating under different ratesetting standards), each rights owner seeks to increase its own royalty, generally without regard to the royalties that services have to pay the various other rights owners. As discussed further below, an example of this phenomenon was seen in recent proceedings involving musical composition public performance licensing for Internet radio services. Effectively, this dynamic has resulted in a ratcheting effect whereby digital music service providers have been thrust into the middle of a "tug-of-war" among rights owners over royalties. The net result of this "tug-of-war" is royalty rates that are (i) not presented to copyright users in a unified way such that digital music services can evaluate, forecast and understand their aggregate royalty expense for all of the copyright rights needed, and (ii) in the aggregate, are unjustifiably high and, ultimately, unsustainable.

    - Interdependence of interests. Because of the interdependence of interests among rights owners, creative talent and digital music services, the conduct of any one party in the music licensing marketplace can have adverse consequences for the others, and the public interest. There is no centralized body with general oversight to effectively balance these

competing interests and minimize the collateral consequences that one "hold out" rights owner can have on all others parties in the ecosystem.

- The current music licensing mechanisms do not work well in the digital environment. The existing music licensing structures are not well-suited for the digital era, as they (i) lack necessary transparency, (ii) are not efficient, and (iii) do not provide a "level playing field" for competitors in terms of ratesetting standards, royalty rates or functionality rules because of platform distinctions or historical anomalies. Nor do these structures often provide a suitable counter-balance to the market power of rights owners.

- Six essential pillars for modernization of copyright laws for the digital environment. U.S. copyright law is in need of modernization for the digital environment, and, as noted above, a holistic view of the entire music licensing ecosystem should be taken. For modernization to be effective, the framework for the new digital era should be based on the following six essential pillars:

    - **Continued Government Oversight and Regulation of Music Licensing Activities:** A music licensing framework that appropriately counter-balances the unique market power and negotiating leverage of copyright owners, and takes digital music services out of the middle of the rights owner "tug-of-war" over royalty rates that has driven up royalty costs to levels that are unsustainable, would facilitate a healthy and sustainable digital music marketplace.

    - **Transparency and a centralized database:** The digital marketplace needs a publicly available, centralized database that contains information about rights ownership of musical works and sound recordings on a work-by-work level and on which digital music services can rely. For such a database to be truly effective, it needs to be accurate, comprehensive and reliable, as well as use standard industry identifiers such as International Standard Recording Code ("ISRC") and International Standard Musical Work Code ("ISWC") numbers that show the relationship between the musical works and sound recordings that embody them, and vice versa. However, as experience with the development of the Global Repertoire Database ("GRD") in Europe has shown, if left entirely to private industry without government oversight, these universal standards (and the centralized database itself) are unlikely to get implemented.

    - **Licensing Efficiencies and Reduced Transaction Costs:** The music licensing marketplace would benefit from a framework that promotes licensing efficiencies and reduced transaction costs for music licensing activities, implemented through vehicles such as compulsory blanket licenses and common agents.

    - **Clarification of Rights**: A music licensing framework where rights owners are not able to drive up royalty rates based on legal uncertainties arising out of the convergence of reproduction, distribution and public performance rights in the digital environment would foster growth and promote new entry into the digital music marketplace.

    - **Reduction of Legal Risks Around Licensing Activities:** Immunity from infringement liability (including statutory damages) for copyright users that have acted diligently and in good faith based on the information contained in the centralized database would reduce risk and encourage further innovation. Further, any entitlement to statutory damages in other contexts should be conditioned on the registration of accurate rights ownership information in the centralized database, utilizing universal standards.

- **"Level Playing Field":** A music licensing framework that creates a "level playing field" where one music service is not advantaged over another in terms of ratesetting standards, royalty rates or functionality rules because of platform distinctions or historical anomalies would increase competition on the merits, thereby incentivizing innovation.

I. INTRODUCTION AND OVERVIEW

1. The current legal and regulatory framework was designed for a historical business model (the sale of physical products) and is ill-suited for the digital environment.

A. Licensing responsibility under the historical business model.

As the Copyright Office has noted in the Background section for this Notice of Inquiry, many of the sound and enduring principles in U.S. copyright law are challenged when applied to the music business in the digital environment. The historical business model for recorded music products was relatively simple and straight-forward. Record companies sold physical products embodying sound recordings, musical works and other copyrighted materials (including artwork) to distributors and retailers, who in turn, resold those finished goods to consumers. Significantly, these distributors and retailers did not need to obtain copyright licenses from content owners in order to *resell the finished goods* because record companies delivered them with "all rights cleared."[3] Moreover, copyright law did not require retailers to seek licenses from content owners in order to engage in activities intended to *promote these sales,* such as in-store public performances of records.[4]

Under the pre-digital model, licensing activity for the promotion of physical product sales was generally the responsibility of parties other than the retailers – such as terrestrial radio broadcasters. These parties, not the retailers, licensed the necessary rights to promote the sale of records, such as by means of terrestrial FM and AM radio airplay. Moreover, the only rights broadcasters needed to secure were public performance rights in the underlying musical works, as Congress has long refrained from recognizing an exclusive right for the public performance of sound recordings by means of terrestrial radio airplay.

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[3] This included the right to reproduce and distribute the musical works embodied in the physical products. It is worth noting that the migration from selling physical products to permanent digital downloads has done little to change this basic construct, at least in the United States. Whether sold or resold on wholesale or agency models, record labels generally still bear responsibility for acquiring and administering mechanical licenses for the musical works embodied in the sound recordings, and paying the required mechanical royalties to musical work rights owners.

[4] Congress has long exempted retailers from the requirement to license musical work public performance rights for such promotional activities under Section 110(7). In the digital environment, there is no equivalent of Section 110(7). Accordingly, for the use of sound clips to promote the sale of permanent digital downloads within the digital download store environment, digital music services are responsible for acquiring and administering musical work public performance rights, and paying the required pubic performance royalties. Congress created the exemption for the promotion of physical sales in response to *Chappell & Co. v. Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3d Cir. 1964), a case brought under the 1909 Act, which "held that the public performance of phonorecords in an establishment selling such phonorecords to be an infringing public performance for profit, notwithstanding defendant's argument that it was merely engaged in advertising the phonorecords and not in a 'public performance for profit.'" Melville B. Nimmer & David Nimmer, 2 *Nimmer on Copyright* § 5.18[F] (2013) (internal citations omitted). In the Fairness In Music Licensing Act of 1998, Congress extended this exemption beyond "copies or phonorecords of the work" to include "the audiovisual or other devices utilized in such performance." Fairness In Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998); *see* 17 U.S.C. § 110(7) (2012). Although the exemption set forth in Section 110(7) has not been extended to digital, and the Southern District of New York recently ruled that the public performance of sound clips in equivalent digital contexts does not constitute a fair use of the musical works, we believe that uses that do not substitute for sales, but instead, promote them, should be encouraged and not discouraged, regardless of whether they are digital or analog in nature. *See United States v. Am. Soc'y of Composers, Authors, and Publishers*, No. 41-cv-1395, 2009 WL 484449 (S.D.N.Y. Apr. 3, 2009).

B. The evolution of the music business from the historical physical business model to the digital environment.

Over the past ten to fifteen years, the music business has been transformed by the digital landscape. Consumers – who are intended to be the primary beneficiaries of our copyright system – have largely benefited from this transformation.[5] We have seen paradigm shifts in the following areas:

- The *way* that sound recordings and musical works are delivered to the consumer (as new digital product configurations and services replace traditional physical products);
- The *technology platforms* used to deliver sound recordings and musical works (as the Internet, mobile carrier networks, cable television networks, satellite television networks and satellite radio networks replace traditional brick-and-mortar retailers and terrestrial broadcasters);
- The *consumer electronics devices* used by consumers to enjoy sound recordings and musical works (as connected, highly portable devices such as smart phones, tablets and lightweight computers replace conventional CD players, turntables and cassette players);
- The *business models* used to create revenue-generating opportunities (as subscription, freemium, bundled and ad supported digital business models replace simple a la carte physical sales);
- Consumer expectations about *how* music can be consumed (as an array of product types, such as permanent downloads, limited downloads and streams – which often enable consumers to be in control of the media they consume by "personalizing" their experiences in a multifaceted, immersive way – replace traditional physical product types);
- Consumer expectations about *when* music can be consumed (as digital music services provide consumers with instant access to music without having to drive to brick-and-mortar stores or wait for mail order shipments to arrive);
- Consumer expectations about the *quantity of titles available* (as consumers migrate to access model services, legitimate digital music services must offer and make available a "critical mass" of licensed works to remain commercially viable, unlike the historical business model where it was acceptable for some titles to be out of stock); and
- A culture that expects licensed digital music services to provide ubiquitous access to all content at *low cost or no cost at all* (as free-to-the-user illegal alternatives are plentiful, unlike the marketplace for traditional physical products).

With respect to these paradigm shifts, DiMA's members have risen to the occasion and are responsible for much of the innovation and substantial financial investment that has transformed the music industry for the better (such as the development of the download, streaming, subscription, locker and other digital business models that represent the future of recorded music delivery). The digital music services offered by DiMA's members provide a variety of compelling, immersive consumer experiences that satisfy the needs of a highly segmented array of consumers.

C. Licensing responsibility has shifted in the digital environment.

In most industries, the manufacturers of products are responsible for sourcing the various components and rights necessary to deliver goods to their network of wholesalers and distributors, so they

[5] Mark Cooper, *Copyright Policy, Creativity And Innovation In The Digital Economy: Comments of the Consumer Federation of America*, (November 13, 2013), *available at* http://www.ntia.doc.gov/files/ntia/consumer_federation_of_america_comments.pdf.

may be resold to other businesses or directly to end user customers without the need to acquire additional components or rights. Under the historical business model, record companies performed the role of the manufacturer, and, as such, they delivered physical record products to their network of distributors and retailers with "all rights cleared." In the digital environment, these roles have been reversed, and digital music services (i.e., the retailers) must source many of the component parts of the product – individual copyright based rights – and bear all of the burdens and responsibilities for (i) acquiring and administering those rights and (ii) paying the required royalties out of their own share of the revenues generated.

These incremental responsibilities and burdens have vastly complicated the licensing landscape, and diminished the operating margins for digital music services that now perform these converged roles. For example, unlike the physical distributors of yesteryear, today's digital distributors must identify and locate licensors of rights associated with sound recordings, musical works and other copyrighted materials (such as artwork); negotiate and administer licenses; and navigate the complex web of rights ownership in the U.S. and global licensing paradigms.[6] Under the current licensing framework and industry structure, digital music service providers are forced to bear the entire burden of reconciling any conflicting demands from rights owners, who often assert overlapping royalty claims for the same uses of the same works.[7] This change represents a seismic shift in the distribution of recorded music product – and one with far-reaching repercussions, as detailed below.

2. The effects of the current legal and regulatory framework in the digital environment.

A. <u>The current legal and regulatory framework enhances the negotiating leverage of rights owners</u>.

The challenges faced by digital music services are formidable and fundamentally different from the challenges faced by retailers and distributors under the historical music business model. The shift in licensing responsibility from record companies to digital music services, compounded by the unique and byzantine nature of music licensing in the digital environment under the current legal and regulatory framework established by U.S. copyright law, has significantly *enhanced the negotiating leverage of right owners* (and diminished the leverage of licensees). This framework has proven detrimental to digital music service providers and actually has served to undermine the shared belief that rights owners should be appropriately compensated for the use of copyrighted works. The following attributes of today's music licensing model, as supported by the current legal and regulatory framework, are among the most problematic:

- <u>Fragmented rights ownership</u>. Based on anachronistic distinctions in U.S. copyright law, sound recording and musical work rights are markedly fragmented[8] and controlled by numerous rights owners. Adding further complication, rights within the musical work

[6] Although it is beyond the scope of this Notice of Inquiry, it is worth mentioning that many digital music service providers that operate legitimate music services in the U.S. also operate services in other countries. These services must navigate similarly complex copyright regimes on a country-by-country basis, adding further complexity to the burden of the digital music service providers.

[7] These overlapping claims stem from the convergence of various Section 106 rights in the digital era, which is discussed in more detail elsewhere in this response.

[8] Examples of this fragmentation include the separation of sound recording and musical work rights, the separate licensing structures for copyright rights within the musical work rights bundle, and the separate international licensing structures for musical work rights and certain sound recording rights.

rights bundle itself may be further fragmented across numerous rights owners.[9] Accordingly, in order to comply with their licensing responsibilities, digital music services must acquire, retain and administer licenses under copyright from a *multitude* of rights owners. The effects of this fragmentation on licensees in the music licensing marketplace are discussed in greater detail in our response to Question 4 below.[10]

- Access services, and the need for licensing ubiquity. While it might be possible to launch a digital music service with only the sound recordings owned and controlled by the three major labels and a few independent labels and aggregators, doing so would limit the service's commercial viability in light of consumer expectations that "everything" should be available. Moreover, few services can be commercially viable without musical work licenses from *all* music publishing rights owners, because musical work rights generally cut across the lines of sound recording copyright ownership (e.g., musical works in sound recordings owned or controlled by Warner Music Group are controlled by tens of thousands of music publishers and not exclusively by Warner/Chappell, its affiliated music publishing company). The need for licensing ubiquity requires services to secure licenses from tens of thousands of rights holders, covering tens of millions of tracks, in order to meet consumer expectations in the digital environment.

- New legal uncertainties arising out of rights convergence. Reproduction, distribution and public performance rights have converged in various ways, and the lines between them are often unclear. Accordingly, the multitude of rights owners with whom digital music services must secure licenses often assert overlapping claims for the same or analogous rights, which can increase a digital music service provider's overall royalty expense by requiring redundant payments for a single use of a copyrighted work (i.e., "double dipping" by rights owners). For example, the performance rights organizations (PROs) long asserted that digital downloads and ringtones implicated public performance rights in addition to "mechanical" reproduction rights; while this position was ultimately rejected by multiple legal decisions,[11] it cast a shadow of uncertainty for digital music services and led to the unnecessary payment of millions of dollars in duplicative royalties for many years. In addition, this convergence of rights increases transaction costs as digital music services must often clear, for example, both public performance and reproduction/distribution rights in a musical work for a use whose historical analog would have only required one or the other such clearance.

- Unprecedented market power of rights owners. After decades of industry consolidation, rights owners now have unprecedented market power (and significantly more market

[9] For example, the musical work "We Are Young" as recorded by the recording artist "fun." splits musical work copyright ownership among four different songwriters and seven different publishers. As a further example, the musical work "Get Lucky," as performed by Daft Punk, which won this year's GRAMMY Award for Best Pop Duo/Group, has four separate songwriters and four separate music publishers

[10] Fragmentation, in the context of musical works, also harms songwriters in that their intended royalty payments are often redirected to cover arguably duplicative administrative expenses. *See Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. of the Judiciary*, at 110th Cong. 14 (2007) (statement of Marybeth Peters, Register of Copyrights) ("The system would also offer substantial advantages to rights holders. Under a blanket license system, there are economies of scale that reduce the administrative costs associated with the collection and distribution of the royalties.").

[11] *See, e.g., In re Cellco Partnership*, No. 09-cv-7074, 2009 WL 3294861 (S.D.N.Y. Oct. 14, 2009); *United States v. Am. Soc'y of Composers, Artists, and Performers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

power than any of the individual services that require particular licenses from all of them).[12]

- Lack of a "level playing field." The complex patchwork of *laws*,[13] *regulations*,[14] *private voluntary licensing arrangements*, *collective licensing arrangements*,[15] and *court rulings*[16] that comprise the current legal and regulatory framework for music licensing have created an unlevel playing field, that unfairly tilts competition, typically in favor of legacy technologies, at the expense of innovating technologies. For example, ratesetting standards, royalty rates and functionality rules provide an advantage to some service types over others. These issues are discussed in greater detail in our responses to Questions 8 and 9 and our consolidated response to Questions 12 and 13 below.

- Lack of transparency. The lack of a publicly available, centralized database for musical works and sound recordings makes it difficult, if not impossible, for digital music services to determine what rights they do and do not have at any given time.[17] This creates a host of problems and inefficiencies which are discussed in greater detail in our responses to Questions 1, 3, 5 and 22 below.

- Statutory damages. The current risk of statutory damages under U.S. copyright law enhances the leverage and bargaining power of rights owners, because the law imposes severe economic consequences for any mistakes on the part of licensees, however technical and regardless of "fault."[18] U.S. copyright law lacks a "safe harbor" from statutory damages that would shield copyright users from infringement liability if they have acted diligently and in good faith based on the best information available, which is often limited because of the lack of a centralized database, as noted above.

B. The rights owner "tug-of-war" over royalty rates, and its effect on the aggregate royalty expense of digital music services.

In the licensing marketplace, the fragmented rights ownership structure creates an environment in which each individual licensor negotiates for a greater share of services' revenue in separate, but parallel,

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[12] See e.g., Flavia T. Fortes, *Music Industry Consolidation: The Likely Anticompetitive Effects of the Universal / EMI Merger*, American Antitrust Institute 7 (Aug. 30, 2012), *available at* http://www.antitrustinstitute.org/sites/default/files/White%20paperEMI%20Universal.pdf. ("A hypothetical merged Universal/EMI would have had nearly 40% of the market in 2011, leaving only Sony with nearly 30% and Warner with less than 20% among rival 'majors.' This 4-3 reduction would take the market from 'moderately concentrated' to 'highly concentrated'…"); *see also* notes 36 and 37 *infra* and accompanying text.

[13] Such laws include the statutory licenses codified in Sections 112, 114 and 115 of the Copyright Act.

[14] Such regulations include the rates and terms for various statutory licenses codified in the CFR and the Federal Register.

[15] Such collective licensing arrangements include the collective licensing of musical work public performance rights under antitrust consent decrees.

[16] Such court rulings include interpretations of the laws codified in Sections 112, 114 and 115, the scope and meaning of the antitrust consent decrees, and the boundaries between rights under state laws and federal copyright

[17] It is worth noting that this information is rarely provided by rights owners to licensees in practice, even in direct deals where the information is readily available. Moreover, some of the private databases utilized by the rights owners themselves reflect conflicting ownership information. For example, the database used by a PRO may show that a musical work is owned or controlled by a music publisher, but that music publisher's own database may not include any reference to the musical work at all.

[18] *See* 17 U.S.C. § 504 (2012).

negotiations with digital music services. Understandably, each licensor focuses on its own individual self-interests – namely, how to maximize its own share of the total revenue pie. As a result of this fractured approach, these individual licensors generally have no interest in considering (i) the aggregate amount of royalties paid by distributors to all licensors, (ii) the value the service itself provides, such as the substantial investment, creativity and innovation, including patents and other intellectual property, that enhance the overall user experience, and, accordingly, the value of the music for the consumer,[19] and (iii) the costs of other inputs and participants in the value chain. Unlike the relative simplicity of the historical business model, distribution in the digital environment requires digital music services to share revenues with a wide array of other value chain participants, such as mobile network operators, Internet service providers and consumer electronics vendors, who bring much needed scale and relationships with consumers. Further, digital music service providers are often required to bear considerable infrastructure, technical and operational costs by utilizing third party vendors to provide necessary services and functions.

With all of these costs and expenses, the percentage of revenue that any digital music service can make available to all rights owners (and still turn a profit) is relatively fixed. However, when an individual rights owner successfully negotiates with a service for a greater share of the service's revenue, the resulting incremental royalty expense reduces the digital music service's share of revenues rather than reallocating a fixed pool of "wholesale costs" among the different rights owners. As a result, the digital music service provider frequently finds itself in the middle of a "tug-of-war" among the rights owners over royalties. The situation may be exacerbated in circumstances where individual rights owners enhance their negotiating leverage even further by withholding their licenses until other licensors have concluded their deals with the service.

Perhaps nowhere has this "tug-of-war" been more publicly recognized than in the recent ASCAP ratesetting proceeding involving Pandora Media. As noted by Judge Cote in a decision handed down in that proceeding in March 2014, the underlying premise for Sony/ATV's purported withdrawal of its catalog from the ASCAP repertory for certain digital uses was not that they felt the long-standing, well-established range of royalty rates for *musical work* public performance rights was unreasonable in *absolute terms*, but rather, when compared to the extraordinarily high royalty rates being paid by webcasters for *sound recording* rights under the Section 112 and 114 statutory licenses, they were not reasonable in *relative terms.*[20]

This all leads to upward pressure on royalty rates, which is entirely borne by the digital music services. Thus, much of the current debate over rates stems from disagreement among the labels, publishers and PROs about how to allocate the *content owners' fixed share of the pie*, rather than from a notion that service providers are not paying enough, in the aggregate, for content.[21] The net result of this "tug-of-war" over royalties among rights owners is aggregate royalty rates that are unjustifiable and, ultimately, unsustainable.

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[19] The value of the digital music services' contribution is discussed in greater detail in Section I.2.D below.

[20] *In re Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 2014 WL 1088101, at *25 (S.D.N.Y. Mar. 18, 2014) ("*Pandora II*") ("In his interview with Billboard.biz, reported on January 18, Bandier explained that the rates 'are quite reasonable. When you compare it to the rate record companies are getting, it was really miniscule.'").

[21] It is not novel for the content user to pay an all-in royalty for multiple rights in the copyright bundle. For example, music services pay a total fee for the combined right to the public performance of sound recordings under 17 U.S.C. § 114 and for any ephemeral reproductions that result from such a public performance under § 112(e). 37 C.F.R. § 380.3(c) (2013) ("The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by the Licensee solely to facilitate transmissions for which it pays royalties shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.").

C. Interdependence of interests.

On a *macro level*, each of the stakeholders in the music licensing marketplace shares a common interest in, and would benefit from, a functional licensing structure that enables and facilitates long term, sustainable and profitable digital music businesses. On a *micro level*, however, the licensing structure that exists today enables each of the fragmented rights owners to "jockey for position" in the manner noted in Section I.2.B above, without regard for the *collective effect* that these individualized negotiations have on the potential profitability of digital music services (or the shared goal of building long-term, sustainable and profitable digital music businesses for the future).

Because of the symbiotic relationship between rights owners, creative talent and digital music services, the conduct of any one actor in its individualized negotiations can have unintended collateral consequences for the other unrelated parties. For example, a musical work that is held back from a digital music service over licensing issues would not only affect the publisher and the songwriter, but the record label and featured performer in the sound recording as well, and vice-versa. Because these individualized negotiations take place at different times, in different places, with different rights owners, and under different standards, the interdependence of interests often gets "lost in the shuffle." The "common good" – as well as the long term public interest in ensuring the continued existence of a vibrant music ecosystem where digital music services can operate long-term, sustainable businesses that can delight consumers for generations to come – would be served by copyright modernization and continued government oversight over certain key aspects of music licensing activity.

D. In the rights owner "tug-of-war" over royalties, the value added by digital music service providers is often overlooked.

While DiMA's members recognize the value of music as one of the critical inputs for their innovative services, content owners have tended to ignore, or undervalue, the massive investment by digital music service providers for many of the other critical inputs that allow services to delight consumers. In fact, the innovative services that are the result of the substantial investments made by DiMA members fulfill the primary goal of the Copyright Act: consumer access to creative works. The transformation of the music business to the digital environment could not have occurred without the substantial investment, creativity and innovation of legitimate digital music providers in developing and deploying these services, but the value added is often overlooked in ratesetting proceedings under statutory licenses and in individual negotiations with rights owners. This significant inequity was pointed out by Judge Cote in an ASCAP ratesetting decision handed down in March 2014:

> A rights holder is, of course, entitled to a fee that reflects the fair value of its contribution to a commercial enterprise. It is not entitled, however, to an increased fee simply because an enterprise has found success through its adoption of an innovative business model, its investment in technology, or its creative use of other resources. It appears that Sony, UMPG, and ASCAP (largely because of the pressure exerted on ASCAP by Sony and UMPG) have targeted Pandora at least in part because its commercial success has made it an appealing target. Pandora has shown that its considerable success in bringing radio to the internet is attributable not just to the music it plays (which is available as well to all of its competitors), but also to its creation of the [Music Genome Project] and its considerable investment in the development and maintenance of that innovation. These investments by Pandora, which make it less dependent on the purchase of any individual work of music than at least

some of its competitors, do not entitle ASCAP to any increase in the rate it charges for the public performance of music.[22]

3. The need for continued regulatory oversight in the area of music licensing.

A. <u>The purpose of U.S. copyright law, and the required balancing of interests</u>.

The fundamental purpose of U.S. copyright law is to serve the public interest by striking the optimal balance between (i) encouraging the creativity of authors by granting exclusive property rights in works of authorship, and (ii) fostering an efficient and competitive marketplace that ensures access to those works of authorship.[23] Because the public interest is at the core of copyright protection, the rights of authors are limited in various ways (as opposed to being absolute). These limitations – which range from the finite duration of copyright protection (as specified by the Constitution) to the myriad exceptions, exclusions and limitations established under U.S. copyright laws and the corresponding federal regulations, as well as the court rulings that have interpreted those laws and regulations – serve as a critical counter-balance to the market power of rights owners in the music licensing marketplace.

B. <u>Congress and the Department of Justice have long recognized that a music licensing marketplace cannot properly function without regulatory oversight</u>.

Both Congress and the Department of Justice have long recognized that the marketplace for copyrights creates ample opportunities for rights owners to frustrate, rather than enhance, an efficient competitive environment for the licensing of copyrighted works. These opportunities stem from the market power of rights owners, and the lack of available substitutes for the copyright rights needed. As a result, for over a century, the various rights conferred by U.S. copyright law have been subject to a regime of regulatory oversight that supplements, and operates in parallel with, the general principles of antitrust laws that apply to every industry. Each of these mechanisms and procedures was enacted to counter-balance the unique market power of copyright owners, and to ensure that copyright users can bring innovative technologies, products and services to consumers at fair prices, without being held up by the status of rate negotiations and/or ratesetting proceedings.

(a) <u>The compulsory "mechanical" licenses for the reproduction and distribution of musical works embodied in phonorecords</u>.

Since 1909, Congress has implemented a system that has allowed record labels to obtain compulsory "mechanical" licenses for the reproduction and distribution of musical works embodied in phonorecords, in order to ensure that there was a vibrant marketplace for the sale of recorded music.[24] As noted above, under the historical business model, retailers were also exempt from the need to secure musical work public performance licenses under Section 110(7) in furtherance of the same goal. As a

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[22] *Pandora II*, 2014 WL 1088101, at *46.

[23] *See* Nimmer, *supra* note 4, § 1.03[A] ("[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities." (internal footnote omitted)).

[24] *See* Nimmer, *supra* note 4, § 8.04[A] (2013) ("The Congress that enacted the 1909 Act was concerned with the possible emergence of 'a great music monopoly'. To forestall this threat, Section 1(e) of the 1909 Act enacted a compulsory license provision.").

result of this combination of regulations, retailers and record companies were free to sell recorded music without being encumbered (or potentially held back) by music licensing issues.[25]

(b) The public interest in "radio" in all of its forms, and the Section 112 and 114 statutory licenses.

In 1995 (and as further amended in 1998), Congress granted a compulsory license for the performance of sound recordings by means of non-exempt digital audio transmissions under Section 114 (and a corresponding compulsory license for the making of ephemeral recordings used to facilitate non-exempt digital audio transmissions under Section 112).[26] These compulsory licenses are particularly significant because they represent Congressional recognition that without them, market failures would have deprived the public of the benefits of new digital music services, including Internet radio services, satellite radio services, and radio services delivered through cable television and satellite television systems.[27]

(c) Exceptions and exclusions under U.S. copyright law.

In addition to the compulsory licenses noted above, Congress has also counter-balanced the unique market power of musical work and sound recording copyright owners through a long history of exceptions and exemptions to the exclusive rights otherwise conferred by Section 106.[28]

C. Antitrust considerations.

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[25] Since 1909, Congress has established various other statutory licenses to counter-balance the unique market power of copyright owners, including the following: compulsory license for secondary transmissions by cable systems (§ 111(d)); compulsory license for public performance of musical works in jukeboxes (§ 116); compulsory license for the public performance of musical works and display of pictorial, graphic and sculptural works by public broadcasting entities (§ 118); compulsory license for secondary transmissions by satellite carriers (§ 119); compulsory license for the reproduction and distribution of musical works in digital phonorecords (§ 115); compulsory license for the performance of sound recordings by means of non-exempt digital audio transmissions (§ 114); compulsory license for the making of ephemeral recordings used to facilitate non-exempt digital audio transmissions (§ 112); and sui generis right for the importation and distribution of digital audio recording devices (§ 1004).

[26] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified at 17 U.S.C. §§ 112, 114); Digital Millenium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in relevant part at 117 U.S.C. §§ 112, 114).

[27] S. Comm. on the Judiciary, Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 128, 104th Cong., 1st Sess. 25 (1995), reprinted in 1995 U.S.C.C.A.N. 356 ("The Committee is aware of concerns that the copyright owners of sound recordings might become 'gatekeepers' and limit opportunities for public performances of the musical works embodied in the sound recordings.").

[28] Examples of these exceptions and exemptions include the following: exemptions from the reproduction right for ephemeral recordings (§ 112(a)), computer programs (§ 117(a)(1)) and computer maintenance (§ 117(c)); an exemption from the distribution right under the first sale doctrine (§ 109(a)); exemptions from both the reproduction and distribution rights for libraries and archives (§ 108) and for public broadcasting of sound recordings as part of educational programs (§ 114(b)); an exemption from both the reproduction and adaptation rights for computer program archives (§ 117(a)(2)); and exemptions for public performances for classrooms (§ 110(1)), instructional broadcasting (§§ 110(2), 111(a)(2)), religious services (§ 110(3)), fraternal organizations (§ 110(10)), non-profit performances (§ 110(4)), vending establishments (§ 110(7)), transmissions to handicapped persons (§ 110 (8)), secondary transmissions in hotels (the *Jewell-LaSalle* exemption) ((§ 111(a)(1)); display transmissions of television and radio in small commercial establishments (the *Aiken* exemption) (§ 110(5)), non-profit secondary transmitters (§ 111(a)(5)), nonsubscription broadcast transmissions (§ 114(d)(1)(A)), and retransmission of an exempt nonsubscription broadcast transmission (§ 114(d)(1)(B)).

Antitrust laws provide another critical counter-balance to the market power of rights owners in the music licensing marketplace. The exclusive rights conferred by copyright law are often in tension with both the public interest and the interests of intellectual property rights users. In the early part of the twentieth century, the prevailing antitrust view held that the inherent monopoly rights conferred by the granting of exclusive rights under our intellectual property laws were *incompatible* with the fundamental purpose of our antitrust laws (which were designed to protect against the abuses of monopoly power).[29] The more modern view, as recently set forth by the U.S. Department of Justice and the Federal Trade Commission, is that our intellectual property laws (including copyright) and antitrust laws share the same fundamental goals (i.e., enhancing consumer welfare and promoting innovation), and "work in tandem to bring new and better technologies, products, and services to consumers *at lower prices*."[30]

Under the modern view, the purpose of our antitrust laws as they relate to intellectual property rights is to "ensure that new proprietary technologies, products and services are bought, sold, traded and licensed in a *competitive environment*."[31] However, even under the modern view, it is well recognized that a competitive environment with robust competition in the marketplace cannot exist in markets where intellectual property rights are held by rights owners with significant *market power*, and there are no *good substitutes* reasonably available to the users of those intellectual property rights in the marketplace.

(a) The ASCAP and BMI antitrust consent decrees.

The unique market power of rights owners in the context of licensing musical work public performance rights under the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") collective licensing regimes has long been counter-balanced by the antitrust consent decrees that the Department of Justice has put in place to govern the conduct of ASCAP (since March 1941) and BMI (since January 1941).[32] The processes and protections assured by these consent decrees serve several important roles that are critical to an efficient, properly functioning marketplace for these rights, and are discussed in greater detail in our responses to Questions 5, 6 and 7 below.

(b) The looming specter of publisher withdrawals from ASCAP and BMI.

In 2011 and 2012, various music publishers attempted to withdraw their catalogs from the ASCAP and BMI repertory for certain digital uses.[33] In two separate legal decisions handed down in 2013 by the federal courts with jurisdiction over ASCAP and BMI ratesetting proceedings, these courts

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[29] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 1 (2007).
[30] *Id.* (emphasis added).
[31] *Id.* (emphasis added).
[32] *See* Christopher Harrison, *You Gotta Fight for the Right to Publicly Perform*, 21 Texas Entm't and Sports L.J. 5 (2012).
[33] In May 2011, EMI Music Publishing purported to withdraw its catalogs from ASCAP's repertory for certain digital uses, effective as of January 1, 2012. Several other music publishers, including Warner/Chappell, Universal Music Publishing Group and BMG, followed with similar "partial" withdrawals. *See In re Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 2013 WL 5211927, at *3 (S.D.N.Y. Sept. 17, 2013) ("*Pandora I*"). In September 2012, EMI Music Publishing and Sony/ATV Music Publishing purported to withdraw their catalogs from BMI's repertory for certain digital uses, effective as of January 1, 2013. Several other publishers – BMG Rights Management, Kobalt Music Group, Universal Music Publishing Group, Wixen Music Publishing and George Johnson Music – followed with similar withdrawals, effective as of January 1, 2014. *See Broadcast Music, Inc. v. Pandora Media, Inc.*, Nos. 13-cv-4037, 64-cv-3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013) ("*Pandora III*").

ruled that partial withdrawals are not permitted under the antitrust consent decrees.[34] However, both of these decisions left open the possibility that music publishers could withdraw their respective catalogs from ASCAP's or BMI's repertory for *all purposes*. It is rumored that the music publishers and the PROs are seeking modifications to the consent decrees to allow for partial withdrawals, which would give them the ability to withdraw their musical catalogs from the ASCAP and BMI repertories for only certain limited digital uses. As noted in these decisions and publicly reported articles,[35] the publishers attempted to withdraw certain digital rights for one simple reason – to further enhance their individual negotiating leverage to extract higher royalties (and other terms) from digital music services that have no reasonable substitutes for the rights they need (musical work public performance rights). The possibility of future withdrawals (in full or, if the consent decrees were to be modified, in part) threatens to undermine the key processes and protections assured by the antitrust consent decrees. The potential effects of such withdrawals are discussed in greater detail in our response to Question 5 below.

D. <u>The unprecedented market power of rights owners</u>.

It bears repeating that the market power of musical work and sound recording rights owners is greater now than any other time in our history. A little over fifteen years ago, there were six major record labels. Today, with the recent acquisition by Universal Music Group (the largest of the major record labels) of EMI (the smallest), there remain only three. On the musical work side, a little over fifteen years ago, there were six major music publishers. Today, with the recent acquisition of EMI Publishing (the largest of the major music publishers) by Sony/ATV, there remain only three. The increased concentration of market power of the major labels and the major publishers *greatly enhances* the leverage of right owners (and further diminishes the leverage of digital music services) when negotiating licenses for sound recordings and musical works.

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[34] In a legal decision that was handed down by the federal court with jurisdiction over ASCAP ratesetting proceedings in September 2013, Judge Cote ruled that under the antitrust consent decree that governs ASCAP's conduct, if a music publisher has made its catalog available for licensing by ASCAP to the public *in any respect* (*i.e.*, partially or fully), that catalog is therefore a part of ASCAP's "repertory" for *all* purposes (thereby rendering the purported partial withdrawals for certain digital uses *ineffective* for any purpose, with the result that the publishers involved remained *"all-in"* as a result of any purported partial withdrawal of rights). *Pandora I*, 2013 WL 5211927, at *6-*8. In a separate legal decision that was handed down by the federal court with jurisdiction over BMI ratesetting proceedings in December 2013, Judge Stanton similarly ruled that that under the antitrust consent decree that governs BMI's conduct, publishers cannot effectuate withdrawals for some uses (such as certain digital uses) without withdrawing their catalogs for all uses, and therefore, a purported partial withdrawal of a publisher's catalog from BMI's repertory for certain digital uses is effectively a withdrawal of that catalog from BMI's repertory for all purposes (thereby rendering the purported partial withdrawals for certain digital uses an *effective withdrawal for all purposes and service types*, including broadcast radio stations, television networks, bars and restaurants, with the result that the publishers involved remained "all-out" as a result of any purported partial withdrawal of rights). *Pandora III*, 2013 WL 6697788, at *4

[35] *Pandora II*, 2014 WL 1088101, at *14, *35 ("[The publishers] believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publically perform a composition."); Bill Donahue, *Judge In ASCAP-Pandora Royalty Row Spells Out Rate Ruling*, Law 360, Mar. 19, 2014, *available at* http://www.law360.com/articles/519905/judge-in-ascap-pandora-royalty-row-spells-out-rate-ruling; Ed Christman, *Why Publishers Lost Big Against Pandora*, Billboard, Mar. 20, 2014, *available at* http://www.billboard.com/biz/articles/news/publishing/5944618/why-publishers-lost-big-against-pandora-analysis ("Both of those rates [negotiated by Sony and Universal directly with Pandora after the publishers' attempted partial withdrawals from ASCAP] are substantially higher than the 1.85% royalty rate that ASCAP was being paid by Pandora and neither qualify as market rates according to the Judge, because negotiating circumstances compelled Pandora to accept such rates.").

E. <u>The relationship between market power and music licensing issues</u>.

The relationship between market power and negotiating leverage is well known to the rights owners themselves. For example, in its opposition to the merger of Universal Music Group and EMI, Warner Music Group submitted testimony to the United States Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights illustrating how a major label with market power can use its leverage in negotiations with digital distributors to extract economic concessions and other favorable contract terms.[36] Warner's testimony went on to explain how a combined Universal Music Group/EMI would have such unprecedented market power that it would "be able to exercise its blocking position to coerce exclusionary deals and extract higher royalties, advances and other favorable terms by virtue of its market power alone."[37]

Further, in their capacity as the *licensees* of musical work rights (for the records they create, manufacture and distribute under the historical business model), the major labels have supported the existence of the compulsory license for the reproduction and distribution of musical works on a continuous basis since 1909, and have participated in each proceeding to adjust royalty rates and terms under Section 115 ever since, including the industry-wide settlements in 2008 and 2012, respectively.[38]

4. Copyright modernization is needed to ensure a legal and regulatory framework that will work in the digital environment.

A. <u>Copyright modernization should take a holistic, rather than a "piecemeal" approach in the area of music licensing</u>.

As the Register of Copyrights has previously noted, Congress generally moves slowly in the copyright space for a variety of reasons, including the complexity of the subject matter, the intensity of interested parties on particular issues, general public indifference on copyright matters, and finite time

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[36] *The Universal Music Group/EMI Merger and the Future of Online Music: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Edgar Bronfman, Jr., Director, Warner Music Group), *available at* http://www.judiciary.senate.gov/imo/media/doc/12-6-21BronfmanTestimony.pdf.

[37] *Id.*

[38] *See, e.g., Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords,* Docket No. 2011-3 CRB Phonorecords II (Feb. 1. 2011) (RIAA Petition to Participate), *available at* http://www.loc.gov/crb/proceedings/2011-3/ (stating that "RIAA participated in all previous proceedings to adjust royalty rates under Section 115 [and] has a significant interest in the royalty rates and terms that are the subject of this proceeding"); *Discussion Draft of the Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong., 2d Sess. (2006) (statement of Cary H. Sherman, President, Recording Industry Association of America, Inc.) (arguing that proposed expansions of the 115 compulsory mechanical license to new forms of digital delivery were not broad enough, and advocating further expansion by "extend[ing] the blanket license to ALL products and services covered by the mechanical compulsory license…" (emphasis in original)); *Comm. on the Judiciary, Copyright Law Revision*, H.R. Rep. No. 83, at 66 (1st Sess. 1967) ("[T]he record producers argued vigorously that the compulsory license system must be retained. They asserted that the record industry is a half-billion-dollar business of great economic importance in the United States and throughout the world; records today are the principal means of disseminating music, and this creates special problems, since performers need unhampered access to musical material on nondiscriminatory terms. Historically, the record producers pointed out, there were no recording rights before 1909 and the 1909 statute adopted the compulsory license as a deliberate anti-monopoly condition on the grant of these rights. They argue that the result has been an outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice.").

given other domestic and international priorities.[39] Consequently, the current legal and regulatory framework for music licensing developed in a piecemeal manner, and is the product of accommodating the needs, goals and desires of special interest groups who "jockey for position" in their lobbying efforts to effectuate specific and narrow changes at any given time based on historical legal distinctions and rights recognized under U.S. copyright law.

However, the various issues and problems with the current music licensing framework have created a "perfect storm" that has led to systemic failure in the music licensing marketplace. The only way to fix this broken system and to address these issues, problems and inefficiencies is to view the music marketplace in a holistic way. Such a holistic approach should cut across the lines of traditionally recognized rights under U.S. copyright laws, and across the interests of particular groups that developed licensing practices in the pre-digital era.

Further, any solution must take into account the public interest in creating a licensing environment that allows digital music service providers to operate long-term, sustainable businesses that can delight consumers for generations to come. We could not agree more with the sentiments of the Register of Copyrights who, quoting former Register of Copyrights Thorvald Solberg, stated that "there comes a time when 'the subject matter ought to be dealt with as a whole, and not by further merely partial or temporizing amendments.'"[40]

B. <u>The "Six Pillars" of U.S. copyright law modernization for the digital environment</u>.

As the Copyright Office considers making its recommendations to Congress regarding potential areas for the modernization of U.S. copyright law, DiMA urges the Copyright Office to take a holistic view of the entire music licensing ecosystem, and provide a framework for the new digital era that is based on the six essential pillars discussed more fully in the Executive Summary section above:

- *Continued Government Oversight and Regulation of Music Licensing Activities*
- *Transparency and a Centralized Database*
- *Licensing Efficiencies and Reduced Transaction Costs*
- *Clarification of Rights*
- *Reduction of Legal Risks Around Licensing Activities*
- *"Level Playing Field"*

[39] Maria A. Pallante, *The Next Great Copyright Act*, 36(3) Colum. J.L. & Arts 315, 319 (2013).
[40] *Id.* (quoting Thorvald Solberg, *Copyright Law Reform*, 35 Yale L.J. 48, 62 (1926)).

II. RESPONSES TO THE SPECIFIC QUESTIONS POSED BY THIS NOTICE OF INQUIRY

MUSICAL WORKS

1. Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works.

A. <u>The Section 115 statutory license for the reproduction and distribution of musical works is vital</u>.

First, the Section 115 statutory license provides an *essential counter-balance to the unique market power of copyright rights owners*. It does this by providing a mechanism for immediate license coverage, thereby negating the rights owner's prerogative to withhold the grant of a license. Importantly, this immediate license coverage is not dependent on the status of rate negotiations and/or ratesetting proceedings. Without the ability to obtain this immediate obligatory coverage, some of the innovative digital music services in the marketplace today may not have been able to attain a significant enough number of musical work licenses to be considered attractive by consumers, while others would have been unable to launch at all, and thus would have been kept out of the marketplace entirely.

Second, the Section 115 statutory license provides a *useful benchmark for direct deals*. The royalty rates established by Section 115 ratesetting proceedings are often used as benchmarks for direct licenses of musical work rights, especially in cases where particular consumer offerings do not squarely fit into one of the statutory license categories available under Section 115 or its rate structure.

Third, the Section 115 statutory license provides a *framework for negotiating statutory rates by industry consensus*. By providing antitrust immunity for collective licensing discussions to settle ratesetting proceedings under Section 115, this essential framework enables stakeholders to negotiate rates and terms for a variety of digital music service types, consumer offerings and business models. This process was used successfully in 2008 and 2012, when rates and terms for a wide variety of physical and digital product types were negotiated by the relevant stakeholders, and implemented into the Code of Federal Regulations.[41]

Fourth, the Section 115 statutory license provides *necessary procedures for self-auditing and certification*. The self-auditing requirements provide rights owners with appropriate financial assurances regarding accountings.[42] At the same time, these requirements provide digital music services with appropriate protections against the possibility of direct audits by potentially tens of thousands of individual rights owners, which would be virtually impossible to administer and settle, and would significantly interfere with the day-to-day operations of digital music services.

Finally, the Section 115 statutory license provides *necessary procedures for notice and cure based on inaccurate accountings*. The Section 115 statutory license provides rights owners with appropriate opportunities to question accountings and provides digital music services with appropriate

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[41] *See* Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 Fed. Reg. 67938 (Nov. 13, 2013) (final rule) (codified at 37 C.F.R. § 385) ("setting the rates and terms for the section 115 statutory license for the use of musical works in physical phonorecord deliveries, permanent digital downloads, ringtones, interactive streaming, limited downloads, limited offerings, mixed service bundles, music bundles, paid locker services, and purchased content locker services"); Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510 (Jan. 26, 2009) (final rule) (codified at 37 C.F.R. § 385) (same).
[42] *See* 17 U.S.C. § 115(c)(5) (2012).

opportunities to rectify, clarify and/or address the concerns of rights owners without jeopardizing license coverage. This mechanism for assuring *continuous license coverage* during periods of discussion (or dispute) provides another counter-balance to the unique market power of copyright owners that is as essential as the *initial* immediate license coverage provided by the Section 115 statutory license upon service of an NOI.

B. A number of significant problems with the Section 115 statutory licensing process limit the effectiveness of the Section 115 statutory license.

Although the continued existence of the Section 115 statutory license for the reproduction and distribution of musical works *is vital,* there are a number of *significant problems* with the licensing *process* that currently *limit its effectiveness*:

- Song-by-song licensing is inefficient and expensive. The current process of song-by-song licensing has not worked well under the historical business model for a variety of reasons,[43] and is particularly ill-suited for the digital environment. While the Section 115 statutory license provides an important tool for securing licensing ubiquity, the process of securing that ubiquity is highly inefficient and costly because millions of works must be licensed individually from the tens of thousands of different rights owners who own and control the required rights. Moreover, to the extent that a service chooses to file statutory license notices with the Copyright Office for the many musical works for which the relevant rights owners cannot be identified, the costs can be overwhelming given the volume of works at issue.[44]

- The licensing process under Section 115 lacks necessary transparency. The lack of a publicly available, centralized database for musical works limits the effectiveness of the licensing process in several significant respects:
    - First, it requires each of the dozens of digital music services to dedicate separate internal systems and personnel to developing rights owner information on a song-by-song basis, or to engage third-party service providers such as The Harry Fox Agency ("HFA") or Music Reports, Inc. to do so on its behalf. In either case, the undertaking is incredibly costly, and because the same information is developed by multiple parties (including the record labels) in parallel, there is much duplication of effort.
    - Second, in cases where statutory licenses under Section 115 are supplemented with direct licenses with music publishers, it is difficult to determine what is (and is not) covered by any given direct license, since this information is seldom provided by the music publishers to their own licensees. Accordingly, it is almost impossible to ascribe an

[43] For example, Section 115 requires services to clear the underlying publishing rights for newly released sound recordings before distributing them, but such a task is nearly impossible in many cases, where there are co-writers of a musical work and those co-writers do not determine their individual relative percentages of ownership (if any) until *after* the phonorecords which embody them are commercially released. This is a challenge that the major labels themselves have faced under Section 115 when securing mechanical licenses for physical products under the historical business model.

[44] The filing fee for "[r]ecordation of a notice of intention to make and distribute phonorecords" under 17 U.S.C. § 115 is $75 for the first title and $20 for each additional title for each group of ten titles. Circular SL 4L, *Copyright Office Licensing Division Service Fees, available at* http://www.copyright.gov/fls/sl04l.pdf (last visited May 14, 2014). Thus, the Copyright Office filing fee amounts to $255 for every ten musical works with unknown authors. For example, ten thousand (10,000) unknown authors would cost a service more than two-hundred fifty thousand dollars ($250,000) in filing fees alone to protect the service from potential statutory damages for infringement of the reproduction and distribution rights in musical works whose authors are nowhere to be found.

appropriate value to a direct license agreement, and to determine which musical works must be separately licensed through statutory licenses under the licensing process in Section 115.

- Third, despite the best intentions of a digital music service provider to identify accurately every musical work rights owner for every musical work, there are inevitably musical works whose owner(s) cannot be identified at all, or that are misidentified as a result of inaccurate information contained in the incomplete privately available databases relied upon today by digital music services.
- Fourth, the statutory licenses under Section 115 are only available if the copyright owner has already made or authorized a recording of the composition that has been distributed to the public in the U.S.[45] It is quite challenging to ascertain whether this first use has, in fact, occurred, as most of the privately available databases relied upon by digital music services (including the musical work information independently developed by the record labels themselves) lack this critical information. This problem is especially acute in circumstances where co-writers of musical works disagree about the relative percentages of their individual contributions to the work as a whole, and do not resolve these intra-songwriter and intra-publisher disputes over "splits" until long after the initial commercial release.

The risk of any resulting "rights gaps" exposes digital music service providers to the possibility of statutory damages, even in instances where the digital music service provider has acted diligently and in good faith based on the best information available to them, with limited (if any) control over how to mitigate this legal risk. This significantly limits the effectiveness of the licensing process, and exposes digital music services to levels of risk that are not equitable under the circumstances.

- The risk of statutory damages for "timing" issues inherent in the Section 115 licensing process. Given the difficulties noted above in determining whether a first use has occurred, the specter of statutory damages for failing to timely send NOIs under the Section 115 licensing process exposes digital music service providers to levels of risk that are not equitable under the circumstances.
- The lack of financial certainty caused by "timing" issues inherent in the Section 115 licensing process. For digital music services that rely on licenses under Section 115 as well as separate licenses for the public performance of musical works, it is often impossible to determine the appropriate deduction for musical work public performance royalties at the time that accountings under the Section 115 licenses are due. This is because the calculation of "mechanical" royalty rates under Section 115 requires that public performance royalties be deducted; and public performance rates are often not determined – whether by "interim agreement," "final agreement" or ratesetting proceeding – until long after the close of the month during which Section 115 royalties are due. As a result, digital music service providers must often make assumptions about how much to accrue, and then hold the accrued amounts for substantial periods of time (which is not beneficial for music publishers or songwriters who desire to get paid more quickly). Further, once the actual rates become known, digital music services must recalculate their royalties, restate their earnings for prior periods (which investors do not like), and send restated Section 115 royalty statements (which is costly and administratively burdensome).

[45] 17 U.S.C. § 115(a)(1). Section 115(b)(1) provides in relevant part as follows: "Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner."

- Monthly accountings. In direct license agreements for rights otherwise covered by the Section 115 statutory licenses, it is customary for digital music services to pay rights owners on a *quarterly basis*. Similarly, in recording agreements with recording artists it is customary for record labels to pay mechanical royalties to artists who are also songwriters on a quarterly basis, even in circumstances where the record royalties payable for the uses and exploitations of the sound recordings that embody these musical works are paid on a less frequent basis.[46] However, royalties under the Section 115 statutory licenses are required on a *monthly basis*. Because of the vast number of rights owners and musical works licensed under the Section 115 statutory licenses, each set of accountings requires administrative resources and out-of-pocket costs. The more frequently accountings are required, the less efficient and more burdensome it is for the digital music services that pay these royalties.

- "Hard-coded minima." The royalty rate structures for some (but not all) rate categories under the Section 115 statutory licenses set minima that reflect reproduction and distribution rights only,[47] rather than an "all-in" minimum that also includes the cost of royalties for public performance rights.[48] If musical work public performance rights are not available at "reasonable rates" through the processes and protections under the ASCAP and BMI antitrust consent decrees for any reason,[49] the "hard-coded minima" in Section 115 could cause the "all-in" rates to be exceeded, which was never intended by the stakeholders that negotiated the voluntary settlement of the rates and terms under the Section 115 statutory licenses in 2008 and 2012. Such a phenomenon would undermine the Section 115 ratesetting process as a whole.

2. Please assess the effectiveness of the royalty ratesetting process and standards under Section 115.

A. The royalty ratesetting process under Section 115 has generally been effective.

As noted in our response to Question 1, the royalty ratesetting process under Section 115 provides an essential *framework* for negotiating statutory rates by industry consensus, which is only possible because of the antitrust immunity for collective licensing discussions to settle rate setting proceedings under Section 115. Through this framework, stakeholders are able to negotiate rates and terms for a variety of digital music service types, consumer offerings and business models and bring them to market for the benefit of consumers.

B. The royalty ratesetting process under Section 115 could be made more effective.

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[46] *See, e.g.*, Matthew Bender, 8-159 Entertainment Industry Contracts FORM 159-1 (Exclusive Recording Artist Agreement [Long Form] with Commentary), at ¶¶ 8.01, 11.01(d) (2014).

[47] The royalty minima for the following rate categories covers the reproduction and distribution rights only, and do not cover public performance rights: "standalone non-portable subscription—streaming only," "standalone non-portable subscription—mixed," "standalone portable subscription service," and "bundled subscription services." *See* 37 C.F.R. § 385.13 (2013).

[48] The royalty minima for the following rate categories are truly "all-in," meaning that the PRO fees for the public performance rights are included in (and can be deducted from) the minimum amount owed for the mechanical rights: "free nonsubscription/ad-supported services," "mixed service bundle," "music bundle," "limited offering," "paid locker service," and "purchased content locker service." *See* 37 C.F.R. §§ 385.13, 385.23.

[49] For example, in the event that music publishers withdraw entirely from ASCAP and BMI, or, alternatively, just for certain digital uses in the event that the antitrust consent decrees were to be modified by the Department of Justice to allow for partial withdrawals.

Although the royalty ratesetting process under Section 115 has generally been effective, the fast-moving digital landscape sometimes outpaces the five year cycle for ratesetting proceedings under Section 115. The royalty ratesetting process under Section 115 would be *more effective* if it provided a mechanism for *interim ratesetting proceedings* on an as-needed basis for *new* service types, consumer offerings and business models that develop in between the regular ratesetting proceedings. As the music business continues its evolution from the historical business model to the digital environment, it is essential that digital music services meet consumer expectations, and a process under Section 115 that recognizes the pace of change could be incredibly valuable.

C. The royalty ratesetting standards under Section 115 have generally been effective.

Since 1976, royalty ratesetting proceedings under Section 115 have been governed by the standard set forth in Section 801(b),[50] which provides in relevant part as follows:

> (1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:
>
> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[51]

The Section 801(b) standard for ratesetting proceedings under Section 115 was adopted as part of the copyright revisions implemented in 1976.[52] As previously noted, in their capacity as the *licensees* of musical work rights under the historical business model, the record labels have long argued that this standard correctly balances the relevant factors required to yield a fair and equitable royalty for the exercise of musical work reproduction and distribution rights under the Section 115 statutory licenses. The Section 801(b) standard has been time-tested to provide fair rates (i.e., "reasonable fees") that have been accepted for more than half a century in many different contexts, including ratesetting proceedings under Sections 114(f)(1)(B), 115, and 116.

3. Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities,

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[50] *See* H.R. Rep. No. 94-1476, at 111 (1976) ("This [Section 115] rate will be subject to review by the [CRT], as provided in section 801, in 1980 and at 10-year intervals thereafter.").
[51] 17 U.S.C. § 801(b) (2012).
[52] *See* H.R. Rep. No. 94-1476, at 173-74.

rather than on a song-by-song basis? If so, what would be the key elements of any such system?

A. The music marketplace would benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis.

As previously noted in our response to Question 1, the current process for acquiring licenses under Section 115 on a song-by-song basis has many significant drawbacks including inefficiencies, expenses, lack of transparency, inequitable exposure to legal risk, lack of financial certainty and the possibility that all-in rates may not, in fact, be all inclusive. As discussed more fully in the next section, the music marketplace would greatly benefit from blanket licenses under Section 115.

B. The Section 115 statutory license could be made more effective.

The effectiveness of the Section 115 statutory license would be *significantly enhanced* by implementing a licensing regime that incorporated the following *key elements*:[53]

- Blanket licenses. For the reasons noted elsewhere, the music marketplace would benefit greatly from replacing the current process of licensing music on a song-by-song basis with a blanket license system (without the ability of rights owners to "opt-out"). Under this system, one license application would be served under a collective administration mechanism covering all musical works. For such a system to be effective, copyright users must nonetheless continue to have (i) payment options designed to ensure that they only pay for the rights they need (and the actual level of use and consumption), as per the current framework of Section 115, (ii) the ability to enter into direct licenses with rights owners in addition to (or in lieu of) these blanket licenses, and (iii) the ability to appropriately offset amounts paid under direct licenses from the minima prescribed by the blanket licenses.[54]

- Transparency and a centralized database. The problems and issues noted in Section II.1.B, above, could be greatly mitigated by the recommended centralized database of musical works and sound recordings.

- Collective administration. A mechanism should be established that enables the collective administration of musical work rights, in a manner similar (but not necessary identical) to the mechanism proposed in the context of the Section 115 Reform Act of 2006 ("SIRA").[55] Collective administration of musical work copyrights has worked in the context of public

[53] Several of these key elements were incorporated in the proposed Section 115 Reform Act of 2006 ("SIRA"), which was fully negotiated by interested stakeholders in 2006 but failed to be enacted into the copyright law for unrelated reasons.

[54] At a minimum, if song-by-song licensing is still required, there should be a system that facilitates an automated, electronic process for serving NOIs (in lieu of the current requirement under the implementing regulations that these NOIs be served in paper formats, which is inefficient, costly and more difficult to track and administer). *See* 37 C.F.R. § 201.18 (2013). Alternatively, if a SIRA-like structure for blanket licenses and collective administration is not implemented, there should be a safe harbor that shields copyright users from infringement liability if they have acted diligently and in good faith based on the information contained in the centralized database, to avoid inequitable outcomes.

[55] For clarity, we are not suggesting an implementation of SIRA exactly as was proposed in 2006. However, we believe that there are many elements and components from SIRA that would serve the music licensing marketplace well today.

performance rights in musical works (ASCAP, BMI and SESAC), and reproduction/public performance rights in sound recordings (SoundExchange, Inc.), but no similar mechanism exists for reproduction and distribution rights for Section 115 licenses. Difficult logistical issues – particularly the many reporting, payment and other operational issues – should be left to implementing regulations, and not addressed in Section 115 directly. However, it is critical that any collective administration mechanism be in addition to, and not in lieu of, the recommended centralized database for musical works, as digital music services should, at all times, retain the right to pay the required royalties directly to the applicable rights owners instead of through one or more common agents.

- Legal certainty. The copyright laws should be clarified to provide that the blanket license covers all intermediate copies (e.g., server, cache and buffer copies) necessary to facilitate the digital delivery of music, and intermediate copies for non-interactive streaming should be royalty free, or exempt (to avoid "double dipping" by rights owners based on claims arising out of overlapping copyright rights).

4. For uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner? How might such a unified process be effectuated?

A. For uses under the Section 115 statutory license that also require a public performance license, the licensing process would be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner.

As previously noted, the fragmentation of rights ownership and the convergence of rights increase the number of transactions that must be undertaken for the license of musical works, and each additional transaction diminishes licensing efficiencies, and increases transaction costs for both licensors and licensees.

B. How a unified process for the licensing of performance rights along with reproduction and distribution rights might be effectuated.

A process for licensing performance rights along with reproduction and distribution rights in a unified manner could be effectuated by a system that incorporated the following key elements:

- Collective administration. A mechanism should be put in place that enables the collective administration of an "all-in," combined mechanical and performance royalty. The rights owners would be responsible for allocating the aggregate "all-in" royalty among themselves (i.e., between the "mechanical" and public performance interests) based on factors that they deem to be reasonable and appropriate under the circumstances. By allowing the rights owners to make this allocation as between themselves, the digital music service providers would be taken out of the rights owner "tug-of-war" over royalty payments.

- Process for determining reasonable rates. In an ideal world, services that require a combination of musical work public performance rights, as well as reproduction and distribution rights under Section 115, would be able to acquire such rights from a single licensing source under a single statutory license and pay a single royalty to a common agent, similar to the way that SoundExchange administers the Section 112 (reproduction) and 114 (public performance) statutory licenses. However, DiMA recognizes that such a structure would require a fundamental

alteration of the existing framework for musical work licensing. To the extent that the existing framework is retained, the collective licensing agent(s) DiMA is proposing for the collection of royalties under Section 115 would be authorized to collect the "all-in" royalty payable under Section 115, and then apportion an appropriate percentage of that royalty to the PROs, thereby removing the digital music service providers from the middle of the rights owner "tug-of-war" over publishing royalty payments.[56] Digital music services that require only public performance licenses would continue to operate under the current licensing framework that governs the PROs.

- No ability to opt-out. As a further counter-balance to the already significant market power of rights owners, to ensure the essential protections of the ASCAP and BMI antitrust consent decrees it is essential that rights owners not have the ability to "opt-out" of this licensing process.

- Transparency and a centralized database. For the reasons noted elsewhere, the licensing process would be greatly facilitated by the recommended centralized database for musical works, including information about the sound recordings in which such musical works are embodied.

C. A unified licensing process for licensing otherwise fragmented rights is not new.

The use of a collective administration mechanism to manage rights that are fragmented across different rights owners under U.S. copyright laws is not new, and has already been in place for some time with respect to the collection and administration of royalties under the Section 112 and 114 statutory licenses for sound recordings. In this context, SoundExchange, Inc. ("SoundExchange"), as the collective administration mechanism for statutory royalties under the Section 112 and 114 statutory licenses, collects a single "all-in" royalty that covers both the Section 112 and Section 114 rights. The recipients of these royalties, which include the sound recording rights owners, featured recording artists, and the relevant talent unions, determined among themselves the value of the Section 112 reproduction rights relative to the value of the Section 114 public performance rights, and the digital music services that pay these royalties were not placed in the middle of this determination.

5. Please assess the effectiveness of the current process for licensing the public performances of musical works.

A. The current process for licensing the public performances of musical works has generally been effective.

As previously noted, the blanket licenses (among other forms of licenses) offered by ASCAP, BMI and SESAC provide a framework that promotes licensing efficiencies and reduced transaction costs for both licensors and licensees alike. With regard to songwriters in particular, the process offers greater transparency in the context of performance royalty payments, as the general custom and practice in the music publishing industry is that songwriters, even if subject to arrangements with music publishers for the administration of musical work copyrights and related royalties, receive the "songwriter's share" of public performance royalties directly from ASCAP, BMI and SESAC, respectively.

The processes and protections assured by these consent decrees serve several important roles that are critical to an efficient, properly functioning marketplace for these rights:

[56] Difficult issues regarding how the licensing process would work under this structure need to be worked out, and should probably be addressed through the implementing regulations under Section 115.

- Immediate, blanket licensing. The process allows for immediate license coverage of a vast body of musical works on a "blanket" basis upon the service of a consent decree license request (and is not dependent on the status of rate negotiations and/or ratesetting proceedings). This is an essential counter-balance to the unique market power of rights owners, as it negates the prerogative of a rights owner of an exclusive right from withholding the license and enables digital music services to bring new offerings to market quickly and efficiently for the benefit of consumers.

- Non-discrimination on royalty rates. The "rate parity" concept in each of the antitrust consent decrees requires each of ASCAP and BMI to license all similarly-situated services on comparable terms. This provides another essential counter-balance to the unique market power of rights owners, and ensures that the rates set under the antitrust consent decrees are fair on a relative basis compared to comparable service types, which is essential to the "level playing field" required for services to compete with one another fairly in the marketplace.

- Reasonable rates. As a further counter-balance to the unique market power of rights owners, the process provides a mechanism that allows copyright users to resort to the federal courts with jurisdiction over ASCAP and BMI ratesetting proceedings to set "reasonable fees." This ensures that rights owners cannot use their combined market power to extract unreasonable royalty rates. The interpretation and implementation of the ratesetting standard in ASCAP and BMI ratesetting proceedings have generally been effective because the federal courts appropriately take into account several important factors when attempting to determine appropriate benchmark rates in the music licensing marketplace, such as whether the parties have equal access to information and whether both parties are compelled to act.[57] These critical factors, by contrast, are not recognized under the "willing buyer, willing seller" standard used in some ratesetting proceedings under the Section 112 and 114 statutory licenses. As discussed at greater length in our response to Question 8 below, this difference in interpretation and implementation yields vastly different economic results for copyright users.

B. Withdrawals of musical works from the repertories of ASCAP and BMI threaten to undermine the effectiveness of the current process for licensing the public performances of musical works.

As noted in Section I.3.C., recent decisions by the federal courts in rate setting proceedings under the ASCAP and BMI consent decrees have clarified that as a matter of antitrust law, music publishers cannot withdraw their musical catalogs from the ASCAP and BMI repertory for only certain limited digital uses. However, both of these decisions left open the possibility that music publishers could withdraw their respective catalogs from ASCAP's or BMI's repertory for *all purposes*. Alternatively, it is

[57] These critical factors were noted by Judge Cote in an ASCAP ratesetting decision handed down in March 2014, which cited a textbook definition of "fair market value": "A widely used description of fair market value is the cash equivalent value at which a willing and unrelated buyer would agree to buy and a willing and unrelated seller would agree to sell . . . *when neither party is compelled to act, and when both parties have reasonable knowledge of the relevant available information*. . . . Neither party being compelled to act suggests a time-frame context – that is, the time frame for the parties to identify and negotiate with each other is such that, whatever it happens to be, it does not affect the price at which a transaction would take place. . . . The definition also indicates the importance of the availability of information – that is, the value is based on an information set that is assumed to contain all relevant and available information." *Pandora II*, 2014 WL 1088101, at *32 (emphasis added) (quoting Robert W. Holthausen & Mark E. Zmijewski, *Corporate Valuation* 4–5 (2014)).

rumored that the music publishers and the PROs are seeking modifications to the consent decrees to allow for partial withdrawals, which would give them the ability to withdraw their musical catalogs from the ASCAP and BMI repertories for only certain limited digital uses. If either complete or partial withdrawals were to occur, the processes and protections assured by the antitrust consent decrees – in particular, the assurance of "reasonable fees" for copyright users – would be undermined.[58] In this event, if digital music services and music publishers are unable to agree on licensing terms, certain musical works would not be available, and the commercial viability of the services that require these licenses would be threatened, as consumer expectations of licensing ubiquity could not be achieved. As previously noted, the music publishers sought to withdraw their catalogs for one simple reason – to further enhance their individual negotiating leverage to extract higher royalties (and other terms) from digital music services.

In fact, such withdrawals would be contrary to the very policies that underlie the statutory licenses under Sections 112, 114 and 115, which were designed to ensure that services subject to such licenses could efficiently attain licensing ubiquity, and lawfully operate without having to negotiate individually with tens of thousands of rights holders. When these statutory licenses were created, it was not contemplated that musical works might be removed from the digital licensing purview of ASCAP and BMI. In fact, such withdrawals would open up a "back door" for musical work rights owners to undermine the objectives of the Section 112, 114 and 115 statutory licenses, and the public interest in ensuring that "radio" in all of its forms would not be kept out of the marketplace entirely because of music licensing issues, as noted Section I.3.B(b) above.

Finally, because of the interdependence of interests among sound recording and musical work rights owners, the result of a decision made by any one rights owner *not* to grant a requested license to a digital music service has *collateral consequences* for the other rights owners that have made a decision to *grant* a requested license. Empowering a "hold out" to effectively make a decision (with economic consequences) for other third parties, such as other record labels, music publishers, songwriters, featured recording artists, non-featured recording artists and non-featured vocal performers, turns the principal of recognizing exclusive rights under copyright on its head, and should be avoided.

C. <u>**The current process for licensing the public performances of musical works could be made more effective**</u>.

The effectiveness of the current process for licensing the public performances of musical works would be *significantly enhanced* by implementing a licensing regime that incorporated the following key elements:

- <u>Transparency and a centralized database</u>. The problems and issues noted in Section II.1.B, above, could be greatly mitigated by the recommended centralized database of musical works and sound recordings.[59] As Judge Cote determined in an ASCAP ratesetting decision handed down in March 2014, the music publishers acted in concert with ASCAP to modify ASCAP's internal rule set (known as the ASCAP Compendium) to allow music publishers to withdraw their catalogs from ASCAP's repertory for certain digital uses, for the sole and limited purpose of "closing the

[58] Partial withdrawals would also undermine the principle of platform parity in the consent decrees, which holds that similarly situated services must be treated the same by ASCAP and BMI. *See Am. Soc'y of Composers, Authors, and Publishers v. MobiTV, Inc.*, 681 F.3d 76 (2d. Cir. 2012) ("*MobiTV*"); *Pandora III*, 2013 WL 6697788, at *5 ("BMI cannot combine with [the publishers] by holding in its repertory compositions that come with an invitation to a boycott attached.").

[59] *See Meredith Corp. v. SESAC LLC*, No. 09-cv-9177, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014) ("*Meredith Corp.*"); *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5807 (E.D. Pa. Dec. 20, 2013) ("*RMLC*").

gap between the composition rates and the sound recording rates" through direct licenses outside the framework and protections of the ASCAP antitrust consent decree, which they believed "stood in the way."[60] Judge Cote also found that the lack of transparency regarding rights ownership was used as negotiating leverage, because the withholding of a list of the works in question, which was "readily at hand," denied Pandora the ability to (i) remove the ASCAP repertory controlled by those music publishers from the service if the parties could not reach agreement on economic terms, (ii) apportion any payments between the catalogs of two different music publishers, and (iii) evaluate whether a substantial advance payment paid by Pandora was likely to be recouped.[61] As a result, without this critical information, a digital music service provider is unable to assess its potential legal exposure for the use of unlicensed works (and mitigate any potential exposure by refraining from using those musical works, or taking them down, as the case may be), and determine the value of the blanket licenses and direct licenses offered by rights owners for the public performance of musical works.

- Immunity from statutory damages. To avoid inequitable outcomes, there should be a "safe harbor" that shields copyright users from infringement liability if they have acted diligently and in good faith based on the information contained in the recommended centralized database. Further, any entitlement to statutory damages in other contexts should be conditioned on the registration of accurate rights ownership information in the centralized database, utilizing universal standards.

- No ability to opt out. For the public policy reasons noted above, as a further counter-balance to the already significant market power of rights owners, it is essential that music publishers not have the ability to opt out of the blanket licenses.[62]

6. Please assess the effectiveness of the royalty ratesetting process and standards applicable under the consent decrees governing ASCAP and BMI, as well as the impact, if any, of 17 U.S.C. § 114(i), which provides that "[l]icense fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works."

A. The royalty ratesetting process and standards applicable under the consent decrees governing ASCAP and BMI have generally been effective.

[60] *Pandora II*, 2014 WL 1088101, at *13-*14.

[61] *Id.* At *24 ("Sony understood that it would lose an advantage in its negotiations with Pandora if it provided the list of works and deliberately chose not to do so.").

[62] By opting out, the ability of a rights owner to extract an unreasonable royalty from a digital music service is greatly enhanced, as Judges Cote and Stanton recognized in the recent ASCAP and BMI rate setting proceedings with Pandora Media. These unreasonable royalty rates, in turn, would then be bootstrapped by rights owners as the new market rate to be used in future ratesetting proceedings. As such, very few music publishers (and perhaps as few as one) could effectively control the overall market rate for musical works, and the resulting bootstrapped rate would then have collateral consequences for other publishers and the performing rights organizations, to the detriment of all similarly-situated digital music services and, ultimately, the consumers of digital music services. Further, opt outs create other unintended consequences, such as the possibility that unreasonable rates extracted for the public performance of musical works would cause the all-in rates in 37 C.F.R. § 385 "Subpart B" – which were intended to be inclusive of the aggregate royalties paid for both musical work public performance rights, as well as reproduction and distribution rights – to be exceeded, which was never intended by the stakeholders that negotiated the industry-wide settlements for rates and terms under the Section 115 statutory licenses in 2008 and 2012, respectively.

As noted in our response to Question 5, the royalty ratesetting *processes* under the ASCAP and BMI consent decrees are critical to an efficient, properly functioning marketplace for the public performance of musical works. In addition to the reasons noted above, the oversight of the federal courts to set "reasonable fees" in ratesetting proceedings has been essential. The proceedings are in front of seasoned, tenured, federal judges who are regularly assigned these cases and are able to apply the terms of the consent decrees in a consistent manner. The trials are thorough and the resulting decisions tend to be thoughtful and well-reasoned. Furthermore, the proceedings themselves are conducted utilizing the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which enable litigants to fairly and predictably obtain discovery, present evidence and rely on precedents.

The royalty ratesetting *standards* under the ASCAP and BMI consent decrees similarly provide an essential counter-balance to the unique market power of rights owners, and are equally critical. Under the consent decrees, the federal courts are required to set "reasonable fees" in ratesetting proceedings.[63] In practice, this ratesetting standard has been time-tested in numerous rate setting proceedings for more than half a century to determine rates that have been entirely consistent with this standard, and has consistently established royalty rates that appropriately approximate the "fair market value" of particular licenses in different contexts.[64]

For the reasons already noted in the context of Question 5 and elsewhere in this Notice of Inquiry response, full (or even partial) withdrawals of musical works from the repertories of ASCAP and BMI threaten to undermine the effectiveness of the current royalty ratesetting process and standards applicable under the consent decrees.

B. <u>The impact of 17 U.S.C. § 114(i)</u>.

With respect to the impact, if any, of 17 U.S.C. § 114(i), on the effectiveness of the royalty ratesetting process and standards applicable under the ASCAP and BMI consent decrees, it is worth mentioning that this provision is a good example of the type of legislation that results when special interest groups "jockey for position" in their lobbying efforts to seek specific and narrow changes to U.S. copyright law. The result is piecemeal modifications that benefit only those special interest groups, at the expense of other stakeholders and the public interest.

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[63] *See United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-cv-1395, 2001 WL 1589999, at *6-7 (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree") ("[T]he burden of proof shall be on ASCAP to establish the reasonableness of the fee it seeks ... Should ASCAP not establish that the fee it requested is reasonable, then the Court shall determine a reasonable fee based upon all the evidence."); *United States v. Broadcast Music, Inc.*, No. 64-cv-3787, 1994 WL 901652, at *1 (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree") ("If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when [BMI] advises the [service] of the fee which it deems reasonable, the [service] may forthwith apply to [the Southern District of New York] for the determination of a reasonable fee ... If the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when [BMI] advises the [service] of the fee which it deems reasonable and no such filing by applicant for the determination of a reasonable fee for the license requested is pending, then [BMI] may forthwith apply to [the Southern District of New York] for the determination of a reasonable fee.").

[64] *MobiTV*, 681 F.3d at 82 ("When setting an appropriate rate, the District Court must attempt to approximate the "fair market value" of a license—what a license applicant would pay in an arm's length transaction. ... In so doing, the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music.") (citing *United States v. BMI (Application of Music Choice)*, 316 F.3d 189, 194 (2d Cir. 2003)); *Pandora II*, 2014 WL 1088101, at *31 (noting that Section IX of the ASCAP Consent Decree "requires the rate court to set a 'reasonable' fee for a requested license, but that [the] term is not defined in [the ASCAP Consent Decree]" and citing *MobiTV* as "[g]overning precedent" dictating that courts must approximate the fair market value in determining such a "reasonable fee").

This provision was implemented into U.S. copyright law in 1995 based on lobbying efforts by the music publishers and the PROs,[65] who were concerned that the rate for musical work public performance rights might be *reduced* if the rates for the newly created sound recording public performance rights were taken into account in musical work public performance ratesetting proceedings.[66] Remarkably, with the benefit of hindsight, the music publishers and performing rights organizations have now observed that the royalties established by the Copyright Royalty Board for the statutory licenses under Sections 112 and 114 are in certain cases incredibly high (and, as noted below, so high in some cases that they are unsustainable). Not surprisingly, music publishers are now seeking to use those rates as relevant benchmarks to *increase* the rates for musical work public performance rights. *In theory*, taking a holistic view of the total royalty expense that a digital music service provider should pay would be a positive development for the licensee, because the pool of revenue that any digital music service can make available to all rights owners as "fair compensation" (and still turn a profit) is fixed. However, the repeal of Section 114(i) would only further enhance the ability of musical work rights owners to exploit the fractured nature of rights ownership to their own advantage. Under this construct (i.e., using the sound recording public performance royalty rates as a *benchmark* for musical work public performance royalty rates), the royalty rate for musical work public performance rights would be *increased* without regard to the overall, aggregate royalty expense of the digital music service provider, since the federal courts that oversee PRO ratesetting proceedings do not have the jurisdiction to commensurately *reduce* the royalty payable for the corresponding sound recording rights.

Accordingly, *in practice*, the repeal of Section 114(i) would not result in a holistic determination of the total royalty expense that a digital music service provider should pay. Instead, it is, in a sense, a microcosm of how the current legal framework based on piecemeal changes to U.S. copyright law can serve as a vehicle for one group to take advantage of the fragmented nature of rights ownership to promote its own interests at the expense of the interests of others and, more importantly, of the whole digital music ecosystem.

7. Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternatives that might be adopted?

A. <u>The consent decrees are serving their intended purpose</u>.

As already noted in our responses to Questions 5 and 6, the ASCAP and BMI consent decrees provide an essential counter-balance to the unique market power of rights owners and are critical to an efficient, properly functioning marketplace for the public performance of musical works.[67]

B. <u>The need for the consent decrees is greater now than ever</u>.

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[65] *See Pandora II*, 2014 WL 1088101, at *12 n.30 ("Publishers lobbied for this provision in Congress because they were concerned that the sound recording rates would be set below the public performance rates for compositions and drag down the latter. ASCAP also supported the enactment of the provision, for the same reason.").

[66] *See* Nimmer, *supra* note 4, § 8.22[A][3][a] ("[The] drafters [of the Digital Performance Right in Sound Recordings Act of 1995 (DPRA)] also wished to 'dispel the fear that license fees for sound recording performance may adversely affect music performance royalties.'") (quoting H.R. Rep. No. 104–274, 104th Cong., 1st Sess. 24 (1995)).

[67] If the threat of publishers withdrawing entirely from the PROs were to become a reality, it would upset the delicate balance of the licensing ecosystem, making it necessary to revisit the question of whether the consent decrees are serving their intended purpose.

The concerns that motivated the entry of these consent decrees are still present given modern market conditions and legal developments. In fact, as previously noted in the context of our responses to Questions 5 and 6, the unprecedented concentration of rights in the hands of an increasingly smaller pool of major music publishers makes the processes and protections assured by these consent decrees more important now than ever before. While music publishers have always been free to withdraw their catalogs from ASCAP's or BMI's repertory for all purposes, a right which has been confirmed by the recent decisions in the ASCAP and BMI ratesetting proceedings involving Pandora Media,[68] the practical impossibility of licensing performances nationwide for all purposes, including thousands of radio stations, television stations, bars, restaurants and other public venues, has effectively prevented publishers from exercising its right to do so.[69]

However, if the antitrust consent decrees were to be modified by the Department of Justice to accommodate "limited" withdrawals (such as for certain digital uses, but not for all purposes), the key processes and protections assured by the antitrust consent decrees would be undermined, and the marketplace for musical work public performance rights would be significantly compromised.[70]

The continued need for the processes and protection assured by the consent decrees was well articulated in the March 2014 ASCAP ratesetting decision involving Pandora Media.[71] Specifically, Judge Cote found evidence of closely coordinated conduct by the major music publishers and ASCAP, which was designed to undermine the core processes and protections accorded by these consent decrees that are critical to an efficient, properly functioning marketplace:

- "The publishers believed that [the ASCAP Consent Decree] stood in the way of their closing this gap. They believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publically perform a composition."[72]

- "The press coverage focused on Sony's leverage in negotiations due to its outsize market power: 'Look a little closer, and this is ultimately a very lopsided negotiation .... Pandora absolutely needs Sony's catalog to run an effective radio service. And if they don't pay what Sony/ATV wants, they can't use it, by law.'"[73]

- "What is important is that ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified."[74]

C. <u>**The process for acquiring and administering musical work public performance rights under the consent decrees could be made more effective**</u>.

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[68] *Pandora II*, 2014 WL 1088101; *Pandora III*, 2013 WL 6697788.
[69] *See* note 62, *supra*.
[70] If the antitrust consent decrees were to be modified in this way, the basic premise for allowing music publishers to withdraw should be revisited, with a view to creating a new statutory license for musical work public performance rights.
[71] The need for the protections of the antitrust consent decrees was also acknowledged by the Southern District of New York in *Meredith Corp.*, No. 09-cv-9177, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014), and by the Eastern District of Pennsylvania in *RMLC*, No. 12-cv-5807 (E.D. Pa. Dec. 20, 2013).
[72] *Pandora II*, 2014 WL 1088101, at *14.
[73] *Id.*, at *25.
[74] *Id.*, at *35; *see also* note 59 *supra* for additional context regarding SESAC.

While the consent decrees have served their intended purpose and the need for them now is greater than ever before, for the reasons noted in our responses to Questions 1 and 5, the process for acquiring and administering musical work public performance rights would be *greatly enhanced* through the recommended centralized database.

SOUND RECORDINGS

8. Please assess the current need for and effectiveness of the Section 112 and Section 114 statutory licensing process.

A. <u>There is currently a need for the Section 112 and Section 114 statutory licensing process</u>.

In contrast to the inefficient and expensive work-by-work licensing process for musical work reproduction and distribution rights under Section 115 (which is discussed in our response to Question 1 above), the statutory licensing process under Sections 112 and 114 provides for a *blanket license* for uses of sound recordings which satisfy the eligibility criteria set forth in Sections 112 and 114. As noted in the context of musical work rights, blanket licenses promote efficiency and reduce transaction costs by making a vast body of sound recordings subject to license coverage immediately upon the service of a single notice.[75]

B. <u>There are a number of problems with the Section 112 and Section 114 statutory licensing process that limit its effectiveness</u>.

As noted in Section I.3.B, the statutory license for the performance of sound recordings by means of non-exempt digital audio transmissions under Section 114 (and the corresponding compulsory license for the making of ephemeral recordings used to facilitate non-exempt digital audio transmissions under Section 112) is particularly significant because it reflects a recognition by Congress that a compulsory license is necessary to avoid music licensing complexities that might otherwise deprive the public of the benefits of culturally important digital radio services.[76] However, as noted in our response to Question 2, and as we will discuss further in the context of our answer to Question 9, the intent of Congress has not been fully realized because the "willing buyer, willing seller" standard, which governs the royalty *ratesetting process and standards* applicable to these statutory licenses, has resulted in royalty rates that have been so high and unsustainable that (i) numerous services have exited the business since Congress first established the sound recording public performance right in 1995,[77] and (ii) Congress has had to step

[75] *See* 17 U.S.C. § 114(f)(4)(A) (2012) ("The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings."); 17 U.S.C. § 114(f)(4)(B) ("Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection…").

[76] Prior to implementation of the Digital Performance Right in Sound Recording Act of 1995, digital radio services would not have required sound recording licenses at all

[77] Both AOL and Yahoo! concluded that the resulting high royalty costs were unsustainable for their Internet radio services. In April 2008, AOL reduced its exposure to these fees by entering into an arrangement with CBS Radio to power its Internet radio service (AOL Radio). In February 2009, Yahoo! followed suit by entering into a similar arrangement with CBS Radio to power its Internet radio service (LAUNCHcast). Additional services that have exited the business since Congress established the sound recording public performance right in 1995 include, without limitation, East Village Radio, Turntable.fm, Loudcity, RadioParadise and 3Wk. *See also* Ben Sisario, *East*

in twice to mitigate the substantial economic hardships that the resulting rates imposed on digital music services.[78]

In addition to the applicability of the "willing buyer, willing seller" standard, there are a number of problems with the Section 112 and Section 114 statutory licensing process that *limit its effectiveness*, including the following:

- Expense of participating in ratesetting proceedings before the Copyright Royalty Board. Ratesetting proceedings to establish rates and terms under the Section 112 and Section 114 statutory licenses are long and complex, and the cost for any service to actively participate in this process is very high. This high cost poses a barrier to participation for many smaller digital music services, and, in some cases, larger digital music services as well.

- Evidentiary limitations. The evidentiary rules that govern ratesetting proceedings under the Section 112 and Section 114 statutory licenses prohibit the Copyright Royalty Judges from considering all relevant market data when setting royalty rates. Specifically, Section 114(f)(5)(C) expressly prohibits voluntary agreements between statutory licensees and the receiving agent for the Section 112 and 114 royalties, SoundExchange, from being considered as evidence in ratesetting proceedings, including the royalty rates, rate structure, definition, terms, conditions, or notice and recordkeeping requirements.[79] These voluntary agreements cover the rights actually being granted in the proceeding (non-interactive Internet radio services), unlike the agreements for interactive rights that Copyright Royalty Judges use as proxies to impute non-interactive rates.[80] Copyright Royalty Judges should not be required to consider rates for a *hypothetical marketplace* instead of rates for an *actual marketplace* in this way.

- No pro-ration or apportionment of annual minimum fees based on duration of operation during the applicable calendar year. The rates and terms for many of the service types operating under the Section 112 and Section 114 statutory licenses include an annual minimum fee that is due by

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Village Radio to Close, Citing Licensing Costs, N.Y. Times, May 14, 2014, *available at* http://artsbeat.blogs.nytimes.com/2014/05/14/east-village-radio-to-close-citing-licensing-costs.

[78] *Music Licensing Part I: Legislation in the 112th Congress: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 56 (2012) (statement of Joseph J. Kennedy, Chairman and Chief Executive Officer, Pandora Media, Inc.) ("Two major rate setting decisions and two congressional interventions to undo those decisions - clearly we are dealing with a broken system that needs to be fixed.").

[79] *See* 17 U.S.C. § 114(f)(5)(C). ("Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, *shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings*, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). *It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller*, or otherwise meet the objectives set forth in section 801(b). This subparagraph shall not apply to the extent that *the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection*." (Emphasis added.))

[80] *See* Section II.9.A *infra*.

January 31 of the year covered by the particular Section 112 and Section 114 statutory license.[81] However, not every digital music service has commenced its operations as of January 1 of the year covered by the license. For example, a commercial webcaster that is relying on the "default" rates and terms set forth in 37 C.F.R. § 380.3 and expects to have 100 or more channels would be required to pay an annual minimum fee of $50,000 for that calendar year, even if that commercial webcaster commences making digital audio transmissions and ephemeral recordings on December 1 of that year. The statute (or the implementing regulations promulgated under the statute) should be amended to provide an appropriate pro-ration mechanism for the minimum annual fees.

- No mechanism for recouping royalties under direct licenses from annual minimum fee. For some digital music service providers that rely on the statutory licenses under Sections 112 and 114, it is common practice to concurrently have direct licenses in place with some sound recording rights owners. However, there is no mechanism for reducing or recouping royalties (or pre-payments of royalties) paid directly to sound recording copyright owners under direct licenses from the annual minimum fee. Accordingly, the royalty framework set by the Section 112 and 114 statutory licenses should be amended to allow for recoupment or offset in these circumstances.

- Purging server copies every 6 months. As a condition of eligibility for the Section 112 statutory license, Section 112(e)(1)(C) provides that "unless preserved exclusively for archival purposes, the copy or phonorecord [must be] destroyed within six months from the date the transmission program was first transmitted to the public."[82] In light of technological developments and current practices, this requirement imposes an unnecessary burden on digital music services without any corresponding benefit to rights owners or the public interest. Accordingly, 112(e)(1)(C) should be amended to abolish this requirement.

- Limitations on the number of server copies. Another condition of eligibility for the Section 112 statutory license is that digital music services must make "no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more)."[83] The intent of this provision is to leave the question of whether more than one phonorecord is permissible to the implementing regulations promulgated under Section 112. In light of technological developments, a limitation of no more than one phonorecord imposes an unnecessary burden on digital music services without any corresponding benefit to rights owners or the public interest. Moreover, there is no benefit for leaving this determination to implementing regulations. Accordingly, Section 112(e) should be amended to allow for the creation of as many phonorecords as are reasonably necessary to facilitate digital audio transmissions under the Section 114 statutory license.

9. Please assess the effectiveness of the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

A. The royalty ratesetting standards applicable to the various types of services subject to statutory licensing under Section 114 have been generally ineffective.

[81] 37 C.F.R. §§ 380.4(d), 380.13(d), 380.23(c), 383.3(b), 384.4(d) (2013).
[82] 17 U.S.C. § 112(e)(1)(C).
[83] 17 U.S.C. § 112(e).

The "willing buyer, willing seller" standard – which only applies to a single class of services (non-interactive Internet radio services) – is codified in Sections 112(e) and 114(f), and provides in relevant part as follows:

> The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—
>
> (A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and
>
> (B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.
>
> In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms under voluntary license agreements described in paragraphs (2) and (3). The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.[84]

This standard – which has consistently resulted in royalty rates that are disproportionately higher than in contexts that rely on the 801(b) standard – requires judges to set a rate based solely on *marketplace benchmarks*, but there is very little record evidence of market rates for directly licensed Internet radio services that are not tied to a separate rights grant for additional service types and functionalities (such as direct licenses for interactive services). In recognition of this fact, the standard requires the Copyright Royalty Judges to assume a *hypothetical marketplace* for the rights actually being granted, and *impute* the appropriate rate for the rights actually granted (non-interactive Internet radio services) from the royalty rates paid by digital music services for interactive rights that are not eligible for the statutory licenses under Sections 112 and 114. Once secured, the alleged precedents set by these direct licenses are then bootstrapped as the relevant benchmarks for determining the *hypothetical marketplace* assumed by the "willing buyer, willing seller" standard. Moreover, unlike the 801(b) standard, the "willing buyer, willing seller" standard fails to account for the disruptive impact that high royalty rates may have on digital music service providers, and the public interest in maximizing the availability of creative works to the public.

Another problem with the "willing buyer, willing seller" standard has been that a component of the royalty is usually calculated and determined on the basis of the number of performances, even in circumstances where the higher usage does not equate to higher revenues for the digital music service provider. The Internet Radio Fairness Act (which was not enacted) sought to mitigate this fundamental problem by eliminating the ability to use the rates paid by interactive services, or any rates agreed to by

[84] 17 U.S.C. §§ 112(e)(4), 114(f)(2)(B).

major labels, in Section 112 and 114 ratesetting proceedings.[85] As noted previously, the resulting royalty rates have been so high and unsustainable that Congress has had to step in twice to mitigate the substantial economic hardship that the resulting rates imposed on digital music services.[86] By contrast, the 801(b) standard has never required Congressional intervention in the almost half century since it was introduced.

Finally, under the "willing buyer, willing seller" standard, many Internet radio services have had to pay in excess of 50% of their revenue to SoundExchange under the Section 112 and 114 statutory licenses (of course, such royalties are in addition to those that the services must pay to publishers for the use and exploitation of the underlying musical works). By contrast, broadcast radio pays nothing to the labels for their use of sound recordings, and Sirius XM pays less than 10% of its revenue for the same rights for its satellite digital audio radio service (which rate was established under the 801(b) standard). There is no justifiable reason that performance royalties for Internet radio are determined under an inequitable ratesetting standard.

B. The royalty ratesetting standards applicable to the various types of services subject to statutory licensing under Section 114 could be made more effective.

As previously discussed, the 801(b) standard has been time-tested to provide fair rates in many contexts, including the ratesetting proceedings set forth in Sections 114(f)(1)(B), 115, and 116. It bears repeating here that the record labels have participated as *licensees* in every proceeding to adjust royalty rates and terms under Section 115,[87] and as a result have benefited from the 801(b) standard that was adopted for such proceedings under the 1976 Act.[88] It is disingenuous for the labels to suggest that a different standard should apply for Internet webcasters.

C. Additional problems with the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

In addition to the application of the "willing buyer, willing seller" standard, there are a number of problems with the royalty ratesetting process and standards that *limit their effectiveness*, including the following:

- Reversed adjudication process. Under the current procedural rules that apply to ratesetting proceedings under the Section 112 and 114 statutory licenses, parties are required to submit a statement of the case prior to the commencement of discovery.[89] Moreover, the scope of discovery that is permissible is limited to non-privileged material that is the subject matter

[85] H.R. 6480 § 3(a)(2)(D)(v), 112th Cong. (2012).
[86] Congress stepped in first with the Small Webcaster Settlement Act of 2002 and then again with the Webcaster Settlement Acts of 2008 and 2009. *See also* note 78, *supra*.
[87] *See* note 38 *supra*.
[88] *See* note 52 *supra* and accompanying text.
[89] 37 C.F.R. §§ 351.4, 351.5(a) (2013); 17 U.S.C. §§ 801(b)(6)(C)(i)-(ii). Although 37 C.F.R 351.4(c) permits a participant to amend this statement based on new information received during the discovery process, up to 15 days after the close of discovery, the process is nevertheless not efficient and moreover, proves a tactical advantage to rights owners as they are aware of the direct licenses in the market place to a far greater degree than the digital music services, especially the ones who only operate music services under the Section 112 and 114 statutory licenses.

presented in the statement of the case.[90] Accordingly, in preparing a statement of the case, parties are required to *assume* what they will develop during discovery and hope that relevant information will be voluntarily revealed by their opponent in the opponent's written case, which is a significant reversal of the traditional adjudication procedures followed by state and federal courts and prejudicial to the interests of the litigants. The Section 112 and 114 statutory licenses, and the related implementing regulations governing the rate-setting procedures, should be amended to correct this procedural anomaly.

- Compressed time frame for discovery. Litigants have only 60 days in which to complete all discovery – among ALL litigants.[91] Even in the event that the Copyright Royalty Judges see fit to extend the discovery period, they have very little time to do so, after factoring in the time required for mandatory settlement periods,[92] the submission of written statements,[93] settlement conferences,[94] hearings, rebuttal, and proposed findings of fact and conclusions of law. In typical ratesetting proceedings, the schedules issued by the Copyright Royalty Judges mandate that all discovery – among all parties - must be completed in 60 days. This does not provide digital music services enough time to undertake a full discovery process, and advantages labels, who possess the lion's share of the relevant discoverable information.

- Discovery vehicles and limitations. Under the discovery vehicle limitations set forth in 17 U.S.C. § 801(b)(6)(C)(iv) and 17 C.F.R. § 351.5(2), the participants on each side are *collectively* entitled to up to 25 interrogatories and 10 depositions.[95] Because SoundExchange is the sole participant on behalf of sound recording copyright owners, it is entitled to 25 interrogatories and 10 depositions. However, all interested digital music services, collectively, must *share* 25 interrogatories and 10 depositions. In the currently pending proceeding, there are 28 such

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[90] 17 U.S.C. § 801(b)(6)(C)(v) ("Any participant under paragraph (2) in a proceeding under this chapter to determine royalty rates may request of an opposing participant *nonprivileged documents directly related to the written direct statement or written rebuttal statement* of that participant." (Emphasis added.)).

[91] 17 U.S.C. § 801(b)(6)(C)(iv) ("Discovery in connection with written direct statements shall be permitted for a period of 60 days, except for discovery ordered by the Copyright Royalty Judges in connection with the resolution of motions, orders, and disputes pending at the end of such period.").

[92] 17 CFR 351.2 (2013) ("After the date for filing petitions to participate in a proceeding, the Copyright Royalty Judges will announce the beginning of a voluntary negotiation period and will make a list of the participants available to the participants in the particular proceeding. *The voluntary negotiation period shall last three months, after which the parties shall notify the Copyright Royalty Judges in writing as to whether a settlement has been reached.*" (Emphasis added.)).

[93] 17 CFR 351.4 (2013) ("All parties who have filed a petition to participate in the hearing must file a written direct statement. The deadline for the filing of the written direct statement will be specified by the Copyright Royalty Judges, *not earlier than 4 months, nor later than 5 months, after the end of the voluntary negotiation period* set forth in §351.2." (Emphasis added.)).

[94] 17 CFR 351.7 (2013) ("A post-discovery settlement conference will be held among the participants, within 21 days after the close of discovery, outside of the presence of the Copyright Royalty Judges. Immediately after this conference the participants shall file with the Copyright Royalty Judges a written Joint Settlement Conference Report indicating the extent to which the participants have reached a settlement.").

[95] 17 U.S.C. § 801(b)(6)(C)(iv); 17 CFR 351.5 (2013) ("In a proceeding to determine royalty rates, the participants entitled to receive royalties shall collectively be permitted to take no more than 10 depositions and secure responses to no more than 25 interrogatories. Similarly, the participants obligated to pay royalties shall collectively be permitted to take no more than 10 depositions and secure responses to no more than 25 interrogatories. Parties may obtain such discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. Relevant information need not be admissible at hearing if the discovery by means of depositions and interrogatories appears reasonably calculated to lead to the discovery of admissible evidence.").

participating digital music services. This gives a decided tactical and procedural advantage to SoundExchange in discovery matters.

10. Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

A. DiMA takes no view on whether the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings.

We take *no view* on (i) whether the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings, (ii) whether there are reasons to continue to withhold such protection, or (iii) whether pre-1972 sound recordings should be included within the Section 112 and 114 statutory licenses.

B. Any approach taken with respect to the copyright status of pre-1972 sound recordings should be holistic: Pre-1972 sound recordings should either be "all-in" or "all-out" for all purposes, with no exceptions or exclusions.

Although we take no view on whether the music marketplace might benefit from extending federal copyright protection to pre-1972 sound recordings, we strongly believe that pre-1972 sound recordings should either:

> [1] Be covered by federal copyright protection for *all purposes* (including the statutory licenses under Sections 112 and 114, the "safe harbors" under Section 512 and each of the myriad other statutory licenses, exceptions and exemptions set forth elsewhere in U.S. copyright law), *or*
>
> [2] Not be covered by federal copyright protection for *any purposes at all.*

As noted in other places throughout this response, the current legal and regulatory framework for music licensing developed in a piecemeal manner, and is the product of accommodating the needs, goals and desires of special interest groups. We feel that this tradition should not be continued in the area of pre-1972 sound recordings; rather, this issue should be addressed holistically. Recognizing pre-1972 sound recordings for federal copyright protection for select purposes would be confusing, short-sighted, and against the public interest.

11. Is the distinction between interactive and noninteractive services adequately defined for purposes of eligibility for the Section 114 license?

The distinction between interactive and noninteractive services *is adequately defined* for purposes of eligibility for the Section 114 license. The definition of an "interactive service" set forth in Section 114(j)(7), as clarified by the Second Circuit in *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009), provides an adequate degree of clarity regarding what constitutes an "interactive service" and a "noninteractive service" for purposes of eligibility for the Section 114 statutory license.

PLATFORM PARITY

12. What is the impact of the varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms. Do these differences make sense?

Because of the close relationship between Questions 12 and 13, we are consolidating our response to Question 12 under Question 13, below, so that the issues raised can be addressed collectively.

13. How do differences in the applicability of the sound recording public performance right impact music licensing?

A. The varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms, unfairly tilts competition in favor of some digital music service providers, to the disadvantage of others.

The "playing field" regarding ratesetting standards is not level, and the result is fundamental inequity. The differences between the "willing buyer, willing seller" and 801(b) standards, and their resulting impact on the royalty rates that are established under them, have been discussed in our responses to Questions 2, 8 and 9.

Beyond the inherent inequities associated with the differing ratesetting standards, lawmakers[96] and the recording industry itself[97] have recently cited the absence of a sound recording public performance right for terrestrial AM, FM and HD Radio broadcasts as additional evidence that the current system lacks balance and further tilts the competitive landscape in favor of some music service providers, to the disadvantage of others. In his testimony before the United States Senate Committee on Commerce, Science, and Transportation in support of the merger of the satellite radio services Sirius and XM, the then-CEO of Sirius assured government regulators that a merged Sirius and XM would not create a "monopoly" that could harm competition or new market entrants, because the two satellite radio services do not just compete with each other; they compete head-to-head with a wide variety of other entertainment services and products for the attention of the consumer, including AM and FM terrestrial radio, HD Radio, Internet radio, permanent digital downloads that are sold to consumers and enjoyed on

[96] Jennifer Martinez, *Nadler Circulates Draft Legislation on Music Royalties*, The Hill, Aug. 20, 2012, *available at* http://thehill.com/policy/technology/244413-nadler-circulates-draft-legislation-on-music-royalties (quoting Nadler as saying, "[t]he lack of a performance royalty for terrestrial radio airplay is a significant inequity and grossly unfair."); *Blackburn, Eshoo Introduce Legislation to Protect Musicians' Creative Content*, official website of Rep. Marsha Blackburn (press release), May 7, 2014, *available at* http://blackburn.house.gov/news/documentsingle.aspx?DocumentID=379223 (last visited May 21, 2014) ("'This is a basic issue of modernizing the law to get rid of a dated loophole that only applies to AM/FM radio,' Blackburn said. … 'When Kenny Rogers "The Gambler" is played on Internet radio or satellite radio, Kenny gets paid, but when it is played on AM/FM radio, he doesn't get anything.'").

[97] *Performance Rights Act (H.R. 848): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association Of America); Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, 21 Intell. Prop. & Tech. L.J. 10 (Aug. 2009); *see also* Bruce A. Lehman, *Intellectual Property and the Nat'l Information Infrastructure: the Report of the Working Group On Intellectual Property Rights* 221-225, Information Infrastructure Task Force of the Commerce Dep't (Sep. 1995), *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf.

portable devices and mobile phones that provide access to various types of audio entertainment.[98] The merger was subsequently approved by the Department of Justice and Federal Communications Commission on this basis.[99]

The different ratesetting standards, royalty rates and functionality rules based on platform distinctions do not make sense in the digital environment where the very same consumer electronics devices – such as automobile in-dash receivers – are capable of receiving digital and/or analog transmissions of the same sound recording, yet the sound recording will bear a different royalty rate (or will not be royalty-bearing at all) depending on whether the service that delivered it is considered AM terrestrial radio, FM terrestrial radio, HD Radio, satellite radio or Internet radio under U.S. copyright laws.

B. Fair competition among digital music service providers can be restored by applying the balanced standard under Section 801(b) to all services operating under the Section 112, 114 and 115 statutory licenses.

As previously noted, the royalty standard that applies to Internet radio services (i.e., "willing buyer, willing seller") often results in a royalty rate that is demonstrably higher than the services that operate under the Section 801(b) standard. In lieu of the "willing buyer, willing seller" standard, the balanced standard under Section 801(b) should be adopted to apply to *all services* operating under the Section 112, 114 and 115 statutory licenses. And, as noted above, various lawmakers and the recording industry believe that the lack of a sound recording public performance right for terrestrial AM, FM and HD Radio broadcasts has further tilted the competitive balance in favor of some music service providers, to the disadvantage of others.

CHANGES IN MUSIC LICENSING PRACTICES

14. How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?

A. Direct licensing by musical work owners in lieu of licensing through a common agent or PRO *is quite prevalent* for musical work *reproduction and distribution rights*, but not for musical work *public performance rights*.

Direct licensing by musical work owners in lieu of licensing through a common agent or PRO is quite prevalent for musical work reproduction and distribution rights covered by the major music publishers, the larger independent music publishers and HFA's publisher-principals. Some digital music services have entered into direct license agreements with smaller independent music publishers, but this practice is the exception rather than the rule. Because there are a vast number of musical works that are not controlled by the major music publishers, the larger independent music publishers or the remainder of

[98] *XM-Sirius Merger and the Public Interest: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. (2007) (statement of Melvin Alan Karmazin, CEO, Sirius Satellite Radio).
[99] DOJ, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc.* (press release) (March 24, 2008), *available at* http://www.justice.gov/opa/pr/2008/March/08_at_226.html; *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket 07-57, 23 F.C.C.R. 12348, 12408, 12410-11, 12434-35, ¶¶ 1, 131, 135 & App. B (July 25, 2008) (Memorandum Opinion and Order and Report and Order).

HFA's publisher-principals, direct licenses are usually supplemented with NOIs under the Section 115 statutory license process, which (as previously discussed) involves substantial administrative costs.

To perform this function, many digital music services engage the Harry Fox Agency or Music Reports, Inc. (the only private businesses that offer musical work mechanical and reproduction rights research, administration and management services in the U.S.) to undertake this NOI process on their behalf for a fee, as the services do not have the in-house resources and infrastructure necessary to undertake this process themselves. Many of the digital music services that enter into direct licenses also use these companies to administer the payment of royalties under their direct licenses, because the administration (not just the acquisition) of publishing licenses requires personnel and infrastructure that many services do not have.

However, direct licensing by musical work owners in lieu of licensing through a common agent or PRO *is not prevalent* for musical work *public performance rights*. The potential withdrawal of repertoires from the PROs would make direct licensing of musical work public performance rights much more prevalent. However, as previous noted,[100] these withdrawals would disrupt the musical work licensing marketplace and cause an array of adverse effects for digital music services and the public interest, including the extraction of unreasonable royalty rates based on a combination of market power and lack of transparency into the catalogs that were the subject of the contemplated withdrawals.[101]

For the reasons noted in the next section, it vitally important that the licensing regime maintain the right of parties to enter into direct license arrangements.

B. <u>How direct licensing impacts the music marketplace</u>.

Direct licensing impacts the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees, by *facilitating the introduction of new business models* that do not fit squarely into any of the categories covered by the Section 115 licenses. This gives digital music services and rights owners the flexibility to *vary statutory requirements* and the flexibility to agree on *new and innovative license types and royalty rate models*, which ensures the ability of digital music services to license the rights they require to fit the unique needs of their businesses.

While direct licenses offer cost efficiencies and reduced transaction costs, they also pose a number of significant challenges:

- As previously noted, direct licensing results in high transaction costs to secure and administer licenses. The number of licensors is vast because of the fragmentation of rights, and it is often not cost effective to acquire rights under direct licenses from the "long tail" of independent labels and music publishers.

- Most individually negotiated agreements are long and complex. Rights owners do not share the same concerns in each individual negotiation, which protracts the negotiation period and can lead to impasses.

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[100] *See* Sections I.3.C(b), II.5.B, and II.7.B *supra*.

[101] For example, in the ASCAP ratesetting proceeding with Pandora Media, Judge Cote found that a pattern of conduct, including lack of transparency about the musical works involved, was designed by the music publishers to drive up the royalty rate for musical works by 250%. Accordingly, Judge Cote disregarded Sony ATV's direct license with Pandora Media as a relevant benchmark rate for musical work public performance rights. *Pandora II*, 2014 WL 1088101, at *36-*38.

- Direct license negotiations can take a long time, and can delay the time-to-market for innovative products and services.

- Disparate approaches taken by rights owners on key economic terms put upward pressure on royalty rates, and often include unreasonable demands on key economic terms, such as advances and minimum revenue guarantees.

- Many rights owners are concerned with parity vis-à-vis other rights owners, which results in the imposition of so-called "most favored nations" (or "MFN") clauses for the benefit of rights owners. Because there is no counter-balance to the market power of rights owners in the music licensing marketplace, these MFN clauses are usually asymmetrical in their application, and solely benefit the rights owners.

- The negotiation of direct licenses can increase overhead costs and divert key personnel away from other critical operational, marketing or management functions on behalf of the digital music service.

- Since there is no uniform standard for royalty accountings, each rights owner often imposes its own royalty reporting requirements on digital music services, frequently using proprietary reporting specifications unique to that rights owner. This reduces efficiencies, and adds to the administrative burden and expense undertaken by digital music services.

- As the music publishing industry consolidates and reduces its staffing and overhead, rights owners do not have enough personnel and other resources necessary to fully explore and assess licensing opportunities.

- The existence of the statutory rates under Section 115 sometimes serves to inhibit, rather than facilitate, the willingness of rights owners to experiment with innovative approaches on economic terms in order to avoid the possibility of setting "precedents" that would be adverse to their interests in future ratesetting proceedings.

Nevertheless, direct licenses provide a critical function for music licensing in the digital environment, and the legal and regulatory framework provided by U.S. copyright law must preserve the ability of digital music services to enter into direct licenses.

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

DiMA takes *no view* on whether the government could play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms.

16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?

The innovations to address the complexity of music licensing have generally been undertaken by digital music services, at their expense. In order to secure, administer and retain music licenses, digital music service providers must devote extraordinary time and resources to develop the following:

(i) Information about rights ownership (including building, or funding the building of, redundant, private databases that, for reasons already noted, are often not comprehensive, reliable or accurate);

(ii) Systems to track massive amounts of data related to the usage of content; and

(iii) The complex systems necessary to account to rights owners in a variety of different (and often conflicting) formats and specifications.

In addition to these costs and functions, digital music services must develop content hosting and infrastructure in a way that enables the terms and conditions of myriad music licenses to be satisfied, along with data analytics, management reporting, chart reporting, and enforcement of content access rules (including digital rights management systems for some service types).

17. Would the music marketplace benefit from modifying the scope of the existing statutory licenses?

Other than as discussed in our responses to other questions in this Notice of Inquiry, DiMA takes *no view* on whether the music marketplace would benefit from modifying the scope of the existing statutory licenses,.

REVENUES AND INVESTMENT

18. How have developments in the music marketplace affected the income of songwriters, composers, and recording artists?

The development and deployment of legitimate music services has resulted in *significant royalty payments* by digital music service providers to rights owners for the benefit of songwriters, composers, and recording artists. The legitimate music services represented by DiMA's membership collectively have paid billions of dollars in royalties to content owners in a marketplace where the sale of physical products – long the content owners' primary source of revenue – has continued to decline year-over-year.[102] The various forms of music streaming and so-called "subscription" services are now recognized by rights owners as a "mainstream model."[103] According to IFPI, the recorded music industry's global trade organization, the biggest growth area in recorded music has been in music subscription services, with revenues up 51.3% globally in 2013, while the sale of permanent downloads remains the largest revenue segment from digital music services, at 67% of global revenues.[104] The New York Times recently reported that while the trend for the historical business model is one of decline, streaming services around the world are expected to continue showing substantial growth in the income they generate for songwriters, composers, and recording artists: "The music business has started to see streaming as its salvation. … In 2013, streaming services around the world yielded $1.1 billion in income for the music industry, a number that has been growing fast."[105]

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[102] While the decline in physical music sales was inevitable, legitimate digital music services have created new royalty streams for the benefit of rights holders by monetizing digital music consumption and sharing the revenues with licensors.

[103] Francis Moore, *Introduction*, IFPI Digital Music Report 2014, at 5 (2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.

[104] IFPI Digital Music Report 2014, at 17 (2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.

[105] Sisario, *supra* note 1.

With respect to recording artists, SoundExchange recently reported a 312% increase in the total sum of royalties it paid to recording artists and labels in 2012 versus 2008.[106] Digital radio alone paid out $590.4 million in royalties to artists and rightsholders last year.[107] And according to a report recently released by the Recording Industry Association of America ("RIAA"), the recorded music industry's trade organization in the United States, payments to rights owners in connection with on-demand streaming services have also substantially risen, totaling $220 million in 2013.[108] The substantial royalties generated by the combination of statutory and direct licenses for the use of sound recordings has brought stability to the recording industry, which until recently had witnessed a constant decline in revenues.[109] With respect to songwriter income, royalties paid by digital music services for musical work public performance rights provide the lifeblood for most songwriters. Both ASCAP and BMI reported record high royalty payments of $851.2 million and $814 million, respectively, to their songwriter, composer and publisher members on revenues of $944 million each.[110] SESAC's revenues have grown from just $9 million in 1994 to $167 million in 2013.[111]

The substantial royalties paid by digital music services constitute new revenue streams that were unimagined just a few decades ago. The legitimate music services represented by DiMA's membership make significant royalty payments to content owners. These royalty payments are, in turn, shared with songwriters, composers, and recording artists in accordance with the terms of their respective agreements music publishers, record companies and other rights administrators. Although licensed digital music services have no control over, or insight into, the manner in which content owners share proceeds with songwriters, composers, and recording artists, it is worth noting that the current system, which is based on overlapping copyright rights recognized under U.S. copyright law – sometimes for the same uses of the same works – causes licensing inefficiencies and operational redundancies which add to the expense of administering rights on behalf of rights owners, and correspondingly diminishes the income of songwriters, composers and recording artists.[112]

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[106] *2012 Annual Review* 1, SoundExchange, http://www.soundexchange.com/wp-content/uploads/2014/01/2012-Annual-Review.pdf. Between 2012 and 2013, SoundExchange reported a 19% increase in payments to artists; *Year End Recap 2013*, SoundExchange, http://www.soundexchange.com/wp-content/uploads/2014/02/year-end-recap-2013.pdf.

[107] *Music Industry Leader SoundExchange Celebrates Year of Milestones with 2013 Total Distributions Reaching $590 Million*, SoundExchange (press release), Feb. 4, 2014, http://www.soundexchange.com/pr/music-industry-leader-soundexchange-celebrates-year-of-milestones-with-2013-total-distributions-reaching-590-million/; *see also* Alex Pham, *Streaming Made Up One-Fifth of U.S. Recorded Music Revenue in 2013*, Billboard, Mar. 18, 2014, *available at* http://www.billboard.com/biz/articles/news/digital-and-mobile/5937634/streaming-made-up-one-fifth-of-us-recorded-music (last viewed May 9, 2014).

[108] Joshua P. Friedlander, *News and Notes on 2013 RIAA Music Industry Shipment and Revenue Statistics*, RIAA, *available at* http://76.74.24.142/2463566A-FF96-E0CA-2766-72779A364D01.pdf.

[109] According to the RIAA, total music industry revenues have been stable at about $7 billion for the past four years, but had been on a steady decline before that, dropping from $8.8 billion in 2008 to $7.8 billion in 2009 to the current level of $7 billion in 2010. *Id.*

[110] *ASCAP Reports Strong Revenues in 2013*, Am. Soc'y of Composers, Authors, and Publishers (press release), Feb. 12, 2014, http://www.ascap.com/press/2014/0213-2013-financials.aspx; *Broadcast Music Inc. Reports Record-Breaking Revenues of $944 Million*, Broadcast Music Inc. (press release), Sept. 23, 2013, http://www.bmi.com/press/entry/563077.

[111] Ed Christman, *SESAC Refinances Debt to Cut Interest Payments*, Billboard, Apr. 8, 2014, *available at* http://www.billboard.com/biz/articles/news/legal-and-management/6042238/sesac-refinances-debt-to-cut-interest-payments (last viewed May 9, 2014).

[112] For example, in the context of ASCAP and BMI, each PRO retains administration fees of approximately 12% of the gross royalties paid by digital music services. Based on the 2013 royalties noted above, DiMA estimates that approximately $200 million of the royalties paid by digital music services in 2013 was redirected from songwriters

19. Are revenues attributable to the performance and sale of music fairly divided between creators and distributors of musical works and sound recordings?

Revenues attributable to the performance and sale of music are *not* fairly divided between creators and distributors of musical works and sound recordings. Distributors bear a *disproportionate percentage* of the costs, expenses and related risks for the investment in and operation of digital music services, relative to the share of revenues they generally retain (after making royalty payments for the use of musical works and sound recordings). In addition to the cost of royalty payments, digital music services must bear the costs of acquiring and administering the licenses for musical works and sound recordings, as well as many other operational costs, such as those related to engineering; content hosting, delivery, and billing infrastructure; financial clearing; bandwidth; reporting; marketing; and technology, software, services, and backend infrastructure. As was made plain by the testimony of the record labels' expert witness in the last ratesetting proceeding for the satellite radio and preexisting subscription services under the Section 112 and 114 statutory licenses, digital music services pay the lion's share of their revenues over to rights owners at roughly the following rates:[113]

Digital Product Type	% of Gross Revenues Rate *Sound Recording Rights Only*	% of Gross Revenues Rate *Inclusive of Sound Recording and Musical Work Rights*
Permanent Audio Download	N/A	70%
Interactive Subscription (Non-Portable)	50% - 60%	60% - 72%
Interactive Subscription (Portable)	60% - 65%	70% - 78%

Unfortunately, the public discourse around the compensation of creators is quite misleading. For example, much publicity was recently generated about a tweet from Bette Midler, where she observed that after more than four million plays on Pandora's Internet radio service, she only received $144.21 in royalties.[114] What this publicity failed to take into account is that four million plays on Pandora's service represents the equivalent number of "impressions" (public performances) as just twenty spins on a terrestrial FM radio station that averages 200,000 simultaneous listeners. Even more significantly, this publicity ignores the fact that terrestrial FM broadcasters do not pay *any* royalties to creators for the public performance of sound recordings. Of course, there is little transparency about what happens to the significant royalties generated from digital music services *after they are paid* to record labels, music

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and retained to cover administrative expenses. *See ASCAP CEO John LoFrumento's Remarks from the 2014 ASCAP General Annual Membership Meeting*, Official Website of Am. Soc'y of Composers, Authors, and Publishers, Apr. 24, 2014, *available at* http://www.ascap.com/playback/2014/04/action/john-lofrumento-membership-meeting-remarks.aspx ("2013's operating ratio stood at 12.4%."); *FAQs*, official website of Broadcast Music, Inc., *available at* http://www.bmi.com/faq/entry/what_happens_to_the_fees_that_businesses_pay_and_how_much_profit_does_bmi_m (last visited May 21, 2014) ("Currently, more than eighty-seven cents of every dollar of your licensing fee goes to our affiliated copyright owners.").

[113] *See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, SoundExchange Witness Direct Statements, Docket No. 2011-1 CRB PSS/Satellite II, at 15 (Nov. 29, 2011) (expert witness statement of George S. Ford, President, Applied Economic Studies).

[114] *See, e.g.*, Paul Resnikoff, *After 4,175,149 Plays, Pandora Pays Bette Midler $144.21*, Digital Music News, Apr. 6, 2014, http://www.digitalmusicnews.com/permalink/2014/04/06/bettemidler.

publishers and PROs, and processed under the financial terms of recording artists' and songwriters' own private arrangements with rights owners. As might be imagined, a significant portion of the royalties received are retained by these rights owners for their own account, or applied toward the recoupment of advances paid to recording artists and songwriters.

While the public is led to believe through the aforementioned sorts of publicity that digital music services do not pay significant royalties, nothing could be further from the truth. In fact, digital music services are paying more in royalties and wholesale proceeds, as a percentage of their gross revenue, than any music distributors under the historical business model.

20. In what ways are investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, impacted by music licensing issues?

DiMA takes *no view* on what ways investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, are impacted by music licensing issues. Although DiMA's members have significant intellectual property portfolios of their own and have great respect for the investments made by content creators, DiMA's members do not generally perform the functions of music creators, record labels or music publishers.

21. How do licensing concerns impact the ability to invest in new distribution models?

As we have noted elsewhere in our responses to the other specific questions posed in this Notice of Inquiry, the current legal and regulatory framework provided by U.S. copyright law for music licensing has created a "perfect storm" of issues and areas of concern that have led many potential investors *to refrain from investing* in new distribution models. Such issues and areas of concern include: the complexity of music licensing caused by the fragmented nature of rights ownership; unsustainable royalty rates; the cost of acquiring and administering licenses; lack of transparency regarding rights ownership; and substantial legal risks, such as the potential liability for statutory damages for "mistakes," however innocent or unavoidable they may be.

In testimony before the U.S. House of Representatives Subcommittee on Intellectual Property, Competition and the Internet of the Committee on the Judiciary in 2012, one investor noted the following about the chilling effect that music licensing issues have had on entrepreneurship and investment in new business models:

> As venture capitalists we evaluate new companies largely based on three criteria: The abilities of the team, the size and conditions of the market the company aims to enter, and the quality of the product. Although we've met many great entrepreneurs with great product ideas, we have resisted investing in digital music largely for one reason: The complications and conditions of the state of music licensing. The digital music business is one of the most perilous of all Internet businesses. We are skeptical under the current licensing regime that profitable standalone digital music companies can be built. In fact, hundreds of millions of dollars of venture capital have been lost in failed attempts to launch sustainable companies in this market. While our industry is used to failure, the failure rate of digital music companies is among the highest of any industry we have evaluated. This is solely due to the overburdensome royalty requirements imposed upon digital-music licensees by record companies under both voluntary and compulsory rate structures. The compulsory royalty rates imposed upon

> Internet radio companies render them noninvestible businesses from the perspective of many VCs.[115]

Addressing these concerns and problems through a comprehensive modernization of U.S. copyright law for the digital environment will go a long way toward stimulating a new wave of investment in new distribution models.

DATA STANDARDS

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

As noted in our responses to Questions 1, 3, 5 and 8, the lack of transparency around rights ownership information for musical works and sound recordings makes it difficult if not impossible for digital music services to determine what rights they do and do not possess at any given time, which presents many adverse consequences. A publicly available, centralized database for musical works and sound recordings would go a long way toward resolving many of the problems identified in our response to this Notice of Inquiry.

The federal government *could encourage* the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process by establishing a set of best practices, database standards, and a regime for enforcing participation and compliance. At a minimum, this regime could encourage adoption by incorporating the following key elements:

- Statutory damages. Without limiting the concept of a "safe harbor" from statutory damages previously suggested (i.e., one that shields copyright users from infringement liability if they have acted diligently and in good faith based on the best information available, such as the centralized database), eligibility to seek statutory damages in general should be conditioned on participation in the centralized database, utilizing the universal standards.

- Attorneys' fees. As a further incentive for participation, like the registration of copyrighted works with the Copyright Office,[116] eligibility to seek attorneys' fees in infringement cases in general should be conditioned on the registration of accurate rights ownership information in the centralized database, utilizing the universal standards.

- Economic incentives. The federal government should also encourage the adoption of universal standards by creating other economic incentives for rights owners to participate.

The federal government should develop these standards, practices and compliance regulations in conjunction with interested parties from the private sector, as much of the information required is already controlled by private parties in disparate private databases, and there are many different data standards utilized by digital music service providers and rights owners today that would need to be harmonized. However, as the experience with the development of the GRD has shown (and as previously noted), if left

[115] *Music Licensing Part I: Legislation in the 112th Congress: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 71 (2012) (statement of David B. Pakman, Partner, Venrock).
[116] 17 U.S.C. § 412 (2012).

entirely to private industry without oversight from the federal government, these universal standards – and the centralized database itself – are unlikely to get implemented.

OTHER ISSUES

23. Please supply or identify data or economic studies that measure or quantify the effect of technological or other developments on the music licensing marketplace, including the revenues attributable to the consumption of music in different formats and through different distribution channels, and the income earned by copyright owners.

DiMA believes that the following data and economic studies measure or quantify the effect of technological or other developments on the music licensing marketplace:

- Michael Masnick and Michael Ho, *The Sky is Rising*, Computer and Communications Industry Ass'n, Engine Advocacy and Floor 64, Jan. 2012, *available at* http://www.techdirt.com/skyisrising/.

- Brett Danaher, Samita Dhanasobhon, Michael D. Smith and Rahul Telang, *Understanding Media Markets in the Digital Age: Economics and Methodology* (Apr. 2014), *available at* http://www.nber.org/chapters/c12999.pdf.

- *Adventures in the Netherlands: Spotify, Piracy and the New Dutch Experience*, Spotify, Jul. 17, 2013, *available at* https://spotify.box.com/shared/static/nbktls3leeb0rcyh41sr.pdf.

- *IFPI Digital Music Report 2014*, IFPI, *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.

- Joshua P. Friedlander, *News and Notes on 2013 RIAA Music Industry Shipment and Revenue Statistics*, RIAA, *available at* http://76.74.24.142/2463566A-FF96-E0CA-2766-72779A364D01.pdf.

- Jean-Manuel Izaret, John Rose, Neal Zuckerman and Paul Zwillenberg, *Follow the Surplus: How U.S. Consumers Value Online Media*, Boston Consulting Group (Feb. 2013), *available at* http://www.bcgtelaviv.com/documents/file127046.pdf.

- Thomas Künstner, Matthew Le Merle, Hannes Gmelin and Christian Dietsche, *The Digital Future of Creative Europe: The Economic Impact of Digitization and the Internet on the Creative Sector in Europe*, Booz & Co. (Mar. 24, 2013), *available at* http://www.strategyand.pwc.com/global/home/what-we-think/reports-white-papers/article-display/digital-future-creative-europe.

24. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

As noted in our response to Questions 12 and 13, the digital music services that operate under the Section 112 and 114 statutory licenses not only compete against each other without regard to these platform distinctions, they also compete with a wide variety of other entertainment services and products for the attention of the consumer, including AM and FM terrestrial radio, HD Radio and permanent digital downloads. Just as there is no rational basis for different ratesetting standards applicable to each of these competing services, there is no rational basis for there to be discriminatory standards for applying *the programming rules and restrictions* to these services that compete for the same users, time spent

listening, advertising dollars and subscription dollars. Yet, the standards under Section 114(d)(2), are applied in such a way as to advantage some competitors (e.g., satellite radio and digital radio that is bundled with cable and satellite television services) over others (e.g., Internet radio). For example, the following five rules apply to Internet radio services, but not any of the other service types operating under the Section 112 and 114 statutory licenses:[117]

- The service cannot "knowingly perform the sound recording…in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity…"[118]

- The service must cooperate in order to prevent technology from "automatically scanning… transmissions…in order to [allow the user to] select a particular sound recording;"[119]

- The service must not take "affirmative steps to cause or induce the making of a phonorecord by the transmission recipient" and must enable its own technology to the fullest extent possible "to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format;"[120]

- The service must accommodate technical anti-circumvention measures for the identification and protection of copyrighted works;[121] and

- The service must ensure that the title of the sound recording, the album, and the artist "can easily be seen by the transmission recipient in visual form" during the performance.[122]

Fair competition among digital music service providers can be restored by applying the same programming rules and restrictions under Section 114(d)(2) to all services operating under the Section 112 and 114 statutory licenses. The programming rules and restrictions under Section 114(d)(2) should apply to *all service types* that rely on Section 114 statutory licenses, such that the law creates a "level playing field" for all parties.

III. CONCLUSION

In making its recommendations to Congress regarding potential areas for the modernization of U.S. copyright law in the area of music licensing, DiMA urges the Copyright Office to take a holistic view of the entire music licensing ecosystem, and provide a framework for the new digital era that is based on the six essential pillars outlined in Section I of this Notice of Inquiry response. Because of the importance and technical complexity of the various issue involved, we respectfully suggest that the Copyright Office conduct further analysis into the current landscape with a view to [1] achieving a better understanding of the "perfect storm" of music licensing issues and problems that has created systemic failure in the music licensing marketplace, and [2] determining how the issues, problems and inefficiencies discussed in this Notice of Inquiry response may be addressed through appropriate legislative changes.

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[117] 17 U.S.C. § 114(d)(2)(C); *see* Nimmer, *supra* note 4, § 8.22[D][1][c] (2013).
[118] 17 U.S.C. § 114(d)(2)(C)(iv).
[119] 17 U.S.C. § 114(d)(2)(C)(v).
[120] 17 U.S.C. § 114(d)(2)(C)(vi).
[121] 17 U.S.C. § 114(d)(2)(C)(viii).
[122] Nimmer, *supra* note 4, § 8.22[D][1][c] (2013) (describing the requirements of 17 U.S.C. § 114(d)(2)(C)(ix)).

Dated: May 23, 2014

By: _____

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Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of:	
Music Licensing Study	Docket No. 2014-03

Reply Comments of the Digital Media Association ("DiMA")

The Digital Media Association ("DiMA") respectfully submits the following reply comments in response to the Copyright Office's second Notice of Inquiry, seeking additional written comments to the above-referenced Notice of Inquiry (the "Notice of Inquiry").

First, DiMA commends the Copyright Office for initiating this inquiry and for continuing the study. DiMA appreciates the opportunity to participate and is willing to continue to participate in the study going forward and to assist the Copyright Office in any way we can. As set forth in our first set of comments in response to the initial Notice of Inquiry, DiMA is the leading national trade organization dedicated to representing the interests of licensed digital media services, including many of the leading players in the digital music marketplace today. DiMA's members include Amazon.com, Apple, Google/YouTube, Microsoft, Pandora, Rhapsody, Slacker and others.

DiMA's members operate a broad array of different digital music service types and consumer offerings that span across the spectrum of music licensing concerns, from so-called "statutory, non-interactive internet radio" which utilizes the Section 114 license, to on-demand streaming services which have had to forge independent licenses in a free market, to digital download services which employ the Section 115 compulsory reproduction license (or some variation thereof). Many of DiMA's members provide a multitude of these services, for which they must seek a broad array of music licenses. As the premiere providers of copyrighted sound recordings and musical works through virtually every form of legitimate online music service, DiMA's members are directly affected by existing methods of licensing music, as well as the mechanisms for obtaining music licenses that are shaped by U.S. copyright law. DiMA has been actively involved in many of the legislative efforts, recent hearings, studies, analyses, public inquiries and roundtables conducted by the Copyright Office on various aspects of copyright law.

It is important to note that the interests of DiMA and its members are aligned with those of the rights owners in several significant respects. First, DiMA members share the belief that rights owners should be appropriately compensated for the use of copyrighted works. Second, DiMA members also share the desire to ensure the long-term survival of the music business, going forward. The legitimate music services represented by DiMA's members have collectively paid billions of dollars in ever-increasing royalty payments to content owners, recording artists and songwriters, even as the sale of physical products – long the content owners' primary source of revenue – has continued to decline year-over-year. The delivery of engaging, innovative music services offered by DiMA members is critical to the central public policy underlying our copyright system: affording the widest range of consumers' access to the widest range of creative works.

The complex process for music licensing in the digital landscape that exists today in the United States is unnecessarily fragmented and outdated and as a result, chills investment in legitimate music services and the continued development and expansion of innovative services that are essential to the

survival of the recorded music industry. We are pleased that the Copyright Office is continuing its examination of the music licensing landscape. We remain hopeful that, after evaluating the issues, the Copyright Office can formulate at least some basic recommendations that Congress will consider to modernize U.S. copyright law so that it assures consumers continued access to a vibrant marketplace for music products and services in the digital era.

As we made clear in our initial submission in this study, the process for music licensing in the United States, as it has been applied in the current digital landscape, threatens to chill investment in, and the continued development and expansion of innovative, legitimate music services that are essential to the survival of the recorded music industry. The most significant problems with the system are:

- Fragmentation of copyright rights and rights ownership. The rights in and to musical works under U.S. copyright law include multiple varied and distinct rights. Sound recordings, and the musical works embodied within them, are separate rights that are routinely owned by different copyright holders and indeed, often multiple copyright holders for just the musical compostion. This fragmentation with multiple "stacked" rights, which all must be cleared in order to exploit a final sound recording of a musical composition, was not disruptive to the historical business model for the making, distribution, promotion and sale of physical records, but it is a significant problem in the digital age, where retailers have effectively become the licensees.

- Shifted licensing responsibility. In contrast to the historical physical model, in the digital environment, music services are functionally equivalent to the distributors and retailers that sold music under the "brick and mortar" business model. Licensing responsibility has shifted to the digital services as the retailers – a first in the history of the music industry.

- The impact of rights fragmentation and the shifting of licensing responsibility onto digital music retailers. The rights fragmentation and shifting of licensing responsibility to service providers has created formidable challenges for digital music services for various reasons unique to music licensing in the digital environment, including:

    - New legal uncertainties. As a result of the shift in licensing responsibility and the development of new music delivery technologies of the digital era, digital music services are subjected to legal uncertainties around the precise rights implicated for particular activities, overlapping claims for royalty payments, and significant potential legal exposure.

    - The need for licensing ubiquity. As the music business has shifted from physical sales of individual records to the digital services – and as it seems to be moving from ownership models to access models - digital music services need to secure licenses from tens of thousands of rights holders, covering tens of millions of tracks, in order to offer consumers commercially viable services. Failing to secure the necessary licenses is not an option.

    - The "tug-of-war" over royalties. Because each negotiation and rate setting proceeding occurs individually, at different times, in different places and before different rate setting tribunals operating under different rate setting standards, each individual rights owner/administrating body seeks to increase its own royalty, generally without regard to the aggregate royalties that services have to pay to the totality of various rights owners. This dynamic has resulted in an upward spiral of costs to digital music service providers who have been thrust into the middle of this "tug-of-war" among multiple rights owners over multiple, individual royalties. The net result of this "tug-of-war" is royalty rates that

are (i) not presented to copyright users in a unified way such that digital music services can evaluate, forecast and understand their aggregate royalty expense for all of the copyright rights needed, and (ii) in the aggregate, are unjustifiably high and, ultimately, unsustainable.

The current music licensing mechanisms do not work well in the digital environment. The existing music licensing structures are not well-suited for the digital era, as they (i) lack necessary transparency, (ii) are not efficient, and (iii) do not provide a "level playing field" for competitors in terms of rate setting standards, royalty rates or functionality rules because of platform distinctions or historical anomalies. Nor do these structures often provide a suitable counter-balance to the market power of rights owners.

U.S. copyright law is in need of modernization for the digital environment, and, as noted above, a holistic view of the entire music licensing ecosystem should be taken. For modernization to be effective, the framework for the new digital era should be based on the following six essential pillars:

- **Continued Government Oversight and Regulation of Music Licensing Activities:** A music licensing framework that appropriately counter-balances the unique market power and negotiating leverage of copyright owners is necessary to a healthy and sustainable digital music marketplace.

- **Transparency and a centralized database:** The digital marketplace needs a publicly available, centralized and reliable database that contains information about rights ownership of musical works and sound recordings on a work-by-work level. Development of data standards, such as International Standard Recording Code ("ISRC") and International Standard Musical Work Code ("ISWC") need to be developed and employed with consistency. Experience with the stalled development of the Global Repertoire Database ("GRD") in Europe has shown, if left entirely to private industry without government oversight, these universal standards (and the centralized database itself) are unlikely to get implemented. The establishment of data standards and a database must be stimulated and maintained by governmental action.

- **Licensing Efficiencies and Reduced Transaction Costs:** The music licensing marketplace would benefit from a framework that promotes licensing efficiencies and reduced transaction costs for music licensing activities, implemented through vehicles such as the development of an accurate, comprehensive and reliable database of all musical works, compulsory blanket licenses and regulated common agents.

- **Clarification of Rights**: The music licensing framework should be established so that discrete rights owners are not able to drive up royalty rates based on legal uncertainties arising out of the convergence of reproduction, distribution and public performance rights in the digital environment. Certainty would foster growth and promote new entry into the digital music marketplace.

- **Reduction of Legal Risks Around Licensing Activities:** Immunity from infringement liability (including statutory damages and attorney's fees) for copyright users that have acted diligently and in good faith to negotiate licenses, would reduce risk and encourage further innovation.

- **"Level Playing Field":** A music licensing framework should include a truly "level playing field" where particular music services are not advantaged over others, in terms of royalty obligations, rate setting standards, royalty rates or functionality rules, based on technological platform distinctions or historical anomalies. Clear and unbiased rights and obligations, for all parties, would increase competition on the merits, thereby incentivizing innovation.

RESPONSES TO THE SPECIFIC QUESTIONS SET FORTH IN THE COPYRIGHT OFFICE'S SECOND REQUEST FOR COMMENTS

Data and Transparency:

1. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.

As DiMA has long advocated, and as recently as in our initial comments in response to the Copyright Office's commencement of this study, a comprehensive and authoritative database of musical works and sound recordings - a central registry of all current rights holder, sound recording and musical work metadata necessary to adequately identify, refer to, license and pay for the use of sound recordings and the musical works they embody - must be established and maintained in order for the continued existence and growth of a commercial music ecosystem in the digital age. Establishing such a database would not only facilitate direct licensing, lend transparency and hopefully reduce overall licensing costs, but the existence of such a reliable database would also alleviate many of the other problems that we currently see in the music copyright landscape (some of which are the subject of other discrete policy studies undertaken by the Copyright Office); concerns about compulsory licenses, lack of blanket coverage and certainty, orphan works and many other issues plaguing the music licensing marketplace today.

Accurate, timely and transparent data on what works are available, from whom and for what uses, would afford rights holders greater flexibility in licensing and greater information about the uses of their works and the revenue those uses generate. It would also provide music providers with the ability to engage in large-scale licensing much more efficiently. A reliable database would also help solve other concerns regarding musical works and copyright. It would allow the identification of the totality of works known and available for licensing, thereby moving us towards truly blanket coverage, certainty about licensed rights and concurrent reduction of concerns about liability, and it would also necessarily help reduce and potentially solve the orphan works problem, as it relates to musical works.

Ideally, such a database would include all information about all musical works - both compositions and sound recordings - available for any type of licensing, including not only all forms of public performance, reproduction and distribution, but also availability for licensing of uses that are currently non-statutory. A database which contains accurate and timely information about all works available for compulsory mechanical licensing, or for blanket performance licensing, or for statutory streaming, would not end its usefulness with that one statutory purpose. Properly established and populated, such a database would be useful to facilitate other, voluntary licenses for additional types of uses not covered by compulsory or blanket licenses that it may serve, initially.

The database should be in a flexible, scalable, machine-readable format and should be open to public review, to facilitate continuous licensing and the innovation and launch of licensed services. While the database should not be open to public editing, rules regarding the entry of data in the database should be crafted with ample latitude to allow the data to be updated and corrected by any legitimate party with up-to-date information on the contents of the database. The actual oversight of the musical works and sound recordings database - within the Copyright Office or other Government office, perhaps with assistance from the private sector – should likely follow the structure of a private non-profit body, operating within a charter that should include a Board or other governing division comprised of representatives from rights holders; including individual creators and aggregators from the music publishing, sound recording industries, and from music service provider constituencies.

The actual form of the database could take any number of contours, whether it be centrally located, co-located, distributed or some combination thereof. The most important aspect of a musical works and sound recordings database is that it be comprehensive, accurate and reliable. Ideally, the Copyright Office could be the central location for the database and for the input and maintenance of the data. That structure would afford the certainty of a single official database, maintained by a single, reliable entity, with clear authority over the contents and intended use of the database.

If the Copyright Office is unable or unwilling to take on the burden of establishing and maintaining a musical works database, for financial or other reasons, the Copyright Office could join with private sector providers to establish a database that is operated privately, with Copyright Office input and approval. The Copyright Office could even go so far as to simply establish a set of "best practices" that potential database operators would be obliged to adhere to, in order to be authorized to handle the database, or a portion of it.

Whether a musical works and sound recordings database is to be established and maintained by the Copyright Office or by a private entity or group of private entities, Congress and/or the Copyright Office could incentivize potential partners by allowing some measure of commercial benefit for participating in the database, such as designating a small portion of license fees/royalties generated to cover administrative costs of those private entities that participate in developing and maintaining the database.

The Copyright Office and/or Congress can best incentivize private actors to gather, assimilate and share reliable data within a musical works and sound recordings database a number of ways. In the first instance, the Copyright Office should first identify (with input from stakeholders) and publicize the data standard to be utilized. Placing the accepted data standard on copyright registration forms, the Copyright Office website, and any other public materials that the copyright office distributes would go a long way to informing creators in particular, and the public, in general, of the data points and standards necessary to maintain an effective licensing database.

Going further, the Copyright Office should make the submission of that data a pre-requisite for copyright registrations accepted by the Copyright Office, under the present Chapter 4. The properly identified data points and format should be enumerated and specifically made part of the requirements under Sections 402, and Sections 407 through 412, to secure copyright registration, to make claims thereunder and to seek remedies for infringement. Finally, the Copyright Office could further incentivize private actors to participate in developing and sharing reliable data by providing economic incentives, such as limited liability exposure, unrestricted access to the database, or perhaps reduced registration costs, to those who provide accurate and timely data and participate in the development and maintenance of the database.

2. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

While the most widely embraced identifiers are the International Standard Recording Code ("ISRC") and/or International Standard Musical Work Code ("ISWC"), these identifiers are hardly uniform or reliable in either their presence or their application. To be clear, the basic information necessary to be able to identify musical works and sound recordings for the purposes of licensing and payment include a few simple fields of information:

1) Song Title
2) Artist(s) (Featured Artist and Contributing Artist, if any)
3) Composer(s)
4) Album Title
5) Releasing Record Label
6) Musical Works Publisher(s)
7) PRO Affiliation

These data points, while few and relatively simple to organize and track, are only partially issued and managed by a myriad of uniquely interested parties, none of which have any interest in collecting, organizing or making available all of the identifying information necessary, for all uses. Neither ISRC Codes nor ISWC Codes are applied to all works, nor are they applied uniformly or correctly, even when they are attached to work. What is more, many services note that currently, not only ISRC, but also UPC - in addition to the information listed in items 1-4 above, are usually required in order to properly identify a work for commercial exploitation. In effect, services cannot rely solely on ISRC, but are required to use other criteria, in addition to ISRC, in order to properly identify a work, in today's marketplace.

Many parties with access to some or all of this data keep it in proprietary format (often to satisfy long-outdated legacy systems), and within proprietary databases that are not open for public review. Many parties not only collect limited information they specifically need as may bes necessary only to administer the particular right they might be concerned with, but they do it in unique formats, without regard to being able to distribute or allow others to use the data in any other context.

For instance, performing rights organizations ASCAP, BMI and SESAC collect and maintain only the information they need to administer public performance licenses for their members. ISWC codes are only applied by each of them, respectively, only to the songs within their respective repertories. Their databases are only searchable manually, on an individual song-by-song basis and are explicitly disclaimed as incomplete and unreliable, with prohibitions on using the data for any other purpose other than licensing works within their repertory, for public performance uses.[1]

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[1] BMI Terms of Use: *"The information contained in the database has been provided to BMI from a variety of sources, and BMI makes no warranties or representations whatsoever with respect to its accuracy. In some cases, the writer or publisher information shown may not reflect actual copyright ownership of a work as registered with the U.S. Copyright Office. In addition, writers or publishers for whom BMI does not license a work are not listed. Any use of this information for purposes other than to determine what musical compositions are contained in the BMI Repertoire through the last update is solely at the risk of the user. ...BMI specifically disclaims any and all liability for any loss or damages which may be incurred, directly or indirectly, as a result of the use of the information in this database, or for any omissions or errors contained in the database."*

ASCAP Terms of Use: *"The information contained in the ACE Database is updated weekly. The information contained has been supplied to ASCAP by various sources and ASCAP makes no representations as to its accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database."*

The inefficiency of these databases was explicitly observed in the most recent rate-setting proceeding between Pandora and ASCAP. Despite the fact that ASCAP's Consent Decree mandates that ASCAP make its repertory available, specifically to "enable users to make more informed licensing decisions and can facilitate substitution of music from one PRO for music from another or direct licensing from rights holders,"[2] the structure and form of ASCAP's current database does not and cannot fulfill that purpose. As Judge Cote noted in her ruling: "Although ASCAP attempted at trial to show that Pandora could have used public sources of information to identify the Sony catalog, it failed to show that such an effort would have produced a reliable, comprehensive list, even if Pandora had made the extraordinary commitment necessary to try to compile such a list from public data."[3]

The government can incentivize more universal availability and adoption of data and data standards by again, identifying the requisite data points that all stakeholders require and codifying how those points should be reported, and further making those data points a requirement for Federal Registration in Chapter 4, a part of all Federal Records, and an absolute requirement for bringing an action for copyright infringement.

In addition, the Government could further incentivize private actors to participate in developing and sharing reliable data by also including an obligation for authors and copyright owners to identify all entities to which those authors have authorized to license works on their behalf, as a pre-requisite to any claims for remedies for infringement. While it would seem that authors and other rights holders should be incentivized by the potential commerce alone to identify any agencies, aggregators or other collectives whom they have empowered to license their works, sometimes they unfortunately fail to recognize the advantage. Obligating authors and rights holders to identify those who they empower as their agents would go further to eliciting that important information, and making it known.

As an adjunct to requiring authors and rights holders to identify the agencies that they authorize to license their works, the Government could also require the inverse; that all collectives or aggregators of copyrights, such as music publishing companies, record companies, performing rights organizations, mechanical licensing agencies, royalty collection and/or processing agencies and the like, must make publicly available the proper data, in the proper format, in order to be authorized to represent any third-party author/artists' interests, or to make claims for infringement on behalf of any author or artist.

SESAC Terms of Use: *"The SESAC repertory database contains works in the SESAC repertory for which SESAC, Inc. has compiled information from various sources. The database lists songs or compositions, titles, composers, authors and publisher information on musical compositions, including copyrighted arrangements of public domain works. The information is updated regularly and may change on a daily basis.*

SESAC, Inc. makes no representations and/or warranties with respect to the accuracy or completeness of the information. There are no representations and warranties contained herein and SESAC, Inc. specifically disclaims any direct or indirect liability for any losses or risks of any kind, including but not limited to incidental, special, exemplary, punitive or consequential damages, arising or which may arise out of the use, application or omission of any of the information in the database.

The following information provided by SESAC in response to specific requests may not be copied, sold or distributed by any method including electronic, magnetic or print without prior written consent from SESAC.

This is proprietary material and your cooperation is expected."

[2] United States of America v. American Society of Composers Authors and Publishers, Second Amended Final Judgment "AFJ2," Sec X; Department of Justice Memorandum in Support of AFJ2, at page 37.

[3] In Re Petition of Pandora Media, Inc. , __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) at page 68-69.

Finally, as we suggested above, the Government could further incentivize private actors to participate in developing and sharing reliable data by providing economic incentives, such as limited liability exposure, unrestricted access to the database, or perhaps reduced registration costs, to those who provide accurate and timely data and participate in the development and maintenance of the database.

3. Please address possible methods for enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of non-usage-based forms of compensation (*e.g.*, advances against future royalty payments and equity shares).

Again, the most effective method of enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities would be to require all rights-owners and licensing agents – record labels, music publishers, performing rights organizations, mechanical licensing agents and individual rights holders, as well – to establish and maintain timely, accurate, public machine-readable databases of all works that they own, control or excercise licensing rights for.

The Government could establish a requirement that any entity seeking to operate as a collective or aggregator of music copyright licensing rights, such as music publishing companies, record companies, performing rights organizations, mechanical licensing agencies and royalty collection and/or processing agencies, must make publicly available a comprehensive, machine-readable database of all works they claim to represent, in order to be recognized as authorized to represent third-party authors and artists' interests, and specifically to make claims for infringement or claims on behalf of any author or artist.

It is a necessary component of the business of any collective or aggregator of these rights for exploitation, as part of a business endeavor, to identify and catalog the rights they have accumulated to represent, and the parties from whom (and the terms on which) those acquisitions have been made. It is a simple task for these businesses to make that information, which they must maintain in order to run and value their businesses, available to the general public. It should be a requirement that such collectives and aggregators adequately identify the catalogs they claim to represent.

Transparency in the reporting of usage of and payment for works can be accomplished by requiring those agencies and collectives to report timely and accurate data of all uses of works that have been reported to them, along with accurate and timely accountings of all forms of payment received for such uses. In the first instance, direct payment for discrete usage should always be reported to the author or rights holder with the least amount of obfuscation. Any entity that seeks the authority to operate as an agent on behalf of individual authors or copyright holders should be required to make available, to each and every author or other rights holder they represent, an accurate, comprehensive, machine-readable database of all uses and payments made therefore that have been made to the agent, in order for the agent to be authorized to represent third-party authors and artists' interests, and specifically to make claims for infringement or claims on behalf of any author or artist.

Any entity that purports to operate as an agent on behalf of individual authors or copyright holders which does not make available, to each and every author or other rights holder they represent, an accurate, machine-readable database of all uses and payments made therefore that have been reported to the agent, should, at the least, be prohibited from making any claims for infringement or other claims on behalf of any authors, artists or other rights holders.

We understand the concerns regarding the disclosure of non-usage-based forms of compensation, such as pre-paid advances and equity ownership. There has been a good deal of public discussion regarding these transactions and how they affect overall artist compensation. While concerns over these issues may be legitimate, these transactions are often extremely complex and subject to (and therefore tailored to) a myriad of accounting, finance, tax and other concerns. As a result, it may be likely that any attempt to require disclosure of these types of remuneration in a broad policy directive will actually result in very little being reported back to authors or rights holders, as "compensation" or other recognizable benefit, in practice. In light of the complex nature of this topic, DiMA does not have a specific recommendation with respect to a requirement to disclose particular transactions or business arrangements.

Musical Works

4. Please provide your views on the logistics and consequences of potential publisher withdrawals from ASCAP and/or BMI, including how such withdrawals would be governed by the PROs; whether such withdrawals are compatible with existing publisher agreements with songwriters and composers; whether the PROs might still play a role in administering licenses issued directly by the publishers, and if so, how; the effect of any such withdrawals on PRO cost structures and commissions; licensees' access to definitive data concerning individual works subject to withdrawal; and related issues.

Potential publisher withdrawals from ASCAP and/or BMI, should not be allowed on a selective, "partial" basis. Music Publishers wishing to have their works licensed outside of the collectives of ASCAP or BMI, for any uses, should not be able to reap the benefits that are only available as a result of participating in collective licensing. Benefits of collective licensing, such as lower administrative costs, sharing of enforcement costs, etc., should not be available to parties who seek to circumvent the very controls which have proven necessary to keep such collective oligopolies in check. Music publishers should have to decide to either work within a collective, which is necessarily subject to some oversight, or to engage in entirely self-administered licensing. As DiMA made clear in our filing with the Department of Justice in response to their inquiry on this issue, to afford music publishers all or most of the benefits of these collectives, while allowing them to selectively circumvent only the clearly-necessary controls the collectives must adhere to, is antithetical to both basic notions of anti-competitive behavior and to the specific purpose of the Consent Decrees, themselves.

In the event of complete withdrawal of all rights, licensees must have access to definitive data concerning the repertory administered by the performing rights organization in question and any individual works subject to withdrawal as the Pandora and ASCAP case made painfully clear. The "blanket licensing" system that exists currently between the three main PROs; ASCAP, BMI and SESAC, establishes a marketplace that operates on the premise that, as long as a music service has licenses from all three PROs, the extent of any specific repertory or catalog (or change thereto) is inconsequential. If licensed by all three PROs that cover the marketplace, the net effect is that licensee music services have "blanket coverage" and need not worry about specifics of which works are affiliated with any particular PRO. Obviously, this approach is only effective when the licensing landscape is so-covered by a complete "blanket."

If the blanket nature of the license market is compromised in any way, then it becomes imperative for licensees to know precisely which works are licensed through the collectives and which works are subject to direct licensing, through individual music publishers. Anything short of complete disclosure of accurate information regarding the repertory gives rise to potential infringement.

The need for clear data on what repertory is available through the PROs versus which repertory is available directly from music publishers, in the event of publisher withdrawals, is absolutely critical to public performance licensees. This is something that ASCAP apparently counted on quite effectively, as a bargaining chip in their negotiations with Pandora. As Judge Cote noted in her decision in Pandora vs. ASCAP: "That same day, Pandora also asked ASCAP for the list of Sony works in ASCAP's repertoire. It would have taken ASCAP about a day to respond to Pandora's request with an accurate list of the Sony works. But, ASCAP, like Sony, stonewalled Pandora and refused to provide the list" ... "By withholding the list [of its repertory], Sony deprived Pandora of significant leverage in their negotiations. Pandora was faced with three options: shut down its business, face crippling copyright infringement liability. ...Sony's determined refusal to provide the list despite repeated requests over the license negotiation period is testament to the importance Sony itself placed on this bargaining chip."[4]

It is clear that even now, with the public disclosure requirements which are part of the current ASCAP Consent Decree, the information regarding PRO repertory and how any publisher withdrawals would affect the repertory fall far short of the explicitly-stated goal of "enabling users to make more informed licensing decisions and facilitating substitution of music from one PRO for music from another or direct licensing from rights holders." The need for timely, accurate and easily-accessible data regarding PROs' repertory is essential to maintaining a truly competitive licensing marketplace for the performances of musical works. This is true even when that marketplace is effectively covered by a "blanket," resulting from PRO licenses. That information becomes absolutely necessary, in the event of publisher withdrawals from those PROs.

Publisher withdrawals from the PROs are likely incompatible with existing publisher agreements with songwriters and composers, as well, and would require, at the least, significant modification of each of those agreements, or the performance licensing business, at large. The musical work publishing business literally relies on the historical and continuing assumption that music publishers will have the performance rights for the works in their catalogs administered by a PRO, who in turn, have direct relationships and outstanding fiduciary duties to their songwriter affiliates.

The overwhelming majority of publishing and administration agreements that songwriters have entered into over the last 70 years are premised on the presumption that the music publisher, with whom the songwriter enters into the agreement, will coordinate with that songwriter's Performing Rights Organization with respect to the administration of the public performance rights to those compositions the songwriter delivers under the agreement. Songwriters - and their publishing and administration agreements, by their very terms - assume the publisher and songwriter's continued affiliation with the Performing Rights Organizations as a basic element of the contractual bargain and relationship. Songwriters would be immeasurably damaged by the ability of their music publishers to claim that certain compositions, or certain rights and uses of certain compositions, were not subject to the administration of the PRO, an assumption that underlies virtually every songwriter's music publishing and/or administration agreement entered into over the last 70 years.

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[4] *In Re Petition of Pandora Media, Inc. , __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) at page 101; fn 68*

If music publishers simply withdraw an artist's works from administration by the artist's chosen PRO, doing so would effectively change the very terms of those agreements, to the detriment of the songwriters.[5] Indeed, PROs that even allow such withdrawals may be subject to claims by individual songwriters of a breach of the PRO's fiduciary duty to the songwriter members.

The economics of virtually every publishing, co-publishing and administration agreement entered into over the last 70 years were negotiated with full and complete reliance on the "splits" between songwriters and publishers being administered by the PROs. A typical publishing agreement that refers to a 75/25% split between the songwriter and publisher on "publisher income" necessarily assumes a greater payout the songwriter on the overall income, since, by virtue of the PRO's administration of the public performance income, the "publisher income" includes only half of the total income generated by public performances, with the other half of the income generated by those public performances being paid directly to the songwriter, and never counted among the "publisher income" subject to the subsequent split.

Songwriters would no longer be able to rely on their PROs and the statements they receive from them, to determine uses of their compositions. Songwriters would be left only to look to their music publishers for that information.

5. Are there ways in which the current PRO distribution methodologies could or should be improved?

The current PRO distribution methodologies can and should be improved. Artists have virtually no information regarding how the PRO income is allocated, how plays are reported or how payments are calculated. Even major music publishers are unhappy with the way ASCAP and BMI account to artist and publishers, and are seeking more detail in their payments to writers and accountings to publishers, the ability to monitor payments and conduct audits.

As Sony/ATV said in their comments in response to the pending Department of Justice inquiry into the Consent Decrees that govern ASCAP and BMI:

"...in reality, the methods used by ASCAP and BMI to allocate payments to the various music publishers and writers are complicated and often opaque. The "transparency" of which some writers and writer associations speak is typically the division of royalties between publisher members and songwriter members; however, this division is only a small piece of the transparency equation."[6]

ASCAP's payment calculation system is laid out in no less than a 20 page document that includes an acknowledgement that they rely on sample reporting, apply "song credits" through a "weighting formula" and then apply those through separate formulas for writer and publisher payments, and two and a half pages of "defined terms" that must be referred to, to even try to figure out the formula.[7] Similarly, BMI also weighs performances based on a number of loosely defined factors. Additionally, BMI builds in

[5] Songwriter's Guild Comments Submitted to the Department of Justice in Connection with its Review of the ASCAP and BMI Consent Decrees http://www.justice.gov/atr/cases/ascapbmi/comments/307845.pdf

[6] Sony/ATV, LLC Comments Submitted to the Department of Justice in Connection with its Review of the ASCAP and BMI Consent Decrees, at page 18. http://www.justice.gov/atr/cases/ascapbmi/comments/307983.pdf

[7] http://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf

several different "bonuses" to their payout structure, including a "Hit Song Bonus," a "Standards Bonus," a "Super Usage Payment" which is tied to television uses and a "Music Payment Bonus."[8]

These sampling, calculation and payout schemes are not easily understandable, result in varied payouts that have little relationship to actual performances, are virtually impossible to audit and clearly favor bigger, established artists and their music publishers over smaller artists.

6. In recent years, PROs have announced record-high revenues and distributions. At the same time, many songwriters report significant declines in income. What marketplace developments have led to this result, and what implications does it have for the music licensing system?

The PROs have announced record-high revenues and distributions over the last 10 years, during a time period in which the overall recorded music industry has seen declines. Both ASCAP and BMI have seen their membership double between 2003 and 2013[9] and their respective revenues and royalty distributions increased similarly.[10] SESAC's annual revenue has averaged 30 % yearly growth, growing by a factor of 19 times over a 20 year period, from $9 million per year in 1992 to an estimated $167 million in 2013.[11]

Neither DiMA nor any of its individual members are in a position to assess whether - despite the proudly-reported clear increases in both revenues AND royalty payments to songwriter members by each of the PROs - any individual or class of songwriters have actually suffered any declines in income, whether "significant" or not. We are not aware of any songwriters providing verified income statements, tax returns or other proof to support claims that they have suffered declines in income from their PROs.

Nevertheless, even assuming - only for the sake of argument - that some songwriters have experienced declines in their payments from their PROs, there are likely many possible factors that could explain that occurrence. In the first place, individual songwriters, like all other artists and performers, eventually fall out of fashion and their works become less commercially popular, over time. It is to be expected that, like the income generated by any product or service that has passed its peak of commercial demand, particular songs will receive less airplay and therefore generate less income. This natural decline in revenues for particular songwriters is something that has always occurred, should be expected and is not a result of any development in the music licensing system.

Beyond the obvious acknowledgment that composers and their musical works are timely and necessarily subject to declining popularity and revenue over time, the lack of transparency in the way that the PROs' distribute royalties to their affiliates and high administrative costs within ASCAP and BMI certainly contribute to the limited payments that some songwriters receive. Songwriters who know their songs have been played complain that they receive no payment, at all, for those plays, while more popular artist receive "bonus" payments, beyond what plays they had were actually reported.

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[8] http://www.makingitinmusic.net/publishing-2/performing-rights-organizations-2-how-does-bmi-and-ascap-calculate-payouts.html

[9] 2003 ASCAP Membership = 150,000 v. 2013 = 500,000, 2003 BMI Membership = 300,000 v. 2103 = 600,000 – ASCAP and BMI Press Releases, 2003 and 2013.

[10] http://www.billboard.com/biz/articles/news/1445452/ascap-revenues-hit-record-high-in-2003
http://www.billboard.com/biz/articles/news/publishing/5901249/ascaps-2013-revenues-distributions-rise-in-2013
http://www.bmi.com/news/entry/20031021_bmi_reports_revenue_increase
http://www.bmi.com/press/entry/563077

[11] http://www.billboard.com/biz/articles/news/legal-and-management/6203855/sesac-gets-new-leadership-plans-to-greatly-expand

Marketplace developments that may have contributed to the alleged reduction in songwriter income necessarily include first and foremost the advent of the internet and services such as those of DiMA members, which provide consumers access to a much wider selection of music, produced by a broader array of artists, than what was traditionally exposed by the limited terrestrial radio and major record company system of marketing music. DiMA's services allow consumers to be exposed to, and then go on to delve deeply into, independent and non-mainstream areas of music that were historically largely, if not completely, unavailable through traditional, mainstream media outlets.

Self-produced and marketed artists, special-interest "niche" artists and others that would never have found an audience through the limited exposure provided by major record companies and terrestrial radio can now participate in a virtually unlimited marketplace for music. These developments have clearly led to a "democratization" of the music business, in which many participants can find a specific audience, as opposed to the traditional system, in which only a few, select, big stars are selected to be mass-marketed to a passive public. Accordingly, more artists are making some income form the performance of their works, while a select few artists that managed to dominate the narrower avenues previously available might be making less.

This democratization of the music business demands further efficiencies in music licensing, as more and more individual artists eschew the traditional major record company route and instead run their entire careers individually. Those millions and millions of smaller, self-promoting artists need an efficient licensing system that affords all artists – not just major artists that have the advantage of major music publisher and record company backing – the same ability to enter the marketplace and claim their part of it.

7. If the Section 115 license were to be eliminated, how would the transition work? In the absence of a statutory regime, how would digital service providers obtain licenses for the millions of songs they seem to believe are required to meet consumer expectations? What percentage of these works could be directly licensed without undue transaction costs and would some type of collective licensing remain necessary to facilitate licensing of the remainder? If so, would such collective(s) require government oversight? How might uses now outside of Section 115, such as music videos and lyric displays, be accommodated?

DiMA takes exception to the characterization, set forth in the Second Request for Comments that "many stakeholders appear to be of the view that the Section 115 statutory license for the reproduction and distribution of musical works should either be eliminated or significantly modified to reflect the realities of the digital marketplace"[12] and to the implicit assumption in this inquiry, that the inquiry should be focused only on the potential elimination of the compulsory license, specifically. In the first place, it is not clear that "many stakeholders" appear to be of the view that Section 115 should be eliminated or significantly modified. Of the 85 comments received and published by the Copyright Office, it appears that a small minority specifically seek elimination or significant modification of the Section 115 statutory license. The vast majority of comments do not even address the question, at all. Of the remaining comments that do address efficacy of the Section 115 compulsory license, a significant number of those remaining comments either support the retention of the Section 115 compulsory license and/or seek to expand and enhance the license.

Significantly, A2IM, which represents a broad coalition of over 325 independently owned U.S. music labels, which collectively, represent the largest music label industry segment (according to

[12] Federal Register, Vol. 79, No. 141,Wednesday, July 23, 2014, at page 42833

Billboard Magazine and Neilsen-Soundscan, 34.6% of the U.S. recorded music sales market in 2013 and approximately 40% of digital recorded music revenues) submitted comments which explicitly stated:

"The Section 115 Compulsory mechanical license is part of a music licensing framework that appropriately counter-balances the unique market power and negotiating leverage of copyright owners with certain controls on the marketplace."[13] This position was also publicly re-iterated at the New York Round Table discussion that the Copyright Office conducted.

Similarly, Brigham Young University's submission said, unequivocally:

"Section 115 is working wonderfully for our needs at the University. We love the predictable, statutory rate and the compulsory provision. It's the only part of the law (outside Section 107) where the user has some refreshing leverage in the music licensing world."[14] Again, that position that was also explicitly re-stated, in person, at the Nashville roundtable session conducted by the Copyright Office.

The Future of Music Coalition ("FMC"), a non-profit collaboration between members of the music, technology, public policy and intellectual property law communities, which described themselves as being "comprised of performing artists, composers, independent label owners, music publishers and advocates that have paid close attention over the past 14 years to developments in the technology space and their impact on music creators," filed comments that included the following, regarding the Section 115 compulsory license, in their submission:

"The 115 statutory license aids a functional music marketplace in numerous ways. Without an efficient means for sound recording owners to obtain permission to reproduce and distribute songs to which they do not retain underlying composition rights, the delivery of catalog to services and consumers would be impeded.

Current debates about the efficacy of the compulsory mechanical license tend to obscure its benefits. While it isn't hard to understand why the major publishers would want the licensing of musical compositions to be subject to direct negotiation — as is the case with sound copyright owners and services — consolidation in the publishing sector means that under such a scenario, a small handful of publishers would be able to leverage their valuable and vast catalogs to the potential detriment of competition. Besides limiting opportunity for independents, this would also frustrate the ability for sound recording owners to bring their products to the marketplace, exacerbating tensions between labels, recording artists, and publishers. It could even lead to a lowering of rates as some publishers cut bargain - basement deals to remain competitive."

The FMC submission went on to actually consider the additional benefits that would come from expanding Section 115, converting it to a full blanket license.[15]

Beyond the considered, explicit support for the Section 115 compulsory license in many of the comments, of those few comments that did call for an elimination of the Section 115 compulsory license (which, not surprisingly, includes comments of the NMPA and also several of its members and other music publishers, who also filed individually) most did so without citing any "realities of the digital marketplace." The NMPA comments, and several of the others, such as those of GEAR Music

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[13] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/American_Association_of_Independent_Music_MLS_2014.pdf

[14] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Brigham_Young_University_Copyright_Licensing_Office_MLS_2014.pdf

[15] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Future_of_Music_Coalition_MLS_2014.pdf

Publishing, plainly seek a repeal of the Section 115 compulsory license with a request for a free market, entirely, with respect to ALL mechanical reproduction licenses, whether for more traditional physical goods or digital uses. Comments seeking the abolishment of the Section 115 compulsory license based on the assertion that the 115 compulsory is and always has been an improper burden on songwriters and their collectives are not made any more urgent or current by suggesting that the request is made now, only in response to the alleged "realities of the digital marketplace."

DiMA does not support the elimination of the Section 115 compulsory license. As we made clear in our initial comments, DIMA member companies occupy an uncomfortable middle ground in a multi-rights owner "tug-of-war" over royalty rates between several, independent right holders, which has driven up overall royalty costs to levels that are virtually unsustainable, under the present system. Any relaxation of the existing controls on that marketplace would effectively decimate any hope for a healthy and sustainable digital music marketplace, going forward.

As imperfect as it is - with no obligation for musical work copyright holders to identify themselves, on one hand, yet the requirement on the part of potential licensees to locate and notify those unknown rights holders of an intent to make mechanical reproductions, on the other - the music licensing marketplace still benefits from the Section 115 compulsory license framework that promotes licensing efficiencies and reduces transaction costs. The Section 115 mechanical license should remain, and should be made more effective and efficient, by establishing a comprehensive and authoritative public database of the identity and ownership of musical works (and sound recordings), as discussed more fully, above.

When considering even the possibility of eliminating the Section 115 compulsory license today, it is important to note that the massive consolidation that has occurred in the recording and music publishing businesses over the last 25 years (much of it occurring in just the last 5 – 10 years), which has resulted in the establishment of significant market-dominating corporations, was approved largely because the existence of the Section 115 compulsory license. As these marketplace consolidations were proposed and subsequently reviewed for regulatory approval, the review occurred entirely within the context that the Section 115 compulsory license was, and would continue to be, in effect as a significant check on the resulting consolidated market power. Accordingly, any consideration of eliminating or curtailing the compulsory license going forward would necessarily require re-examining the entire marketplace, which has only been permitted to develop into the present state - of only a handful of participants, each of which wields market-shaping power - as a result of the compulsory license being in place.

The current Section 115 compulsory license is really only effective as a means of guaranteeing music users - that is, record companies and digital music services - access to a large number of musical works, in return for defined payments and terms. While it is a statutory license, it is not a fully functional blanket license. The Section 115 license does not guarantee complete licensing of all compositions that may be in existence and otherwise capable of reproduction and distribution, nor does it provide for licensing of potential new or alternate uses that might not fit within an interpretation of a "phonorecord." As such, the current Section 115 compulsory license falls short of a full blanket license, which would afford complete coverage for all mechanical reproductions and distributions.

If the Section 115 statutory compulsory license is to be eliminated, it should be replaced by a blanket licensing system, similar to the performing rights market, where all musical works are available for licensing, from a limited number of licensors, which licensors are subject to governmental oversight and controlled rate-setting, and in which timely, accurate and easily-accessible data regarding the licensed work, and the terms upon which it can be licensed, is readily available to potential licensees. The ability to identify and license all works, comprehensively, and to make accurate payment for the use

of those works is absolutely essential to maintaining a truly competitive licensing marketplace for musical works. The efficiencies afforded by the establishment of such a concentrated marketplace, must naturally also be accompanied by significant governmental oversight of the licensing entity(ies) empowered with that unique collective licensing authority. Statutorily-created monopolies beg for concomitant supervision of their significant pricing and other market-shaping behavior.

In addition to the continued need for some type of regulated, blanket license system for licensing of musical works for reproduction and distribution of musical works, any transition from the compulsory license market to a more uniform, blanket license market for musical works that might even be considered must be carried out in a very deliberate, controlled set of phases, all of which would necessarily be subject to oversight of a disinterested mediating entity. Simply abolishing the long-standing compulsory license is quite literally not an option. Any potential change in the system should be carefully monitored, with an explicit understanding that any change that produces a significant upset of the existing marketplace would be considered evidence that the change being undertaken is ill-advised and likely should be abandoned.

Digital service providers and record companies do, in fact, need to obtain licenses for millions of songs in order to meet consumer expectations and be commercially viable. While it is possible for digital music distribution services to be successful without an absolute complete catalog of all works, the allowable margin of unlicensed works is clearly quite thin. The unfortunate results within the market over the last 5 to 10 years have proven that without a significant majority of the works available, services cannot effectively compete. The historical landscape is littered with digital music delivery companies that were unable to sustain themselves without licenses for the majority of musical works. At present, there are no digital distribution services operating in the United States without at least every major music publisher licensed. Those that could not acquire licenses from all majors either closed or did not enter the U.S. market, at all.

While it would seem that a significant percentage of those millions of works which are necessary to launch and maintain a viable music delivery service works could be directly licensed without undue transaction costs, some type of collective licensing remains necessary to facilitate licensing of the remainder. The licensing costs for large catalogs are essentially fixed. A single license, for the entire catalog of millions and millions of songs takes only incrementally increased time, energy and cost to execute over a single license for a single composition. Pursuing individual licenses for each of hundreds of thousands or even millions of individual musical works that are not a part of larger catalogs is not a viable proposition. This is true for both digital music service providers on the licensee side and also for independent artists who are not part of a significant catalog, on the songwriter/licensor side.

Digital music delivery services, who need to offer as many titles as possible to remain competitive and require business certainty about the availability and the cost of those millions of titles, would require some type of centralized licensing system, in order to ensure that they have properly licensed as many musical works as possible. On the other side of the equation, small independent artists would need a licensing scheme that would ensure that they could easily get their works placed on these services at a competitive rate, so that they could effectively participate in the wider market now presented by digital services, a market that previously afforded independent artists little or no exposure.

As discussed above and elsewhere, such collectives require government oversight. As has been historically recognized by Congress and the Department of Justice - and as the federal judges retaining jurisdiction over certain Consent Decrees have, as recently as this year, found to be the case - the natural behavior for collectives and monopolies is to instinctively leverage their position and attempt to extract supra-competitive rates and terms. We should not need to point to the recent evidence of this behavior, specifically in the context of music licensing (as convenient as it may be), to make the point. It is a plain

economic fact which requires no supporting citation that left unchecked, monopolies and oligopolies will unfailingly exploit the market power they accrue. Accordingly, the efficiencies that inure from a concentrated marketplace require significant governmental oversight of the few licensing entity(ies) authorized to operate without natural marketplace competition.

Potential uses now outside of Section 115, such as music videos and lyric displays, could easily be accommodated on a voluntary basis, by licensors. One of the additional significant ancillary benefits to establishing an efficient licensing regime that would be built around a comprehensive and authoritative public database of musical works and sound recordings, beyond going great lengths in resolving issues such as realizing a truly blanket licensing result, affording certainty about licensed rights and reducing liability, and helping accurately identify orphaned works, is that once the database is established and a licensing system utilizing it is in place, for even a single type of use, that database can easily be extended to support licensing for any number of other uses. A database initially constructed specifically to support compulsory licensing of Section 115 mechanical rights could easily be extended by rights holders to facilitate licensing of the works represented in the database for any number of additional uses. The availability of voluntary licenses for any type of use could be made available through the database. Similarly, rights users, such as record labels, digital music services and audio visual producers could solicit licenses for those additional uses directly to the rights holders identified in the database.

Much discussion at the round table meetings surrounded the so-called "RIAA Proposal," which was also specifically mentioned by the Copyright Office in your solicitation for these Reply Comments.[16] Briefly, the proposal would apparently allow music publishers and sound recording owners to collectively negotiate, among themselves, an industrywide revenue-sharing arrangement as between them, with a fixed percentage of licensing fees for use of a recorded song allocated to the musical work and the remainder to the sound recording owner. Record labels would thereafter be permitted to bundle musical work licenses with their sound recording licenses, with the third-party licensees making payments for the musical work, in accordance with the previously established ratio, directly to music publishers and the balance to the record companies owning the sound recordings, according to the agreed industry percentages. We further understand that the end result of the "RIAA Proposal" assumes that the Section 115 compulsory license would be eliminated and free market rates would apply, and further that such an arrangement would extend to certain audiovisual uses not currently covered by the Section 115 license, such as music videos and lyric display.

The proposal was rather forcefully and consistently rejected by many of the music publisher participants at the round table discussions, and certainly by all of the representatives of major music publishing concerns. Accordingly, we are not convinced that the proposal warrants detailed consideration. A proposal that is predicated upon coordination between record labels and music publishers, which has been rejected out-of-hand by the music publishers, may not be very viable, regardless of its potential merits.

For what it is worth, some of the basic elements of the RIAA Proposal at least address some issues that would necessarily lead to a much more efficient music licensing marketplace. The proposal includes the concept of bundling two distinct rights necessary to effectively license a sound recording; the rights to a) the sound recording, and also b) the underlying musical composition, into a single transaction, which transaction would supposedly be ultimately negotiated on economically reasonable and viable terms. The concepts of establishing "one-stop-shopping" to acquire both of those two important rights, as well as the concept resulting in a single transaction for the total "content costs" should be considered more closely.

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[16] Federal Register, Vol. 79, No. 141,Wednesday, July 23, 2014, at page 42835

Reducing the number of licensors that need to be dealt with by providing a single licensor entity that passes through other included rights would reduce the number of transactions necessary and the transaction costs, greatly. Additionally, combining both of the rights necessary to engage in music distribution into one transaction, as opposed to having them addressed in multiple discrete transactions, none of which incorporate or take into account other rights licensing costs or terms, would help alleviate a significant facet of the "tug-of-war" over rights and royalties music distributors face, and presumably result in total transaction costs that would come within economically sustainable levels. These are admirable goals that should be pursued, in whatever context rights holders can find comfortable accommodating.

Sound Recordings

8. Are there ways in which Section 112 and 114 (or other) CRB rate setting proceedings could be streamlined or otherwise improved from a procedural standpoint?

There are several ways in which Section 112 and 114 and or other CRB rate setting proceedings could be streamlined. In the first instance, the Section 112 "ephemeral" license should be, at the least, updated to reflect the realities of the transmission of performances of sound recordings in today's day and age. Requirements such as that the ephemeral recordings, necessary to engage in transmissions, must be "destroyed within six months from the date the transmission program was first transmitted," or that the transmitting entity "make no more than 1 phonorecord of the sound recording" are archaic and serve no real purpose in modern broadcasting. Similarly, the need to have a distinct rate-setting process, that results in a separate rate specifically attributable to the 112 ephemeral license (as distinct from the Section 114 license rate) is a procedural redundancy that serves no actual purpose. The basic concerns addressed by the 112 license can and should be incorporated into the 114 license, as a component of the process of making transmissions under section 114.

Moving on, several improvements could and should be made to the statutory rate setting procedures. For example, all rate setting could occur under dedicated federal judges and under standard Federal litigation rules. As the 70 year history of ASCAP and BMI Consent Decrees indicates, such rate setting procedures conducted in that context are not unduly burdensome, and they do not produce significantly unforeseen results. Moreover, by making such a change policymakers would eliminate questions that some have raised regarding the constitutionality of the Copyright Royalty Board and guarantee that complex music licensing disputes would be resolved by judges with increased experienced and tenure. Properly appointed, sitting federal judges, with years of practice before them, have proven astute at grasping the nuances of music licensing and particularly adept at applying standards and arriving at fair rates under those standards.

The rate setting process itself could be significantly streamlined by allowing for discovery before presentation of the parties' direct cases, and combining the direct and rebuttal phases of the ratesetting hearings into a single integrated trial, in ordinary civil litigation. In addition, more should and could be done to encourage settlements. Adoption of settlements is currently painfully slow and labored. The Copyright Royalty Judges seem overly concerned with details of settlements, particularly as the adoption of those settlements may impact the awkward division (and overlap) of jurisdiction between the Copyright Royalty Board and the Copyright Office. Encouraging swift adoption of settlements, allowing settlements to be treated as non-precedential, and perhaps allowing non-precedential interim settlements (i.e. in between the 5 year rate setting intervals) are just some of the ways that the current process could be modified to engender more settlements.

International Music Licensing Models

9. International licensing models for the reproduction, distribution, and public performance of musical works differ from the current regimes for licensing musical works in the United States. Are there international music licensing models the Office should look to as it continues to review the U.S. system?

While it may seem initially as though international licensing models for the reproduction, distribution, and public performance of musical works might offer viable alternatives to consider, contemplation of adopting these regimes should be considered carefully, and in full context. There may be certain aspects of foreign licensing systems that we can learn from and perhaps even incorporate. For instance, a closer harmonization of U.S. licensing systems with international systems would facilitate the inevitable move towards a global marketplace.

It is important to take note however, that several of the models developed in earnest throughout Europe, Asia and Latin America recently have failed in actual practice. In addition, these regions often have entirely different copyright schemes, such as "author's rights" being superlative to so-called "neighboring rights" (which vary widely in scope between different countries and collections of states) and "broadcast mechanical rights" which make the adoption of certain standards very difficult, if not impossible under the U.S. system.

Other Issues

10. Please identify any other pertinent issues that the Copyright Office may wish to consider in evaluating the music licensing landscape.

During the course of the public round table discussions the Copyright Office seemed to embrace the perspective, perhaps fostered by some commenters, that the 801 (b) rate-setting standard is somehow inherently geared to result in "below market rates" which rates are only intended to provide a "subsidy" to assist fledgling start-up businesses. With a further assumption that "mature" businesses should be able to "age out of" the 801(b) standard[17] and into the willing buyer-willing seller rate-setting standard, which people think are "rates that are closer to what would come about in the free market."[18]

As we tried to make clear in our comments at the round table, it does not seem that many of the commenters believe that 801(b) is somehow a less-preferred rate-setting standard that should only be applied temporarily. There were at least 6 participants at the New York Public Round Table, where the issue was discussed, that took the opportunity to explicitly announce support for the 801(b) standard over willing buyer-willing seller.[19]

Beyond the fact that there does not appear to be any agreement - or even majority - on the issue, there is an absence of historical or factual support for the assertion on the part of commenters, or an assumption on the part of the Copyright Office, that 801(b) is somehow inappropriate or has only been adopted as an interim standard that companies or industries should "mature out of." The 801(b) standard

[17] Music Licensing Public Roundtable, Monday, June 23, 2014, transcript, at pages 327-329.

[18] Id at 334.

[19] Myself, Willard Hoyt of the Television Music License Committee, LLC, at page 45; Paul Fakler, representing the National Association of Broadcasters and Music Choice, at page 309-311; Cynthia Greer of Sirius XM Radio Inc., at 326; William Malone, of the Intercollegiate Broadcasting System, Inc. at 349; and Jodie Griffin, of Public Knowledge, at 318.

has been in effect and employed to set a variety of music licensing rates, both for mechanical licenses and for public performances of sound recordings, since 1976. It has been applied to numerous rate-setting proceedings, none of which resulted in so much as a request for Congressional intervention, much less actual intervention occurring. Many of the rate-setting proceedings conducted under the 801(b) standard did not even result in an appeal of the rate set, in the initial proceeding.

In sharp contrast, the willing buyer-willing seller standard for rate setting is only employed with respect to setting the rate for statutory uses of sound recordings in non-interactive digital radio, and only since 1998. Congress only applied a similar "fair market value" standard to a non-existent market once prior, in the context of the satellite television industry. As some may recall, the rate determination under that statute resulted in rates and terms that were seen as so unfair and problematic that it set off years of debate in Congress, ultimately resulting in Congress not only reversing the result, but additionally going out of its way to discourage any further use of the standard for the satellite television industry, with the Satellite Home Viewer Act of 1999.[20] Not surprisingly, almost every application of the willing buyer-willing seller standard to non-interactive internet radio has also resulted in Congressional intervention, and virtually all applications of the standard have resulted in lengthy appeals.

A fundamental flaw with "constructed fair market value" standards such as the willing buyer-willing seller standard, is that the "market" the standard seeks to construct or emulate does not exist and often has never existed. There is no market, nor has there even been a historical model, to inform the judges what the fictional "willing buyer" would ask for, or more importantly, be able to actually get, or what the fictional "willing buyer" might be truly willing to pay, in a marketplace that would not incorporate the terms of the statutory license environment.

The 801(b) standard, as opposed to trying to emulate a market that, by its very terms does not and cannot exist, simply announces four objectives to be sought, when setting rates under the standard:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The wisdom behind § 801(b) rests in these four extremely important, flexible objectives. The first objective essentially re-states the Constitutional purpose of copyright law. The second objective is to assure that, under existing conditions, royalty payments will foster the continued existence and growth of

[20] "Applying the new marketplace value standard as it was required to do, the CARP not surprisingly raised the rates considerably. The satellite industry, with less than 10 million subscribers, was required to pay more in statutory royalty fees than the cable industry, which had nine times the number of subscribers. The satellite industry and its customers were irate."

"In reaction to complaints about the outcome of the 1997 CARP proceeding that raised the section 119 royalty rates, Congress abandoned the concept of marketplace value royalty rates and reduced the CARP-established royalty fee for network stations by 45 percent and the royalty fee for superstations by 30 percent." Statement of David O. Carson, General Counsel, United States Copyright Office, before the Committee on the Judiciary United States Senate,108th Congress, 2nd Session, May 12, 2004.

the market, by equitably compensating creators and also providing fair income to those services that utilize the works. The third objective is to assess the relative value of contributions of both the copyright owner and the copyright user, in the market. The fourth objective is focused on minimizing disruption, for each industry involved in the overall bargain, and the need for rates that do not upset those industries or their prevailing practices.

The application of these objectives comprising the 801(b) standard does not result in inherently "below market rates." Indeed, in one of the most consistent applications of the standard – the statutory rate for mechanical licenses under Section 115 – the 801(b) standard has virtually uniformly resulted in what are unequivocally ABOVE market rates. The vast majority of recording agreements over at least the last 40 years, all of which are entered into in a completely unregulated, free market, include provisions under which recording artists and songwriters freely agree to a marketplace rate for the reproduction of the musical works to be reproduced under the agreement, at a rate which is typically a full 25% below the statutory rate, which has been set pursuant to the 801(b) standard, since 1976.

The willing buyer-willing seller standard is not only clearly NOT the preferred rate setting-standard of a majority of the commenters who have submitted thoughts on it to the Copyright Office, it is in fact a relatively novel approach to the important task of statutory rate setting, and one that has proved both far more problematic and far less predictable than the 801(b) standard, in the short tenure of its tumultuous application. Discussions regarding the standard that should be applied to important rate-setting proceedings resulting in rates that will effectively determine the survival of significant participants in the music ecosystem should consider these facts, seriously.

CONCLUSION

In making its recommendations to Congress regarding potential areas for the modernization of U.S. copyright law in the area of music licensing, DiMA continues to urge the Copyright Office to take a holistic view of the entire music licensing landscape, beginning with consideration of the true intent and purpose of Copyright. Copyright is not intended to benefit authors and artists first and the public second, as some have erroneously proposed. It is, explicitly, intended to promote the public good that comes from a wide dissemination of creative works, and to ensure that primary public benefit is promoted, through the means of securing exclusive rights to authors for limited times. As the Constitutional framers, Congress and the United States Supreme Court have all observed, the goal should be to strike the proper balance between the principal concerns of the public at large, with the appropriate incentives to stimulate individual creators.[21]

In addition, in policy debates regarding copyrights, we must maintain an appreciation of the unique nature and monopoly that is inherent in each copyrighted work. Individual copyright owners enjoy a limited set of rights, for a limited period of time, specifically in recognition of the unique, intrinsically monopolistic charachter of copyrights. Copyrighted works are not commodities that compete directly with each other. Just as a novel will not serve as a suitable replacement for a textbook, any particular song is a unique "good," for which no other market replacement readily exists. As such, while copyright owners are given great flexibility in the rights to exploit the works they create, the collective licensing of musical works is inherently anticompetitive, as the license for any particular musical work cannot be a substitution for another specific musical work.

[21] "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served. . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . ." H.R. Rep. No. 60-2222, at 7 (1909); "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' Art. I, 8, cl. 8." Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340 (1991).

Accordingly, we urge the Copyright Office to consider the six essential pillars outlined in our initial response to the Copyright Office's original Notice of Inquiry on this topic, as you continue to study the state of music licensing in the United States. In respect of both the importance and the technical complexity of the various issue involved, we respectfully suggest that the Copyright Office continue to conduct further analysis of music licensing issues and the significant problems that have plagued the marketplace which have been discussed in this and other responses and replies, the round table discussions and elsewhere, as part of the Copyright Office's ongoing assessment of the music licensing aspects of the Copyright law, which may ultimately be included in recommendations for appropriate legislative changes.

Dated: September 12, 2014

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Before the
CHIEF, LITIGATION III SECTION, ANTITRUST DIVISION
OF THE U.S. DEPARTMENT OF JUSTICE
450 5TH STREET NW, SUITE 4000
WASHINGTON, DC 20001

In the Matter of	)	
	)	
Review of ASCAP and BMI Consent Decrees	)	In Re: Final Judgments in United States v. ASCAP, 41 Civ. 1395 (S.D.N.Y.), and United States v. BMI, 64 Civ. 3787 (S.D.N.Y.) ("Consent Decrees")
	)	

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I. Introduction

The Digital Media Association (DiMA) is an established trade association whose membership has helped revolutionize the music marketplace and to democratize creative opportunity. DiMA members include Amazon.com, Apple, Live365, Microsoft, Pandora, Rhapsody, Slacker and YouTube. The innovative products and services that DiMA-member companies bring to market have changed – and will continue to change – how consumers obtain and enjoy music, entertainment and other media. As many DiMA-member services include the performance of music, DiMA-member companies regularly license performance rights for musical compositions from performing rights organizations ASCAP and BMI.[1]

DiMA members appreciate the Department of Justice's oversight and enforcement of the Final Judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) ("Consent Decrees"). DiMA Members specifically appreciate that, since the entry of the Consent Decrees in 1941, the Department of Justice has periodically reviewed the operation and effectiveness of the Consent Decrees and those reviews have led to both Consent Decrees having been amended several times since their entry. The ASCAP Consent Decree was last amended in 2001 and the BMI Consent Decree was last amended in 1994.

DiMA understands that the Antitrust Division is currently undertaking this review to examine the operation and effectiveness of the Consent Decrees and to explore whether the Consent Decrees should be modified and, if so, what modifications would be appropriate, in light of the fact that "ASCAP, BMI and some other firms in the music industry believe that the Consent Decrees need to be modified to account for changes in how music is delivered to and experienced by listeners." While unsure of which "other firms in the music industry" have

[1] As detailed herein, DiMA-member companies that publicly perform music often must also secure the right to perform the sound recordings that embodying the underlying musical compositions licensed by ASCAP and BMI. These rights to publicly perform sound recordings may be obtained by DiMA-member companies under certain circumstances pursuant to a statutory license under § 114 of the Copyright Act.

requested this review – and further unsure as to what specific changes have occurred in how music is delivered and experienced by listeners that would necessitate any substantial changes in the Consent Decrees - DiMA members nonetheless support the Department in the quest to examine the Consent Decrees to determine their effectiveness and to explore possible modification of them.

Before answering the Department's specific questions below, it is important to address a few issues regarding ASCAP, BMI, the Consent Decrees and how they operate, and the environment that has led to this most recent call for the Department to review the Consent Decrees. The Department of Justice should consider the request for substantive changes to the ASCAP and BMI Consent Decrees very carefully, noting many consolidations in the music industry that have occurred not only in the shadow of, but quite literally only because of, the existence of the Consent Decrees.

Both ASCAP & BMI's Revenues, Distributions and Membership Have Grown Substantially While They Have Both Operated Under The Current Consent Decrees

In the last decade, ASCAP & BMI's revenues and membership have grown substantially. For example, both ASCAP and BMI have seen their membership double between 2003 and 2013[2] and their respective revenues and royalty distributions increased similarly.[3] This fantastic growth occurred entirely while both organizations were operating under the current Consent Decrees. These growth numbers are especially enviable as they occurred in large part over the last 6 or 7 years, a period of economic decline for many American businesses, including, in particular, the recorded music industry.

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[2] 2003 ASCAP Membership = 150,000 v. 2013 = 500,000. 2003 BMI Membership = 300,000 v. 2103 = 600,000 – ASCAP and BMI Press Releases, 2003 and 2013.

[3] http://www.billboard.com/biz/articles/news/1445452/ascap-revenues-hit-record-high-in-2003
http://www.billboard.com/biz/articles/news/publishing/5901249/ascaps-2013-revenues-distributions-rise-in-2013
http://www.bmi.com/news/entry/20031021_bmi_reports_revenue_increase
http://www.bmi.com/press/entry/563077

This incredible growth and success not only occurred "despite" the existence, operation and enforcement of the Consent Decrees but, quite clearly precisely *because* of the existence of the Consent Decrees. The marked increase in both the number of affiliated songwriters and publishers and in revenue is attributable to the Court's application of the Consent Decrees and the fair market value standard.

Without the presence of the Consent Decrees, ASCAP and BMI would not have been able to retain and trade on their significant market power, in turn, citing their dominance as a lure for potential music publisher and songwriter affiliates. Absent the Consent Decrees, in a more truly-competitive market for music work performance rights (i.e. a market consisting of multiple competitors of relatively equal bargaining power), ASCAP and BMI would likely not have been able to achieve the prolific increase in revenues that they managed under the Consent Decrees. It is worth noting that, during this same period of astounding growth for ASCAP and BMI and their affiliates, the recorded music industry – the industry which ASCAP and BMI's Music Publisher affiliates have openly acknowledged they desperately want their royalty rates to mirror, now - saw marked declines.[4]

Clearly, the existence and application of the Consent Decrees has done absolutely nothing to harm ASCAP or BMI as regards their ability to sustain and grow their businesses. This is true, whether considered either objectively – in the context of general economic growth (especially during a period of severe economic recession), or more specifically - in the context of the music business, in particular.

[4] RIAA – 2003 Revenues = $14 Billion v. 2013 = $7 Billion – RIAA Annual Report, USA Recording Industry in Numbers; IFPI Digital-Music-Report-2014, page 6; http://www.ifpi.org/facts-and-stats.php

Digital Music Streaming Services are the Only Entities That Perform Musical Works That Are Obliged to Pay BOTH Composition Performance Fees AND Sound Recording Performance Fees

It is also important to note that digital music streaming services – uniquely – are the ONLY services that pay performance rights for the performance of BOTH a) sound recordings, AND b) musical compositions. Terrestrial radio, television, bars, restaurants and other business establishments – and all other services and locations that perform musical works – only pay ASCAP, BMI and SESAC for the right to perform the inherent composition. None of these entities have any obligation to pay record labels for the performance of the sound recordings which embody the compositions. It is only digital services - such as DiMA members – that are obligated to make payments for both.

It is this unique, double-royalty obligation, that only digital services are saddled with, that has driven the recent attempts by ASCAP and BMI members to withdraw their rights - ONLY for performances via digital services – and further prompted their request of the Justice Department to engage in the instant review of the Consent Decrees, specifically to allow for these types of punitive, partial withdrawals, which have been determined to be disallowed, under the Consent Decrees, by the Judges with jurisdiction over them.

In his testimony in the recent rate-setting trial between ASCAP and Pandora, conducted pursuant to the ASCAP Consent Decree, John LoFrumento, ASCAP's CEO, testified that his members never complained about the revenues collected from, for example, terrestrial radio broadcasters, which pay sound recording owners no royalties.[5] Indeed, both ASCAP and BMI

[5] In Re Petition of Pandora Media, Inc. , __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014)Trial Tr. pp. 289-90 (Jan. 23, 2014): "Q. My question is whether the frustration with the disparity was limited to a disparity in new media performance rights as opposed to other areas of ASCAP licenses? A. It had to do with new media performance rights. Q. It's true, is it not, that you never heard similar dissatisfaction from ASCAP members concerning the revenues collected for terrestrial -- A. No, I did not hear complaints. ; Trial Tr. pp. 291 (Jan. 23, 2013) "Q. Even beyond terrestrial radio, it is true, is it not, you have not heard any dissatisfaction with any disparity between what ASCAP collection performance royalties and what sound recording owners collect in performance

continue to enter into bargains with representatives of other broadcast media – media sources that do NOT labor under a sound recording performance royalty – to license their considerable catalogs at ever-more attractive rates and terms.

It is important to note that, just before the rate litigation between ASCAP and Pandora unfolded, both ASCAP and BMI voluntarily agreed, with many terrestrial radio broadcasters represented by the Radio Music Licensing Committee[6] to new licenses[7] that cover those terrestrial radio stations for broadcasts between January1, 2010 through December 31, 2016. These agreements, which both ASCAP and BMI entered into voluntarily and submitted to the respective courts for approval in 2012, included such provisions as:

- A 75 Million Dollar "industry fee credit" against 2010-2011 terrestrial broadcaster "industry" payments (in addition to the terrestrial broadcast industry's retention of 40 Million Dollars in fee reductions that had been ordered by the Court at the interim fee stage of the litigation);

- A performance royalty rate of 1.7% of gross revenue fee structure for blanket/music format license-reporting stations, minus a "standard deduction" of 12% for commissions and costs of collection;

- What amounted to a 25% standard deduction for those broadcasters of revenue attributable to "new media uses" (as those uses were now included in the same 1.7% overall rate); and

- Expanded rights grants accommodating the terrestrial radio industry's developing "new media" platforms, such as Internet websites, smart phones, and other wireless devices.

Plainly, ASCAP and BMI are not requesting to have the Consent Decrees modified because the existence of the Consent Decrees makes it impossible for them to negotiate fair rates in the current market. Under these very Consent Decrees, both ASCAP and BMI have explicitly

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royalties or other royalties in connection with any other media that ASCAP licenses? A. That is true."

[6] Radio Music Licensing Committee - http://www.radiomlc.org/Homepage/4779186

[7] http://www.radiomlc.org/pages/4795848.php
http://www.radiomlc.org/pages/6282052.php
http://www.ascap.com/~/media/files/pdf/licensing/radio/2010%20radio%20station%20license%20agreement.pdf
http://www.bmi.com/licensing/entry/radio
http://www.bmi.com/forms/licensing/radio/2012_RMLC_blanket_per_program.pdf

acknowledged that they have no problem with the fees that are paid by terrestrial broadcasters (even for their digital broadcasts). Both ASCAP and BMI have voluntarily submitted to the controlling courts freely-negotiated agreements with terrestrial broadcasters which include massive credits, reductions in rates, significant deductions - and even lower rates for "new media" and digital uses by those broadcasters.

It is clear that the aim of this request is to ultimately allow ASCAP and BMI to uniquely target digital-only broadcasters – the only entities that have both a royalty obligation for the performance of a) musical works, AND also b) sound recordings - for focused, selective, attack, aimed at increasing the performance royalty rates that only digital-only broadcasters must pay. Again, in his testimony in the recent rate-setting trial between ASCAP and Pandora, ASCAP's CEO John LoFrumento testified that ASCAP board members believed that the affiliated publishers who withdrew their "new media rights" would be able to get higher rates from Pandora and that ASCAP would then be able to use those higher rates in any future negotiations or rate setting proceeding to secure higher rates for publishers that remained in ASCAP.[8] This plan of attack was presented to reluctant board members, as an inducement to have them agree to the partial withdrawals.[9]

Permitting the type of partial withdrawals that ASCAP and BMI seek permission to engage in would undoubtedly harm competition among music service licensees. The type of selective, partial, targeted withdrawals that ASCAP and BMI members have attempted are, by their own

[8] Petition of Pandora Media, Inc. Trial Tr. p. 300 "Q. The answer to my question was yes, the expectation was the 2 withdrawing publishers would be able to secure higher rates than ASCAP was getting, right? A. That was their belief, yes. Q. It was also the expressed intention of the publishers who were considering withdrawal that these higher rates could then be used as benchmarks in order to help ASCAP raise its own rate. Isn't that right? A. Yes."
[9] Id., page 301 "Q. It's true, is it not, that one of the factors that was used to try to gain the support of those that had expressed concern about the partial withdrawals was the possibility that the expected higher rates that the publishers would receive would be used by ASCAP to raise the rates for everyone within ASCAP. Isn't that right? A. There was a linkage between the two, publishers said if we get a higher rate, then ASCAP could try to negotiate a higher rate. Q. And that was one of the things, one of the arguments that was used within the board discussions about the partial withdrawals, to try to gain the support of those that initially expressed concern, correct? A. Yes."

admission, designed to allow the PROs and their affiliates to unilaterally pick formats and mediums for punitive (or preferential) rates and licensing terms, in a coordinated attempt to thwart the very purpose of the Consent Decrees and obtain supra-competitive rates.

ASCAP and BMI Allege that the Consent Decrees Are Not Suitable For the Digital Age, Yet Fail To Provide Any Specific Element of this Supposed Incompatibility

As a justification for the request to have the Consent Decrees modified, both ASCAP and BMI have alleged generic complaints that the Consent Decrees are "decades old" and "not suitable for the digital age," yet neither of them has articulated any particular element of either the Consent Decrees themselves, or the way that musical works are performed by digital services in the "internet era," that requires modification of the basic terms of the Consent Decrees. The essence of how music is performed publicly via digital services is no different than the way it is performed by analog transmissions. While the format of the transmission is technically distinct, with one being digital and the other analog, there is nothing about the process of engaging in the public performance of musical works through a digital delivery that is any different than the performance of those musical works through an analog transmission. Similarly, the way musical works are licensed for performance for digital performance is in no way different than the process for licensing for analog performances.

We are well into the age of digital performances of musical works. The Copyright Act was amended almost 20 years ago specifically to acknowledge the digital performances of musical works and sound recordings that was a reality, at that time. Both the ASCAP and BMI Consent Decrees have undergone review and modification within that time, and the very text of each Consent Decree contemplates broadcasters employing various technological means – beyond analog terrestrial broadcast means - of transmitting performances of ASCAP and BMI's repertory. Indeed, the most recent modification of the ASCAP Consent Decree, which occurred

in 2001, was accompanied by the Department explicitly taking into account digital services. The very text of the Amended Consent Decree states, as the Department itself noted publicly, that the modification was undertaken (in part) to "expand and clarify ASCAP's obligation to offer certain types of music users, including background music providers and Internet companies, a genuine alternative to a blanket license."[10]

Additional indications that the Consent Decrees in no way fail to accommodate the licensing of music performances through modern means include the plain fact that both ASCAP and BMI have, over recent years, entered into numerous voluntary agreements to license terms and fees for digital performances of their repertory, as well as participating several proceedings before the rate courts that retain jurisdiction over the Consent Decrees, specifically to determine appropriate rates and terms for digital performances. Both ASCAP and BMI have managed these events, all without any problems applying the terms of the Consent Decrees to these digital uses.

There is no merit to the argument that now, in 2014, after at least a decade of operating within the bounds of the Consent Decrees, as they have been applied to many various digital services, that the Consent Decrees are "outdated" and are "not suitable for the digital age." As Judge Cote observed in the recently-concluded ASCAP v. Pandora rate case: "It is true that the digital delivery of music has permitted the creation of customized radio stations that are unique to individual listeners. But, despite that development, customized radio retains the essential characteristics of radio."[11] The amorphous claims that the terms of the Consent Decrees are somehow an outdated hindrance, which are being put forth as vague support of the clear ultimate goal - which is to be able to single out digital music services for unique rate increases, the likes of which the Consent Decrees were specifically designed to prohibit - should not carry any weight.

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[10] Dep't of Justice Announcement, issued Monday, September 5, 2000.
[11] In Re Petition of Pandora Media, Inc., page 132

Musical Works Are Not Commodities That Can Be Interchanged and Compete Directly with Each Other in the Market for Licenses

Any policy debate over the continuing role of Performing Rights Organizations and the Consent Decrees under which ASCAP and BMI operate must be conducted with an appreciation of both copyright law and antitrust law being considered. Individual copyright owners enjoy a limited set of rights, for a limited period of time, specifically in recognition of the unique nature of copyrights. Both the Constitution, and Congress in crafting laws pursuant thereto, considered the unique nature and potential monopoly that is inherent in each copyrighted work. It is understood that copyrighted works are not commodities that compete directly with each other. Just as a novel will not serve as a suitable replacement for a textbook, a particular song is a unique "good," for which no other market replacement readily exists. While copyright owners are given great flexibility in the rights to exploit the works they create, the music industry has repeatedly demonstrated the anticompetitive reality of arrangements under which multiple copyrighted works are aggregated and licensed collectively, as the Performing Rights Organizations in the United States are specifically designed to do.

The collective licensing of the performance right for musical works is inherently anticompetitive, as the right to license a particular musical composition cannot be a substitution for another specific musical work. As such, the simple aggregation of certain musical works for licensing by the Performing Rights Organization is, in-and-of-itself, a somewhat anti-competitive behavior. The need to closely monitor the market behavior of such collectives is even more pronounced when the total market of participating licensees is reduced to the lowest single numbers, each with sufficient market share to dictate the entire market.

The existing ASCAP and BMI consent decrees do not eliminate this market power entirely, they merely serve to limit some of the negative effects of the monopolistic position.[12] However imperfectly, the ASCAP and BMI consent decrees attempt to preserve the potential benefits of such aggregation while recognizing this anticompetitive potential. In light of this reality, as long as ASCAP and BMI exist with the market concentrations that they have amassed, they must be subject to oversight in their dealings with licensees, as they currently are, under the present Consent Decrees.

II. Responses to Specific Questions:

1) Do the Consent Decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Are there provisions that are ineffective in protecting competition?

a) The Consent Decrees Continue to Serve Important Competitive Purposes Today

The Consent Decrees obviously continue to serve a very important function. Recent cases indicate that the very type of behavior that initially gave rise to the Department's cases against ASCAP and BMI – the precise type of anti-competitive behavior which the Consent Decrees were and are intended to regulate – continue today. As Judge Cote's decision in the recent ASCAP v. Pandora rate case noted: "In addition, the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying AFJ2 and casts doubt on the proposition that the 'market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned.'[citation omitted]."[13] ASCAP and its affiliated publishers engineered a plan to circumvent the ASCAP Consent Decree and to specifically use the market power that each of them had acquired while

[12] ASCAP v. MobiTV, Inc ., 681 F.3d 76, 82 (2d Cir. 2012) "the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."; United States v. BMI (In re: Application of Music Choice), 426 F.3d 91, 96 (2d Cir. 2005) "As we held with respect to ASCAP, rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights.".

[13] In Re Petition of Pandora Media, Inc., __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014), at page 97.

under the Consent Decree, to frustrate the fundamental goal of that Consent Decree.[14] ASCAP and its affiliate music publishers Sony and UMPG did not act as competitors in the marketplace at all, and as a result of this unfair coordination, their already very significant individual market power was substantially enhanced, for each of them.[15]

It is an unfortunate reality that, despite the fact that the Consent Decrees have been in place since the early 1940s, the anti-competitive behavior that they were specifically intended to address and curtail is still very-much present. The anti-competitive practices of ASCAP, BMI and their affiliated music publishers (as well as, apparently, SESAC, the only other Performing Rights Organization in the U.S., which is not presently subject to a Consent Decree[16]) is apparent and this anti-competitive behavior was applied immediately, following certain music publishers attempted withdrawal of their substantial catalogs from ASCAP and BMI. The ASCAP and BMI consent decrees are a necessary attempt to preserve the potential benefits of such aggregation, while recognizing the anti-competitive propensities of any such collective.

b) There Are Few, if Any, Provisions of the Consent Decrees That Are No Longer Necessary to Protect Competition or That Are Ineffective in Protecting Competition

In addition to the clear, still-present need for the Consent Decrees, in order to keep in check what is the obviously, inherently anti-competitive nature of ASCAP, BMI and their affiliated music publishers, the terms and text of the Consent Decrees themselves have been modified at

[14] Id., at Page 96 "ASCAP has not shown that either the Pandora-Sony or the Pandora-UMPG licenses are good benchmarks for its license with Pandora. Sony and UMPG each exercised their considerable market power to extract supra-competitive prices."

[15] Id., at page 97; "What is important is that ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified."

[16] SESAC is currently a defendant in two pending antitrust lawsuits, brought by the Radio Music Licensing Committee and the Television Music Licensing Committee in 2012. A 2013 evidentiary hearing in the RMLC case on a preliminary injunction motion resulted in a conclusion that the RMLC had a likelihood of success on the merits of its antitrust claims. Radio Music License Committee, Inc. v. SESAC Inc., No. 12-cv-5087, Report and Recommendation, 29 (E.D. Pa. Dec. 20, 2013).

several points over the years, to ensure that the Consent Decrees do, in fact, continue to remain relevant and applicable and to serve important competitive purposes. The BMI Consent Decree was modified in 1996 and the ASCAP Consent Decree was modified as recently as 2001, with the Department noting, at the time, that the modification specifically provided "increased competition in music licensing, update the procedures for settling license fee disputes, and eliminate[d] certain costly and outdated provisions of the original decree." While there may be some areas where the Consent Decrees could be clarified, homogenized and otherwise updated, as discussed more fully below, the Consent Decrees continue to serve important competitive purposes today and should not be modified in any way that undermines their basic purpose.

There are some provisions of the Consent Decrees and the form, format and implementation of each of them that prevent competition or that may be ineffective in protecting competition. One such area is the ineffectiveness of, and the disparity between, the public disclosure obligations in the ASCAP Consent Decree vs. the BMI Consent Decree, which is discussed in more detail in response to the Department's fourth question, below. The current public disclosure requirement in the ASCAP Consent Decree is, in itself ineffective. That issue is exacerbated by the distinction with the BMI Consent Decree, which has no such disclosure requirement. This lack of uniformity in the Consent Decrees applicable to the two largest, direct competitors in the music performance licensing market make the current Consent Decrees ineffective in protecting competition.

2) What, if any, modifications to the Consent Decrees Would Enhance Competition and Efficiency?

The substantive response to question 2 follows the response to question 3, below, as the response regarding specific suggested modifications to enhance competition is contained in the response and observation that the differences between the Consent Decrees adversely affects competition.

3) Do Differences Between the Two Consent Decrees Adversely Affect Competition?

Certain Modifications, Including Eliminating Substantive Differences, Would Enhance Competition and Efficiency

Differences between the Consent Decrees adversely affect competition because those terms and conditions that vary between each of the Consent Decrees ultimately result in the market in which licensees cannot make adequate comparisons between the respective repertory of each ASCAP and BMI, cannot make informed assessments of the value of each and cannot directly compare all of the elements of the cost, effectiveness and operation of licenses acquired under the distinct Consent Decrees. As discussed below, the differences between the way the two distinct Consent Decrees are drafted and organized frustrates the over-arching goal of enhancing competition in the music work performance marketplace. Both logic and actual demonstrated market conditions dictate that, given an opportunity to amend the Consent Decrees, the Department of Justice ought to standardize both of the Consent Decrees, making them uniform and following the same form and format. Modifications aimed at making the Consent Decrees more uniform and current would enhance competition and efficiency.

There are several areas where modifications, aimed at enhancing competition, should be made to the Consent Decrees. The Consent Decrees would be much more conducive to efficient licensing, as well as enabling both ASCAP and BMI, and their licensees and potential licensees,

to adequately assess the marketplace and properly value the respective repertories, if the Consent Decrees were uniform in form and format.

With respect to the public disclosure requirement, which is discussed at length in response the Department's fourth question, below, the differences between the way the two distinct Consent Decrees are drafted and organized significantly frustrates the over-arching goal of enhancing competition in the music work performance license marketplace. In addition, the definitions should be consistent across both the ASCAP and BMI Consent Decrees. Definitions of important, fundamental terms such as those that define the repertory in question should be consistent across both Consent Decrees.

For instance, the ASCAP Consent Decree defines "ASCAP's Repertory" as: "those works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time,"[17] while the BMI Consent Decree defines "Defendant's repertory" as "those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense."[18] These definitions should be updated and made consistent, to clearly indicate that a) the repertory subject to both Consent Decrees is "those compositions, the right of public performance of *which defendant has or hereafter shall have* the right to license or sublicense," and b) to make it clear that so-called "split works" (i.e. a musical work which is co-written by two or more writers, with at least two of those writers having affiliations with separate Performing Rights Societies) may be licensed by either of the affiliated Performing Rights Societies, without requiring a license from both Performing Rights Organizations, with respect to that work.

Other definitions (which are generally more comprehensive as they are found in the more-recently amended ASCAP Consent Decree), should be applied to both Consent Decrees.

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[17] ASCAP Consent Decree, Sec. II (C).
[18] BMI Consent Decree, Sec. II (C).

Defined terms and their definitions should be made more comprehensive and be applied in both the ASCAP and the BMI Consent Decrees, simultaneously. Terms such as "Background/foreground music service," "Per program license," "Per-segment license," "Programming Period" (versus "Program" found in the BMI Consent Decree) "Similarly Situated" and the definition of the "Through to the Audience" license, which are found in the more current ASCAP Consent Decree,[19] should be incorporated into the BMI Consent Decree, as part of a general move towards making the two Consent Decrees uniform and therefore more conducive to true competition. In addition, defined terms such as such as the current distinction between "Music user" and "On-line music user" found in the current ASCAP Consent Decree,[20] do not seem relevant and should be dispensed with.

The Department should also consider addressing and updating and/or adding other important, terms. The term "Licenses in Effect" should be a defined term, with the definition including not only current licenses which have been finalized, but also any pending "application for a license that has been made." Other terms, which may be subject to continued interpretation, such as the concept of an "interactive service" should likely be addressed by incorporating flexibility into the Consent Decrees with respect to that term. Both the ASCAP and BMI Consent Decrees should address the issue of what constitutes an "interactive service" by referring to the Copyright law as may be interpreted by case law, much as the terms "Right of public performance" and the general reference to "Performance" are addressed throughout both the ASCAP and BMI Consent Decrees, presently. Incorporating such flexibility will avoid a potential situation of a particular service possibly being deemed "non-interactive" following adjudication of those issues in separate proceedings, which service might fall under a static definition of (or unprincipled application of the term) "interactive," in the continued application of the Consent Decrees.

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[19] ACAP Consent Decree, Sec II *et. seq.*
[20] ACAP Consent Decree, Sec II (F), (G), (H).

In addition to ensuring that terms and definitions are consistent across the two Consent Decrees, elements of the form of the individual Consent Decrees should be homologated, as well. The specific delineation of what is "Prohibited Conduct"[21] vs. behavior the "Defendant is enjoined and restrained from"[22] should be made consistent, in both form and language, across both the ASCAP and BMI Consent decrees. Similarly, the Per-Program and Per-Segment License structure of the ASCAP Consent Decree[23] should be incorporated into both Consent Decrees. And the explicit availability of an Adjustable Fee, Blanket License, as is described in the BMI Consent Decree[24] should be incorporated into both the ASCAP and BMI Consent Decrees, as well. Each of these respective provisions, as have been applied, serve to make the licensing process flexible, efficient and available to a wide array of potential licensees, ensuring that many different licensees can avail themselves of public performance licenses, regardless of the size or situation of the particular licensee.

4) How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?

a) It is Extremely Difficult to Acquire the Contents of ASCAP's or BMI's Repertory in a Useful Format and That Lack of Transparency Severely Impacts Competition

As briefly addressed above, a major distinction between the ASCAP Consent Decree and the BMI Consent Decree is that the ASCAP Consent Decree includes a comprehensive section, Section X, which enumerates several requirements for ASCAP to make available to the public information about the compositions contained in its repertory, ostensibly so that music users can more easily determine which PRO administers the rights to particular compositions and the

[21] ASCAP Consent Decree, Sec IV.
[22] BMI Consent Decree, Sec. IV
[23] ASCAP Consent Decree, Sec VII.
[24] BMI Consent Decree, Sec. VIII.

identity of the ultimate rights holder for such compositions. Those provisions, as well-intentioned as they may be, have proven to be less-than effective, as ASCAP has interpreted them to mean that ASCAP is only obligated to provide a partial online database, which is only searchable by song title. Even more troubling, the BMI Consent Decree contains no public disclosure requirement, at all. We understand that BMI representatives have publicly stated, as a result, that BMI is under no obligation to provide data on BMI's repertory.

The ineffectiveness of the current public disclosure requirement in the ASCAP Consent Decree, and the complete absence of any disclosure requirement in the BMI Consent Decree, makes it virtually impossible to acquire the contents of ASCAP's or BMI's repertory in any useful format. This state of affairs has an immense negative impact on competition. Without knowing the contents of the repertory to be licensed, a potential licensee is essentially blind to the particulars of what is being licensed, and must take it on pure faith that the repertory is as significant as ASCAP or BMI represents it is. Licensees cannot adequately value the license for the repertory, and significantly, cannot ascribe value to potential direct licenses of works that may be within that repertory. Modifications of the transparency requirements in both Consent Decrees are not only warranted, but in fact, absolutely necessary, in order to effectively promote competition in market for music performance licenses.

Section X of the ASCAP Consent Decree was imposed as part of the 2001 Amendment to the Consent Decree.[25] Section X is comprised of several detailed instructions governing how inquiries regarding specific compositions must be responded to by ASCAP, how and where a list of works in ASCAP's repertory is to be maintained and the specifics of how the repertory list

[25]United States of America v. American Society of Composers Authors and Publishers, Second Amended Final Judgment "AFJ2," Sec X; Department of Justice Memorandum in Support of AFJ2, at page 37.

must be made available. Finally, Section X prohibits ASCAP from initiating infringement actions for works that were not identified on the electronic public list.[26]

As this Department's Memorandum in Support of the adoption of Section X as part of the most recent amendments to ASCAP Consent Decree in 2001 itself noted, the information required under Section X was intended to "enable users to make more informed licensing decisions and can facilitate substitution of music from one PRO for music from another or direct licensing from rights holders."[27] Unfortunately however, as the most recent rate case with ASCAP painfully indicates, these public information requirements do not go far enough in enabling music users to make licensing decisions, as is the provision's stated intent. ASCAP has very narrowly interpreted the provisions of Section X of the current Consent Decree to be satisfied by its limited, "searchable database," which can only be searched manually, on a song-by-song basis. Applying this interpretation of its public disclosure obligations, ASCAP was able to successfully obscure the extent of its repertory, and that of its affiliated music publishers, to successfully stymie efforts of Pandora to make precisely the type of "more informed licensing decisions to facilitate substitution of music from one PRO for music from another or direct licensing from rights holders" that the Consent Decree is intended to facilitate.

As Judge Cote noted in her decision: "That same day, Pandora also asked ASCAP for the list of Sony works in ASCAP's repertoire. It would have taken ASCAP about a day to respond to Pandora's request with an accurate list of the Sony works. But, ASCAP, like Sony, stonewalled Pandora and refused to provide the list."[28] And "Although ASCAP attempted at trial to show that Pandora could have used public sources of information to identify the Sony catalog, it failed to

[26] AFJ2, Sec X.
[27] Dep't of Justice Memo in Support of AFJ2, at page 37.
[28] In Re Petition of Pandora Media, Inc., at page 67.

show that such an effort would have produced a reliable, comprehensive list, even if Pandora had made the extraordinary commitment necessary to try to compile such a list from public data."[29]

It is clear that the public disclosure requirements which are part of the current ASCAP Consent Decree, while intended to provide public access to data regarding ASCAP's repertory, fall far short of the explicitly-stated goal of "enabling users to make more informed licensing decisions and facilitating substitution of music from one PRO for music from another or direct licensing from rights holders." The need for timely, accurate and easily-accessible data regarding both ASCAP's and BMI's repertory is absolutely essential to maintaining a truly competitive licensing marketplace for the performances of musical works.

In addition to the fact that the lack of available data from ASCAP as noted previously, the BMI Consent Decree presently has no explicit provisions requiring public disclosure of BMI's repertory, at all. Following the observations made initially by the Department of Justice, and much more recently by Judge Cote in the context of amendment of and the recent rate case conducted pursuant to the ASCAP Consent Decree, both of which emphasize the incredible importance of the public disclosure of accurate and timely information about repertory – and beg for enhancement and enforcement of those provisions - it is clear that the BMI Consent Decree should also include parallel, enhanced public disclosure requirements, as well.

b) Modifications to the Transparency Requirements in the Consent Decrees Are Not Only Warranted, But Necessary

Both the ASCAP and BMI Consent Decrees should be modified, to make it absolutely clear that both ASCAP and BMI are both obliged to maintain accurate, timely databases, which should be machine-searchable, by catalog, publisher/administrator and writer, as well as by song, of all works within their respective repertories, which lists should be publicly available, at all times, to any and all licensees and prospective licensees. Further, both the ASCAP and BMI Consent

[29] Id.,at page 69.

Decrees should be amended to include appreciable consequences for failure to maintain such public disclosures, such as potential penalties in the form of fines or, at the very least, being absolutely enjoined from bringing actions, whether it be infringement, petitions to the rate court, or any other action, against any party, regarding any composition which is not accurately depicted in a publicly-available list of repertory.

5) Should The Consent Decrees Be Modified to Allow Rights Holders to Permit ASCAP Or BMI to License Their Performance Rights To Some Music Users But Not Others? If Such Partial or Limited Grants Of Licensing Rights to ASCAP And BMI Are Allowed, Should There Be Limits On How Such Grants Are Structured?

a) The Consent Decrees Should Not Be Modified to Allow Rights Holders to Permit ASCAP or BMI to License Their Performance Rights to Some Music Users But Not Others

The Consent Decrees should not be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others. Doing so would run counter to the very essence of the Consent Decrees, which is to ensure that ASCAP and BMI provide their entire repertory for licensing to all licensees, at rates that are uniform among all licensees that are similarly situated. Any modification that would allow ASCAP or BMI to permit their affiliated music publishers to limit ASCAP or BMI's authority to license their performance rights to some music users but not others would empower ASCAP and BMI to selectively license certain entities but not others, at various rates, subject only to their unique discretion. ASCAP and BMI and their affiliated music publishers could simply allege some "distinction" (however minor or inconsequential) between otherwise similarly situated services. What is more, allowing individual music publisher affiliates to withdraw portions of their catalogs from ASCAP or BMI would wreak havoc on the literally millions of agreements with songwriters, who's publishing agreements are founded on the assumption that public performance licenses would occur as part of ASCAP and BMI.

We understand that the instant inquiry itself was prompted by both ASCAP and BMI specifically seeking modification of the Consent Decrees to, among other things, allow their affiliated rights holders to withdraw some of their rights to license their performance rights through ASCAP and/or BMI, as those rights holders may see fit. There is no reason for the Department to consider modifying the Consent Decrees to allow rights holders to withdraw some of their rights from ASCAP and/or BMI. Under both of the Consent Decrees currently, there is no prohibition against rights holders withdrawing the works that they control, or for rights holders to license those works to music users, directly. Accordingly, there would likely be little or no competitive benefit to allowing rights holders to withdraw only portions of their rights or their catalogs from ASCAP and/or BMI, only for certain uses.

Indeed, allowing *selective, partial* withdrawal of particular rights, which rights are needed only by certain services, would be highly anti-competitive and would eviscerate the very essence of the Consent Decrees: The requirement that ASCAP and BMI license their entire catalog, at competitive rates, to all potential licensees seeking licenses.

Works that are licensed through ASCAP and/or BMI are, and should be, licensed subject to the terms of the Consent Decrees, which have been correctly interpreted to include the obligation to license all works in their respective repertory,[30] to all licensees requesting a license, at fair rates and for the same rate among similarly-situated licensees. The decision for a rights holder to remove their catalog or certain works from ASCAP or BMI for the purposes of licensing and administration should necessarily be a considered undertaking, with rights holders having to weigh the benefits that are derived from collective licensing through ASCAP or BMI – benefits that include lower transaction costs, efficient licensing, collective funding of rate negotiations and rate-setting proceedings, enforcement of performance rights and other administrative

[30] BMI vs. Pandora, 13 Civ. 4037 (LLS) (Dec. 18, 2013) Opinion and Order; and In re: Pandora Media, Inc., 2013 WL 5211927 (Sept. 17, 2013) Opinion and Order.

functions - all of which are subject to the oversight applied by the Consent Decrees, against the potential benefits of individual, direct licensing – which include potentially higher individual fees, the ability to seek preferred placement of the rights holder's works and freedom from sharing collective cost and licensing burdens that benefit other rights holders – all of which are subject to the vagaries of running an individual, stand-alone, competitive business.

There is likely nothing more anti-competitive than to allow rights holders to elect to have all of the benefits of collective licensing – the centralized administration, streamlined licensing and payments, collective enforcement, etc. - that are only available through collectives such as ASCAP and BMI, without being subject to any of the oversight that has proven to be necessary for the equitable operation of those collectives.

In addition, the history of the musical work publishing business literally relies on the continued assumption that music publishers will have the performance rights for the works in their catalogs administered by ASCAP and/or BMI, who in turn, have direct relationships and outstanding fiduciary duties to their songwriter affiliates. The overwhelming majority of publishing and administration agreements that songwriters have entered into over the last 70 years are premised on the presumption that the music publisher with whom the songwriter enters into the agreement, will look to that songwriter's Performing Rights Organization - ASCAP or BMI – for administration of the public performance rights to those compositions the songwriter delivers under the agreement. Songwriters – and their publishing and administration agreements, by their very terms - assume the continued affiliation with the Performing Rights Organizations as a basic element of the contractual bargain and relationship. Songwriters would be immeasurably damaged by the ability of their music publishers to claim that certain compositions, or certain rights and uses of certain compositions, were not subject to the

administration of ASCAP and/or BMI, an assumption that underlies virtually every songwriter's music publishing and/or administration agreement entered into over the last 70 years.

b) If Such Partial or Limited Grants Of Licensing Rights To ASCAP And BMI Are Allowed, They Should Only be Allowed Subject to Strict Controls

If the Department of Justice and the presiding courts of the Southern District of New York do believe that allowing partial withdrawals of rights holders' catalogs would encourage competition, it is imperative that any such relaxation of the existing provisions in the Consent Decrees, requiring rights holders to license their entire catalogs through ASCAP and BMI be premised on and governed by significant controls. Just some of the points that must be considered in order to make any scheme of partial withdrawals even remotely workable and conducive to competition include:

- No direct license with respect to any partially withdrawn rights which are entered into by any a music publisher with a market share of greater than 10% (of either total works or market revenue) can be used as evidence of the reasonable value of a Performing Rights Organization's blanket license in any rate trial.

- The Performing Rights Organization and rights holder seeking to withdraw some of their rights must give 12 months' notice of the impending withdrawal, which notice must include not only a specific description of which license rights are being withdrawn, but also must include a complete, detailed and accurate list of the works for which partial rights are intended to be withdrawn;

- Songwriters must be able to keep their rights within the Performing Rights Organization and payments for the "writer's share" for all exploitations, including any exploitations subject to a partial withdrawal made to and administered by their Performing Rights Organization, regardless of a music publisher withdrawing partial rights to that songwriter's works;

- The Board – with any prospective withdrawing rights holder abstaining – of ASCAP and BMI should vote on whether and how to implement any proposed withdrawal of partial rights.

- No rights holder who engages in any partial withdrawal of certain licensing rights can sit on the Board of ASCAP or BMI; and

- No rights holder who engages in any partial withdrawal of certain licensing rights can re-submit the withdrawn licensing rights for at least 3 years;

These requirements would constitute the minimum level of restrictions that should be attendant to any consideration of allowing partial withdrawals by rights holders of certain rights from ASCAP and BMI. Not having these controls and allowing certain large music publishers – some of whom now approach individual market share that is on par with ASCAP and BMI, themselves – to withdraw and hold out their considerable catalogs for higher rates, while simultaneously allowing smaller publishers, who's catalogs are less valuable, to choose not to license directly (at what would necessarily be a lower rate, in a competitive marketplace), and simply acquire the benefit of the value "benchmark" established by the larger music publishers, to be applied to the respective Performing Rights Organization, would skew the marketplace and effectively allow the largest market participants to dictate the price for all market participants.

As has been observed in previous rate cases, the "blanket" ASCAP and BMI license is effectively worth more than the individual licenses that is comprised of, largely due to the blanket, full-coverage nature of the license being granted.[31] Once the full coverage of that blanket license is reduced by direct licenses outside of the collective, so to, the value of the remainder of the collective is similarly reduced.

An obligation to give ample advance notice and full disclosure of precisely what rights for what works may be subject to a partial withdrawal is self-evidently appropriate. As the recent Pandora case plainly makes clear, the purported withdrawal of rights, without any facility for licensees to identify the works that would be withdrawn, effectively forces licensees into licensing on any terms that the licensing entity(ies) presents. Not knowing the scope of what

[31] CBS v. BMI, 441 U.S. 1 (1979), at page 21 "Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product." Id., at page 22 "To the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material."

works might not be subject to the license, the licensee faces certain, substantial, "crippling" copyright infringement actions.[32]

Similarly controls that require the consent of Board of the Performing Rights Organization (with any prospective withdrawing rights holder abstaining) prior to effectuating any partial withdrawal, and a limitation that rights holders who partially withdraw of certain licensing rights may not sit on the Board of ASCAP or BMI are self-explanatory. The Board of ASCAP and BMI should be able to decide – without the influence of the member with an interest in the issue - whether and how to implement such withdrawals.

A requirement that songwriters be able to keep their rights within the Performing Rights Organization of their choice, with all payments for the "writer's share" for all exploitations, including any exploitations subject to a partial withdrawal, made to and administered by their Performing Rights Organization, regardless of a music publisher withdrawing partial rights to that songwriter's works, is also absolutely necessary and self-explanatory. As discussed above, songwriters fundamentally rely on the Performing Rights Organizations as part of the music publishing framework. Music publishers cannot be allowed to undermine the very foundation of decades and decades of music publishing and administration agreements with the songwriters to whom they have a fiduciary duty, by simply withdrawing certain rights form ASCAP and BMI. The contractual obligations that exist between songwriters and their music publishers, as fulfilled by the Performing rights Organizations, must be preserved.

Finally, if the Department of Justice is going to consider allowing these partial withdrawals, then the Department itself must revisit its merger guidelines with respect to music publishing. In the first instance, the Department will need to be extra vigilant in its oversight and efforts to

[32] In Re Petition of Pandora Media, Inc., at page 101 "By withholding the list, Sony deprived Pandora of significant leverage in their negotiations. Pandora was faced with three options: shut down its business, face crippling copyright infringement liability, or agree to Sony's terms."

ensure that the largest publishers are not empowered by partial withdrawals of rights as a mechanism to acquire greater catalog and become even bigger market dominators. If smaller publishers begin to acquiesce to consolidation efforts following any changes to the Consent Decrees, the effect might be to exacerbate an even bigger problem of market concentration.

6) Should The Rate-Making Function Currently Performed By The Rate Court Be Changed To A System Of Mandatory Arbitration? What Procedures Should Be Considered To Expedite Resolution Of Fee Disputes? When Should the Payment of Interim Fees Begin And How Should They Be Set?

a) The Rate-Making Function Currently Performed By the Rate Court Should Not Be Changed To a System of Mandatory Arbitration

The rate-making function currently performed by the rate court should not – and likely cannot - be changed to a system of mandatory arbitration. While arbitration sometimes enjoys a popular conception as a cheaper, faster alternative dispute resolution, especially for small claims, experience (as well as numerous studies), has shown that with respect to large-scale and sophisticated cases, it is the opposite. The very special nature of the musical work performance landscape, including both the increasingly-sophisticated services that perform the works and the unique nature of the works, requires a rather detailed review of the facts in any particular rate-case. Recent rate cases have redoubled the understanding that the Federal discovery and litigation process, overseen by sophisticated judges with broad powers and a history of dealing with the subject matter and the parties involved is not only preferable, but indeed necessary, in order to properly adjudicate disputes and rate cases with respect to the licenses attendant to performance of musical works.

In their response to the Copyright Office's recent Music Licensing Study,[33] ASCAP explicitly acknowledged that they are seeking to have the rate-setting procedures applicable to ASCAP

[33] http://www.copyright.gov/docs/musiclicensingstudy/

under the Consent Decree converted to private arbitration with limited discovery[34] and including a presumption that direct deals are reflective of Fair Market Value.[35] BMI's response also alludes to the same concerns.[36] In addition, both ASCAP and BMI are calling for the repeal of §114(i),[37] a provision of the Copyright law that ASCAP and BMI both lobbied to have included,[38] which limits the applicability of sound recording royalties in consideration of musical work rate-setting proceedings. If this amendment passes, it will require massive amounts of additional evidence, by all parties, to demonstrate the significance of the differences between the sound recording industry and the music publishing industries, and the distinctions between sound recording royalties and musical work performance royalties.

Arbitration of rates and other issues involving musical works and sound recordings have proven no more cost effective – and have resulted in far less consistent results – than the ASCAP and BMI rate cases have. Recent rate-setting arbitrations have taken years to adjudicate, cost multiple millions of dollars for each of the involved parties to be litigated, led to wildy disparate rates among competing services, been subject to numerous appeals and even Congressional interventions.[39]

Finally, the Consent Decrees themselves, and following that, any proposed modification, are subject to the continuing jurisdiction of the Federal Courts of the Southern District of New York. It would seem unlikely that the Federal Court with continuing jurisdiction over the Consent

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[34] ASCAP Comments in Response to Copyright Office Notice of Inquiry, http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/, at page 23

[35] Id, at page 24

[36] BMI Comments in Response to Copyright Office Notice of Inquiry, http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/, at pages 8 and 16.

[37] ASCAP Comments in Response to Copyright Office Notice of Inquiry,at page 27, BMI Comments in Response to Copyright Office Notice of Inquiry, at page 9

[38] H.R. Rep. 104-274, at 24 (1995) (describing 114 (i) as dispelling "the fear that license fees for sound recording performance may adversely affect music performance royalties"); In Re Petition of Pandora Media, Inc., fn 30, at page 37

[39] H. R. 7084 the "Webcaster Settlement Act of 2008" amending section 114 of title 17, United States Code, following the Copyright Royalty Board Order which set sound recording royalty rates for webcasters in 2009, to provide for agreements for the reproduction and performance of sound recordings by webcasters.

Decrees would entertain a modification of them that would effectively end that continuing jurisdictional oversight. While it is possible that the Judges who will ultimately decide the applicability of any proposed modifications to the Consent Decrees might be convinced to pass some or all of the rate-setting process under the Consent Decrees to a Special Master or arbitrator, for the reasons outlined above, having these sophisticated proceedings shifted out of the full Federal Court process and over to a less comprehensive process would provide neither a cost savings nor yield any better results.

b) Procedures That May Be Considered to Expedite Resolution of Fee Disputes May Include Appropriate Interim Fees that Should be Set at a Very Low Minimum to Ensure Continued Negotiations

BMI, in their response to the Copyright Office's inquiry into music licensing, suggested that one area where the procedures may expedited is in the area of fee disputes is with respect to interim fees.[40] Indeed, the only minor issue that could represent how the Consent Decrees might be "not suitable for the digital age," could be the allegation that some small services may have acquired a license on an interim basis and gone out of business before making complete payment under the interim license. While we are skeptical of the amounts – both in terms of the number of these "transient" licensees that have come and gone and the actual dollar losses that may have been incurred, as a result - we nonetheless acknowledge that perhaps, following demonstration of the significance of this problem, a limited interim fee payment, to be held in escrow, might be warranted. Where the Performing Rights Organization can unequivocally demonstrate that a prospective licensee lacks any recognizable ability to make full payment of appropriate license fees, when set, some minimum interim license fee might be appropriate. When considering such an amendment, it is important to ensure that any such minimum interim license fee be set at a

[40] BMI Comments in Response to Copyright Office Notice of Inquiry, at pages 3 and 16.

rate that does not either dis-incentivize the Performing Rights Organization from, or exhaust the resources of the licensee, preventing, continuation of diligent efforts to set a fully-applicable rate for the service in question.

c) Payment of Appropriate Interim License Fees Can Begin in the First Regular Payment Period Following Issuance of the License

Again, while we believe that the prevalence of disappearing licensees that utilize significant numbers of works and go out of business prior to making payment for the use of those works - and we are even more certain that any actual monetary damage resulting from any such un-paid licenses is miniscule - DiMA sees no reason why, following demonstration by the Performing rights Organization of the likely inability of a prospective licensee to make an appropriate minimum payment, the Department of Justice should not entertain the possibility of requiring appropriate interim fee payments, payable upon the first regular payment period set forth in the prospective license, with the interim fee payment being held in an escrow account.

7) Should the Consent Decrees be Modified to Permit Rights Holders to Grant ASCAP and BMI Rights in Addition to "Rights of Public Performance"?

If the Consent Decrees Are to be Modified to Permit Rights Holders to Grant ASCAP and BMI Rights in Addition to "Rights of Public Performance," any Such Modification Must be Accompanied by Significant Oversight

The modification of the Consent Decrees to permit rights holders to grant ASCAP and BMI the authority to license rights in addition to "rights of public performance" (such as the right to license "mechanical reproductions" or "synchronization" rights) may present a way to serve competitive purposes with respect to those additional rights. Allowing the "bundling" of disparate rights available (and necessary, in many cases) to be licensed under a small group of licensors that can provide many rights necessary and/or desirable can create sorely-needed efficiencies in the music licensing marketplace.

Notwithstanding what are potential benefits of potentially reducing the number of licensors in the marketplace from which licensees must seek the multitude of licenses for the various separate uses of musical works, it is clear that any consideration of allowing ASCAP or BMI to effectively become central way-points within the broader musical works licensing market absolutely must be subject to the type of oversight that the Consent Decrees currently provide, with respect to the performance license for musical works.

As has been discussed at length in this response, above, within the limited authority of representing only the public performance license for musical works, both ASCAP and BMI have demonstrated significant, repeated and ongoing propensities to engage in what is disturbingly pervasive anti-competitive behavior. Providing these entities with the authority to aggregate and negotiate for even more rights, including very significant rights, within the music industry, must be coupled with a continued – and indeed, increased – level of oversight, to ensure that they do not abuse what would necessarily be even more significant market power, over a larger set of rights.

Those restrictions must include, at a minimum:

- A complete extension of the requirement that ASCAP and BMI issue licenses to potential licensees upon request, thereby averting threats of copyright infringement for failure to accede to ASCAP or BMI's license fee demands;

- Requiring that ASCAP and BMI license similar users similarly, prohibiting ASCAP and BMI from price discriminating within a group of users;

- Requiring ASCAP and BMI to maintain accurate, timely and publicly available to any and all licensees and prospective licensees, databases of all of the works and rights that they represent and are authorized to license, that are machine-searchable by catalog, publisher/administrator and writer, as well as by song. To enable users to make fully informed licensing decisions and facilitate substitution of music from one PRO for another or direct licensing from rights holders. With appreciable consequences for failure to maintain such public disclosures;

- Conferring the jurisdiction of the Federal Court of the Southern District of New York, which currently supervise the ASCAP and BMI Consent Decrees, to act as a "rate court" in

setting reasonable license fees for all licenses being offered by ASCAP or BMG, under the same terms and conditions as are applicable under the Consent Decrees currently;

- Barring ASCAP and BMI from obtaining exclusive rights to license any of the rights of their affiliated copyright owners' works, preserving the right of potential licensees to secure rights licenses for any rights that ASCAP and BMI are authorized to offer directly from composers and music publishers;

- Prohibiting ASCAP and BMI from licensing any of the rights they represent on a fixed-fee blanket license, unless requested by the licensee, so that licensees are able to secure license rights to portions of the catalogs represented by ASCAP and BMI in transactions directly with rights holders (and requiring ASCAP and BMI to recognize and give credit for any such direct licenses, when calculating the fees due for the remainder of their catalog).

Once again, if the Department of Justice is going to consider allowing ASCAP and BMI to engage in the licensing of multiple-rights, it is incumbent upon the Department to examine its merger guidelines with respect to music publishing. The Department should demand significant oversight authority, to ensure that neither ASCAP, nor BMI, nor large music publishers are empowered by the aggregation of even more rights under their authority, to acquire greater catalog and amass even greater market power.

Conclusion

DiMA and its members fully support the Department of Justice in its mission to examine the effectiveness of the ASCAP and BMI Consent Decrees. We are pleased to see the Department invite all interested persons, including songwriters and composers, publishers, licensees, and service providers, to provide the Department with information, comments and perspectives relevant to whether the Consent Decrees continue to protect competition and we remain eager to continue to be involved in the Department's review of these important Antitrust Decrees.

We believe that there is little that needs to be done to ensure that the Consent Decrees remain an important and viable element in the music licensing marketplace. Given that the Department has undertaken this review, there may be opportunity to make clarifications to the language and pursue consistency in the form of the individual Consent Decrees, to ensure that they are clear, comparable and fostering competition. Significant changes however, such as those sought by ASCAP and BMI to relax the rate-setting process, allow partial withdrawals of rights from ASCAP and BMI licensing repertory, and the possible joint licensing of performance rights with other music rights by the Performance Rights Organizations, are substantial and raise significant concerns.

The Department of Justice should carefully consider the requests for substantive changes that fundamentally alter the character and purpose of the Consent Decrees. ASCAP and BMI have managed to flourish, including reaping ever-greater revenues from digital music services, while operating under the Consent Decrees. A call for significant changes to the Consent Decrees at this time seems largely unwarranted and, if undertaken at all, should be done with the utmost caution.

Respectfully submitted,

/s/_____

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Before the
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Comments of Pandora Media, Inc. In Response to the Department of Justice's Review of the ASCAP and BMI Consent Decrees

Pandora Media, Inc. ("Pandora") welcomes the review of the Department of Justice (the "Department") of the consent decrees that govern the American Society of Composers, Authors, and Publishers ("ASCAP"), and Broadcast Music, Inc. ("BMI"). We recognize that this process is part of a broader review of whether these consent decrees should remain in effect and/or be modified, and we are sensitive to the Department's concerns about the status of these decrees. Our central message is this: while other decrees may be outdated, these decrees are relevant and needed more than ever in light of increasing market concentration in the music publishing industry. They remain critical to constraining ASCAP's and BMI's overwhelming market power and the Department's continued involvement in this area is necessary. The demands of certain music publishers and the performance rights organizations ("PROs") to eliminate or relax the decrees should be rejected.

INTRODUCTION

The apparent cause of the Department's review of these consent decrees is revealing. There has been no outcry from the licensee community that the decrees are no longer necessary or no longer protect them from the collective market power of the PROs.[1] Rather, only one side is demanding that the decrees be eliminated or relaxed: the PROs and the major music publishers who are their members, such as Sony/ATV[2] ("Sony") and Universal Music Publishing ("Universal"). They believe that the rate-making process conducted by the two supervising courts – district courts responsible for setting reasonable, fair market prices and preventing the PROs from charging supracompetitive rates – sets prices for ASCAP and BMI blanket licenses that are too low *for digital media users*.[3] They shroud their desire to raise prices in vague assertions about a rapidly changing marketplace and the "extraordinary evolution in the ways in which music is now distributed and consumed."[4]

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[1] In contrast, licensees were largely in support of the 1994 modification to the BMI consent decree, which provided for a rate court similar to the ASCAP consent decree to resolve license fee disputes.

[2] In June 2012, an investor group led by Sony Corporation of America acquired EMI Music Publishing and announced that Sony/ATV Music Publishing, a joint venture between Sony and the Estate of Michael Jackson, will administer EMI Music Publishing on behalf of the investor group, available at (http://www.sony.com/SCA/company-news/press-releases/sony-corporation-of-america/2012/investor-group-including-sony-corporation-of-ameri.shtml). The combined market share of Sony/ATV and EMI is more than 31%. *See* Music & Copyright, "UMG leads the new order of recorded-music companies, Sony dominates music publishing, available at http://musicandcopyright.wordpress.com/2013/05/01/umg-leads-the-new-order-of-recorded-music-companies-sony-dominates-music-publishing/.

[3] Notably, the PROs and major publishers do not complain of the rates ASCAP and BMI are able to obtain for more 'traditional' media services, such as television and terrestrial radio. For example, John LoFrumento, ASCAP's CEO, recently testified that he does not receive complaints from publishers regarding the rates ASCAP obtains from traditional media services. *In Re Petition of Pandora Media, Inc.*, __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) (hereinafter "*In Re Pandora* Slip Op."); Trial Tr. (Jan. 23, 2014) at 289-90.

[4] *See* Paul Williams, Statement to the House Judiciary Committee, Music Licensing Under Title 17—Part Two, June 25, 2014. Because these consent decrees are long-standing, they have withstood the advent of numerous 'extraordinary evolutions' of the ways in which music is distributed and consumed. For example, the consent decrees were able to adapt to the adoption of broadcast television, cable television and satellite television, as well as cable radio and satellite radio. . The PROs and their publisher affiliates did not include any of these types of

This is just rhetoric. The publishers and the PROs are frustrated by the extent to which the decrees fulfill their purpose. More to the point, the PROs and publishers are unhappy because the consent decrees prevent them from implementing a scheme that has the purpose (and would have the effect) of raising prices across the board without regard to competitive constraints.

In the end, the catalyst for this consent decree review boils down to dissatisfaction among the two largest music publishers, namely Sony[5] and Universal, which are owned by even larger multinational media conglomerates, which themselves own the world's two largest record labels, with the *relative* fees Pandora pays to record labels.[6] These publishers are not arguing that their catalogs are significantly more valuable to Pandora than their catalogs are to traditional terrestrial or satellite radio. Rather, these publishers argue that it is 'unfair' that Pandora would pay so much *more* to the owners of the sound recordings that embody their musical works.[7]

These publishers have demonstrated no inclination to work with the sound recording copyright owners (which are controlled by the same corporate parent) to

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services in the partial withdrawals and continued to license these services at their historical rates. *See In re Pandora*, Trial Tr. (Jan. 23, 2014) at 345-46.

[5] *See* Ben Sisario, Deals to Split EMI Spur Scrutiny and Criticism, available at http://www.nytimes.com/2012/02/20/business/media/emi-consolidation-with-sony-and-universal-prompts-scrutiny-and-opposition.html

[6] Ironically, the rates Pandora pays to record labels to publicly perform sound recordinds are themselves the subject of a compulsory license and judicial rate-setting; *see, e.g.*, National Music Publishers' Association Petition to Participate in the Copyright Royalty Board Proceeding, available at http://www.loc.gov/crb/proceedings/14-CRB-0001/NMPA.pdf.

[7] Evidence introduced during the recent rate-setting proceeding between ASCAP and Pandora revealed that an executive at a major publisher indicated that if Pandora were paying record labels 25% of revenue (the alternative fee structure under the Pureplay Webcaster license under which Pandora pays record labels for the public performance of sound recordings), the publishers would "probably be okay" with the rates Pandora was then paying ASCAP and BMI (i.e., approximately 4% of revenue). *In re Pandora*, Trial Tr. (Jan. 20, 2014) at 1087-1088.

reallocate the total royalties Pandora pays based on the relative values of each copyright owners' contribution to the creation of the music Pandora performs. Instead, these publishers and PROs have attempted to create sham 'withdrawals' from the PROs, use the enhanced market power these largest publishers have been allowed to accumulate under the current regulatory regime to obtain supracompetitive fees, and use those supracompetitive fees to obtain across-the-board increases for everyone. Simply put, they want the Department to endorse a new system that does not resemble a competitive market in any sense of the term. In a truly competitive market not distorted by the collective power of publishers acting in concert by and through the PROs, some publishers would inevitably suffer while others might benefit.[8] And now, if they do not get their way, these publishers have publicly threatened to withdraw entirely from ASCAP and BMI.[9]

The PROs and these publishers' unilateral efforts to weaken or eliminate the consent decrees demonstrate that the decrees continue to serve a critical pro-competitive purpose. The truth is that the consent decrees are just as important today as they were seventy years ago, if not more so. Without the protection the decrees provide, music users would be at the mercy of the PROs and the largest publishers, who now appear to control them. Pandora respectfully urges the

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[8] *See* Phil Galdston, Maria Schneider and David Wolfert, Why Songwriters (and Indie Publishers) Need the PROs, July 29, 2014 10:54 AM EDT (noting that, in the event of large publisher withdrawals from the PROs, "users like Pandora will demand to negotiate lower fees for smaller repertoires. As a result, those writers and independent publishers who remain with the PROs are likely to earn less.") (http://www.billboard.com/biz/articles/news/publishing/6193399/why-songwriters-and-indie-publishers-need-the-pros).

[9] *See* Sony Threatens to Bypass Licensers in Royalties Battle (Jul. 10, 2014), available at http://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html?_r=0; *see also* Statements of David Kokakis in the Transcript for the Copyright Office Los Angeles Roundtable (June 17, 2014) at 32-35.

Department to reject the proposals to modify the decrees, and provides responses to the Department's specific questions below.

I. Background

A. Pandora and the PROs

Pandora is an Internet radio service with a listener base of tens of millions of active users. As an active participant in the rate court process and a company that interacts frequently with the PROs and the major publishers, Pandora is well situated to provide comments on proposed modifications to the ASCAP and BMI consent decrees.

This review of the decrees should start with the obvious: the PROs possess enormous market power. Together, ASCAP and BMI control approximately ninety percent of the public performance rights in musical compositions.[10] Over the years, ASCAP and BMI have frequently competed with each other for songwriter members.[11] Because songwriters can only be members of one PRO, while music publishers almost always have catalogs in ASCAP and BMI (and SESAC)[12], the PROs typically do not "compete" for publishers. The PROs even less infrequently

[10] *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 79-80 (2nd Cir. 2012) ("ASCAP represents about half of the nation's composers and music publishers. . . [and] Broadcast Music, Inc. ('BMI') represents most of the remaining composers."). *See also* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, Sept. 4, 2000 at 6-7 ("ASCAP has in excess of eight million compositions in its repertory. These compositions comprise between 45 and 55 percent of the music performed in most venues. . . BMI has between four and five million compositions in its repertory, also comprising between 45 and 55 percent of the music performed in most venues.").

[11] For example, Neil Diamond and Bob Dylan, formerly ASCAP writers, moved to SESAC in 1995. Eagles members Glenn Frey and Don Henley switched from ASCAP to BMI in 1996. James Taylor and Joni Mitchell, formerly BMI writers, joined ASCAP in 1997.

[12] SESAC LLC is the smallest U.S. PRO and is not presently governed by a consent decree. Presently SESAC is the defendant in two separate antitrust lawsuits. *See Radio Music License Committee , Inc. v. SESAC LLC*, 12-cv-05807-CDJ (E.D. Pa.) and *Meredith Corp. v. SESAC LLC*, 09-cv-09177-PAE (SDNY).

compete with each other for licensees, as services such as Pandora typically require a license from all three PROs to operate.[13]

Although that lack of competition would be expected to yield the highest possible prices, the consent decrees have successfully constrained the PROs' market power. Key protections in the consent decrees include:

- Users' ability to obtain a blanket license upon request (the effective compulsory license provisions) (AFJ2 § VI; BMI Consent Decree §XIV);
- Non-exclusive grants of rights: PROs must allow individual member rights-holders to offer direct licenses to users (and to provide per-program and adjustable-fee blanket licenses as alternative license forms which facilitate such direct licensing activities) (AFJ2 §§ V-VIII; BMI Consent Decree § VIII);
- Users' ability to obtain "through to the audience" licenses (AFJ2 § V; BMI Consent Decree § IX);
- Transparency requirements (albeit weak) (AFJ2 §§ X, XII; BMI Consent Decree §§ VII, XI, XIII); and
- Users' ability to obtain a "reasonable" fee determination from the rate courts overseeing ASCAP and BMI in the absence of a negotiated agreement with a PRO. (AFJ2 § IX; BMI Consent Decree § XIV).

Without these protections, the PROs would be able to combine their market power – along with the threat of copyright infringement liability – to extract supracompetitive rates from licensees.

It is important to situate the consent decrees within the broader context of music licensing. Although the licensing of public performance rights takes place under the strictures of the consent decrees, compulsory statutory licensing regimes

[13] Because the PROs have repertories of copyrighted music that are exclusive of one another (expect for so-called 'split works' which are within both the ASCAP and BMI repertoire), Pandora must obtain a license from both ASCAP and BMI in order to perform all of the music on its service.

are commonplace in the broader music licensing space, including for certain non-interactive sound recording performance rights (and the making of related ephemeral phonorecords) and publishers' mechanical licensing rights for personal, non-commercial use.[14] Because copyright law is primarily intended to encourage the widest dissemination of creative works and licensees need broad access to music rights in order to operate their businesses, Congress has created mechanisms (compulsory licenses) to facilitate efficient licensing of copyrighted music.[15] If the ASCAP and BMI consent decrees had never been established, Congress almost certainly would have created a similar compulsory licensing regime for public performance rights in compositions. In this context, it is inconceivable that Congress and the Department would have enabled a licensing framework along the lines that the PROs and publishers are now urging: one in which the PROs would be free to license (or withhold licenses) in any manner they see fit. The PROs (and certain publishers) insistence that the decrees are "outdated" creatures from a bygone era ignores the reality that music rights historically have been subject to compulsory licensing structures of one form or another.[16]

The proposed modifications to the consent decrees may also create a (unintended) significant market inefficiency in the way music is currently licensed.

[14] See, e.g., 17 U.S.C. §§ 112, 114, 115.

[15] *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and the useful Arts.'"); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.).

[16] Moreover, as discussed in more detail below, any change to the process for licensing public performance rights should take into account effects on the broader music licensing market. The availability of other rights subject to statutory licensing regimes raises the question whether it is sound public policy for the Department to make changes to what amounts to just one part of a more complicated market. That is particularly true because Congress created the compulsory licensing regime for sound recordings against the broader backdrop of the consent decree *status quo* and has recently been conducting hearings into the music licensing marketplace.

Specifically, the licensing practice of publishers separating the right to make a sound recording (e.g., the right to make a reproduction of the musical work) from the right to perform the musical work embodied in the sound recording once it is made introduces the potential for an additional "hold-up" inefficiency into the market. Because the owner of the performance right in the musical work does not include this right of public performance in the reproduction license granted to the record label when a record label makes a sound recording, users like Pandora must deal with two parties instead of one. Said differently, if music publishers granted to record labels *both* the right to reproduce *and* the right to perform its musical works, services such as Pandora could obtain all the rights necessary to operate its service solely from the record labels. This is the same basic problem dealt with in the "source" or "through-to-the-audience" license mandated for licensing music in motion pictures.[17]

Because sound recording performance fees and PRO fees are set separately, the result is a ratcheting effect where digital media services are in the middle of a tug-of-war between rights owners (many of whom are under common ownership).[18] ASCAP's and BMI's otherwise economically unjustifiable insistence that digital music services should pay higher rates is an example of this ratcheting effect. In fact, the PROs and certain publishers have freely admitted, even under oath, that

[17] Courts have characterized similar practices as improperly extending the copyright monopoly, *see e.g.*, *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 848-50 (D. Minn. 1948).
[18] *In re Pandora Media, Inc.*, Slip Op. at 62-63.

the genesis of their recent campaign to raise rates for new media arises from "envy" over the rates paid for sound recording performance rights.[19]

B. The major publishers and the partial withdrawals

When the consent decrees were first created, the publishers had not accumulated the market shares they have today. BMI's market share when it entered its consent decree was less than Sony (which now controls the EMI catalogs as well), Universal, and Warner-Chappell, the third major publisher, which is owned by Warner Music Group.[20]

Today, the landscape has changed. Under the combined compulsory licensing regime of Section 115 of the Copyright Act and the ASCAP and BMI consent decrees, major publishers like Sony and Universal have consolidated publishing rights that surely would have raised antitrust concerns absent the consent decrees and statutory compulsory licensing protections to users. Even with these protections, however, smaller publishers and songwriters have felt threatened by this "concentration of the publishing industry."[21]

Dissatisfied with the consent decrees — particularly the effective compulsory license and rate-setting provisions — but unwilling to abandon joint licensing entirely, certain publishers invented the concept of a "partial withdrawal."[22] As Judge Cote explained, "[t]he publishers believed that AFJ2 stood in the way of their

[19] *Id.* at 120-21.
[20] *See* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, Sept. 4, 2000 at 16.
[21] *See In re Pandora*, Slip Op. at 42-43 (discussing songwriter fears that withdrawn publishers would be less accountable and transparent when administering their rights).
[22] *Id.* at 41. It should be noted that never in the 100 year history of ASCAP or 75 year history of BMI have publishers sought to "partially withdraw" rights from the PROs.

closing" the gap between rates for sound recording rights and public performance rights.[23] "They believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publicly perform a composition."[24] The publishers sold skeptical songwriters on the partial withdrawal idea by promising that "if the major publishers could get higher license rates by direct negotiations with new media companies outside of ASCAP then those rates could be used in rate court litigation to raise the ASCAP license fees."[25] In reality, the selective "new-media" withdrawals were intended to let the publishers target users who could credibly be threatened with copyright infringement damages that could put them out of business, with the result being "hold-up" prices that could then be used to recalibrate the consent decree rates across the board. This threat was even more credible because ASCAP (and BMI) agreed to continue to provide administrative services for the partially withdrawn publishers (and, in the case of ASCAP, at discounted rates which ASCAP's other members effectively subsidized), thereby eliminating any pain the publishers might have experienced by withdrawing from the PROs.[26]

Pandora's experience vividly confirms the anticompetitive results of the partial withdrawals. Predictably, Sony and Universal leveraged the upheaval

[23] *Id.*
[24] *Id.*
[25] *Id.* at 45.
[26] *Id.* at 49 ("the Administration Agreements meant that the withdrawing publishers faced little downside in withdrawing new media rights. They could continue to enjoy the benefits of having ASCAP perform burdensome back-office tasks while licensing internet music entities directly.").

created by their sudden new-media withdrawals from ASCAP – including the threat of massive-scale copyright infringement, and the vacuum created by the sudden absence of consent decree protections for affected PRO interim licensees like Pandora – to establish dramatic, short-term price increases.[27] Then, according to plan, ASCAP tried to use those price increases to benchmark a higher rate for its blanket license.

Judge Cote's opinion describes this anticompetitive behavior in detail, including the following. Sony began the negotiations with Pandora with a "not-too-veiled threat."[28] In response, Pandora repeatedly requested a list of Sony's works so that Pandora could seek to remove them from its service if the parties failed to reach agreement.[29] Despite having such "a list readily at hand," Sony refused to provide it.[30] As Judge Cote found, "Sony decided quite deliberately to withhold from Pandora the information Pandora needed to strengthen its hand in its negotiations with Sony."[31] Without a list of Sony's works, Pandora faced an impossible dilemma: either shut down its service entirely to avoid the risk of crippling copyright infringement liability or agree to significant price hikes in a direct license with Sony. Pandora chose the latter.

The Universal negotiations were to the same effect. Universal's then-CEO Zach Horowitz began the negotiations by "uttering what [Pandora] took to be an

[27] *Id.* at 96-101.
[28] *Id.* at 62.
[29] *Id.* at 64-66.
[30] *Id.* at 66.
[31] *Id.*

implicit threat."[32] Horowitz then proposed an industry-wide rate of eight percent of revenue, which he thought was "reasonable, particularly in light of what Pandora was paying to the record labels for sound recording rights."[33] Pandora's attorney was "aghast. He told Horowitz that in his 20 years in the music industry he had never encountered a situation in which a licensor suggested that rates should effectively double overnight, going from 4% to 8%."[34] Universal ultimately provided Pandora with a list of its works, but required Pandora to sign a confidentiality agreement that prevented "it from using the list to remove the [Universal] works from its service."[35] So Pandora faced the same impossible choice: either shut down its service altogether or agree to a dramatic price hikes. As with Sony, Pandora chose the latter.

All the while, Sony and Universal interfered with Pandora's efforts to conclude a license with ASCAP short of litigation. In her decision determining that the deals negotiated between Pandora and certain withdrawing publishers could not serve as valid benchmarks for Pandora's ASCAP royalty rate, Judge Cote found that "the evidence at trial revealed troubling coordination between Sony, [Universal], and ASCAP, which implicates a core antitrust concern underlying AFJ2[.]"[36] In particular, the evidence showed that:

- "Sony and [Universal] justified their withdrawal of new media rights from ASCAP by promising to create higher benchmarks for a Pandora-ASCAP license and purposefully set out to do just that";

[32] *Id.* at 74.
[33] *Id.* at 75.
[34] *Id.* at 75-76.
[35] *Id.* at 77.
[36] *Id.* at 97.

- "[Univeral] pressured ASCAP to reject the Pandora license ASCAP's executives had negotiated, and Sony threatened to sue ASCAP if it entered into a license with Pandora";
- "ASCAP refused to provide Pandora with the list of Sony works without Sony's consent, which Sony refused to give"; and
- "despite executing a confidentiality agreement with Pandora, Sony made sure that [Universal] learned of all of the critical terms of the Sony-Pandora license" and "ASCAP expected to learn the terms of any direct license that any music publisher negotiated with Pandora."[37]

In sum, "ASCAP, Sony, and [Universal] did not act as if they were competitors with each other in their negotiations with Pandora," which meant that "the very considerable market power that each of them holds individually was magnified."[38]

Judge Cote ultimately held that ASCAP's decree did not permit partial withdrawals and that ASCAP members' works would continue to be available to all licensees upon application. Nevertheless, ASCAP tried to use the Sony and Universal direct licenses as benchmarks in the rate-setting proceeding with Pandora, which licenses Judge Cote rejected.

Meanwhile, the major publishers attempted to orchestrate similar new-media withdrawals with BMI. Like Judge Cote had determined of the ASCAP decree, Judge Stanton held that BMI's decree did not permit such partial withdrawals. In his opinion, however, Judge Stanton went a step further, declaring that the partial withdrawals would in fact operate as full withdrawals.[39] The major publishers, with BMI's assistance, created similar upheaval, uncertainty, and short-term leverage by

[37] *Id.* at 97-98.
[38] *Id.* at 112.
[39] *Broadcast Music, Inc. v. Pandora Media, Inc.*, 13-cv-4037 Order and Op. at 11-12 (Dec. 18, 2013).

purporting to completely withdraw from BMI in late December 2013. Certain publishers then negotiated direct agreements with Pandora, only to "rejoin" BMI days later. By performing that maneuver, the publishers were able to circumvent Judge Stanton's ruling that partial withdrawals are impermissible and extract supracompetitive prices from Pandora once again. Unsurprisingly, BMI has openly discussed its intent to rely on these flawed licenses as benchmarks in its proceedings against Pandora.[10]

Pandora's experiences demonstrate that the complaints about the consent decrees and the partial license grant proposals are not meant to promote more competitive pricing, but rather to circumvent the rate court check on unreasonable license fees.

II. Do the consent decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Are there provisions that are ineffective in protecting competition?

A. The consent decrees continue to serve critical pro-competitive purposes.

The competitive concerns arising from the market power the PROs have acquired through the aggregation of public performance rights held by member songwriters and publishers are as real and significant now as they were when the

[10] *See* BMI on Rights Withdrawal, an Open Letter to the Music Industry, by Del Bryant (Feb. 12, 2013), available at http://www.billboard.com/biz/articles/news/legal-and-management/1538785/bmi-on-rights-withdrawal-an-open-letter-to-the-music. ("We have already cited these marketplace agreements [from Sony/ATV and EMI] in our negotiations with our licensees and we will encourage our Rate Court to consider them as a new indicator of market value."). *See also*, *Broadcast Music, Inc. v. Pandora Media, Inc.*, Pet. for the Determination of Reasonable License Fees (Dkt. 31) at 14 ("The rate quoted by BMI to Pandora is reasonable in light of the several free market licenses negotiated directly between withdrawn publishers including: (i) the license agreement recently negotiated between Sony and Pandora; (ii) the license agreement between EMI and Pandora; (iii) any other agreements between a publisher which has withdrawn its digital rights from BMI's catalog that may be negotiated with Pandora prior to the finalization of the license at issue. . . ").

decrees were established. The PROs are ongoing collaborations among competitors, so the suspect conduct persists. This is not a case of a consent decree proscribing conduct in which the defendant no longer engages. The obligations and restrictions that the consent decrees impose on ASCAP and BMI are still necessary to ensure that the PROs offer the procompetitive user benefits that justify their existence. Indeed, over the years, conditions have become more conducive to anticompetitive behavior. Market concentration has increased significantly among music publishers, and opportunities for exchanging and acting on competitively sensitive information have increased and have become entrenched.[41]

Pandora's experience in the recent ASCAP case provides strong evidence that the decrees are serving their intended purposes. Judge Cote's 136-page decision makes evident the importance of the consent decrees in constraining the market power of ASCAP and BMI.[42] Importantly, as Judge Cote found, the publishers and PROs have demonstrated a propensity toward coordinated anticompetitive behavior.

The PROs and the publishers repeatedly insist that reform is necessary because for some unspecified reason digital media transmissions of musical works warrant higher rates. The PROs and publishers never explain *why* digital media services should be disadvantaged relative to, for example, their terrestrial radio competitors. As Judge Cote held and the Second Circuit affirmed in the earlier

[41] *In re Pandora*, Slip Op. at 42-43, 96-98.
[42] The recent SESAC antitrust cases show that antitrust concerns can arise even with a PRO that has a much smaller share of available works than ASCAP, BMI, or even the major publishers. *See RMCL v. SESAC*, Report and Recommendation, 12-cv-5807 (Dec. 23, 2013).

MobiTV litigation, PRO licenses traditionally have not and should not discriminate against licensees based on the mode of distribution by which the licensee transmits content to users.[43] Whatever the mode of distribution of particular types of content (whether audio/radio content or audiovisual content), the PROs contribute the same input; i.e., a blanket license to perform musical works in its repertoire. Consumers may prefer receiving content through one mode of distribution over another, but the technology enabling such preferred mode of distribution is supplied by the service, not the PRO. If, for example, Internet radio is inherently more or less valuable than terrestrial radio in terms of generating revenue, percentage-of-revenue license fees will naturally reflect that since the royalty payment will grow on a linear basis with the revenue base. There is no reason to charge media companies engaged in the distribution of the same or similar forms of programming discriminatory percentage-of-revenue rates based on the manner in which their programming services reach the consumer.

Indeed, there have been no changes in "how music is delivered to and experienced by listeners" that bear on the "competitive concerns arising from . . . the aggregation of music performance rights held by" ASCAP and BMI.[44] The advent of "new" digital media has increased music distribution; e.g., in the context of radio programming consumers are no longer limited to AM/FM broadcast radio and they can hear music on more devices and enjoy wider programming options. But non-interactive digital media providers (like Pandora) operate for all intents and

[43] *In re Pandora*, Slip Op. at 124.
[44] U.S. Department of Justice, Antitrust Consent Decree Review, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html

purposes like terrestrial and satellite radio – they select and play sound recordings using formulas that will attract listeners in ways that will support advertising and user subscriptions and generate revenue in the same way that revenue is generated by terrestrial and satellite radio. In fact, new media providers represent a more fragmented base of providers than terrestrial radio (which negotiates with PROs on an industry wide basis via the RMLC) or satellite radio, with a single provider (Sirius XM), implying that new media firms have less bargaining power in dealing with licensors and that publishers would incur higher transaction costs dealing directly with new media firms than they would dealing directly with the RMLC or Sirius XM, which are not targets of the partial withdrawals at issue here.

In the end, the Department should not lose sight of the realities of the marketplace. This is not a world of atomistic competition, where individual rights holders negotiate with users in a competitive marketplace.[45] The PROs are duopolies that control the marketplace for blanket licenses to their respective repertories, which have over time grown dramatically in size, and the large publishers such as Sony and Universal can exercise enormous market power.

III. Should the Consent Decrees be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others? If such partial or limited grants of licensing rights to ASCAP and BMI are allowed, should there be limits on how such grants are structured?

As Pandora's experience vividly illustrates, partial withdrawals should not be permitted. The partial withdrawals were designed to enable publishers with enormous market power to selectively participate in PROs, evading the compulsory

[45] *See In re Pandora*, Slip Op. at 102.

licensing and rate court protections for targeted licensees.[46] For a limited subset of licensees, the partial withdrawals remove the decree protections designed to mitigate the anticompetitive effects of collective licensing by the PROs without providing any mechanisms to ensure a competitive environment. This harm is compounded by the fact that the long history of the availability of public performance rights from the PROs has allowed publisher market shares to balloon without much scrutiny. Allowing for *en masse* withdrawal of over 50% of the works available via the PROs (which would be the case if Sony and Universal were to withdraw from either ASCAP or BMI) threatens to create short-term upheaval that, if unchecked, could cause irreparable harm to existing new-media entities.[47]

A. From an antitrust perspective, partial withdrawals are anti-competitive

Pandora recognizes that partial withdrawals may be appealing in theory. That is because, in the abstract, partially withdrawn publishers should compete with each other (not only directly, but also through competition with the very PROs they would still belong to with respect to other users). But reality belies theory. In the real world, partial or limited grants of licensing rights to ASCAP and BMI will not create competition, competitive rates, or valid benchmarks for blanket license rates, as has been suggested (without support) by the PROs and publishers. Indeed, Pandora's experience with the PROs' current efforts to permit "partial withdrawals"

[46] *Id.* at 97–99.

[47] That upheaval would be particularly acute because music publishing rights are often split between two or more songwriters or publishers, making it difficult to identify who holds all of the performing rights. The performing rights in sound recordings, on the other hand, typically are not split between multiple licensors but are controlled by a single record label.

demonstrates that their purpose is to raise prices and not to create or foster competition.

There are a number of reasons why the consent decrees should not be modified to permit partial license grants. *First*, continued publisher involvement in a PRO for some users but not others is a recipe for coordination. Both PROs are operated for benefit the publishers and songwriters, not users. In such a situation, and as Pandora's experience shows, it is unrealistic to think that the PRO will compete against the publishers. The testimony of ASCAP's CEO was that he did not even consider the possibility of charging lower prices than those obtained by withdrawing publishers in an attempt to increase revenues for ASCAP by driving higher amounts of usage of its remaining repertory.[48] Partial withdrawals thus allow publishers to escape the constraints of the rate court without replacing it with the constraints of competition.[49]

It is telling that not all publishers are in favor of partial license grants (or would exercise such a right if given to them). Indeed, Pandora's experience is that some publishers threatened to withdraw but ultimately did not, and those that did withdraw re-entered the PROs after they signed direct deals with Pandora. Presumably, many publishers believed that they would do worse under a regime of partial license grants.[50] The scheme the publishers and the PROs worked out on their own allowed publishers to opt out or not, with the expectation (as publicly

[48] *In re Pandora*, Trial Tr. (Jan. 23, 2014) at 246-47.
[4949] This is particularly true where PROs and music publishers insist on most-favored-nations provisions ("MFNs"), which they sometimes refer to as "schmuck insurance." PROs will often demand MFNs not only against other PROs, but against individual publishers.
[50] *See. e.g.*, Council of Music Creators, Comment to Copyright Royalty Board Notice of Inquiry Regarding Music Licensing.

stated by industry leaders) that all publishers would benefit from higher blanket license prices that would be benchmarked to license agreements negotiated by the few largest publishers who sought to exercise partial withdrawals.

Second, a publisher's continued involvement in the PRO, or the ability to partially withdraw and rejoin at will, creates a perverse incentive for PROs not to compete with withdrawing publishers and instead to use withdrawn publisher rates as benchmarks in rate court.[51] It makes no economic sense to apply the rates that the large publishers can extract through the exercise of their market power to all of ASCAP or BMI. That would give the remaining and, likely smaller, publishers the benefit of the prices obtained by the largest publishers. That would be economically backwards. If larger publishers get more money on the theory that their repertory is more valuable, the smaller publishers should get less money.

In its comments to the Copyright Office's Notice of Inquiry Regarding Music Licensing, ASCAP proposed amendments that would, *inter alia*, among other things, "establish[ ] an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders who have withdrawn rights from a PRO and similar licensees provide the best evidence of reasonable rates[.]"[52] In other words, ASCAP seeks through the proposed evidentiary presumption to achieve equality of outcomes for withdrawing publishers and those catalogs left for licensing by ASCAP. The courts have consistently held that such an attempt to achieve

[51] *See* Del R. Bryant, BMI on Rights Withdrawal: an Open Letter to the Music Industry, Feb. 13, 2013 ("We have already cited these marketplace agreements in our negotiations with our licensees and we will encourage our Rate Court to consider them as a new indicator of market value."), http://www.bmi.com/news/entry/bmi_on_rights_withdrawal_an_open_letter_to_the_music_industry.
[52] *See* Comments of ASCAP (May 23, 2014) at 4.

equality of outcomes, when done through private agreements, comprises a *per se* unlawful price-fixing conspiracy.[53]

Rather than carry an evidentiary presumption, the rate courts should continue to weigh the evidence surrounding direct licenses. For example, as Judge Cote's opinion carefully explains, the direct licenses that Sony and Universal negotiated with Pandora did not reflect fair market value because the circumstances surrounding the negotiations were not indicative of a competitive market. In particular, Judge Cote found that Pandora was effectively compelled to transact.[54] Her conclusion noted that this was in part the result of asymmetries in the information available to the negotiating parties, as exemplified by Sony and Universal depriving Pandora of repertory information during negotiations. For these and other reasons recounted in her decision after trial, Judge Cote declined to rely on those direct licenses as benchmarks for rate-setting.[55] On the other hand, the evidence demonstrated that EMI[56] did not seek to leverage its withdrawal or the threat of infringement in the same manner as Sony and Universal. And the rate in the EMI agreement, which was the same rate as Pandora's prior ASCAP agreement, became the rate set by Judge Cote.

For these reasons, among others, the Department should reject the PROs' proposal to adopt an "evidentiary presumption" that all direct licenses entered into by publishers "who have withdrawn rights from a PRO" reflect fair market value.

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[53] *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003) ("Defendants' concern for the weakest among them has a quaint Rawlsian charm to it, but we find it hard to square with the competitive philosophy of our antitrust laws.").
[54] *In re Pandora* Slip Op. at 101.
[55] *Id.* at 97–111.
[56] Pandora executed a direct license with EMI for its ASCAP repertoire in 2012, before Sony acquired EMI.

Third, permitting partial withdrawals would impose significant costs on users and the Department. Some examples are set out below:

Users. It is self-evident that permitting publishers to make partial license grants to the PROs would impose significant new costs on users. Users would need to negotiate licenses from more parties. Moreover, although their investments were made in the context of compulsory music licensing, affected users would be subject to the threat of injunctions and statutory damages in dealing with the subset of rights holders who would benefit from partial withdrawals from the PRO blanket licenses. In addition, users would be subject to entrenched licensing practices that have shifted transaction costs from copyright owners to users. For example, the practice of multiple copyright owners each agreeing to license only their share of a single work (contrary to the normal operation of copyright law as embodied in the consent decrees and the PROs' longstanding membership agreements) could require a user to obtain a license at a different negotiated rate from each co-publisher. In a more competitive market, a user could take a license from one of the copyright owners and let that owner deal with allocating the royalties among the other co-owners.

Similarly, the entrenched practice of requiring services to directly secure public performance rights from music publishers when sound recording companies already secure from music publishers reproduction and distribution rights for the sale of sound recordings requires a service such as Pandora to obtain a license at a separately determined rate from both the record label and the music publisher.

Under the *status quo*, the adverse impact of this fragmentation has been ameliorated by the compulsory blanket license system; i.e., Section 114 of the Copyright Act for sound recording performance rights and the ASCAP and BMI consent decrees for musical work performance rights. Looking at the market from a broader perspective, changing one aspect of the U.S. music licensing regime after a long history of business practices and legislation that developed under that regime would impose serious adverse consequences on services, with no discernible benefit to consumers.

The Department. When a publisher grants only partial licensing rights to a PRO, the publisher is still part of the decision-making process at, and will be receiving distributions from, the PRO. As a result, there may be opportunities for publishers and PROs to co-mingle or otherwise adjust the PROs' internal rules in ways that can be used to frustrate competition. The Department will, therefore, have to take measures to ensure that such co-mingling does not take place.

It should be noted that in AFJ2 the Department abandoned efforts to monitor how ASCAP divides profits among its members, claiming that it had limited ability to untangle how ASCAP accounted for its distributions.[57] Thus, modifying the Decrees to permit partial license grants would require the Department to exercise greater oversight than is currently required over an aspect of PRO operations that the Department is admittedly ill-equipped to police.

[57] *See* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, Sept. 4, 2000, at 40.

In sum, the undefined proposal of allowing "rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others" is so fraught with anticompetitive risk that it should not be permitted. The only policy reason to permit such a change to the consent decrees is to inject competition into what has been a regulated market. As detailed above, the partial withdrawal of rights from PROs would not increase competition, either among publishers or between publishers and PROs.

Moreover, insofar as publishers and PROs assert that partial withdrawals are necessary to facilitate direct licensing transactions, that is simply not the case. There have been numerous instances of direct licensing within the current consent decree framework, ranging from those that were the subject of the *DMX* case to the many direct licenses that have developed in the local television and cable television marketplaces in conjunction with per-program licensing.[58]

Beyond the macro problem of altering one aspect of a more complicated overall market, there are many reasons why letting publishers make partial license grants to PROs is problematic from an antitrust standpoint. The conditions for true competition do not exist. Publisher concentration has increased significantly. The current PRO structure encourages the exchange of competitively sensitive information and coordinated action among PRO member publishers. From the perspective of what the PROs are set up to do (grant blanket/per-program and

[58] *See, e.g., Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32 (2d. Cir. 2012); *United States v. ASCAP (Buffalo Broadcasting Co.)*, 1993-1 Trade Cas. ¶70,153 (S.D.N.Y. 1993) ("*Buffalo Broadcasting I*"); *United States v. ASCAP (Capital Cities/ABC)*, 157 F.R.D. 173 (S.D.N.Y. 1994) ("*Capital Cities/ABC II*"); *United States v. ASCAP (Capital Cities/ABC)*, 831 F.Supp. 137 (S.D.N.Y. 1993) ("*Capital Cities/ABC I*"); *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1985), *cert. denied*, 469 U.S. 1211 (1985) ("*Buffalo Broadcasting II*").

AFBL licenses covering *all* works in their repertories), such information sharing and collective action may be sensible; but it cannot be permitted among the same publishers where the purpose of "partial" licensing is assertedly to foster competition.

As this discussion shows, the PROs' and the publishers' proposal that the consent decrees "sunset" after ten years should similarly be rejected. The consent decrees continue to serve critical pro-competitive purposes, and there is no reason to install a time bomb inside them. For so long as the anticompetitive behavior (actual or potential) that is regulated by the consent decrees persists, the consent decrees should remain in full force and effect.

IV. What, if any, modifications to the Consent Decrees would enhance competition and efficiency?

For the reasons cited above, the Department should reject the requests of the PROs and major publishers to modify the consent decrees because such requests would not enhance competition or efficiency.

V. Do differences between the two Consent Decrees adversely affect competition?

In a perfect world, the material terms of the two consent decrees would be identical. Although the terms of the decrees vary, in Pandora's experience, these differences have not resulted in materially different outcomes. For example, although the remedy awarded by Judge Stanton was different from the remedy awarded by Judge Cote, both courts concluded that publishers are not entitled to partially withdraw from the PROs. Recent history suggests that, even though set by different judges, similar rates are obtained by ASCAP and BMI in rate-setting

proceedings—as they should be. If the Department determines that the consent decrees should be modified, then the language of the decrees should be harmonized.

VI. Should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration? What procedures should be considered to expedite resolution of fee disputes? When should the payment of interim fees begin and how should they be set?

Pandora shares the PROs' concerns about the costs of rate court litigation. While the PROs complain of having to litigate with multiple licensees, services such as Pandora often have to litigate rate settings against both ASCAP and BMI. That said, all but one of the rate court cases since 2005 that ASCAP bemoans in its Comments to the Copyright Office were initiated by ASCAP or BMI. Indeed, over the long history of the rate courts, few rate court cases have gone to trial. The rate courts fulfill their intended purpose and have served the PRO and license community well. Their decisions are reliable and create precedents upon which parties can rely; and the cost of litigation encourages settlement.

Abolishing the rate courts, on the other hand, would unjustifiably strengthen the PROs' hand and prejudice applicants. As Pandora has learned from its own experiences, the PROs are in a demonstrably better position at the beginning of any rate case dispute. The PRO knows far more about the marketplace than the licensee because the PRO has access to the details of all its agreements with myriad licensees. The PRO may also know much about the applicant's business, which is often publicly available (as is surely the case with Pandora). The licensee, on the other hand, knows only the terms of the agreements to which it is a party. This huge information deficit requires federal court supervision and application of the

federal rules of civil procedure and evidence (not typical arbitration rules) to cure. It is unlikely that Pandora could have unearthed the critical evidence upon which Judge Cote relied in the kind of short-form arbitration that the PROs now advocate.

It is also noteworthy that Judge Cote repeatedly invited ASCAP to propose ideas to reduce the cost of rate court litigation. We are not aware of any proposals ASCAP has made to Judge Cote on this front. In Pandora's view, every efficiency of private arbitration that ASCAP cites in its Copyright Office Comments could be accomplished via streamlined procedures in the rate court. That should be the focus of discussion and dialog, as Judge Cote has invited. Elimination of the federal rules and principles of *stare decisis*, to the contrary, would be a huge setback to the licensee community.

VII. How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?

Pandora submits that the existing transparency requirements adversely affect competition because they are too weak. Transparency is key to a competitive marketplace for performance rights. The Department need look no further than Judge Cote's decision to understand why. Her decision underscores how publishers (and ASCAP) took advantage of the lack of transparency regarding ownership of publishing rights. As explained earlier, Sony and Universal capitalized on Pandora's lack of information about the works in their catalogs. Because Pandora could not identify who owned which works, it faced the dilemma of either shutting down entirely or agreeing to significant price increases.

To solve this problem, the consent decrees should require that PROs post information to the public on a searchable basis in commercially usable formats; e.g., real-time, application programming interface-enabled and searchable work-by-work, publisher-by-publisher, writer-by-writer, and also available in bulk. Both the ASCAP and BMI publicly available databases include information identifying the recording artist(s) associated with the sound recording(s) embodying a musical work. This information is critically important to services such as Pandora and should be included whenever available. This would enable the user community to more readily determine (i) who owns/controls the works they may wish to license and (ii) what works (and sound recordings in which they are embedded) they must avoid using to avoid infringement claims if they do not wish to accept the terms offered by a publisher/writer whose works are not available through a PRO (*e.g.,* after a PRO "withdrawal").

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CONCLUSION

Pandora supports the Department in its review of the ASCAP and BMI consent decrees. We look forward to working with the Department, along with other stakeholders and interested parties, the Copyright Office and the House Judiciary Committee's Subcommittee on Intellectual Property, on the important issues surrounding music licensing.

Respectfully submitted,

/s/ Christopher S. Harrison

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RESPONSES OF MS. BETH MATTHEWS TO QUESTIONS
SUBMITTED BY SENATOR LEE

Questions for the Record

How Much for a Song?:

The Antitrust Decrees that Govern the Market for Music

Senator Lee

Beth Matthews

During the hearing, the potential coordination among the publishers and ASCAP referenced in Judge Cote's opinion in Pandora v. ASCAP came up repeatedly.

- What is your response to the allegations mentioned in the hearing and in Judge Cote's opinion?

Response:

ASCAP respectfully disagrees with the suggestion in Judge Cote's *Pandora* opinion that there was "troubling coordination" between certain music publishers and ASCAP. ASCAP has never engaged in any form of wrongful "coordination" with its members. Nor did Judge Cote find that there had been any such wrongful "coordination" between ASCAP and its members. Indeed, as the Copyright Office observed in its recent report concerning Copyright and the Music Marketplace, Judge Cote did not make any finding, or reach any conclusion, as to whether the purported "coordination" was "wrongful or legitimate." U.S. Copyright Office, COPYRIGHT AND THE MUSIC MARKETPLACE, at 154 (February 2015) (hereinafter, the "Copyright Office Report") (citing *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 357-58 (S.D.N.Y. 2014). Judge Cote's opinion is currently on appeal before the Second Circuit, and ASCAP has explained in detail in its appeal briefs why there was no basis for Judge Cote's purported concern about coordination between ASCAP and its publisher members. Rather than repeat those arguments here, I am attaching copies of ASCAP's appellate briefs; the "coordination" issue is discussed on pages 46-50 of ASCAP's main appeal brief, and on pages 19-22 of ASCAP's reply appeal brief.

Nor is there any reason to suspect, as some have suggested in their comments to the Subcommittee, that modification of the Consent Decree will somehow lead to collusive conduct in the future. The Consent Decree will remain in effect, and ASCAP and copyright owners will continue to be bound by the Sherman Act. As the Copyright Office noted in its recent report, regardless of what restrictions are included in the Consent Decree, the DOJ retains the ability to "investigate and address potential anticompetitive behavior on an as-needed basis." Copyright Office Report at 156. These protections are more than sufficient to ensure that modification of the Consent Decree will not lead to "collusion" between ASCAP and its members.

* * *

ASCAP argues that modifying the Consent Decree to allow for partial withdrawals by its members will help promote a competitive market.

- Why is that the case?

Response:

Modifying the Consent Decree to permit ASCAP to accept partial grants of rights—thereby enabling members effectively to withdraw certain rights from ASCAP—will promote competition in a number of different ways. First, partial grants will promote the disaggregation of rights and foster competition between ASCAP and its members, as well as with other PROs and music licensing entities, as the members' "partial exit" from ASCAP will enable them to enter the market as additional sellers. Second, by allowing members to directly license some licensees without bearing the costs or risks of directly licensing all licensees, partial grants increase the economic attractiveness of direct licensing in general, and thus create more opportunities for ASCAP members to enter into direct licenses that compete with ASCAP, other PROs (such as BMI and SESAC), and other copyright holders. Third, permitting partial grants of rights will create competition among PROs and non-PRO competitors to administer the copyright owners' direct licenses, which will encourage PROs to become even more efficient, leading in turn to lower administrative costs for the PROs and potential savings that can be passed on to licensees. Fourth, the market for direct licenses that will develop as a result of the partial grants of rights will result in agreements between willing buyers and willing sellers—free from the constraints of compulsory licensing—that are more likely to reflect the true value of public performance rights. As such, these licenses will provide true market benchmarks for subsequent negotiations and ASCAP Rate Court proceedings, and ultimately improve the rate-setting process overall, a result that benefits every songwriter and publisher. Finally, allowing ASCAP to accept partial grants of rights will preserve the features of collective licensing that accrue to the benefit of both licensees and music creators.

* * *

I understand that ASCAP is making significant investments in transparency. Transparency is important for two reasons: first, it allows potential licensors to properly assess the value of the catalog they are acquiring a license for; second, it allows them to avoid costly infringement suits.

- What do your transparency efforts look like?
- Will potential licensors be able to rely on the information you provide to protect them from infringement suits?

Response:

ASCAP strongly believes that transparency of data is crucial for a properly functioning music licensing marketplace. Indeed, ASCAP has structured its business operations around this principle, in its relationships with its customers, as well as with its members.

Since 1950, the ASCAP Consent Decree has required that ASCAP make available to the general public information as to ASCAP members and the works comprising the ASCAP repertory. The 2001 amendments to the Decree expanded ASCAP's transparency requirements; ASCAP must make available for free a "public electronic list" consisting of separate databases of current ASCAP members and ASCAP works, showing titles, writers, and current publishers or other copyright owners of each work. ASCAP has provided this information in two ways: via ASCAP's searchable online ACE (ASCAP Clearance Express) database, and on a DVD-ROM that is made available to anyone on request.

In response to calls for even greater transparency and data search functions, in March 2015 ASCAP upgraded its ACE database to permit users to view or download the complete catalog of any ASCAP writer or publisher member (the latter including the combined catalogs of certain major publishers). Moreover, if any ASCAP member resigns from ASCAP and removes its catalog of works from the ASCAP repertory, ASCAP will also provide a list of the withdrawn works to any licensee (or potential licensee), upon request.

We believe that as a result of these developments, ASCAP makes available to music users the most robust and comprehensive data regarding musical works available from any source. We are confident that a music user will be able to rely on this data to determine whether they require an ASCAP license; and if so, that an ASCAP license will provide them with the rights they need to perform lawfully the songs in the ASCAP repertory and protection from infringement claims with regard to performances of those ASCAP works.

ASCAP is also transparent to its members. As a membership organization, ASCAP believes that its members have a right to complete information regarding their royalties. For decades, ASCAP has published its distribution rules. ASCAP also provides members with detailed information regarding their royalty distributions and employs dedicated member service representatives to discuss with members any questions regarding their membership and their royalties. ASCAP members enjoy full interactive online access to their confidential royalty distribution detail that they can access at any time.

Of course, providing a high level of data transparency is a laborious and expensive endeavor. ASCAP's repertory is comprised of millions of individual works, many with multiple writers and publishers. The repertory is fluid, evolving on a daily basis as new works are added or removed, and catalogs are transferred or sold to new owners. Nevertheless, ASCAP expends very significant resources to ensure that it has, and can make available, the most current information about its member and their catalogs, working in concert with writers, publishers and other collecting societies around the world to ensure that our data is as accurate as possible. To that end, it should be emphasized that ASCAP's efforts are only a single piece of the larger music ecosystem. It is imperative that all players in the marketplace—copyright owners, licensors and music services alike—follow ASCAP's example and ensure that accurate data is made available on a fully transparent basis. This, in turn, will ensure the proper and efficient licensing of musical works and distribution of royalties to all entitled parties.

RESPONSES OF MS. BETH MATTHEWS TO QUESTIONS
SUBMITTED BY SENATOR HATCH

Questions Posed by Senator Orrin G. Hatch

1. Question for all panel members:

   With respect to transparency of license agreements negotiated directly by publishers, I am concerned about one situation in particular: a publisher striking a deal to license its works under which a licensee pays an upfront fee to the publisher—not disclosed to or shared with the songwriters affiliated with the publisher—in exchange for the licensee paying to the publisher directly a lower royalty rate.

   How can we make certain that all payments by licensees for musical works pursuant to agreements negotiated directly by publishers are fully disclosed to songwriters and shared with them?

   Additionally, how could such requirements be enforced?

ASCAP Response

The arrangements between songwriters and music publishers are matters of private negotiation between those parties to which ASCAP is not privy. Such contracts are separate agreements made outside of their relationship with ASCAP and have no bearing on the royalty payments made by ASCAP to its members. Accordingly, ASCAP respectfully cannot comment on those private songwriter-publisher agreements. Nevertheless, ASCAP appreciates the importance of transparent dealings and believes that transparency of data is crucial for a properly functioning music licensing marketplace. Indeed, ASCAP has structured its business operations around this principle, in its relationships with its customers, as well as with its members.

As a membership organization, ASCAP believes that its members have a right to complete information regarding their royalties. For decades, ASCAP has published its distribution rules. ASCAP also provides members with detailed information regarding their royalty distributions and employs dedicated member service representatives to discuss with members any questions regarding their membership and their royalties. ASCAP members enjoy full interactive online access to their confidential royalty distribution detail that they can access at any time. We would hope that all entities in the music licensing ecosystem – including songwriters and publishers – arrange for similar transparency in their transactions and operations.

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RESPONSES OF MS. BETH MATTHEWS TO QUESTIONS
SUBMITTED BY SENATOR LEAHY

Questions of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing on
"How Much For a Song?: The Antitrust Decrees That Govern the Market for Music"
March 10, 2015
Question for the Record for All Witnesses

The ASCAP and BMI consent decrees with the Department of Justice exist in the context of a larger and complicated music licensing ecosystem that many say is in need of reform. I believe strongly that any comprehensive music licensing improvements must ensure: that all music creators are fairly compensated for all of their works; that innovative, legitimate delivery methods can continue to benefit consumers and marginalize illegitimate alternatives; and that technology can bring increased transparency to the data that is essential to an efficient licensing system.

Q: Please share your thoughts on what elements are critical to any efforts to improve the music marketplace.

A: Despite the debate and conflicting opinions on certain specific issues in the current music licensing discussions, there appear to be three points to which practically every party agrees. The first is that the music licensing system demands the utmost in efficiency, for the benefit of music creators, music services and, ultimately, the listening public. The second is that music creators – songwriters and performing artists alike – deserve to be fairly compensated for the use of their work. The third, essentially a corollary of the first two, is that collective licensing as practiced by ASCAP for 100 years is the most effective and efficient means by which to serve the needs of music creators, businesses that perform music, and music listeners everywhere, and must remain as a necessary piece of the licensing solution.

While those goals had been met for many decades under the current regulatory regime that governs how music users are licensed, it is clear that technological changes in the way people listen to music and in the economics of the music business, particularly for songwriters and composers who do not share the same revenue streams as recording artists, demand commensurate changes to the regulatory regime. In today's regulated marketplace, it is becoming increasingly difficult for music creators to realize a competitive return for their creative efforts, and for organizations such as ASCAP to serve appropriately the needs of its members (music creators), its customers (music licensees) and the music listening public. Accordingly, two immediate changes to the regulatory system are necessary.

First and foremost, the antiquated ASCAP Consent Decree must be updated. Instead of ensuring an efficient competitive marketplace that provides a fair market return to ASCAP's members, numerous provisions of the current ASCAP Consent Decree have had the opposite effect. For example, digital music services are increasingly interested in

licensing efficiently all of the rights needed to operate their services in one transaction, but ASCAP is prohibited from licensing rights in musical works beyond the right of public performance. And, when ASCAP and a music user cannot reach a final agreement on licensing rates or terms, the parties are forced to resort to an extremely time-consuming, labor-intensive and expensive rate court process costing millions of dollars in litigation expenses. Recently, the ASCAP rate court interpreted the ASCAP Consent Decree as prohibiting ASCAP's members from obtaining more control over the licensing of the musical works in their catalogs by retaining for themselves the exclusive right to license certain music users; a result counter to the pro-competitive goals of the Consent Decree. Simply put, constrained by an outdated Consent Decree, ASCAP can no longer meet the evolving needs of writers, publishers, music licensees and, ultimately, consumers.

Second, certain modest amendments to the Copyright Act are necessary. For example, evidentiary limitations imposed by Section 114(i) of the Copyright Act have perpetuated an unprincipled disparity in the compensation provided to songwriters for the use of their songs, as compared to the compensation provided to record companies for the use of their sound recordings. And, rate standards imposed under Section 115 for mechanical licenses have resulted in below fair market rates paid to songwriters.

The continued viability of collective licensing in the United States is in jeopardy. Without changes to its Consent Decree, ASCAP may face the complete resignation of certain of its largest publisher members, a result that could be as damaging for music users as it could be for ASCAP and its remaining members. Without a robust collective licensing system, the increased cost of having to negotiate licenses with hundreds of thousands of individual copyright owners would likely be passed on to consumers and stymie the growth of innovative new services that would benefit consumer choice and experience. And without amendments to the Copyright Act, songwriters will continue to suffer below-market returns for the use of their labor.

The simplest and most immediate solution to these problems is the amendment of the ASCAP Consent Decree and the Copyright Act to reflect the realities of the modern music marketplace and acheive more efficient and effective collective licensing, including. We propose modifying the ASCAP Decree to (1) shift rate-setting to an expedited private arbitration system; (2) allow new media services to secure licenses from PROs on a bundled basis; and (3) allow PROs to accept partial grants of rights from its members. Additionally, ASCAP strongly supports passage of the Songwriter Equity Act, a piece of legislation that will help songwriters achieve a fair market rate of return.

These proposed changes will benefit all constituencies in the music licensing marketplace. For consumers, these changes will ensure access to a broad range of music at a fair price. For music licensees, they will ensure continued access to the music they want at a reasonable rate. And for the songwriters and composers who are the foundation of the rapidly changing music ecosystem, they will ensure fair compensation for their creative works so that they can continue to write the songs we all enjoy.

Questions Posed by Senator Orrin G. Hatch

1. Question for all panel members:

With respect to transparency of license agreements negotiated directly by publishers, I am concerned about one situation in particular: a publisher striking a deal to license its works under which a licensee pays an upfront fee to the publisher—not disclosed to or shared with the songwriters affiliated with the publisher—in exchange for the licensee paying to the publisher directly a lower royalty rate.

How can we make certain that all payments by licensees for musical works pursuant to agreements negotiated directly by publishers are fully disclosed to songwriters and shared with them?

Additionally, how could such requirements be enforced?

LEE THOMAS MILLER --- Witness, Broadcast Music Incorporated.
President, Nashville Songwriters Association

Answer:
The answer to this question must begin with complete and full disclosure/transparency of the terms of any deal directly negotiated by a music publisher. The U.S. Register of Copyrights in her 2015 report on "Copyright and the Music Marketplace" states as one of four key principles: "Usage and payment information should be transparent and accessible to rightsowners."

In today's difficult market environment for songwriters—with only a fraction of the music publishing deals available compared to the pre-digital market—-a scenario could emerge where a music publisher could demand that a songwriter give up any rights to a portion of advance or bonus payments. This could even become the industry standard. In order to avoid such a scenario, there should be a requirement, that cannot be superseded by contracts, that the songwriter receive a pro-rata share of any advances or bonuses resulting from a deal directly negotiated by a music publisher.

Songwriters should receive 100% of their "writer's share" and any "publisher's share" as identified in the exclusive songwriter-publisher agreement in effect at the time royalties are earned. Such payments should be based on a songwriter's song activity on a particular service during the time period of the deal directly negotiated by the music publisher.

Working songwriters, would prefer that any royalties due them from direct-licensing deals be paid directly to the songwriter instead of "passing through" the music publisher--whether this be in the form of an advance, bonus or normal royalties earned. This direct payment could be paid to the songwriter from a performing rights society who is administering a direct-licensing deal for a music publisher, or the songwriter could elect to have their performing rights society collect and distribute their share of advances, bonuses or normal royalties -- even if the music publisher has not contracted with a performing rights society for administration on a specific direct licensing/distribution deal.

While songwriters and music publishers believe they should be able to set rates according to a willing-buyer, willing-seller standard in a free market environment, some government oversight could still be required, including monitoring full disclosure requirements resulting from direct-licensing deals by music publishers. The U.S. Copyright Office could determine how this disclosure requirements are overseen and enforced. Performing rights societies could also potentially play an oversight role in such deals.

Question to Ms. Jodie Griffin, Public Knowledge:

Ms. Griffin, in your prepared testimony, you note "[w]ith technologically neutral competition policies, new music distribution platforms will have a fair shot at thriving in a sustainable way…"

How do you reconcile this statement with the fact that there is not a performance right for terrestrial radio?

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Questions of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing on
"How Much For a Song?: The Antitrust Decrees That Govern the Market for Music"
March 10, 2015

Question for the Record for All Witnesses

The ASCAP and BMI consent decrees with the Department of Justice exist in the context of a larger and complicated music licensing ecosystem that many say is in need of reform. I believe strongly that any comprehensive music licensing improvements must ensure: that all music creators are fairly compensated for all of their works; that innovative, legitimate delivery methods can continue to benefit consumers and marginalize illegitimate alternatives; and that technology can bring increased transparency to the data that is essential to an efficient licensing system.

Q: Please share your thoughts on what elements are critical to any efforts to improve the music marketplace.

A: We need to move toward marketplace solutions, rather than have the government set songwriter royalty rates under rules from 1909 and 1941. Songwriter royalty rates are determined under unfair standards that do not reflect a "willing-buyer, willing-seller" standard. This has resulted in nominal increases in mechanical royalties that have grown from two cents in 1909 to only 9.1 cents in 2015. Similarly, songwriters receive streaming royalties up to 14 times lower than artists and record labels under antiquated standards.

Absent a totally free market for songwriters, ASCAP and BMI consent decrees should be amended to allow for blanket licensing of all royalties, performance, mechanical and synchronization. Arbitration would work much more efficiently than rate courts when it comes to setting rates and having start-up companies in the digital music distribution business pay fairly for my songs when they commence distributing them.

During the recent Senate subcommittee hearing where I testified on behalf of Broadcast Music Incorporated, the digital streaming service Pandora said ASCAP and BMI should remain under consent decrees because each of the performing rights societies controlled about 45% of the licensing/collection of performance royalties in the United States. I find this ironic since Pandora controls more than 70% of the digital streaming market."

Lee Thomas Miller

RESPONSES OF MR. MATT PINCUS TO QUESTIONS
SUBMITTED BY SENATOR LEE

Questions for the Record

How Much for a Song?:

The Antitrust Decrees that Govern the Market for Music

Senator Lee

Beth Matthews

During the hearing, the potential coordination among the publishers and ASCAP referenced in Judge Cote's opinion in Pandora v. ASCAP came up repeatedly.

- What is your response to the allegations mentioned in the hearing and in Judge Cote's opinion?

ASCAP argues that modifying the Consent Decree to allow for partial withdrawals by its members will help promote a competitive market.

- Why is that the case?

I understand that ASCAP is making significant investments in transparency. Transparency is important for two reasons: first, it allows potential licensors to properly assess the value of the catalog they are acquiring a license for; second, it allows them to avoid costly infringement suits.

- What do your transparency efforts look like?
- Will potential licensors be able to rely on the information you provide to protect them from infringement suits?

Chris Harrison, Pandora

The publishers have threatened to fully withdraw from the PROs if DOJ does not allow partial withdrawals. The PROs believe that such full withdrawals would seriously damage the blanket license system.

- Is the threat of full withdrawal sufficiently compelling to justify amending the consent decree?

Matt Pincus, SONGS Music Publishing

As one of the largest independent publishers, SONGS benefits greatly from the administrative efficiencies offered by collective licensing.

- How would a full withdrawal of the major publisher catalogs from the PROs affect smaller publishers like SONGS?

Senator Lee, as I outlined in my testimony, the consent decrees have effectively left music publishers with two harmful, all-or-nothing business decisions. The first is to avail themselves of the benefits of collective licensing for all performance rights and accept the high costs, inefficiencies and below-market royalty rates that result from government regulation. The second is to fully withdraw all performance rights from collective licensing, thereby destroying longstanding licensing efficiencies and business relationships that have proven beneficial to all parties. Neither choice is economically beneficial to my business as a music publisher and both result from the regulation of my performance rights through the consent decrees. To my knowledge, most publishers - including the majors - would prefer to maintain general licensing through the PROs and are only seeking to negotiate directly with certain specific categories of licensees. My hope is that DOJ amends the consent decrees to provide enough flexibility to allow publishers to avoid this Hobson's choice. So, in short, as an independent publisher, I support the right of publishers to withdraw all or partial rights from the PROs.

However, there is potential outcome that could affect independent publishers disproportionately, and threaten the ability for new independents to enter the market. If major publishers withdraw rights from the PROs, and smaller independent publishers stay within the collective licensing system under the regulatory constraints we suffer under today, the market will become untenable for smaller companies as they may achieve rates that are repressed by government regulation while withdrawing publishers achieve higher rates.

Therefore in addition to allowing for partial rights withdrawal, I think it is imperative that the DOJ reform the Consent Decrees to allow for arbitration rather than supervision by the current rate courts.

Mike Dowdle, Bonneville

I understand that you are a songwriter yourself and had a long career in music before your time in broadcasting. Your background gives you a particularly helpful perspective on these issues.

- In what ways do the PROs and their blanket licenses benefit both songwriters and broadcasters?
- Do you believe the consent decrees as written are necessary to preserve those benefits, or can they be achieved outside the decrees?

RESPONSES OF MR. MATT PINCUS TO QUESTIONS
SUBMITTED BY SENATOR HATCH

Questions Posed by Senator Orrin G. Hatch

1. Question for all panel members:

   With respect to transparency of license agreements negotiated directly by publishers, I am concerned about one situation in particular: a publisher striking a deal to license its works under which a licensee pays an upfront fee to the publisher—not disclosed to or shared with the songwriters affiliated with the publisher—in exchange for the licensee paying to the publisher directly a lower royalty rate.

   How can we make certain that all payments by licensees for musical works pursuant to agreements negotiated directly by publishers are fully disclosed to songwriters and shared with them?

   Additionally, how could such requirements be enforced?

Senator Hatch, publishers and songwriters voluntarily enter into contractual relationships. While the details of particular agreements may vary, publishers' fundamental job is the same: to negotiate deals that maximize the value of the songs they control for the mutual benefit of themselves and their writers. My company – SONGS – would not take actions that are contrary to the interests of our writers, and I believe that also applies to the overwhelming majority of publishers.

While transparency is indeed one of the important cornerstones of building trust in any business relationship, it would not be constructive for the government to attempt to regulate the partnership between writers and publishers. The market provides sufficient incentive for publishers to compensate their writers fairly and to provide transparency.

2. Question to Ms. Jodie Griffin, Public Knowledge:

   Ms. Griffin, in your prepared testimony, you note "[w]ith technologically neutral competition policies, new music distribution platforms will have a fair shot at thriving in a sustainable way…"

   How do you reconcile this statement with the fact that there is not a performance right for terrestrial radio?

RESPONSES OF MR. MATT PINCUS TO QUESTIONS
SUBMITTED BY SENATOR LEAHY

Questions of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
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"How Much For a Song?: The Antitrust Decrees That Govern the Market for Music"
March 10, 2015

Question for the Record for All Witnesses

The ASCAP and BMI consent decrees with the Department of Justice exist in the context of a larger and complicated music licensing ecosystem that many say is in need of reform. I believe strongly that any comprehensive music licensing improvements must ensure: that all music creators are fairly compensated for all of their works; that innovative, legitimate delivery methods can continue to benefit consumers and marginalize illegitimate alternatives; and that technology can bring increased transparency to the data that is essential to an efficient licensing system.

Q: Please share your thoughts on what elements are critical to any efforts to improve the music marketplace.

Senator Leahy, I strongly support all of the goals you enumerated. While the government should continue to have a role in prosecuting commercial-scale piracy operations and facilitating voluntary agreements among stakeholders to help curb infringement, Congress should reevaluate the government's footprint with regard to music licensing. The ability of songwriters and music publishers to license our rights unencumbered by government regulation, whether collectively or directly, is critical to the ongoing viability of our businesses and the continued creation of the songs we all love. Licenses for the intellectual property rights of movies, books, video games, magazines, television shows and recorded music are all negotiated in the free market while songwriters and music publishers remain subject to heavy regulation under antiquated consent decrees. If Congress concludes that the government must continue to be involved in setting rates for the use of musical compositions, then, at a minimum, the rate setting processes must be modernized to yield outcomes that more accurately reflect rates that would have been negotiated in a free market.

March 9, 2015

Dear Senator,

Tomorrow the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights will hold a hearing on the U.S. Department of Justice's (DOJ) review of the ASCAP and BMI consent decrees. The undersigned organizations welcome an examination of the continued need for these consent decrees through the Antitrust Subcommittee's lens of ensuring healthy competition, as well as a discussion of the alleged anticompetitive conduct by both the Performing Rights Organizations (PROs) and music publishers that the Wall Street Journal recently reported is subject to a connected DOJ investigation.[1]

Our position is clear. Our industries, which represent a broad cross section of the music licensing ecosystem - music distributors, electronics manufacturers, Internet companies, television broadcasters, radio broadcasters, and music users - strongly oppose any changes to the ASCAP and BMI consent decrees that would harm competition and consumers. These consent decrees are necessary for the fair and efficient licensing of musical works and should not be weakened.

ASCAP and BMI are associations that music publishers and songwriters use to license the right to publicly perform music on the radio, on television, at trade shows, in bars or restaurants, and on music services like Pandora and SiriusXM. But these collectives—driven by music publishers—have a history of coordinating to abuse their market power to the detriment of music users, consumers and various other segments of the listening public. In 1941, after years of federal antitrust investigations of alleged illegal discrimination, both ASCAP and BMI voluntarily agreed to be governed by the consent decrees. Both decrees have since been amended – ASCAP's in 2001 and BMI's in 1994.

Recently, music publishing executives have claimed that the consent decrees are "obsolete" or "outdated" – without any reference to how their continuation and enforcement hinders ASCAP and/or BMI's licensing processes in the modern era. It is clear that the consent decrees were established for a very specific reason: To keep significantly concentrated market powers in check. That concentrated market power exists to an even greater extent and is still being unfairly used today, and so the consent decrees are needed now more than ever. In just the last year, four different federal district court judges have all found evidence of the same type of anti-competitive behaviors that gave rise to the consent decrees in the first place:

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[1] According to a recent story "Justice Department Investigates Possible Pricing Coordination in Music Publishing," by Hanna Karp, Wall Street Journal, July 14, 2014. Available at: http://www.wsj.com/articles/justice-department-investigates-possible-pricing-coordination-in-music-publishing-1405384088

- In December 2013, Federal District Court Judge Stanton found that music publishers had secretly coordinated with BMI: "BMI cannot combine with [music publishers] by holding in its repertory compositions that come with an invitation to a boycott attached."

- Two District Court judges found sufficient evidence that SESAC, another PRO that does not operate under a consent decree, engaged in monopolistic behavior and violations of the Sherman Antitrust Act.

- In a rate court case involving Pandora and ASCAP, federal District Court Judge Denise Cote found: "the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying AFJ2."

The ASCAP and BMI consent decrees were designed to operate indefinitely because there is no alternate mechanism to ensure competition in the musical works market. In fact, it is only as the result of the framework established by the consent decrees that ASCAP and BMI can license without running afoul of the antitrust laws. The potential harms that arise from the collective licensing and price fixing inherent in the fundamental function of the PROs as marketplace collectives still remain today. The consent decrees should remain intact and not be weakened until the anti-competitive behavior that gave rise to these consent decrees 70 years ago can be mitigated.

Removing the protections that the consent decrees offer and permitting the PROs to abuse their market power would create legal chaos, stifle innovation and expose smaller songwriters to disproportionate harm.

- *Widespread Liability*: Even while they were under the watch and scrutiny of the DOJ, major publishers boldly attempted to withdraw the ability to license to online services from from PROs, while refusing to reveal which songs were covered. Without a consent decree, major publishers could pull certain rights from PROs and not tell anyone. Under the strict liability system of copyright, any business playing that music would be effectively forced into committing unwitting copyright infringement – and could be held liable for substantial monetary damages.

- *Smaller Songwriters Will Be Disproportionately Harmed:* The consent decrees provide smaller songwriters with enhanced protections. They don't have to negotiate licenses on their own, and are guaranteed the same rate of payment as songwriters on the Billboard Top 50. In a world without consent decrees, smaller songwriters could be paid little to virtually nothing for their work.

- *Stifling Innovation*: Well-managed, PROs give developers of new services access to license millions of songs in a simple and convenient manner. The consent decrees help ensure a vigorous environment for innovation and competition.

The consent decrees are more important now than ever before to stop anticompetitive behavior. We urge you, as a member of the Antitrust Subcommittee, to attend the hearing and ask hard questions of those seeking to circumvent the decrees. The burden should be on music publishing executives to refute the evidence in the four recent court cases which demonstrate that the consent decrees are still necessary to ensure a fair and efficient music licensing marketplace.

Sincerely,

Consumer Electronics Association

Computer and Communications Industry Association

Digital Media Association

Internet Association

National Association of Broadcasters

March 10, 2015

The Honorable Mike Lee
Chairman
Subcommittee on Antitrust, Competition, and Consumer Rights
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Amy Klobuchar
Ranking Member
Subcommittee on Antitrust, Competition, and Consumer Rights
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Lee and Klobuchar:

The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies[1] and their global community of users. It is dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.[2] As with any new and disruptive technology, the early days of the Internet challenged existing music distribution and performance models. No doubt, the Internet caused some business models to wane. And given the advocacy of some special interest groups in Washington, DC, the subcommittee would be forgiven if it thought that was the end of the story. Today's marketplace, however, has demonstrated that the Internet has ushered in a new era of creative, new music distribution models, resulted in obscure artists being discovered by the public even while record labels ignored them, and caused an incredible explosion in technological innovation. Even during the Internet's early years, it spurred a new and innovative means of radio transmission. Over the past two decades, not only has Internet radio evolved, but it has also spurred streaming services such as those offered by Internet Association members, including Amazon, Google, Pandora and Yahoo.

Today's hearing is important. The Internet Association submits this testimony first because several of our member companies license music under the terms of the DOJ consent decrees. As such, they are concerned that any changes made to the decrees accurately reflect the marketplace realities of music licensing as well as the important role played by the Internet in services that rely heavily on the licensing of performance rights for music.

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[1] The Internet Association's members include Airbnb, Amazon.com, AOL, auction.com, eBay, Etsy, Expedia, Facebook, Gilt, Google, Groupon, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, Practice Fusion, Rackspace, reddit, salesforce.com, Sidecar, SurveyMonkey, TripAdvisor, Twitter, Yahoo, Yelp, Uber and Zynga.

[2] The Internet Association respectfully submits that this letter be entered into the record for today's hearing on the Department of Justice (DOJ) ASCAP and BMI music licensing consent decrees.

[illegible]

Second, while not all of our members provide music services, they all are concerned that digital content delivery via the Internet in general be afforded fair and equal treatment by any government agency, including the DOJ.

In its 2014 request for public comments, the DOJ asked whether the ASCAP and BMI consent decrees continue to serve important competitive purposes today. We believe that the answer to this question is unambiguously "yes." In fact, there are good reasons why the consent decrees serve to promote competition *even more* so today than when they were first entered into in 1941. The underlying need for the consent decrees - the market power of the PROs - is not and never will be temporary in nature since it is inherent in the licensing structure they have chosen to establish. Furthermore, this market power has proven to be persistent: today ASCAP and BMI jointly retain the performance rights for about 90% of all American compositions. Similarly, the market presence of the major publishers has only increased since the 1940s, to the point where UMPG and Sony/ATV now control over 50% of the U.S. music publishing market.

Although market shares are not a perfect proxy for market power, there is recent and direct evidence that both the PROs and the major publishers are willing to use their dominant market positions in ways detrimental to competition and to consumers. This direct evidence is, of course, the record evidence in the Pandora rate court case decided last year.[3] In her opinion in that case, Judge Cote sets out in remarkable detail how ASCAP, Sony/ATV, and UMPG together acted to facilitate partial withdrawals from ASCAP solely for the purpose of implementing anticompetitive royalty rate increases to Pandora. There is no evidence that the partial withdrawals were used to serve a procompetitive, welfare-enhancing purpose: the publishers and ASCAP did not use the withdrawals to compete for share with one another; and there is no evidence that the withdrawals were used to lower transaction costs. As a matter of fact, the Pandora record evidence showed that the publishers reached agreements with ASCAP after their withdrawal allowing ASCAP to continue to administer the collection and distribution of any royalties collected.

The argument advanced by the PROs and their record label allies that the DOJ music consent decrees should sunset or be modified to allow for partial withdrawals simply because they are old is not analytically sound. While it is true that many markets do change over time, necessitating the need for fresh thinking about consent decrees, this is demonstrably not the case here. The PROs' persistent market power combined with the ease with which the PROs will seemingly coordinate with the major publishers rather than compete with them, strongly suggest that the consents should remain intact.

The DOJ will make an important decision regarding the consent decrees in the coming months. It will decide whether to agree with the PROs and the publishers to allow partial withdrawals under the consent decrees, or whether it will side with innovation and consumers and refuse to allow them.

If the DOJ decides against partial withdrawals, any legal challenge to that decision will face a high burden of proof. Under the current case law, a court would look to "equitable considerations" in determining whether to modify the consent decree, and a challenge to this decision would have to show either (1) "that the basic purposes of the consent decree [] – the elimination of monopoly and unduly

[3] *In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2014 U.S. Dist. LEXIS 36914 (S.D.N.Y. Mar. 14, 2014).

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Internet Association

restrictive practices – have been achieved"[4], or (2) that "time and experience demonstrate that the decree is not properly adapted to accomplishing its purposes."[5] It is far from clear that ASCAP and BMI could meet the standards of *Eastman Kodak*, particularly in light of recent dealings with Pandora.

If, on the other hand, the DOJ does *not* oppose a modification to a consent decree allowing partial withdrawals, a petition to modify faces a much lower burden of proof, "so long as the resulting array of rights and obligations is within the zone of settlements consonant with the public interest today."[6] The Internet Association believes that even under this lower standard, the consent decrees should not be modified to allow partial withdrawals. Permitting partial withdrawals and the possible removal of "new media" services (which some might see as code for "the Internet") from the traditional PRO-licensing process could promote anticompetitive conduct and greater discriminatory practices by legacy music incumbents against new and innovative services.

Although the Internet Association opposes modifying the consent decrees to allow for partial withdrawals, there is one significant pro-competitive modification we wish to highlight for the subcommittee. This improvement is increased transparency around music licensing negotiations. It is no secret that the Internet has since its inception served to lower search and transaction costs for consumers across many markets, saving consumers time and money on a daily basis. We support efforts to bring similar efficiencies to the music licensing process. The Internet Association therefore calls for a public, searchable database containing a complete and comprehensive list of works in both the PROs' and publishers' repertoires. The technology exists to do this today, and we encourage the DOJ to mandate this improvement so that the information asymmetries in this market can be corrected and parties, including our member companies, can negotiate on a level playing field.

We look forward to hearing the discussion at the subcommittee's hearing today, and to working with you and your staff on any issues of concern for Internet companies.

Respectfully submitted,

Abigail Slater
VP Legal and Regulatory Policy
The Internet Association

[4] "*United States v. Eastman Kodak Co.*, 63 F.3d 95, 101 (2d Cir. 1995).
[5] *Id.* at 102.
[6] *United States v. Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990).

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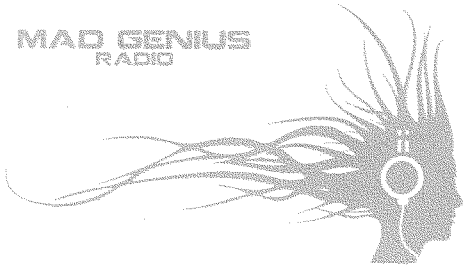

Testimony of Mad Genius Radio for the Record

Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights

"How Much for a Song?: The Antitrust Decrees that Govern the Market for Music"

March 10, 2015

Mad Genius Radio (MGR) seeks to connect fans to the music that they love while also ensuring that the artists behind the music get fair and equitable compensation for their works. This concept of an "artist-first" streaming service, which seeks to pay artists fairly while giving fans more customization, is unique among the current pool of streaming radio services. To date, MGR has attracted over 10,000 listeners who spend an average of 10 hours a week listening to the service – a rate three times higher than most any other streaming service. While MGR is still in its introductory phase, the issue of artist compensation has a profound effect on our business largely because of the attention it is receiving in the media.

Being a new, and small, fish in the burgeoning streaming music pond gives Mad Genius Radio a unique perspective on the issues, challenges, and opportunities that songwriters, musicians, and copyright holders have – as well as the issues, challenges and opportunities that exist for streaming music services now and in the future as the medium continues to expand.

Mad Genius Radio wishes to thank Chairman Lee, Ranking Member Klobuchar, and the entire Senate Judiciary Committee Subcommittee on Antitrust, Competition

Policy and Consumer Rights for holding the recent hearing, "How Much for a Song? The Antitrust Decrees that Govern the Market for Music." There are a lot of differing opinions on how much should be paid for a song, whether or not the antitrust consent decrees that govern the dominant Performance Rights Organizations (PROs) should be amended, and if the streaming music business model is even sustainable, for the services or for the artists who create the music.

Mad Genius Radio appreciates the opportunity to provide its unique perspective on these critical issues to the hearing's official record.

Before the explosion of online music sites and streaming services, the use of copywritten music was pretty straightforward. A song would essentially be protected by two separate copyrights: one for the musical composition comprised of the lyrics, music, melody and structure, and one for the sound recording itself. To obtain a public performance license to play a song, a licensee would have to work through one of the two major PROs – ASCAP or BMI – to ensure that songwriters received adequate compensation for their work when it was played publically. It made sense, in the analog era, that radio stations wouldn't pay performers or copyright holders for the rights to air their music, as radio plays were considered "promotional" and an enticement to the music-listening public to go out and purchase either the song single or the full album or concert tickets, or all of the above.

Radio plays led directly to album sales, and album sales led to sold-out concerts. Sold-out concerts would create buzz for the artist's next work, which would be highly-played on the radio, and on and on it went in a fairly smooth flow – with clear-cut licenses, licensees, and fair compensation and benefits for all parties involved. In the digital era, however, with album sales at all-time lows, listeners turning off terrestrial radio for online services and direct social interaction between artists and their fans via social media sites, this is no longer the case.

In 2003, over 95% of all revenues for the music industry were generated by the sale of physical sound recordings – CDs, cassettes, vinyl records and other media. For the next ten years, with the rapid development of digital music and streaming

music services, the revenues generated by these recordings continued a precipitous decline, and accounted for just 35% of music industry revenue in 2013. Physical recordings were being replaced by digital downloads and streaming services, which in 2013 made up 21% of the music industry's revenue.

To put another way, streaming services went from being non-existent to making up close to a quarter of a $7 billion industry's revenue in just one decade. Despite this rapid growth, much of the legal framework that governs this portion of the music landscape remains mired in World War II-era consent decrees and an analog-era mindset – both of which need to be overhauled in order for music - and the musicians and songwriters that create it – to once again flourish. For streaming royalties to even come close to replacing lost revenue from CD sales and downloads, new approaches need to be considered for how to compensate artists for their work. For too long, artists have had to settle for a "better than nothing" mindset with respect to how their music is licensed, by whom, and the terms of the licensing agreements. This "better than nothing" mindset has left artists struggling to make a living even though more people are listening to music now – and in more unique and customized ways - than ever before.

Mad Genius Radio was founded by a group of passionate music lovers who saw that artists were getting – quite literally – short-changed by the ad-based streaming services that still dominate the streaming market. The solution MGR came up with was a dynamic, highly customized listening experience that also treated artists and songwriters with the respect that they deserve as the creators of the music we all love. The early thinking went: compensate artists adequately in recognition of their work on digital platforms and ask consumers to pay a nominal monthly fee – about the price of latte – for access to an enormous catalog of music customized to their specific tastes. That way, the royalty payment owed by Mad Genius Radio would be substantially larger - and more profitable for artists - than it would be if the service were offered for free, paid for by advertising. That is the vision that drives MGR, and a vision that sees a bright musical future for creators and fans alike.

In order for that bright future to come to fruition, however, there must be structural changes to how music is licensed for digital media. Despite the recent

influx of litigation and zero-sum arguments being made by both the PROs and the large broadcasters and streaming services, changes can be made that will be beneficial to all parties – and ensure a thriving and dynamic musical community where fans can listen to and discover music, songwriters and artists can make a living while being paid more than free services offer, and streaming services will be able to continue to grow their audiences, acquire new customers and maintain sustainable business models.

There are some commonsense reforms that could be made to the existing consent decrees that would help make the digital music licensing process more equitable and less cumbersome. One such proposal has been to move licensing disputes out of lengthy and expensive litigation in rate court and replace the process with arbitration overseen by an impartial third-party. Such a reform would ensure a more efficient and cost-effective system of resolution when issues arise regarding the rates, recordings, and licensing of certain works with respect to digital use.

In recent years, there has been a massive influx in rate court cases brought forth by digital services – many of whom seek to keep royalty rates low so that they can continue to give music away through free, ad-based platforms. Moving to an arbitration model would help to alleviate this burden and ensure that the artists who created the music that sustains these businesses are paid fairly.

Music has always existed as an interaction between songwriters, performers and the fans that was enforced by PROs and strictly regulated by the Federal Government. In the analog era, these relationships were fairly well understood with respect to the distribution and dissemination of musical works. The digital era has made all involved – including this Subcommittee, Congress more generally, and the US Copyright Office – reevaluate these long-held assumptions and relationships. While this subcommittee looks at the very real and serious concern of existing consent decrees – weighing the need for reform over the wants of big broadcasters; the necessity of songwriters to be able to make a living with the innovation that a lightly regulated free market alone can provide – the largest issue at hand has remained ignored. **And that is that the "free music" mantra that still**

proliferates today is detrimental to artists, fans, and to the creation of new music.

A sad but true fact that the first exposure and experience many people had to online music was illegal, free file-sharing services in the late 1990s. Because of that, many people who have never stepped foot in a CD or record store feel that music is an entitlement and not an art form. That belief needs to change, and that will start by transitioning away from the ad-based, free-play models that have thus far taken hold in the streaming music world. By asking consumers to play a responsible role within this evolving musical ecosystem – like they were always asked to do in the analog era - artists and streaming services will be able to work together to provide a more robust and customized experience to the benefit of the artists, services and fans alike. If asked, many music lovers admit that they are willing to pay for digital music subscriptions – and when shown the value-added features subscription-based services offer over ad-based ones – will happily switch.

The algorithms that drive most of today's other radio services fail to serve the individual listener because they substitute groupthink for what should be unique taste and choice. The algorithm-based services also fail to treat the musicians and songwriters as the artists that they are. Addressing the current issues surrounding the outdated consent decrees, while also encouraging users to move to subscription-based streaming services – which pay artists 79% more in royalties on a per-song basis than free ad-based services – will ensure that the American music industry is once again the proud, creative, diverse community it once was, while opening new doors of musical discovery for listeners and allowing artists to once again make a decent living from expressing their unique voice through music.

Thank you, again, Chairman Lee, Ranking Member Klobuchar and all the members of this Subcommittee for letting us submit testimony and share our perspective on these extremely important issues.

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March 4, 2015

The Honorable Michael S. Lee, Chairman
The Honorable Amy Klobuchar, Ranking Minority Member
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Lee and Ranking Member Klobuchar:

As a participant in the music licensing industry for over two decades, Music Choice respectfully offers its unique perspective on the various issues raised in the DOJ's review of the ASCAP and BMI consent decrees. As a preliminary matter, Music Choice notes that the music industry is a complex "ecosystem," which requires a comprehensive, holistic approach when considering changes. Any effective solution needs to enable **all** industry participants, including (i) the copyright owners (e.g., music publishers), (ii) the songwriters from whom the copyright owners obtain their rights, and (iii) licensees that create new revenue streams for copyright owners and new markets for consumers to enjoy music, to thrive and earn a fair income. A solution that works solely to the benefit of the copyright owners while excluding any fair return to the licensees solves nothing.

In evaluating the rhetoric and proposals advanced by the PROs and music publishers, it is important to be mindful of the distinction between a "fair market" and a "free market." Music Choice understands that the DOJ's review of the PRO consent decrees has been driven largely by copyright owners' repeated claims that the existing consent decree regimes have deprived copyright owners of either "fair market" or "free market" royalty rates. The copyright owners sometimes use these terms interchangeably, yet these terms are not synonymous. Remembering the difference is crucial to the extent the DOJ (or Congress) considers any modifications of the existing consent decree regime that would impact the music licensing ecosystem.

At the most basic level, "free market rates" are the rates that a seller would obtain in an idealized market, free from any government intervention in the form of taxes, subsidies, or regulation. "Fair market rates" are typically defined as rates that would be agreed to in an arms-length transaction in a workably competitive market between a willing buyer and a willing seller, each having reasonable knowledge of any relevant information and neither being under any compulsion to act. In a truly competitive market, free market rates may be the same as, or close to, fair market rates. The market for blanket music copyright performance licenses, however, is unique and inherently devoid of competition. This is, in part, due to the bundling of millions of

individual song copyrights in a blanket license. Moreover, no PRO's blanket license is a substitute for any other PRO's blanket license, and licenses covering the entire catalog from each of (at least) the major music publishers are necessary for a music service to avoid massive infringement liability. Consequently, in an idealized "free market," copyright owners can, and will, use their resulting market power to extract rates much higher than the true fair market value of those licenses. Evidence of the abuse of market power that immediately resulted when the major publishers thought they were allowed to operate without consent decree oversight is provided in the recent Pandora/ASCAP rate court case. *See In re Pandora Media, Inc.*, No. 12-8035, 2014 WL 1088101, at *35 (S.D.N.Y. Mar. 18, 2014). Of course, even trying to conceive of the market for digital music performance rights as a free market is problematic, given that (unlike typical markets for goods and services) the performance right itself is purely the product of government intervention in the form of the Copyright Act. As the DOJ (or Congress) considers potential modifications to the consent decrees that would impact royalty rates, it is imperative that the focus be on fair, as opposed to free.

To this end, it is imperative that the protections to both the songwriters and music licensees embodied in the consent decrees be preserved. The music performance licensing market is unique, and is characterized by an inherent market failure stemming from music publishers' aggregation of many thousands of individual copyrights from the individual songwriters, and by further aggregating many of those catalogs within the massive repertories of ASCAP and BMI. Theoretically, if the copyrights remained with their original owners, the songwriters, there could be competition among songwriters for performance licenses; licensees would be able to license only the songs they wanted and could negotiate price based upon the relative value of each song. Of course, this theoretical market would not work in the real world because, among other problems, the transaction costs of individually licensing the many thousands of songs that most licensees use on an annual basis would be impossible to bear for licensors or licensees. Indeed, that problem is one reason why the theoretical market does not exist – because of the impracticality of each songwriter engaging in his or her own licensing, songwriters instead sell their copyrights to music publishers. Even at this level of aggregation, the collective licensing of such a large number of songs on a blanket basis and for a single, undifferentiated price, would obviously constitute price fixing and eliminate any potential competition. As noted above, one music publisher's catalog is not a substitute for any other music publisher's catalog; those catalogs are complementary.

The songwriters' copyrights are further aggregated when those copyrights are placed, along with many other publishers' copyrights, into the repertories of the PROs. Again, these repertories are not substitutes for one another, but rather are complements. These inherent facts give the PROs, and their constituent music publishers, overwhelming market power. The consent decrees, and particularly the rate courts established by those decrees, were put in place to help lessen the anti-competitive nature of collective performance licensing in recognition of the many positive benefits to songwriters, music publishers, and licensees that flow from collective licensing. Neither the positive benefits nor the anti-competitive harms of collective licenses have diminished one bit during the many decades that the music industry has operated under the consent decrees. Eliminating, or even weakening, the consent decrees now would destabilize the entire industry. As demonstrated by the conduct of the major music publishers detailed in the *Pandora* decision, noted above, allowing selective, partial withdrawals from the PROs poses just

as much threat to the industry as eliminating the consent decrees entirely. Such partial withdrawals have only one purpose: to allow publishers to discriminate against the most vulnerable categories of licensees and exercise unfettered market power over those companies, while keeping all of the benefits of collective licensing and administration by the PROs.

In such a complex ecosystem, it is easy to fall victim to the "sound bite" of the day and the "spin" from whichever interested party has captured the public's attention and lose sight of the larger picture. Recently, the focus has been on the struggles of songwriters and their alleged loss of income, which they blame on performance rates set below "fair market value" in the rate courts. Music Choice empathizes with the songwriters and has helped support and promote many thousands of songwriters over its 25 years of programming music. However, songwriters' and music publishers' arguments in favor of eliminating or drastically weakening the consent decrees and rate courts governing public performance licenses are based upon false premises. With respect to songwriters' alleged loss of income, Music Choice is unaware of any evidence supporting a substantial loss of songwriters' income on an industry-wide basis, especially with respect to performance license income. Indeed, ASCAP, BMI, and SESAC each have reported increased membership, revenues, and distributions over the past few consecutive years (with the exception of one temporary, small dip for BMI in 2012 due solely to settlement payments reversing overcharges to broadcasters in prior years). Moreover, overall music publishing industry revenues have increased from $3.9 billion in 2011 to approximately $4.2 billion in 2013, and by 2017 those revenues are projected to increase to approximately $4.4 billion, according to independent market research. Notably, typical music publishing agreements with songwriters provide for songwriters to get an equal, 50% share of revenue from music publishers (and an even higher percentage in co-publishing and administration deals, common for successful songwriters). If music publishing revenues are stable, or even increasing, yet songwriters claim that their revenues are sharply decreasing, either the songwriters are wrong or the music publishers and PROs are failing to pass along the songwriters' proper shares. Either way, the answer is not to re-write the copyright or antitrust law to raise performance rates paid by licensees.

Music publishers' and songwriters' second premise, that the consent decree rate courts have imposed rates below fair market value, is also false. The legal standard employed for decades by the rate courts is, in fact, fair market value. ASCAP and BMI have had several different opportunities, in several different rate cases, to prove (if they could) that the higher rates they desire were consistent with fair market value. Time and time again, before two different, neutral, sophisticated federal district court judges, the PROs failed their burden of proof. Each of these decisions was appealed and affirmed by different panels of federal appellate judges. There can be no question that the current rates have been fairly determined to be fair market rates. The real grievance of the music publishers and songwriters is that they are not happy with the results of these cases. Of course, a seller would always prefer to be paid more than fair market value for their goods or services. But the rate courts, with all the procedural and substantive due process afforded therein, provide a far superior venue to determine fair market value (which is a fact-intensive issue often litigated in federal commercial cases) than a private arbitrator. Federal judges are also better equipped than private arbitrators to decide the complex issues of federal copyright and antitrust law uniquely (and always) presented in rate cases.

Music Choice's issue is not with the songwriters, but rather the way in which their story has been characterized by their trade associations and the major music publishers, along with the tendency to attribute all of their alleged troubles to one factor (performance royalties), rather than looking at all the factors. Indeed, to the extent that music publishers and songwriters have not done as well as they would have liked in recent years, the causes of any such underperformance have nothing to do with performance royalties (which, as noted above, have actually increased), but instead have been driven by a large number of unrelated factors, such as the recent extended recession (which affected everyone, including Music Choice and other licensees) as well as changing music consumer dynamics. With less disposable income, it is natural that consumers would buy less music. Record sale revenues have been further decreased by the advent of digital single downloads, which have freed consumers from having to purchase a bundle of recordings (i.e., an album) that they do not want, and on-demand streaming services, which have in some cases supplanted the need to buy digital downloads. However, there is no data suggesting that Music Choice, or any other non-interactive music service, contributed to such sales and revenue declines – in fact, services like Music Choice promote the sale of songwriters' (and record companies') music and have been a source of additional, incremental revenue. Performance-based music licensees should not be forced to subsidize music publishers for unrelated losses in their other revenue streams.

Sincerely,

Paula T. Calhoun
Senior Vice President & General Counsel

Written Statement of Patrick T. Collins
President and CEO of SESAC Performing Rights
"How Much For A Song?: The Antitrust Decrees That Govern The Market For Music" Hearing
United States Senate
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
March 10, 2015

My name is Pat Collins. I am the President and CEO of SESAC Performing Rights ("SESAC"). On behalf of SESAC, I appreciate the opportunity to submit written testimony to the Subcommittee in connection with March 10, 2015 hearing on "How Much For A Song?: The Antitrust Decrees That Govern The Market For Music."

SESAC is a performing rights organization (a "PRO") that services both the creators and users of non-dramatic musical works (that is, musical compositions—songs—as distinct from sound recordings of songs) by issuing public performance licenses, collecting fees for those licenses, and distributing resulting royalties to its affiliated songwriters, composers, and music publishers. It is the second oldest of the three domestic PROs recognized under the Copyright Act and the only for-profit PRO. SESAC also is the fasting growing PRO, and serves as a constant source of innovation in such areas as state-of-the-art performance monitoring for its affiliates and frequency of royalty payments. It licenses public performance rights in more than 450,000 songs on behalf of its many thousands of affiliated songwriters, composers, and music publishers.

Virtually all performance right licenses granted in this country are issued by one of the three United States PROs – SESAC, the American Society of Composers, Authors and Publishers ("ASCAP"), and Broadcast Music, Inc. ("BMI"). Together, the PROs represent the performing rights of literally millions of musical compositions created and owned by thousands

of songwriters and music publishers. The PROs also service tens of thousands of music users (such as broadcast and cable television networks, online music services, radio stations, and bars and restaurants and many others) by providing licenses which authorize those users to perform the musical compositions to enhance their programming, establishments, or websites.

ASCAP and BMI are both subject to federal consent decrees. Under those decrees, a licensee has an automatic right to use music upon requesting a license. If a given music user cannot reach agreement on a license rate through negotiations with either ASCAP or BMI, either the music user or the PRO can initiate proceedings for the license rate to be set by a judge in the United States District Court for the Southern District of New York (the "Southern District") designated for that particular PRO (these are the frequently referenced "rate courts").[1]

SESAC believes that the consent decrees governing ASCAP and BMI artificially suppress the true value of copyrights in musical compositions. Historically, the licensing fee rates determined by rate courts rarely approach the rates that would result from an arms-length transaction between parties in a free market.

Those rates do not reflect the real world value of the public performance right in musical compositions for a variety of reasons. The rate courts are not bound by a standard that would yield rates approximating those that would otherwise be agreed upon between a willing buyer and a willing seller in an unregulated environment (for example, as required under Section 114 of the Copyright Act, 17 U.S.C.114(f)(2)(B)). Instead, the burden is on ASCAP or BMI to prove that the proposed fees are reasonable.[2] The consent decrees, however, offer no definition or guidelines as to what constitutes "reasonable." As a result, the rate courts have often refused to

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[1] See *United States v. American Soc'y of Composers, Authors & Publishers*, 2001-2 Trade Cas. (CCH) 73,474 (S.D.N.Y. June 11, 2001); *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. (CCH) 71,378 (S.D.N.Y. Nov, 18, 1994).

[2] Id.

consider the fees agreed upon by ASCAP or BMI and other music users outside of the rate court process as benchmarks for determining the reasonableness of a proposed fee.[3] Thus, the rates set by the rate courts may bear no relationship to fees that are actually derived in a free market transactions.

As a result, the consent decrees have the effect of unduly suppressing the value of public performance rights in musical compositions and holding songwriters and music publisher royalties' hostage to systematically protracted rate negotiations and expensive, time-consuming rate court proceedings. SESAC believes that the creators and owners of musical compositions would be better served by the free market determination of fees for the licensing of the public performance right in their works instead of the rate court process as it currently exists.

The broken rate-court process must be seen in the broader context of the current music licensing market. Digital music services that pay license fees for the right to stream the underlying **musical composition** are also required, pursuant to Section 114, to pay separate license fees for the right to stream the **sound recording** in which the composition is embodied, each being a separate copyrighted work.[4] Unlike rates for the public performance of musical compositions established by the rate courts, royalty rates for the non-interactive performances of sound recordings are set by the Copyright Royalty Board (the "CRB") within the Library of Congress.[5]

These separate rate-setting processes – the CRB for sound recordings and the rate courts for musical compositions – are grossly out of step with each other. This has created a dramatic rate disparity between the compensation set for the public performance of a musical work versus the public performance of a sound recording.

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[3] See *In re Pandora Media, Inc.*, 2014 U.S. Dist. LEXIS 36914 (S.D.N.Y. Mar. 14, 2014).
[4] 17 U.S.C. 114(i).
[5] 37 CFR 301.1, et seq.

Musical royalties paid by the streaming service Pandora are a case in point. In its Fiscal Year 2013 Annual Report, Pandora acknowledged that it paid fully 55.9% of its revenue in royalties paid for the right to publicly perform sound recordings (based on a "willing buyer/willing seller" standard set by the CRB). In stark contrast, Pandora acknowledged that it paid only 4.3% of its revenue in royalties for the right to publicly perform the underlying musical works. In other words, Pandora pays 93% of the total royalties it allocates for music use to record labels and artists, while paying only 7% of those total royalties to songwriters, composers and publishers.

This imbalance is due in part to the current language of Section 114(i), under which the ASCAP and BMI rate courts are expressly prohibited from considering the royalty rates for the public performance of sound recordings when setting royalty rates for the public performance of those underlying compositions. That language was originally intended as a means to ensure that the songwriter's and publisher's royalties would not be cannibalized by payments made for the newly-established public performance right in sound recordings in 1995. In fact, the application of that language by the courts has had the opposite effect – the rate court judges' inability to consider rates set by the CRB with respect to sound recordings has led to this wide inconsistency in public performance rates, despite the critical contribution of each creative source to the value of the performed work. The rates paid to songwriters are a small fraction of the rates paid to those associated with the sound recordings that embody the songwriters' works.

SESAC feels strongly that this disparity be addressed expeditiously, and supports the approach taken in the recently introduced Songwriter Equity Act of 2015, namely that Section 114(i) be amended to end the prohibition against the rate courts consideration of rates set by the CRB for the performance of sound recordings in considering rates for the performance of the

underlying musical compositions. This change would allow the rate courts to consider all relevant evidence and draw their own conclusions, encouraged only to set a "willing buyer/willing seller" rate that bears a fair relationship" to the sound recording performance rate. The specifics would be left to the rate courts in their discretion. The proposed language merely establishes a process that permits consideration of the CRB rates, which should lead to a more reasonable valuation for music compositions.

By modifying Section 114(i) to permit the rate courts to include in their consideration these "fair market value" royalty rates paid for sound recording performances, Congress would afford the rate courts the ability to address the rates for musical works based on a more complete examination of marketplace factors. SESAC also is hopeful that the pending review of the ASCAP and BMI consent decrees will lead to a music licensing environment that ensures that songwriters and music publishers will receive marketplace rates for the use of their musical compositions.

SESAC agrees with the comments made by panelists and committee members regarding the importance of transparency. For the record, SESAC has, for the better part of two decades, maintained on its website a Repertory Search function open to the public to verify whether specific compositions were represented by SESAC. Several months ago SESAC supplemented the Repertory Search function with the SESAC Song List. The Song List currently contains the titles of more than 450,000 musical works in the SESAC repertory and the names of SESAC affiliates associated with each musical work. The list is searchable by song title or affiliate name and is downloadable.

Another key topic of discussion at the hearing surrounded rate adjudication mechanisms - rate court versus arbitration. SESAC has agreed to periodic arbitration proceedings with the local television industry and is in favor of arbitration as a viable rate dispute mechanism.

In conclusion, SESAC would like to thank the Chairman and distinguished members of the Subcommittee for the opportunity to provide input in this legislative process of crucial importance to music creators, music users, and, most importantly, the public. It looks forward to working with the Members of the Subcommittee to ensure that all songwriters and publishers receive fair and equitable compensation.

Dear Senator Lee

I understand that the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights plans to hold a hearing next week on the consent decrees governing ASCAP and BMI. On behalf of Utah's television and radio broadcasters, I write to express our strong support for maintaining the ASCAP and BMI consent decrees, which are necessary for the fair and efficient licensing of musical works by broadcasters.

To serve our viewing and listening audiences – your constituents – broadcasters perform musical works not only in our primary programming, but also in our coverage of live events, syndicated programming, and advertisements. A local broadcast station, having limited to no editorial control over what music is performed in many of these instances, must obtain licenses from both ASCAP and BMI or face the threat of significant statutory damages for copyright infringement.

For decades, the consent decrees have enabled your local broadcast stations to license the musical works in the ASCAP and BMI repertories at reasonable rates and conditions despite the substantial market power of these entities. The result has been the proliferation of music across our platforms and fair compensation for songwriters and publishers. Accordingly, we urge you to recognize their continued necessity and to reject calls to weaken their competitive protections. This balanced system benefits not only broadcasters and copyright holders, but also consumers, and should not be modified without significant consideration of the marketplace.

Thank you very much for your consideration.

Sincerely,

Michele Zabriskie
President/CEO
Utah Broadcasters Association

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