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Sent: Tuesday, August 5, 2014 4:56 PM
To: ATR-LT3-ASCAP-BMI-Decree-Review <ASCAP-BMI-Decree-Review@ATR.USDOJ.GOV>
Subject: Songwriters

I am an American songwriter, a member of BMI and a member of the production duo "The Roses". I'm submitting this comment on my own behalf in opposition to the ASCAP and BMI consent decrees. I believe these government actions essentially are a compulsory license outside of the Congress and take away songwriters' rights to due process of law.

Just to be clear, I am not saying that Justice Department consent decrees in general are oppressive. I am saying that the way these particular consent decrees operate is oppressive to songwriters. That operation is oppressive because of the extremely long period of time they have been in effect, because they take away our valuable property rights to negotiate our own licenses, and they essentially force songwriters into being judged guilty before we've even expressed ourselves.

The DOJ has essentially created a single exchange within the federal courts that requires songwriters to join a regulated PRO in order to participate in the market.

So in practice as soon as an individual decides to take the tiniest steps towards being a professional songwriter they immediately fall under one of the two consent decrees and the jurisdiction of one judge in one court. Let's dispense with the fiction that the consent decrees do not apply to songwriters and hence dispense with the fiction that it does not limit the rights of individuals—living, dead and yet to be born.

The Single Exchange Takes My Right to Negotiate

The government limits my ability to participate in a free market; it takes my property rights without due process or just compensation; it even limits my kind of speech (public performance of my songs) as I must participate in this process or effectively forgo compensation when I perform my songs in the public square. I know that there's always the theoretical possibility of a direct license outside of the consent decrees, but as a practical matter, I can tell you that is very rare because it is rarely offered.

As an individual songwriter the consent decrees effectively compel me to submit to this process. At least the compulsory license in the Copyright Act is a legislative action by elected representatives and if I don't like that rule I can work to get someone unelected. Under the consent decrees, generations of songwriters are powerless to stop the government from taking our rights without that legitimacy—for decades. I do not understand how the Department of Justice has the authority to force us to submit to this process.

As soon as an ASCAP writer creates their first song, the writer is forced into a court proceeding that was opened in 1941, seventy three years ago. The BMI consent decree is from 1964, fifty years ago.

Even if I accept the premise that I am guilty until I can prove to the government that I am not, and that my licensing decisions require review by a federal judge at great social expense, what possible justification can there be for my decisions today being subject to a case opened so long ago? This seems like some arbitrary federal assignment of "original sin" to a class of Americans. Does the federal government have a crystal ball? Can they see into the future? Can they read my thoughts? How do they know that every single member of this

class is doing something wrong? How is that possibly Constitutional?

I can't emphasize enough that from my point of view as a songwriter, the consent decrees act as a kind of compulsory license by government edict. The government compels songwriters to allow music services to use our songs whether we like it or not. And unlike the Copyright Act, I can't complain directly to rate court except at great expense. There is nobody to get unelected if we don't like the rate court's decision except very indirectly.

As Ari Emmanuel once said, "Fair is where we end up." He would be wrong in the case of these consent decrees. In practice the consent decrees effectively substitute the opinion of a federal judge for that of a fair negotiation to set the rates at which those services compensate my fellow songwriters and me. After 73 years this has effectively become an unlegislated compulsory license. The consent decrees walk and talk like a compulsory license and after decades of practice they effectively are a compulsory license. At least with a compulsory mechanical license we know where we will end up on the rate.

Essentially the consent decrees take valuable rights to negotiate the exploitation of property from over 500,000 Americans simply because they write songs. And there is no end in sight. (Not to mention the foreign songwriters whose works get swept up and who can't afford to complain to the WTO.)

If we must live under consent decrees, why must all the cases be heard before the same judge in New York City? Not only do the consent decrees unfairly impose the government on songwriters, they also force music services to make their case before a single judge in New York City—twice, once for ASCAP and again for BMI. This is a very expensive process that only the most well-heeled services can afford.

Why shouldn't a service be able to bring their rate case in San Francisco, Los Angeles, Nashville, Austin, Athens—or any federal court? Respectfully, are two federal judges in New York the only federal judges in the entire country capable of trying PRO cases? Surely that can't be true.

I believe that the decrees have become a crutch on which those well-funded music services that can afford the litigation have come to depend. Instead of actually innovating and improving their revenues they use the rate courts as a perceived competitive advantage at great expense to their own shareholders, songwriters and, of course, the taxpayer.

This is not to say that the government should not pursue claims against songwriters if we actually do violate the antitrust laws. I'm not asking for a free pass. We should get the same treatment as Google, Microsoft or anyone else. It's also not to say that there wasn't some justification for the consent decrees long ago.

But from this songwriter's perspective, that time has passed. As James Madison wrote in Federalist 44, "[government] interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." Respectfully, I suggest that Madison could have been describing the Kafka-esque rate courts.