

**From:** Mark D. Bernstein <mark [REDACTED]>  
**Sent:** Tuesday, August 5, 2014 4:31 PM  
**To:** ATR-LT3-ASCAP-BMI-Decree-Review <ASCAP-BMI-Decree-Review@ATR.USDOJ.GOV>  
**Subject:** Comment on the Consent Decree Review

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To the Department of Justice,

First of all, thank you for seeking comment on the efficacy of the Antitrust Consent Decrees applicable to Public Performance Rights Societies BMI & ASCAP. I have practiced as an intellectual property rights attorney specializing in music licensing for over 30 years. I am not writing these comments on behalf of any client, but instead on behalf of the entire profession of honest songwriters and publishers, who find the changes in the music industry wrought by technology to be disconcerting at best and oppressive at worst. I have struggled over the last 10 years to simply and accurately describe what has happened in our music industry because a short apt description is essential to an intelligent discussion about how to address the current situation. I believe that description is as follows:

***Before the rise of internet music listening delivery systems, if I wanted to listen to whatever music I wanted to hear whenever I wanted to, I had to buy the music and now I don't.***

As a result of this dramatic change, the sales of recorded music have plummeted because why would you buy something when you didn't need to in order to consume it and the way music is consumed is by listening to it. This change has fundamentally changed the way in which the professional creator of music looks at the Public Performance of Music for Profit, the licensing of which is at the heart of the Consent Decrees. Of specific concern is the nature of the business of the prospective licensee of a public performance license for the impact of a public performance license granted to a nightclub or arena is fundamentally different than the that of a programmable music listening service such as Pandora, Spotify and others.

Amongst the issues on which you have requested comment is the following, which is germane to my introductory comments:

***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?***

I think that because technology has caused certain public performance use licenses to have an dramatically different impact on the overall revenue derived from a musical composition, the time has come to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others. This will allow the buyers and sellers of the public performance of music (the marketplace) to decide the market value of the public performance of music, dependent on the impact that the public performance sought will have on the overall market for the item at issue, namely music. If I believe that a particular type of public performance is going to increase the market for my music and thus the revenue derived by me for my music, I am more likely to grant that prospective licensee a favorable rate. The only way I can effectuate that kind of market based public performance licensing is by allowing the rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others.

You have also asked:

***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?***

The only reasonable way in which the limited licensing rights should be allowed is by making the rights holders opt out of an entire scope of licenses, rather than on the basis of a particular licensee. For example, a rights holder would have to limit ASCAP and BMI from making any licenses on their behalf to ANY Internet music listening service rather than

limit ASCAP or BMI from making any licenses with SPOTIFY; or **ANY** live music facility as opposed to no licenses for Madison Square Garden. This limitation would let all of the particular type of public performance customers know that certain publishers/songwriters had to be dealt with directly with respect to that particular proposed public performance license.

- ***What, if any, modifications to the Consent Decrees would enhance competition and efficiency?***

The principal modification needed is allowing rights holders to permit ASCAP or BMI to license their performance rights to some types of music users but not others. In considering this, it is important to be mindful of the fact that songwriters and publishers need ASCAP & BMI more for their ability to police the marketplace, bring uniformity to licensing provisions and distribute the royalties generated by the marketplace than they do for setting rates. Indeed, the linkage of these essential services with rate setting now undermines competition by prohibiting publishers from bringing innovative pricing structures to the changing marketplace for public performance licenses.

Right now the system of having a rate czar decide rates results in a one size fits all pricing structure that inhibits flexibility and competition is always about flexibility for buyer and seller, because at its heart, a fair market price is the price a willing buyer pays a willing seller with neither under any compulsion to do the deal. The rate court compels the seller to sell at the set rate and the buyer to buy at that rate. The rate is not set by the market and neither the buyers nor the seller are allowed to opt out and adjust to the changing landscape of the marketplace for particular types of music users by pursuing their own deal.

As long as the consent decree requires the songwriters and publishers to be all in or all out with respect to all music users, the market will remain unfair, inefficient, uncompetitive and hostile to innovation.

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