From: Karl <khzmus[redacted]
Sent: Monday, August 4, 2014 11:37 AM
To: ATR-LT3-ASCAP-BMI-Decree-Review <ASCAP-BMI-Decree-Review@ATR.USDOJ.GOV>
Subject: Comments on the ASCAP/BMI Consent Decrees

Hello. My name is Karl Giesing. I perform and record experimental music under the moniker Karlheinz.

At the outset, I would like to state that I have never been a member of either ASCAP or BMI. I have performed live across the country, and have several releases out on very small independent labels; however, I have never made a living primarily through my music, so I never viewed ASCAP or BMI as being useful to me.

But, like many independent artists (professional and amateur), I believe I have a stake in the consent decrees, because the conflict between PRO's and Internet radio (like Pandora) affects all musicians. Unlike traditional radio, Internet radio is more open to artists who aren't signed to a major publisher (or any publisher at all), and provide opportunities that traditional radio cannot. It is therefore in my best interest both to see Internet radio companies succeed, but also to make sure that they do not unduly exploit artists such as myself. Of course, I am also a music fan and member of the public.

Generally speaking, artists like myself are more closely aligned with the interests of Pandora than we are with the major publishers. For most of recorded music's history, the publishers have acted as gatekeepers to the listening public. For example, it is nearly impossible to get played on terrestrial radio without a major publishing deal. The interests of the major publishers are not the interests of their songwriters, nor even an interest in the market value of music. Their goal, purely and simply, is to keep their gatekeeper status intact. The recent rate court battles with Internet radio stations are an attempt to do just that: to gain a controlling interest in the music on the Internet radio stations, and push out all other artists (whether they are the less-popular songwriters with ASCAP, or independent artists such as myself).

This is the actual motivation behind the "partial withdrawals," and the major publishers' cries for a "fair market price" for music. They hold a monopoly on the music they publish, so they can claim a "fair market price" is whatever they decide it is, and force Internet stations like Pandora to pay it. In the meantime, the "fair market price" for less popular songs - the songs not in their repertoire, like mine - would decrease to zero.

With that in mind, I would like to answer the specific questions you put forth in your call for public comments.

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?

The Consent Decrees are vital to ensure proper competition. As the DOJ is aware, ASCAP and BMI collectively control roughly 90% of the American music market. They have a monopoly on the music that is in their repertoire.

Without the Consent Decrees, the PRO's would be able to disproportionately set royalty rates that would favor some licensees but not others. In fact, this is precisely what the latest rate court decision was about. ASCAP and BMI were attempting to set rates for Pandora (and all Internet radio) that were more than double the rates for traditional radio. They did this by colluding with the major publishers through "partial withdrawals,"

where the major publishers (with ASCAP's consent) would force Pandora into paying vastly higher rates, specifically so that ASCAP could go to the rate court and argue that these rates were the "fair market price" for music. The major publishers did this through a variety of dirty tricks which gave Pandora no bargaining power whatsoever (from unreasonable deadlines, to not disclosing which songs were part of the publishers' repertoire).

This is not hyperbole; the details are in the rate court's decision, which I advise you to read (assuming you haven't already).

In the end, the rate court - justifiably - nullified the partial withdrawals and the disproportionately high rates that the publishers were able to unfairly coerce. I believe it is only because of this that ASCAP and BMI even raised the issue of Consent Decrees with the DOJ. They lost fair and square, and now they're trying to change the rules.

2. What, if any, modifications to the Consent Decrees would enhance competition and efficiency?

After the rate court decision, Pandora ended up paying HIGHER rates, for the same services, than their terrestrial radio counterparts. (Pandora pays 1.85%; the RMLC licensees - like iHeartRadio - pay 1.70%.) This is despite the fact that terrestrial radio pays absolutely nothing in performing artists' royalties (as opposed to songwriter royalties), while Pandora pays out roughly 50% of its income in these royalties.

This is the one area where I would change the consent decrees. The consent decrees require the same rates for similarly situated LICENSEES, but not similarly situated SERVICES. Changing the requirement to similarly-situated services would be both fair to songwriters, fair to Internet radio entities like Pandora, and may also result in higher royalty rates from terrestrial radio.

3. Do differences between the two Consent Decrees adversely affect competition?

I am unaware of the differences between the two consent decrees (I am mainly familiar with ASCAP's), so I can't answer this question specifically. I will guess that standardization is likely to be good for both rights holders and licensees.

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?

If the conflict between Pandora and ASCAP has taught us anything, it's that without the consent decrees, negotiating fair licenses with publishers would be impossible.

The behavior of ASCAP and the publishers was anything but transparent; in fact, they deliberately refused to give Pandora vital information for the sole purpose of destroying Pandora's bargaining power. The lack of transparency regarding their repertoire was a prime example: without knowing which songs were in the repertoire, Pandora would have no idea if it were infringing if it did not conclude a deal in the very limited time it was given. Its choice was either to take the deals as offered, or risk hundreds of thousands of dollars (or more) in infringement awards.

Again, this is all spelled out in the rate court decision.

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?

Such "partial withdrawals" should ABSOLUTELY NOT be allowed under any circumstances.

First of all, publishers (and especially the major publishers) are much less transparent with their songwriters than ASCAP is. This was the reason that the majority of ASCAP's songwriters (as opposed to the publishers) were AGAINST the partial withdrawal scheme. For testimony from songwriters, see the rate court decision, starting on Page 43.

Second, "partial withdrawals" would eventually destroy the bargaining power of the PRO's. All publishers that wanted a higher rate - which, in the rate court battles, was all of them - would do a "partial withdrawal" from ASCAP or BMI.

The eventual outcome of this would be that entities like Pandora simply would not deal with ASCAP or BMI at all. The three major publishers themselves hold a monopoly on the vast majority of the music market, and a monopoly on all of the most popular songs. With partial withdrawals, entities like Pandora would only bargain with ASCAP for the songs that are not in the major labels' repertoire - in other words, the songs that would not make Pandora money. Companies have no desire to give money away, so there would be little reason for entities like Pandora to deal with the PRO's at any level.

Instead, if they did deal with songwriters who weren't with a major publisher, they would set royalties on an individual basis. Compared to the major publishers, small publishers or independent songwriters are relatively powerless. Pandora (and others) would be able to set whatever rates they wanted on a "take it or leave it" basis, and the songwriters would have little or no recourse. (This is what YouTube is being accused of doing, and if "partial withdrawals" are allowed, it would be standard practice.)

This obviously affects me greatly, since I am not signed with a major publisher.

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?

I believe the rate court should NOT be changed to mandatory arbitration. This would simply result in the same outcome as the "partial withdrawal" scenario. In addition, arbitration is generally less open to scrutiny than a public decision, and would likely result in the major publishers gaining a disproportionate amount of power (at the expense of both Pandora and the smaller publishers who could not afford arbitration).

7. Should the Consent Decrees be modified to permit rights holders to grant ASCAP and BMI rights in addition to "rights of public performance"?

Currently, mechanical royalties are covered by statutory royalty rates, and collected by the Harry Fox Agency. Public performance rights for performing artists are collected by SoundExchange. I do not see any benefit from removing the right to collect from either of these entities and granting them to ASCAP or BMI.

Thank you for your time, and I hope you take these considerations into account.

-Karl.