From: Robert Smeets <robert.d.smee[redacted]
Sent: Tuesday, August 5, 2014 7:17 PM
To: ATR-LT3-ASCAP-BMI-Decree-Review <ASCAP-BMI-Decree-Review@ATR.USDOJ.GOV>
Subject: Consent Decree Review

Thank you for taking the time to review the Consent Decrees.
Hopefully the views contained are useful in your review.

Sincerely,
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Do consent decrees continue to serve important competitive purposes today? Why or Why not? Are there provisions that are no longer necessary to protect competition?

Consent decrees serve important purposes today related to competition because rights holders should continue to have the ability to deny usage if they choose to do so under certain limits. In relation to competition among public performances, the consent decree can actually inhibit the purpose of copyright. Instead, the consent decree provides an obstacle between music creators and music users and limits competition at the discretion of the issuer of the decree by use of reasonable fee.

This is illustrated in the case of dissemination through public performance. The consent decree limits the inherent purpose of copyright to stimulate artistic creativity for the public good (definition according to Joseph Fishman, Creating Around Copyright, Harvard Law, forthcoming May 2015) by creating a system in which new creators cannot provide a reference point to show the relevant innovation and creation of new works. For example, in writing a paper, you must cite another author's work if used. However, you do not have to pay the other writer to include his or her idea in your work, but only to acknowledge where the idea originated. In the course of a musical performance of many songs, one previously copyrighted song may serve as a reference point for your original work. This is a critical notion for new artists beginning their journey as a creator because of the inherent structure of professional music performance. This structure relies on familiarity. In other words, people who play only their original music do not generally find professional work performing for the public. As such, no new career can be generated without this allowance. It is a necessity to play familiar music to work. This is the case with any popular band to date from Mississippi John Hurt to The Beatles to Jay-Z.

The notion of reasonable fee is consistent with the purpose of copyright, however, after a certain threshold of professional income has been established. In other words, a bar band playing for fifty

dollars per night is very different than a band selling out arenas playing for tens of thousands of people buying tickets. One suggestion for differentiating between these two kinds of events is the notion of venue capacity because it is typically proportional to the revenue of an event. From my experience as a performer, I recommend the cutoff at right around 1,200 to 1,500 person capacity. So, the notion of reasonable fee for public performances should only apply to performances where the venue has a capacity in this range or larger.

What if any modifications to the consent decrees would enhance competition and efficiency?

There should be more transparency in title information on the part of performance rights organizations. One should not have to enter into any sort of agreement to find out who wrote or published a song. This would allow music users to directly contact willing publishers without having to go through an intermediary performance rights organization about licensing. Music creators and publishers should also have the choice to allow users to contact the publisher directly or through a performance rights organization and the decree should allow for this choice at the discretion of the publisher and creator.

(On a non-consent decree related note, efficiency can also be improved by making this mandatory education for all higher education music performance and composition programs. I went to a reputable college where I studied music extensively and coursework on this subject was not even offered.)

Do differences between the two consent decrees adversely affect competition?

The differences do affect competition because of the clause that states that one must wait one year to switch from one performance rights organization to another. The differences in the decrees allow for competition within the performance rights organizations to offer a better or more suitable deal for writers and publishers with varying interests. However, because of the clause that states one must wait one year to switch from one performance rights organization to another, this decreases competition among the performance rights organizations because clients of those organizations who require services for income are trapped into staying with one organization or the other or must lose income to switch from one to another.

How easy or difficult is it to acquire in a useful format 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?

As noted above, transparency does play a role in competition. One

must first join or enter into agreement with one or the other before one can even see which artists are licensed under each organization. Access to song information is crucial for developing artists and lack of information can inhibit the overall competitive process by forcing artists to make uninformed choices in joining an organization.

Should the consent decree 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?

The consent decree should allow rights holders to permit ASCAP or BMI to limit license availability. However, ASCAP should not be allowed to limit licensing ability to a member of BMI and vice versa on the grounds that one simply belongs to the other organization.

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 payment of interim fees begin and how should they be set?

The rate making function of the rate court should be a mandatory division of revenue. The division of revenue is crucial to the overall goal of copyright. Because record labels and publishers rely on investments other than one particular artist or writer, record labels and publishers should be given more revenue than other beneficiaries. Ideally, to protect investment for all, the rates for revenue should be one third to the record label to diversify artists, one third to the publisher to diversify writers, one sixth to the artists as compensation, and one sixth to the writers as compensation. This ensures that labels and publishers can recoup money lost from other investments while still providing incentive for artists and writers to do their work. It is also important to note that without songwriters, there would be no publishers, artists, record labels or music industry. Without artists, there would be no record labels or music radio stations. The current rates seem to offer considerably more resources to record labels over others who invest and provide the foundation for the labels and the industry.

Interim fees for recordings should be paid and distributed upon collection by the PROs and interim fees for public performances should be paid quarterly.