Comments Regarding ASCAP & BMI Consent Decree Review

August 5, 2014

The Production Music Association (PMA) is a non-profit trade organization representing the interests of over 650 production music libraries.[1] Production music libraries source volumes of music of all genres from composers and artists and license that music on a "blanket" or "per use" basis to the array of music users who need music for their television programs, movie trailers, network promotions, corporate videos, and so much more. It's important to know that much of the music heard on television is supplied by PMA member-libraries. These libraries own the recording rights and publishing rights to the music they represent. This allows for "one-stop" shopping by the user to obtain licenses for all rights (Synch and Master – collectively hereafter referred to as "Synch") needed for a recorded track, except for the public performance right ("Performance"), which is licensed predominantly through ASCAP or BMI. Most of the songwriters, composers and artists that supply music to PMA member libraries are members or affiliates of one of these two performing rights organizations (PRO). As publishers, it is common practice for our members to register their music with their composers' PROs.

For years, Performance royalties have been relied on in the production music industry as sacred when it comes to dependable, sustainable revenues. Unfortunately, ASCAP and BMI have both been "hamstrung" in procuring competitive rates in today's market by outdated and outmoded Consent Decrees. Particularly we believe the rate courts

[1] www.pmamusic.com

and their processes deter, not aid, in achieving fair and proper rates in today's dynamic music marketplace. PMA members have experienced first-hand the pain caused by multi-billion dollar media companies that manipulate the compulsory licensing system established by the Consent Decrees in order to eschew fair and proper license fees. The process of "ask for a license and you're licensed, then settle it out in rate court if you can't agree on fees" encourages strategic avoidance of proper rate setting and payment. It's maddening to try and understand how major corporations are allowed to intentionally delay fair payment, or even payment at all, to the small businessmen and women ASCAP, BMI and the PMA represent. Even when an agreement or decision IS finally reached, ASCAP and BMI are tasked with the burden of making adjustments and/or retroactive distributions in order to correct royalties already paid or catch up on royalties due. These adjustments and/or retroactive distributions are costly to administer for both the PRO and its constituents. Moreover, the delays, adjustments, and "make-up" payments thrust uncertainty and volatility into songwriter, composer, and publisher cash flows, budgets, and bottom lines.

To emphasize the insanity of this process, let's imagine that if every supplier of parts to the major car manufacturers were required to allow those manufacturers to use their parts for free while those manufacturers took their sweet time in deciding if they wanted to a) negotiate or b) sue to obtain the lowest possible rates for those parts. Imagine further the volatility of those suppliers' revenues and even further how frustrating and confusing it would be for those suppliers' vendors to be able to rely upon prompt and consistent payment, and comprehendible invoices. Imagine how costly, inefficient, and chaotic all of the debits, credits and adjustments would be to supplier-side revenues. Imagine a world where all business was conducted this way. Yet this is exactly the world songwriters, composers and publishers have lived in for decades! Why, we ask, have PMA members and the other small businessmen and women in the songwriting and publishing community been singled out for such heavy regulation for so many years? In no other business in America are suppliers forced to provide a product or service first and then negotiate or litigate the price with the buyer later.

In 1941 when the original Consent Decree was written, radio broadcasting was still largely a “mom and pop” industry and television broadcasting was in its infancy. The function of the Consent Decrees made much more sense when broadcasters weren’t multi-billion dollar conglomerates with vast coffers and virtually unlimited lobbying and legal resources. Today, however, broadcast, cable and digital users of music in the U.S. collectively generate more than $130 billion[2] in advertising revenue per year. The playing field has clearly shifted. Why then should these mega users be allowed to drag their suppliers through a lengthy and expensive compulsory licensing process? Big media has nothing to lose and everything to gain by doing so. However, even when we “win”, we lose due to the reasons explained heretofore. ASCAP and BMI need to be able to negotiate for fair license fees without the deliberate sidestepping of licensees who are encouraged to do so by a broken rate court process.

In addition, we believe the rate courts have deterred proper rate setting through the continued, misguided use of rates established through the compulsory licensing process as benchmarks, instead of benchmarks based on free market negotiations. In today’s market, music licenses negotiated directly between willing buyers and sellers exist that do reflect appropriate, real market value. Many PMA members have negotiated direct Performance licenses while negotiating Synch and Master licenses with their customers. Other music publishers and record labels have regularly negotiated direct deals with a wide variety of users, particularly more recently with digital media companies and non-traditional music users. SESAC operates outside of the confines of compulsory licensing and negotiates deals daily with the same entities that need ASCAP and BMI licenses. Now we have Global Music Rights doing the same thing.[3] This is all indicative of a highly dynamic and competitive marketplace

[2] Source: Internet Advertising Bureau/Price WaterhouseCoopers LLP report, *Internet Advertising Revenue Report: 2013 Full Year Results*, April 2014, page 19

[3] Global Music Rights was founded in 2013 by Irving Azoff and represents music rights holders for the licensing of their public performances. Former Performing Rights Organization (PRO) executives Randy run operations. The company offers licensing, distribution and collection services for the exclusive rights granted to music creators and owners by copyright law.

whose rate setting precedents should be the benchmarks, not rates resulting from the compulsory process itself.

Compounding this issue is the prohibition on the rate courts in considering sound recording royalty rates as benchmarks. It's particularly perplexing for PMA members, being both sound recording and composition copyright owners as they are, to see how the sound recording copyright can be valued so disproportionately higher than the composition copyright by services such as Pandora. It is industry norm for a user to pay equal amounts for the rights to synchronize both the sound recording and underlying composition of a track in a film or TV show, for example. It's therefore mind-boggling that rate parity can't be realized or even considered on the Performance side. It is our view then that if the rate courts won't exercise proper judgment in, or are prohibited from, using appropriate, fair market analogues as benchmarks, then the rate courts should be removed from the process in order to let the interested parties negotiate freely and fairly.

This is why it is more important now than ever for PMA members and other publishers to be able withdraw partial rights from ASCAP or BMI. For years, our members have exercised their rights as non-exclusive members of ASCAP and affiliates of BMI to issue direct licenses when feasible for them and their buyers. However, recent rate court decisions have raised new ambiguities with respect to direct licensing some rights while allowing ASCAP or BMI to license others. If the objective is to achieve fair market value for Performance licenses, then what does it matter if that objective is achieved directly or through the PRO? The aspect of allowing both encourages competition and makes the highly competitive marketplace described heretofore even more competitive. Not allowing both does the opposite and ironically deters the very thing that the rate courts purport to covet, i.e., benchmarks based on freely negotiated rates between willing buyers and sellers in a fair market. PMA Members and other publishers should have the flexibility and freedom of choosing the most efficient and economically feasible path, whenever they want, whether this means licensing directly

on the one hand, or through ASCAP or BMI on the other. Sometimes the collective bargaining efficiency of ASCAP or BMI makes the most sense, while other times licensing the Performance right while negotiating Synch and Master rights directly, for example, makes the most sense. The Consent Decrees and the recent odd interpretations of them are fostering an awkward, alter licensing universe that ignores the realities of the 21st century music marketplace we actually live in. They must be rewritten or thrown out altogether in order to ensure rights owners have the ability and flexibility to license their catalogs partially or wholly, either directly or through whatever agent or representative they choose.

Finally, ASCAP and BMI should be allowed to represent all composition rights in a piece of music. As rights converge in the digital domain, more and more music users will seek licenses that include bundled rights. As an example, the lines between the Performance, Mechanical, and Synch rights in content on interactive streaming services are very blurry. It just makes sense then for a user to be able to seek licenses for all three right types when seeking the Performance license from ASCAP or BMI. Denying ASCAP and BMI this flexibility is a missed opportunity to foster a more streamlined licensing system that users and rights owners have been demanding for several years now. It also puts ASCAP and BMI in an inferior position with respect to their competitors at home and other similar collective music licensing organizations abroad. SESAC, the third U.S. PRO, is unrestricted in representing multiple rights and is currently seeking to acquire The Harry Fox Agency[4]. Global Music Rights is unrestricted in this regard as well. Traditionally, music publishers have been able to license multiple rights when doing direct deals with users. Moreover, it is practically industry norm in every copyright respecting territory for the local performing rights society to also administer Mechanical and Synch licenses. PMA members want their PROs to be able to license other rights in their music, and have the freedom of choice

[4] http://www.billboard.com/biz/articles/news/publishing/6099105/sesac-parent-considers-acquisition-of-harry-fox-agency

to decide if and when it makes sense for them to do so.

We thank you for the opportunity to voice our concerns and present our perspectives through these written comments. We hope the Department will clearly see how the current regulatory structure of Consent Decrees and the Rate Courts they establish are major roadblocks to fair and efficient music licensing in today's dynamic media environment. Moreover, we hope it will move quickly to remove these obstacles so that music rights owners and their representatives can more fairly compete.