Before the
UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C.

In the Matter of: **ASCAP and BMI Consent Decree Review**

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

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Introduction and Summary

CTIA-The Wireless Association® offers this initial submission in response to the Department of Justice's June 4, 2014, request for comments concerning the ASCAP and BMI consent decrees (the "Consent Decrees"). CTIA appreciates the opportunity to comment in connection with this important review.

CTIA respectfully submits that:

- The market for music performance rights is not competitive and the Consent Decrees continue today to serve important pro-competitive purposes;
- The recent experience of CTIA's members demonstrates how the Consent Decrees provide an important check on ASCAP's and BMI's Abuse of their Collective Market Power;
- SESAC possesses significant collective market power that should be subjected to effective regulation under a consent decree comparable to the Consent Decrees
- Direct licensing is an important check on performance rights organization ("PRO") market power under the Consent Decrees, but it cannot replace the Consent Decrees due to the high market concentration of the major music publishers and the lack of competition among them.

CTIA elaborates on these points below.

CTIA is an international organization representing all sectors of wireless communications – cellular, personal communication services, and enhanced specialized mobile radio. A nonprofit membership organization founded in 1984, CTIA represents providers of commercial mobile radio services ("wireless telecommunications carriers"), mobile virtual network operators, aggregators of content provided over wireless telecommunications systems, equipment suppliers, wireless data and Internet companies, and other contributors to the wireless universe. A list of CTIA's members appears at http://www.ctia.org/membership/ctia_members/.

CTIA frequently participates in administrative proceedings and coordinates efforts to educate government agencies and the public about wireless issues. For example, CTIA recently submitted comments in response to the Copyright Office's Music Licensing Study, Docket No. 2014-03, which, among other things, raised questions similar to those being evaluated as part of the Justice Department's Consent Decree review. CTIA also has presented its views in testimony before Congress and has filed numerous amicus briefs in the federal courts on behalf of the wireless industry on a variety of issues, including copyright issues. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

CTIA and its members have a substantial interest in the continued effectiveness of the Consent Decrees. Wireless technology not only provides consumers with first-rate telecommunications service, but also provides a convenient and important means for wireless consumers to receive digital performances of music in connection with their wireless devices. CTIA's members, either directly or through agreements with third-party service providers, offer interactive and non-interactive music streaming, access to satellite radio programming, permanent and limited music downloads, ringtone downloads, linear and on-demand video streaming, and access to games with full color graphics and embedded music. CTIA's members also transmit performances of recorded music to individuals placing calls to wireless customers in the form of "ringback tones"— sounds that replace the ringing that the caller hears when he or she calls a mobile telephone. Further, many of the media products and services that CTIA's members make available are available for preview using performances of short clip samples that are streamed over the Internet and wireless networks.

CTIA's members strive to provide their services to their customers at a reasonable cost. Thus, ready access to, and the cost of, music licenses are ongoing concerns. In light of these concerns, CTIA participated as an amicus before the ASCAP Rate Court and the Court of Appeals for the Second Circuit in the case deciding that music downloads did not implicate the public performance right. *United States v. ASCAP (Application Real Networks, Inc. & Yahoo! Inc.)*, 627 F.3d 64 (2d Cir. 2010) (hereinafter "*Yahoo!*").

Moreover, CTIA's members have been litigants before the ASCAP Rate Court, where they were instrumental in resisting ASCAP's efforts to demand public performance royalties for ringtone downloads. *See In re Cellco P'ship d/b/a Verizon Wireless*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (hereinafter "*Verizon Wireless*") (holding that downloading a ringtone to a cell phone is a reproduction but not a public performance).[1] CTIA's members also resisted ASCAP's attempts to discriminate in its royalty fees against new wireless means of performing video. *See ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012) (rejecting ASCAP's discriminatory position and adopting rates consistent with past video licenses).[2]

CTIA members support protection of the legitimate rights of copyright owners. Indeed, CTIA members are among the leading legitimate performers and distributors of recorded music, and pay for the right to do both. Music publishers, and their songwriters, earn substantial performance royalties as compensation for CTIA members' public performances of musical compositions. CTIA, however, believes that the market for music licenses is far from competitive, that the PROs abuse market power derived from

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[1] CTIA members Verizon Wireless and AT&T Mobility were parties in that case. CTIA filed an amicus brief.

[2] CTIA members Verizon Wireless and AT&T Mobility were parties in related cases that were set to be tried shortly after the MobiTV case. Those cases settled after the MobiTV decision. Verizon Wireless filed an amicus brief before the Second Circuit in ASCAP's unsuccessful appeal of the MobiTV decision.

their aggregation of copyrights and their blanket licensing practices, and that the Consent Decrees remain an essential means of mitigating that market power.

In sum, CTIA has a direct interest in the issues raised by the DOJ's Consent Decree review. Those issues will have significant ramifications for the public, the wireless industry, and CTIA's members.

I. The Justice Department Should Ensure that the PROs' Collective Market Power Is Constrained and Provide Protection Against the Comparable Market Power of the Major Publishers.

The Department's Notice of the Consent Decree Review (the "Notice") asks about the continued effectiveness of the Consent Decrees. The Notice specifically notes that the Consent Decrees were last amended in 2001 and 1994 and inquires whether the Consent Decrees "need to be modified to account for changes in how music is delivered to, and experienced by, listeners."

The recent decisions of the ASCAP and BMI Rate Court judges, who have extensive experience with the PROs' behavior, and the recent experience of CTIA's members in their dealings with the PROs, confirm that the decrees remain essential to foster competitive market pricing for music performance rights. Due to the nature of the markets, SESAC and the major publishers also exercise substantial supra-competitive market power. That market power also should be controlled.

A. The Market for Music Performance Rights Is Not Competitive.

Copyright law principles and market structure coalesce to eliminate competition in the marketplace for music performance rights. These combined factors give the PROs enormous market power insulated from competitive forces.

First, ASCAP, BMI and SESAC aggregate huge numbers of musical works that would, in a competitive market, compete for use. Second, the large music publishers have been allowed to merge to the point that the publishing industry is now highly concentrated. Three major publishers control the rights to vast majority of musical works.

Third, copyright law allows rights to be licensed separately. Thus, when programs or commercials that are intended for public performance are produced, the producers obtain only reproduction and distribution rights and need not obtain public performance rights. Indeed, the PROs typically will not grant public performance rights to program producers because they do not actually perform the programs they produce. Thus, it falls to the entity making the performance to clear the performance right.

Unfortunately, however, once a program or ad is produced, or "in the can," the entity making the performance is unable to engender competition among possible suppliers of the performance right. The performing entity must take the program as is and cannot alter it. This gives the licensor of the performance right the ability to exercise "hold up" power – the licensor can seek to charge up to the full value of the entire

program or ad, unconstrained by the actual value contributed to that program or ad by the licensor's music.

Fourth, the PROs typically offer only licenses to their entire repertory. Thus, they effectively eliminate any competition that may exist among their members, among the PROs, between the PROs and their members, or, for that matter, between the use of music and other programming matter.

Fifth, these problems are compounded by the near-impossibility of identifying the potential licensors of any particular performance right. Although the PROs offer on-line searches of their databases, they do not provide a reliable or effective means of identifying the content of each PRO's repertory. As the Magistrate Judge considering a preliminary injunction against SESAC found, SESAC's online search tool "does not provide a reliable means for determining what is SESAC's repertory." Report and Recommendation at 15, *Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5807 (E.D. Pa. Dec. 23, 2013). The court noted that the tool "expressly disclaims that it is accurate, advises stations that it could change on a daily basis, and limits the user to 100 searches per session." *Id.* at 15 n.13. ASCAP's search tool contains a similar disclaimer, stating that "ASCAP makes no representations as to its [search tool's] accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database." All of the search tools limit searches to one work at a time, making searches for numerous works impractical.

As a result, it is effectively necessary for an entity engaging in substantial numbers of public performances, such as a wireless carrier or a service making streamed performances, to obtain licenses from all three PROs. The major publishers, of course, understand the anticompetitive effects of the same behavior. Even where they seek to license their catalogs directly, they strategically withhold information about their content. *See In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2014 WL 1088101 at *35, *36, *38 (S.D.N.Y. 2014) (describing significance of publisher refusals to provide Pandora with usable lists of their catalogs).

The judges that oversee the PROs' conduct have continued to recognize the PROs' market power and to curb their abuses right up to the present, long after "the changes in how music is delivered" referenced in the Notice. In 2005, the United States Court of Appeals for the Second Circuit, which oversees the rate courts that oversee the Consent Decrees, recognized that the "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." *United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005). As recently as 2012, that same court stated that "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012); *see Yahoo!*, 627 F.3d at 76.

Courts examining SESAC's market power also have concluded that SESAC functions as a monopolist and that there is evidence that SESAC has acted unlawfully. *See, e.g., Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(PAE), 2014 WL 812795 at

*36 (S.D.N.Y. 2014) ("In sum, there is sufficient evidence upon which a jury could find that SESAC took action to maintain and fortify its monopoly over licensing of its affiliates' work, by adopting licensing practices that eliminated all realistic competition with its blanket license."); *Radio Music License Committee v. SESAC Inc.*, Report and Recommendation at 31-33 (finding that Plaintiffs had made a prima facie case of a violation of Sherman Act sections 1 and 2, and noting that "SESAC has 100% of the market power over the unique collection of works in their repertory and there are no 'real' alternatives to SESAC's blanket license").

The only protection that users have against ASCAP's and BMI's monopoly power is the protection provided by the Consent Decrees. Those should be retained and, as discussed below, strengthened.

B. The Recent Experience of CTIA's Members Demonstrates that the Consent Decrees Continue to Provide an Essential Check on the PROs' Abuse of Their Collective Market Power.

CTIA members have experienced first-hand the abuses of market power that the PROs continue to perpetrate. In one case, the PROs asserted the right to collect fees for activities that did not even implicate the performance right. In another, they sought to impose hugely discriminatory fees on wireless service providers for the music included in video programming. In both cases, the rate courts acting under the Consent Decrees were essential in protecting the performing entities and the public.

1. The PROs' Over-Reaching Claims Relating to Music Downloads

The PROs asserted for years that downloads of music files, including ringtones, implicated the public performance right. In other words, according to ASCAP and BMI, downloads for which music publishers were fully compensated under the section 115 mechanical license, also required a further payment for a public performance license, due to various theories, including the PROs' construction of the "transmit clause" found in the definition of "to perform or display a work 'publicly.'" 17 U.S.C. § 101.

The PROs used their market power to parlay those claims into millions of dollars of ill-gotten gain. The enormous risk of liability created by copyright law's statutory damages regime precluded users from challenging the PROs' position directly by refusing to take a license. Absent the Consent Decrees, the choice would have been to capitulate or risk enterprise-threatening liability.

The PROs' claims for double-dip compensation were ultimately challenged in the ASCAP Rate Court by services that offered music and ringtone downloads. *See Yahoo!*, 627 F.3d 64 (full downloads); *Verizon Wireless*, 663 F. Supp. 2d 363 (ringtones). The rate court, and then the Second Circuit, consistently held that downloads do not implicate the public performance right. See *Yahoo!*, 627 F.3d at 71 (downloads do not implicate the public performance right); *Verizon Wireless*, 663 F. Supp. 2d at 378 (ringtones do not implicate the public performance right). In other words, the rate court process

established by the Consent Decrees served as an essential check on the PROs' abuse of their market power.

2. ASCAP's Efforts to Discriminate Against Mobile Video Services

CTIA's members also faced ASCAP's abuse of its monopoly power when they sought a reasonable license for their mobile video services. In response to the license request, ASCAP sought a radical change to its longstanding, consistent paradigm for licensing music in video programming. ASCAP eschewed the fee structure that it had long applied in the cable and broadcast television industry, where license fees varied depending on music intensity of the programming between 0.9% and 0.1375% of the programming service's revenue (which does not include the revenue of the entity distributing the content to the public). Instead, ASCAP sought to nearly triple its rates.[3]

Moreover, ASCAP sought to apply those inflated rates to the revenue earned for both the programming and its public distribution. In other words, ASCAP attempted to use its monopoly power to leverage itself into a share of revenues that were earned for the wireless carriers' technical advances and huge capital expenditures in developing and maintaining their networks, revenues that were not reasonably attributable to the music in video programming.

The combined effect of the higher rate and inflated revenue base was that ASCAP sought fees from the wireless industry that were many multiples of the fees it obtains for the same audiovisual performances in other media. ASCAP's attempt to discriminate was particularly egregious given that its cable licenses (and at least one major network broadcast license) encompassed performances of identical content over identical wireless media.

Fortunately, the ASCAP Rate Court and Second Circuit rejected ASCAP's unprecedented attempt to discriminate among media. *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010), *aff'd sub nom. ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012). The district court found that ASCAP's witnesses were not credible, 712 F. Supp. 2d at 224 n.35, and that its case lacked an "explanation of guiding economic principles or any coherent theory," *id.* at 239.

ASCAP's efforts to discriminate against mobile video services shows the lengths to which the PROs will go to exercise their collective monopoly power and the continuing need for the Consent Decrees and rate courts to rein in that power.

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[3] ASCAP sought to apply a rate of 2.5% to revenue that had been adjusted by a "music use adjustment factor," which was determined by the ratio of ASCAP's traditional cable TV rate for a type of programming to 0.9%. Thus, each applicable rate equaled the corresponding cable rate multiplied by 2.5/0.9 (2.78).

C. SESAC's Licensing Practices Provide an Example of What Music Licensing Would Be Without the Consent Decrees.

The SESAC experience provides an example of what the world would look like without the ASCAP and BMI Consent Decrees – unconstrained price increases charging disproportionate amounts for the limited music that is performed. As a result of its behavior, SESAC has been sued for antitrust violations by both the Television and Radio Music License Committees. As discussed above, early decisions in both cases confirm that SESAC possesses collective market power, takes steps to eliminate competitive licensing by its affiliated publishers, and acts to ensure that it is able to extract supra-competitive license fees.

Due to the costs and burdens of private antitrust litigation, it took years of market power abuse by SESAC to provoke these suits. Those costs and burdens make it impractical for most music users to challenge SESAC's unlawful conduct. Justice Department action is needed to protect competition and the public. SESAC should be subjected to effective antitrust regulation comparable to that imposed on ASCAP and BMI.

D. While Direct Licensing Remains an Important Check on PRO Abuses, It Cannot Replace the Consent Decrees Due to the Lack of Competition Among Major Publishers.

The Notice asks whether rights holders should be allowed to limit their grant of licensing authority to ASCAP and BMI in order to license certain uses of their works directly. CTIA respectfully submits that the lack of competition among the major publishers counsels against allowing such partial withdrawals from ASCAP and BMI.

As the rate courts found in the DMX cases, direct licensing, particularly by smaller independent publishers, provides an important check on the PROs' market power and offers both some competition and an indication of the prices that would prevail in a competitive market. Unfortunately, however, the major publishers have been allowed to merge under the cover of the ASCAP and BMI Consent Decrees to the point that the industry is highly concentrated. Moreover, due to this consolidation in the industry, the major publishers offer catalogs that every user must license, so they are no longer substitutes. Thus, the major publishers do not compete with each other. Rather, as the ASCAP Rate Court found in the recent Pandora case, the major publishers exercise extraordinary market power and are willing to abuse that market power to extract supra-competitive license fees.

In the recent Pandora case, the ASCAP Rate Court found in no uncertain terms that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices" in their negotiations with Pandora. Pandora Media, 2014 WL 1088101 at *35. The court found that the negotiations were conducted in a manner that left Pandora with no alternative: "it could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms." Id. According to the court, "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their

negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." Id. at *35-36.

As further evidence of the flaws in a direct-license only regime, when the major publishers tried to withdraw their digital rights from ASCAP and BMI and license them directly, they found it virtually impossible to administer their own rights. Instead, they turned back to ASCAP and BMI to administer the withdrawn rights for the vast majority of users. See id. at *17-18. This showed the withdrawal for what it was: an effort by the major publishers to exercise enormous market power free from the constraints of the Consent Decrees. Accordingly, while direct licensing is an important alternative to the PRO blanket licenses under the Consent Decrees, direct licensing cannot be a substitute for the Consent Decrees.

Conclusion

CTIA appreciates the Justice Department's consideration of these comments and looks forward to working with the Department on these important issues.

Respectfully submitted,

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