

**Before the  
CHIEF, LITIGATION III SECTION, ANTITRUST DIVISION  
OF THE U.S. DEPARTMENT OF JUSTICE  
450 5TH STREET NW, SUITE 4000  
WASHINGTON, DC 20001**

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In the Matter of	)	
	)	
Review of ASCAP and BMI Consent Decrees	)	In Re: Final Judgments in United States v.
	)	ASCAP, 41 Civ. 1395 (S.D.N.Y.), and
	)	United States v. BMI, 64 Civ. 3787
	)	(S.D.N.Y.) (“Consent Decrees”)
	)	

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## **I. Introduction**

The Digital Media Association (DiMA) is an established trade association whose membership has helped revolutionize the music marketplace and to democratize creative opportunity. DiMA members include Amazon.com, Apple, Live365, Microsoft, Pandora, Rhapsody, Slacker and YouTube. The innovative products and services that DiMA-member companies bring to market have changed – and will continue to change – how consumers obtain and enjoy music, entertainment and other media. As many DiMA-member services include the performance of music, DiMA-member companies regularly license performance rights for musical compositions from performing rights organizations ASCAP and BMI.<sup>1</sup>

DiMA members appreciate the Department of Justice’s oversight and enforcement of the Final Judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) (“Consent Decrees”). DiMA Members specifically appreciate that, since the entry of the Consent Decrees in 1941, the Department of Justice has periodically reviewed the operation and effectiveness of the Consent Decrees and those reviews have led to both Consent Decrees having been amended several times since their entry. The ASCAP Consent Decree was last amended in 2001 and the BMI Consent Decree was last amended in 1994.

DiMA understands that the Antitrust Division is currently undertaking this review to examine the operation and effectiveness of the Consent Decrees and to explore whether the Consent Decrees should be modified and, if so, what modifications would be appropriate, in light of the fact that “ASCAP, BMI and some other firms in the music industry believe that the Consent Decrees need to be modified to account for changes in how music is delivered to and experienced by listeners.” While unsure of which “other firms in the music industry” have

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<sup>1</sup> As detailed herein, DiMA-member companies that publicly perform music often must also secure the right to perform the sound recordings that embodying the underlying musical compositions licensed by ASCAP and BMI. These rights to publicly perform sound recordings may be obtained by DiMA-member companies under certain circumstances pursuant to a statutory license under § 114 of the Copyright Act.

requested this review – and further unsure as to what specific changes have occurred in how music is delivered and experienced by listeners that would necessitate any substantial changes in the Consent Decrees - DiMA members nonetheless support the Department in the quest to examine the Consent Decrees to determine their effectiveness and to explore possible modification of them.

Before answering the Department’s specific questions below, it is important to address a few issues regarding ASCAP, BMI, the Consent Decrees and how they operate, and the environment that has led to this most recent call for the Department to review the Consent Decrees. The Department of Justice should consider the request for substantive changes to the ASCAP and BMI Consent Decrees very carefully, noting many consolidations in the music industry that have occurred not only in the shadow of, but quite literally only because of, the existence of the Consent Decrees.

**Both ASCAP & BMI’s Revenues, Distributions and Membership Have Grown Substantially While They Have Both Operated Under The Current Consent Decrees**

In the last decade, ASCAP & BMI’s revenues and membership have grown substantially. For example, both ASCAP and BMI have seen their membership double between 2003 and 2013<sup>2</sup> and their respective revenues and royalty distributions increased similarly.<sup>3</sup> This fantastic growth occurred entirely while both organizations were operating under the current Consent Decrees. These growth numbers are especially enviable as they occurred in large part over the last 6 or 7 years, a period of economic decline for many American businesses, including, in particular, the recorded music industry.

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<sup>2</sup> 2003 ASCAP Membership = 150,000 v. 2013 = 500,000, 2003 BMI Membership = 300,000 v. 2013 = 600,000 – ASCAP and BMI Press Releases, 2003 and 2013.

<sup>3</sup> <http://www.billboard.com/biz/articles/news/1445452/ascap-revenues-hit-record-high-in-2003>  
<http://www.billboard.com/biz/articles/news/publishing/5901249/ascaps-2013-revenues-distributions-rise-in-2013>  
[http://www.bmi.com/news/entry/20031021\\_bmi\\_reports\\_revenue\\_increase](http://www.bmi.com/news/entry/20031021_bmi_reports_revenue_increase)  
<http://www.bmi.com/press/entry/563077>

This incredible growth and success not only occurred “despite” the existence, operation and enforcement of the Consent Decrees but, quite clearly precisely *because* of the existence of the Consent Decrees. The marked increase in both the number of affiliated songwriters and publishers and in revenue is attributable to the Court’s application of the Consent Decrees and the fair market value standard.

Without the presence of the Consent Decrees, ASCAP and BMI would not have been able to retain and trade on their significant market power, in turn, citing their dominance as a lure for potential music publisher and songwriter affiliates. Absent the Consent Decrees, in a more truly-competitive market for music work performance rights (i.e. a market consisting of multiple competitors of relatively equal bargaining power), ASCAP and BMI would likely not have been able to achieve the prolific increase in revenues that they managed under the Consent Decrees. It is worth noting that, during this same period of astounding growth for ASCAP and BMI and their affiliates, the recorded music industry – the industry which ASCAP and BMI’s Music Publisher affiliates have openly acknowledged they desperately want their royalty rates to mirror, now - saw marked declines.<sup>4</sup>

Clearly, the existence and application of the Consent Decrees has done absolutely nothing to harm ASCAP or BMI as regards their ability to sustain and grow their businesses. This is true, whether considered either objectively – in the context of general economic growth (especially during a period of severe economic recession), or more specifically - in the context of the music business, in particular.

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<sup>4</sup> RIAA – 2003 Revenues = \$14 Billion v. 2013 = \$7 Billion – RIAA Annual Report, USA Recording Industry in Numbers; IFPI Digital-Music-Report-2014, page 6; <http://www.ifpi.org/facts-and-stats.php>

**Digital Music Streaming Services are the Only Entities That Perform Musical Works That Are Obligated to Pay BOTH Composition Performance Fees AND Sound Recording Performance Fees**

It is also important to note that digital music streaming services – uniquely – are the ONLY services that pay performance rights for the performance of BOTH a) sound recordings, AND b) musical compositions. Terrestrial radio, television, bars, restaurants and other business establishments – and all other services and locations that perform musical works – only pay ASCAP, BMI and SESAC for the right to perform the inherent composition. None of these entities have any obligation to pay record labels for the performance of the sound recordings which embody the compositions. It is only digital services - such as DiMA members – that are obligated to make payments for both.

It is this unique, double-royalty obligation, that only digital services are saddled with, that has driven the recent attempts by ASCAP and BMI members to withdraw their rights - ONLY for performances via digital services – and further prompted their request of the Justice Department to engage in the instant review of the Consent Decrees, specifically to allow for these types of punitive, partial withdrawals, which have been determined to be disallowed, under the Consent Decrees, by the Judges with jurisdiction over them.

In his testimony in the recent rate-setting trial between ASCAP and Pandora, conducted pursuant to the ASCAP Consent Decree, John LoFrumento, ASCAP’s CEO, testified that his members never complained about the revenues collected from, for example, terrestrial radio broadcasters, which pay sound recording owners no royalties.<sup>5</sup> Indeed, both ASCAP and BMI

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<sup>5</sup> In Re Petition of Pandora Media, Inc. , \_\_\_ F.Supp.2d \_\_\_, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) Trial Tr. pp. 289-90 (Jan. 23, 2014): “Q. My question is whether the frustration with the disparity was limited to a disparity in new media performance rights as opposed to other areas of ASCAP licenses? A. It had to do with new media performance rights. Q. It's true, is it not, that you never heard similar dissatisfaction from ASCAP members concerning the revenues collected for terrestrial -- A. No, I did not hear complaints. ; Trial Tr. pp. 291 (Jan. 23, 2013) “Q. Even beyond terrestrial radio, it is true, is it not, you have not heard any dissatisfaction with any disparity between what ASCAP collection performance royalties and what sound recording owners collect in performance

continue to enter into bargains with representatives of other broadcast media – media sources that do NOT labor under a sound recording performance royalty – to license their considerable catalogs at ever-more attractive rates and terms.

It is important to note that, just before the rate litigation between ASCAP and Pandora unfolded, both ASCAP and BMI voluntarily agreed, with many terrestrial radio broadcasters represented by the Radio Music Licensing Committee<sup>6</sup> to new licenses<sup>7</sup> that cover those terrestrial radio stations for broadcasts between January 1, 2010 through December 31, 2016. These agreements, which both ASCAP and BMI entered into voluntarily and submitted to the respective courts for approval in 2012, included such provisions as:

- A 75 Million Dollar “industry fee credit” against 2010-2011 terrestrial broadcaster “industry” payments (in addition to the terrestrial broadcast industry’s retention of 40 Million Dollars in fee reductions that had been ordered by the Court at the interim fee stage of the litigation);
- A performance royalty rate of 1.7% of gross revenue fee structure for blanket/music format license-reporting stations, minus a “standard deduction” of 12% for commissions and costs of collection;
- What amounted to a 25% standard deduction for those broadcasters of revenue attributable to “new media uses” (as those uses were now included in the same 1.7% overall rate); and
- Expanded rights grants accommodating the terrestrial radio industry’s developing “new media” platforms, such as Internet websites, smart phones, and other wireless devices.

Plainly, ASCAP and BMI are not requesting to have the Consent Decrees modified because the existence of the Consent Decrees makes it impossible for them to negotiate fair rates in the current market. Under these very Consent Decrees, both ASCAP and BMI have explicitly

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royalties or other royalties in connection with any other media that ASCAP licenses? A. That is true.”

<sup>6</sup> Radio Music Licensing Committee - <http://www.radiomlc.org/Homepage/4779186>

<sup>7</sup> <http://www.radiomlc.org/pages/4795848.php>

<http://www.radiomlc.org/pages/6282052.php>

[http://www.ascap.com/~/\\_media/files/pdf/licensing/radio/2010%20radio%20station%20license%20agreement.pdf](http://www.ascap.com/~/_media/files/pdf/licensing/radio/2010%20radio%20station%20license%20agreement.pdf)

<http://www.bmi.com/licensing/entry/radio>

[http://www.bmi.com/forms/licensing/radio/2012\\_RMLC\\_blanket\\_per\\_program.pdf](http://www.bmi.com/forms/licensing/radio/2012_RMLC_blanket_per_program.pdf)

acknowledged that they have no problem with the fees that are paid by terrestrial broadcasters (even for their digital broadcasts). Both ASCAP and BMI have voluntarily submitted to the controlling courts freely-negotiated agreements with terrestrial broadcasters which include massive credits, reductions in rates, significant deductions - and even lower rates for “new media” and digital uses by those broadcasters.

It is clear that the aim of this request is to ultimately allow ASCAP and BMI to uniquely target digital-only broadcasters – the only entities that have both a royalty obligation for the performance of a) musical works, AND also b) sound recordings - for focused, selective, attack, aimed at increasing the performance royalty rates that only digital-only broadcasters must pay. Again, in his testimony in the recent rate-setting trial between ASCAP and Pandora, ASCAP’s CEO John LoFrumento testified that ASCAP board members believed that the affiliated publishers who withdrew their “new media rights” would be able to get higher rates from Pandora and that ASCAP would then be able to use those higher rates in any future negotiations or rate setting proceeding to secure higher rates for publishers that remained in ASCAP.<sup>8</sup> This plan of attack was presented to reluctant board members, as an inducement to have them agree to the partial withdrawals.<sup>9</sup>

Permitting the type of partial withdrawals that ASCAP and BMI seek permission to engage in would undoubtedly harm competition among music service licensees. The type of selective, partial, targeted withdrawals that ASCAP and BMI members have attempted are, by their own

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<sup>8</sup> Petition of Pandora Media, Inc. Trial Tr. p. 300 “Q. The answer to my question was yes, the expectation was the 2 withdrawing publishers would be able to secure higher rates than ASCAP was getting, right? A. That was their belief, yes. Q. It was also the expressed intention of the publishers who were considering withdrawal that these higher rates could then be used as benchmarks in order to help ASCAP raise its own rate. Isn't that right? A. Yes.”

<sup>9</sup> Id., page 301 “Q. It's true, is it not, that one of the factors that was used to try to gain the support of those that had expressed concern about the partial withdrawals was the possibility that the expected higher rates that the publishers would receive would be used by ASCAP to raise the rates for everyone within ASCAP. Isn't that right? A. There was a linkage between the two, publishers said if we get a higher rate, then ASCAP could try to negotiate a higher rate. Q. And that was one of the things, one of the arguments that was used within the board discussions about the partial withdrawals, to try to gain the support of those that initially expressed concern, correct? A. Yes.”



admission, designed to allow the PROs and their affiliates to unilaterally pick formats and mediums for punitive (or preferential) rates and licensing terms, in a coordinated attempt to thwart the very purpose of the Consent Decrees and obtain supra-competitive rates.

**ASCAP and BMI Allege that the Consent Decrees Are Not Suitable For the Digital Age, Yet Fail To Provide Any Specific Element of this Supposed Incompatibility**

As a justification for the request to have the Consent Decrees modified, both ASCAP and BMI have alleged generic complaints that the Consent Decrees are “decades old” and “not suitable for the digital age,” yet neither of them has articulated any particular element of either the Consent Decrees themselves, or the way that musical works are performed by digital services in the “internet era,” that requires modification of the basic terms of the Consent Decrees. The essence of how music is performed publicly via digital services is no different than the way it is performed by analog transmissions. While the format of the transmission is technically distinct, with one being digital and the other analog, there is nothing about the process of engaging in the public performance of musical works through a digital delivery that is any different than the performance of those musical works through an analog transmission. Similarly, the way musical works are licensed for performance for digital performance is in no way different than the process for licensing for analog performances.

We are well into the age of digital performances of musical works. The Copyright Act was amended almost 20 years ago specifically to acknowledge the digital performances of musical works and sound recordings that was a reality, at that time. Both the ASCAP and BMI Consent Decrees have undergone review and modification within that time, and the very text of each Consent Decree contemplates broadcasters employing various technological means – beyond analog terrestrial broadcast means - of transmitting performances of ASCAP and BMI’s repertory. Indeed, the most recent modification of the ASCAP Consent Decree, which occurred

in 2001, was accompanied by the Department explicitly taking into account digital services. The very text of the Amended Consent Decree states, as the Department itself noted publicly, that the modification was undertaken (in part) to “expand and clarify ASCAP’s obligation to offer certain types of music users, including background music providers and Internet companies, a genuine alternative to a blanket license.”<sup>10</sup>

Additional indications that the Consent Decrees in no way fail to accommodate the licensing of music performances through modern means include the plain fact that both ASCAP and BMI have, over recent years, entered into numerous voluntary agreements to license terms and fees for digital performances of their repertory, as well as participating several proceedings before the rate courts that retain jurisdiction over the Consent Decrees, specifically to determine appropriate rates and terms for digital performances. Both ASCAP and BMI have managed these events, all without any problems applying the terms of the Consent Decrees to these digital uses.

There is no merit to the argument that now, in 2014, after at least a decade of operating within the bounds of the Consent Decrees, as they have been applied to many various digital services, that the Consent Decrees are “outdated” and are “not suitable for the digital age.” As Judge Cote observed in the recently-concluded ASCAP v. Pandora rate case: “It is true that the digital delivery of music has permitted the creation of customized radio stations that are unique to individual listeners. But, despite that development, customized radio retains the essential characteristics of radio.”<sup>11</sup> The amorphous claims that the terms of the Consent Decrees are somehow an outdated hindrance, which are being put forth as vague support of the clear ultimate goal - which is to be able to single out digital music services for unique rate increases, the likes of which the Consent Decrees were specifically designed to prohibit - should not carry any weight.

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<sup>10</sup> Dep’t of Justice Announcement, issued Monday, September 5, 2000.

<sup>11</sup> In Re Petition of Pandora Media, Inc., page 132

## **Musical Works Are Not Commodities That Can Be Interchanged and Compete Directly with Each Other in the Market for Licenses**

Any policy debate over the continuing role of Performing Rights Organizations and the Consent Decrees under which ASCAP and BMI operate must be conducted with an appreciation of both copyright law and antitrust law being considered. Individual copyright owners enjoy a limited set of rights, for a limited period of time, specifically in recognition of the unique nature of copyrights. Both the Constitution, and Congress in crafting laws pursuant thereto, considered the unique nature and potential monopoly that is inherent in each copyrighted work. It is understood that copyrighted works are not commodities that compete directly with each other. Just as a novel will not serve as a suitable replacement for a textbook, a particular song is a unique “good,” for which no other market replacement readily exists. While copyright owners are given great flexibility in the rights to exploit the works they create, the music industry has repeatedly demonstrated the anticompetitive reality of arrangements under which multiple copyrighted works are aggregated and licensed collectively, as the Performing Rights Organizations in the United States are specifically designed to do.

The collective licensing of the performance right for musical works is inherently anticompetitive, as the right to license a particular musical composition cannot be a substitution for another specific musical work. As such, the simple aggregation of certain musical works for licensing by the Performing Rights Organization is, in-and-of-itself, a somewhat anti-competitive behavior. The need to closely monitor the market behavior of such collectives is even more pronounced when the total market of participating licensees is reduced to the lowest single numbers, each with sufficient market share to dictate the entire market.

The existing ASCAP and BMI consent decrees do not eliminate this market power entirely, they merely serve to limit some of the negative effects of the monopolistic position.<sup>12</sup> However imperfectly, the ASCAP and BMI consent decrees attempt to preserve the potential benefits of such aggregation while recognizing this anticompetitive potential. In light of this reality, as long as ASCAP and BMI exist with the market concentrations that they have amassed, they must be subject to oversight in their dealings with licensees, as they currently are, under the present Consent Decrees.

## **II. Responses to Specific Questions:**

**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?**

### **a) The Consent Decrees Continue to Serve Important Competitive Purposes Today**

The Consent Decrees obviously continue to serve a very important function. Recent cases indicate that the very type of behavior that initially gave rise to the Department's cases against ASCAP and BMI – the precise type of anti-competitive behavior which the Consent Decrees were and are intended to regulate – continue today. As Judge Cote's decision in the recent ASCAP v. Pandora rate case noted: "In addition, the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying AFJ2 and casts doubt on the proposition that the 'market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned.' [citation omitted]."<sup>13</sup> ASCAP and its affiliated publishers engineered a plan to circumvent the ASCAP Consent Decree and to specifically use the market power that each of them had acquired while

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<sup>12</sup> ASCAP v. MobiTV, Inc., 681 F.3d 76, 82 (2d Cir. 2012) "the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."; United States v. BMI (In re: Application of Music Choice), 426 F.3d 91, 96 (2d Cir. 2005) "As we held with respect to ASCAP, 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."

<sup>13</sup> In Re Petition of Pandora Media, Inc., \_\_\_ F.Supp.2d \_\_\_, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014), at page 97.

under the Consent Decree, to frustrate the fundamental goal of that Consent Decree.<sup>14</sup> ASCAP and its affiliate music publishers Sony and UMPG did not act as competitors in the marketplace at all, and as a result of this unfair coordination, their already very significant individual market power was substantially enhanced, for each of them.<sup>15</sup>

It is an unfortunate reality that, despite the fact that the Consent Decrees have been in place since the early 1940s, the anti-competitive behavior that they were specifically intended to address and curtail is still very-much present. The anti-competitive practices of ASCAP, BMI and their affiliated music publishers (as well as, apparently, SESAC, the only other Performing Rights Organization in the U.S., which is not presently subject to a Consent Decree<sup>16</sup>) is apparent and this anti-competitive behavior was applied immediately, following certain music publishers attempted withdrawal of their substantial catalogs from ASCAP and BMI. The ASCAP and BMI consent decrees are a necessary attempt to preserve the potential benefits of such aggregation, while recognizing the anti-competitive propensities of any such collective.

**b) There Are Few, if Any, Provisions of the Consent Decrees That Are No Longer Necessary to Protect Competition or That Are Ineffective in Protecting Competition**

In addition to the clear, still-present need for the Consent Decrees, in order to keep in check what is the obviously, inherently anti-competitive nature of ASCAP, BMI and their affiliated music publishers, the terms and text of the Consent Decrees themselves have been modified at

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<sup>14</sup> Id., at Page 96 “ASCAP has not shown that either the Pandora-Sony or the Pandora-UMPG licenses are good benchmarks for its license with Pandora. Sony and UMPG each exercised their considerable market power to extract supra-competitive prices.”

<sup>15</sup> Id., at page 97; “What is important is that 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.”

<sup>16</sup> SESAC is currently a defendant in two pending antitrust lawsuits, brought by the Radio Music Licensing Committee and the Television Music Licensing Committee in 2012. A 2013 evidentiary hearing in the RMLC case on a preliminary injunction motion resulted in a conclusion that the RMLC had a likelihood of success on the merits of its antitrust claims. Radio Music License Committee, Inc. v. SESAC Inc., No. 12-cv-5087, Report and Recommendation, 29 (E.D. Pa. Dec. 20, 2013).

several points over the years, to ensure that the Consent Decrees do, in fact, continue to remain relevant and applicable and to serve important competitive purposes. The BMI Consent Decree was modified in 1996 and the ASCAP Consent Decree was modified as recently as 2001, with the Department noting, at the time, that the modification specifically provided “increased competition in music licensing, update the procedures for settling license fee disputes, and eliminate[d] certain costly and outdated provisions of the original decree.” While there may be some areas where the Consent Decrees could be clarified, homogenized and otherwise updated, as discussed more fully below, the Consent Decrees continue to serve important competitive purposes today and should not be modified in any way that undermines their basic purpose.

There are some provisions of the Consent Decrees and the form, format and implementation of each of them that prevent competition or that may be ineffective in protecting competition. One such area is the ineffectiveness of, and the disparity between, the public disclosure obligations in the ASCAP Consent Decree vs. the BMI Consent Decree, which is discussed in more detail in response to the Department’s fourth question, below. The current public disclosure requirement in the ASCAP Consent Decree is, in itself ineffective. That issue is exacerbated by the distinction with the BMI Consent Decree, which has no such disclosure requirement. This lack of uniformity in the Consent Decrees applicable to the two largest, direct competitors in the music performance licensing market make the current Consent Decrees ineffective in protecting competition.

**2) What, if any, modifications to the Consent Decrees Would Enhance Competition and Efficiency?**

The substantive response to question 2 follows the response to question 3, below, as the response regarding specific suggested modifications to enhance competition is contained in the response and observation that the differences between the Consent Decrees adversely affects competition.

**3) Do Differences Between the Two Consent Decrees Adversely Affect Competition?**

**Certain Modifications, Including Eliminating Substantive Differences, Would Enhance Competition and Efficiency**

Differences between the Consent Decrees adversely affect competition because those terms and conditions that vary between each of the Consent Decrees ultimately result in the market in which licensees cannot make adequate comparisons between the respective repertory of each ASCAP and BMI, cannot make informed assessments of the value of each and cannot directly compare all of the elements of the cost, effectiveness and operation of licenses acquired under the distinct Consent Decrees. As discussed below, the differences between the way the two distinct Consent Decrees are drafted and organized frustrates the over-arching goal of enhancing competition in the music work performance marketplace. Both logic and actual demonstrated market conditions dictate that, given an opportunity to amend the Consent Decrees, the Department of Justice ought to standardize both of the Consent Decrees, making them uniform and following the same form and format. Modifications aimed at making the Consent Decrees more uniform and current would enhance competition and efficiency.

There are several areas where modifications, aimed at enhancing competition, should be made to the Consent Decrees. The Consent Decrees would be much more conducive to efficient licensing, as well as enabling both ASCAP and BMI, and their licensees and potential licensees,

to adequately assess the marketplace and properly value the respective repertoires, if the Consent Decrees were uniform in form and format.

With respect to the public disclosure requirement, which is discussed at length in response to the Department's fourth question, below, the differences between the way the two distinct Consent Decrees are drafted and organized significantly frustrates the over-arching goal of enhancing competition in the music work performance license marketplace. In addition, the definitions should be consistent across both the ASCAP and BMI Consent Decrees. Definitions of important, fundamental terms such as those that define the repertoire in question should be consistent across both Consent Decrees.

For instance, the ASCAP Consent Decree defines "ASCAP's Repertory" as: "those works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time,"<sup>17</sup> while the BMI Consent Decree defines "Defendant's repertory" as "those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense."<sup>18</sup> These definitions should be updated and made consistent, to clearly indicate that a) the repertoire subject to both Consent Decrees is "those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense," and b) to make it clear that so-called "split works" (i.e. a musical work which is co-written by two or more writers, with at least two of those writers having affiliations with separate Performing Rights Societies) may be licensed by either of the affiliated Performing Rights Societies, without requiring a license from both Performing Rights Organizations, with respect to that work.

Other definitions (which are generally more comprehensive as they are found in the more-recently amended ASCAP Consent Decree), should be applied to both Consent Decrees.

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<sup>17</sup> ASCAP Consent Decree, Sec. II (C).

<sup>18</sup> BMI Consent Decree, Sec. II (C).



Defined terms and their definitions should be made more comprehensive and be applied in both the ASCAP and the BMI Consent Decrees, simultaneously. Terms such as “Background/foreground music service,” “Per program license,” “Per-segment license,” “Programming Period” (versus “Program” found in the BMI Consent Decree) “Similarly Situated” and the definition of the “Through to the Audience” license, which are found in the more current ASCAP Consent Decree,<sup>19</sup> should be incorporated into the BMI Consent Decree, as part of a general move towards making the two Consent Decrees uniform and therefore more conducive to true competition. In addition, defined terms such as such as the current distinction between “Music user” and “On-line music user” found in the current ASCAP Consent Decree,<sup>20</sup> do not seem relevant and should be dispensed with.

The Department should also consider addressing and updating and/or adding other important terms. The term “Licenses in Effect” should be a defined term, with the definition including not only current licenses which have been finalized, but also any pending “application for a license that has been made.” Other terms, which may be subject to continued interpretation, such as the concept of an “interactive service” should likely be addressed by incorporating flexibility into the Consent Decrees with respect to that term. Both the ASCAP and BMI Consent Decrees should address the issue of what constitutes an “interactive service” by referring to the Copyright law as may be interpreted by case law, much as the terms “Right of public performance” and the general reference to “Performance” are addressed throughout both the ASCAP and BMI Consent Decrees, presently. Incorporating such flexibility will avoid a potential situation of a particular service possibly being deemed “non-interactive” following adjudication of those issues in separate proceedings, which service might fall under a static definition of (or unprincipled application of the term) “interactive,” in the continued application of the Consent Decrees.

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<sup>19</sup> ACAP Consent Decree, Sec II *et. seq.*

<sup>20</sup> ACAP Consent Decree, Sec II (F), (G), (H).

In addition to ensuring that terms and definitions are consistent across the two Consent Decrees, elements of the form of the individual Consent Decrees should be homologated, as well. The specific delineation of what is “Prohibited Conduct”<sup>21</sup> vs. behavior the “Defendant is enjoined and restrained from”<sup>22</sup> should be made consistent, in both form and language, across both the ASCAP and BMI Consent decrees. Similarly, the Per-Program and Per-Segment License structure of the ASCAP Consent Decree<sup>23</sup> should be incorporated into both Consent Decrees. And the explicit availability of an Adjustable Fee, Blanket License, as is described in the BMI Consent Decree<sup>24</sup> should be incorporated into both the ASCAP and BMI Consent Decrees, as well. Each of these respective provisions, as have been applied, serve to make the licensing process flexible, efficient and available to a wide array of potential licensees, ensuring that many different licensees can avail themselves of public performance licenses, regardless of the size or situation of the particular licensee.

**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?**

**a) It is Extremely Difficult to Acquire the Contents of ASCAP’s or BMI’s Repertory in a Useful Format and That Lack of Transparency Severely Impacts Competition**

As briefly addressed above, a major distinction between the ASCAP Consent Decree and the BMI Consent Decree is that the ASCAP Consent Decree includes a comprehensive section, Section X, which enumerates several requirements for ASCAP to make available to the public information about the compositions contained in its repertory, ostensibly so that music users can more easily determine which PRO administers the rights to particular compositions and the

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<sup>21</sup> ASCAP Consent Decree, Sec IV.

<sup>22</sup> BMI Consent Decree, Sec. IV

<sup>23</sup> ASCAP Consent Decree, Sec VII.

<sup>24</sup> BMI Consent Decree, Sec. VIII.

identity of the ultimate rights holder for such compositions. Those provisions, as well-intentioned as they may be, have proven to be less-than effective, as ASCAP has interpreted them to mean that ASCAP is only obligated to provide a partial online database, which is only searchable by song title. Even more troubling, the BMI Consent Decree contains no public disclosure requirement, at all. We understand that BMI representatives have publicly stated, as a result, that BMI is under no obligation to provide data on BMI's repertory.

The ineffectiveness of the current public disclosure requirement in the ASCAP Consent Decree, and the complete absence of any disclosure requirement in the BMI Consent Decree, makes it virtually impossible to acquire the contents of ASCAP's or BMI's repertory in any useful format. This state of affairs has an immense negative impact on competition. Without knowing the contents of the repertory to be licensed, a potential licensee is essentially blind to the particulars of what is being licensed, and must take it on pure faith that the repertory is as significant as ASCAP or BMI represents it is. Licensees cannot adequately value the license for the repertory, and significantly, cannot ascribe value to potential direct licenses of works that may be within that repertory. Modifications of the transparency requirements in both Consent Decrees are not only warranted, but in fact, absolutely necessary, in order to effectively promote competition in market for music performance licenses.

Section X of the ASCAP Consent Decree was imposed as part of the 2001 Amendment to the Consent Decree.<sup>25</sup> Section X is comprised of several detailed instructions governing how inquiries regarding specific compositions must be responded to by ASCAP, how and where a list of works in ASCAP's repertory is to be maintained and the specifics of how the repertory list

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<sup>25</sup>United States of America v. American Society of Composers Authors and Publishers, Second Amended Final Judgment "AFJ2," Sec X; Department of Justice Memorandum in Support of AFJ2, at page 37.

must be made available. Finally, Section X prohibits ASCAP from initiating infringement actions for works that were not identified on the electronic public list.<sup>26</sup>

As this Department's Memorandum in Support of the adoption of Section X as part of the most recent amendments to ASCAP Consent Decree in 2001 itself noted, the information required under Section X was intended to "enable users to make more informed licensing decisions and can facilitate substitution of music from one PRO for music from another or direct licensing from rights holders."<sup>27</sup> Unfortunately however, as the most recent rate case with ASCAP painfully indicates, these public information requirements do not go far enough in enabling music users to make licensing decisions, as is the provision's stated intent.

ASCAP has very narrowly interpreted the provisions of Section X of the current Consent Decree to be satisfied by its limited, "searchable database," which can only be searched manually, on a song-by-song basis. Applying this interpretation of its public disclosure obligations, ASCAP was able to successfully obscure the extent of its repertory, and that of its affiliated music publishers, to successfully stymie efforts of Pandora to make precisely the type of "more informed licensing decisions to facilitate substitution of music from one PRO for music from another or direct licensing from rights holders" that the Consent Decree is intended to facilitate.

As Judge Cote noted in her decision: "That same day, Pandora also asked ASCAP for the list of Sony works in ASCAP's repertoire. It would have taken ASCAP about a day to respond to Pandora's request with an accurate list of the Sony works. But, ASCAP, like Sony, stonewalled Pandora and refused to provide the list."<sup>28</sup> And "Although ASCAP attempted at trial to show that Pandora could have used public sources of information to identify the Sony catalog, it failed to

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<sup>26</sup> AFJ2, Sec X.

<sup>27</sup> Dep't of Justice Memo in Support of AFJ2, at page 37.

<sup>28</sup> In Re Petition of Pandora Media, Inc., at page 67.

show that such an effort would have produced a reliable, comprehensive list, even if Pandora had made the extraordinary commitment necessary to try to compile such a list from public data.”<sup>29</sup>

It is clear that the public disclosure requirements which are part of the current ASCAP Consent Decree, while intended to provide public access to data regarding ASCAP’s repertory, fall far short of the explicitly-stated goal of “enabling users to make more informed licensing decisions and facilitating substitution of music from one PRO for music from another or direct licensing from rights holders.” The need for timely, accurate and easily-accessible data regarding both ASCAP’s and BMI’s repertory is absolutely essential to maintaining a truly competitive licensing marketplace for the performances of musical works.

In addition to the fact that the lack of available data from ASCAP as noted previously, the BMI Consent Decree presently has no explicit provisions requiring public disclosure of BMI’s repertory, at all. Following the observations made initially by the Department of Justice, and much more recently by Judge Cote in the context of amendment of and the recent rate case conducted pursuant to the ASCAP Consent Decree, both of which emphasize the incredible importance of the public disclosure of accurate and timely information about repertory – and beg for enhancement and enforcement of those provisions - it is clear that the BMI Consent Decree should also include parallel, enhanced public disclosure requirements, as well.

**b) Modifications to the Transparency Requirements in the Consent Decrees Are Not Only Warranted, But Necessary**

Both the ASCAP and BMI Consent Decrees should be modified, to make it absolutely clear that both ASCAP and BMI are both obliged to maintain accurate, timely databases, which should be machine-searchable, by catalog, publisher/administrator and writer, as well as by song, of all works within their respective repertories, which lists should be publicly available, at all times, to any and all licensees and prospective licensees. Further, both the ASCAP and BMI Consent

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<sup>29</sup> Id., at page 69.

Decrees should be amended to include appreciable consequences for failure to maintain such public disclosures, such as potential penalties in the form of fines or, at the very least, being absolutely enjoined from bringing actions, whether it be infringement, petitions to the rate court, or any other action, against any party, regarding any composition which is not accurately depicted in a publicly-available list of repertory.

**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?**

**a) The Consent Decrees Should Not Be Modified to Allow Rights Holders to Permit ASCAP or BMI to License Their Performance Rights to Some Music Users But Not Others**

The Consent Decrees should not be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others. Doing so would run counter to the very essence of the Consent Decrees, which is to ensure that ASCAP and BMI provide their entire repertory for licensing to all licensees, at rates that are uniform among all licensees that are similarly situated. Any modification that would allow ASCAP or BMI to permit their affiliated music publishers to limit ASCAP or BMI's authority to license their performance rights to some music users but not others would empower ASCAP and BMI to selectively license certain entities but not others, at various rates, subject only to their unique discretion. ASCAP and BMI and their affiliated music publishers could simply allege some "distinction" (however minor or inconsequential) between otherwise similarly situated services. What is more, allowing individual music publisher affiliates to withdraw portions of their catalogs from ASCAP or BMI would wreak havoc on the literally millions of agreements with songwriters, who's publishing agreements are founded on the assumption that public performance licenses would occur as part of ASCAP and BMI.

We understand that the instant inquiry itself was prompted by both ASCAP and BMI specifically seeking modification of the Consent Decrees to, among other things, allow their affiliated rights holders to withdraw some of their rights to license their performance rights through ASCAP and/or BMI, as those rights holders may see fit. There is no reason for the Department to consider modifying the Consent Decrees to allow rights holders to withdraw some of their rights from ASCAP and/or BMI. Under both of the Consent Decrees currently, there is no prohibition against rights holders withdrawing the works that they control, or for rights holders to license those works to music users, directly. Accordingly, there would likely be little or no competitive benefit to allowing rights holders to withdraw only portions of their rights or their catalogs from ASCAP and/or BMI, only for certain uses.

Indeed, allowing *selective, partial* withdrawal of particular rights, which rights are needed only by certain services, would be highly anti-competitive and would eviscerate the very essence of the Consent Decrees: The requirement that ASCAP and BMI license their entire catalog, at competitive rates, to all potential licensees seeking licenses.

Works that are licensed through ASCAP and/or BMI are, and should be, licensed subject to the terms of the Consent Decrees, which have been correctly interpreted to include the obligation to license all works in their respective repertory,<sup>30</sup> to all licensees requesting a license, at fair rates and for the same rate among similarly-situated licensees. The decision for a rights holder to remove their catalog or certain works from ASCAP or BMI for the purposes of licensing and administration should necessarily be a considered undertaking, with rights holders having to weigh the benefits that are derived from collective licensing through ASCAP or BMI – benefits that include lower transaction costs, efficient licensing, collective funding of rate negotiations and rate-setting proceedings, enforcement of performance rights and other administrative

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<sup>30</sup> BMI vs. Pandora, 13 Civ. 4037 (LLS) (Dec. 18, 2013) Opinion and Order; and In re: Pandora Media, Inc., 2013 WL 5211927 (Sept. 17, 2013) Opinion and Order.

functions - all of which are subject to the oversight applied by the Consent Decrees, against the potential benefits of individual, direct licensing – which include potentially higher individual fees, the ability to seek preferred placement of the rights holder’s works and freedom from sharing collective cost and licensing burdens that benefit other rights holders – all of which are subject to the vagaries of running an individual, stand-alone, competitive business.

There is likely nothing more anti-competitive than to allow rights holders to elect to have all of the benefits of collective licensing – the centralized administration, streamlined licensing and payments, collective enforcement, etc. - that are only available through collectives such as ASCAP and BMI, without being subject to any of the oversight that has proven to be necessary for the equitable operation of those collectives.

In addition, the history of the musical work publishing business literally relies on the continued assumption that music publishers will have the performance rights for the works in their catalogs administered by ASCAP and/or BMI, who in turn, have direct relationships and outstanding fiduciary duties to their songwriter affiliates. The overwhelming majority of publishing and administration agreements that songwriters have entered into over the last 70 years are premised on the presumption that the music publisher with whom the songwriter enters into the agreement, will look to that songwriter’s Performing Rights Organization - ASCAP or BMI – for administration of the public performance rights to those compositions the songwriter delivers under the agreement. Songwriters – and their publishing and administration agreements, by their very terms - assume the continued affiliation with the Performing Rights Organizations as a basic element of the contractual bargain and relationship. Songwriters would be immeasurably damaged by the ability of their music publishers to claim that certain compositions, or certain rights and uses of certain compositions, were not subject to the



administration of ASCAP and/or BMI, an assumption that underlies virtually every songwriter's music publishing and/or administration agreement entered into over the last 70 years.

**b) If Such Partial or Limited Grants Of Licensing Rights To ASCAP And BMI Are Allowed, They Should Only be Allowed Subject to Strict Controls**

If the Department of Justice and the presiding courts of the Southern District of New York do believe that allowing partial withdrawals of rights holders' catalogs would encourage competition, it is imperative that any such relaxation of the existing provisions in the Consent Decrees, requiring rights holders to license their entire catalogs through ASCAP and BMI be premised on and governed by significant controls. Just some of the points that must be considered in order to make any scheme of partial withdrawals even remotely workable and conducive to competition include:

- No direct license with respect to any partially withdrawn rights which are entered into by any a music publisher with a market share of greater than 10% (of either total works or market revenue) can be used as evidence of the reasonable value of a Performing Rights Organization's blanket license in any rate trial.
- The Performing Rights Organization and rights holder seeking to withdraw some of their rights must give 12 months' notice of the impending withdrawal, which notice must include not only a specific description of which license rights are being withdrawn, but also must include a complete, detailed and accurate list of the works for which partial rights are intended to be withdrawn;
- Songwriters must be able to keep their rights within the Performing Rights Organization and payments for the "writer's share" for all exploitations, including any exploitations subject to a partial withdrawal made to and administered by their Performing Rights Organization, regardless of a music publisher withdrawing partial rights to that songwriter's works;
- The Board – with any prospective withdrawing rights holder abstaining – of ASCAP and BMI should vote on whether and how to implement any proposed withdrawal of partial rights.
- No rights holder who engages in any partial withdrawal of certain licensing rights can sit on the Board of ASCAP or BMI; and

- No rights holder who engages in any partial withdrawal of certain licensing rights can re-submit the withdrawn licensing rights for at least 3 years;

These requirements would constitute the minimum level of restrictions that should be attendant to any consideration of allowing partial withdrawals by rights holders of certain rights from ASCAP and BMI. Not having these controls and allowing certain large music publishers – some of whom now approach individual market share that is on par with ASCAP and BMI, themselves – to withdraw and hold out their considerable catalogs for higher rates, while simultaneously allowing smaller publishers, who’s catalogs are less valuable, to choose not to license directly (at what would necessarily be a lower rate, in a competitive marketplace), and simply acquire the benefit of the value “benchmark” established by the larger music publishers, to be applied to the respective Performing Rights Organization, would skew the marketplace and effectively allow the largest market participants to dictate the price for all market participants.

As has been observed in previous rate cases, the “blanket” ASCAP and BMI license is effectively worth more than the individual licenses that is comprised of, largely due to the blanket, full-coverage nature of the license being granted.<sup>31</sup> Once the full coverage of that blanket license is reduced by direct licenses outside of the collective, so to, the value of the remainder of the collective is similarly reduced.

An obligation to give ample advance notice and full disclosure of precisely what rights for what works may be subject to a partial withdrawal is self-evidently appropriate. As the recent Pandora case plainly makes clear, the purported withdrawal of rights, without any facility for licensees to identify the works that would be withdrawn, effectively forces licensees into licensing on any terms that the licensing entity(ies) presents. Not knowing the scope of what

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<sup>31</sup> CBS v. BMI, 441 U.S. 1 (1979), at page 21 “Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product.” Id., at page 22 “To the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material.”

works might not be subject to the license, the licensee faces certain, substantial, “crippling” copyright infringement actions.<sup>32</sup>

Similarly controls that require the consent of Board of the Performing Rights Organization (with any prospective withdrawing rights holder abstaining) prior to effectuating any partial withdrawal, and a limitation that rights holders who partially withdraw of certain licensing rights may not sit on the Board of ASCAP or BMI are self-explanatory. The Board of ASCAP and BMI should be able to decide – without the influence of the member with an interest in the issue - whether and how to implement such withdrawals.

A requirement that songwriters be able to keep their rights within the Performing Rights Organization of their choice, with all payments for the “writer’s share” for all exploitations, including any exploitations subject to a partial withdrawal, made to and administered by their Performing Rights Organization, regardless of a music publisher withdrawing partial rights to that songwriter’s works, is also absolutely necessary and self-explanatory. As discussed above, songwriters fundamentally rely on the Performing Rights Organizations as part of the music publishing framework. Music publishers cannot be allowed to undermine the very foundation of decades and decades of music publishing and administration agreements with the songwriters to whom they have a fiduciary duty, by simply withdrawing certain rights from ASCAP and BMI. The contractual obligations that exist between songwriters and their music publishers, as fulfilled by the Performing rights Organizations, must be preserved.

Finally, if the Department of Justice is going to consider allowing these partial withdrawals, then the Department itself must revisit its merger guidelines with respect to music publishing. In the first instance, the Department will need to be extra vigilant in its oversight and efforts to

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<sup>32</sup> In Re Petition of Pandora Media, Inc., at page 101 “By withholding the list, Sony deprived Pandora of significant leverage in their negotiations. Pandora was faced with three options: shut down its business, face crippling copyright infringement liability, or agree to Sony’s terms.”

ensure that the largest publishers are not empowered by partial withdrawals of rights as a mechanism to acquire greater catalog and become even bigger market dominators. If smaller publishers begin to acquiesce to consolidation efforts following any changes to the Consent Decrees, the effect might be to exacerbate an even bigger problem of market concentration.

**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?**

**a) The Rate-Making Function Currently Performed By the Rate Court Should Not Be Changed To a System of Mandatory Arbitration**

The rate-making function currently performed by the rate court should not – and likely cannot – be changed to a system of mandatory arbitration. While arbitration sometimes enjoys a popular conception as a cheaper, faster alternative dispute resolution, especially for small claims, experience (as well as numerous studies), has shown that with respect to large-scale and sophisticated cases, it is the opposite. The very special nature of the musical work performance landscape, including both the increasingly-sophisticated services that perform the works and the unique nature of the works, requires a rather detailed review of the facts in any particular rate-case. Recent rate cases have redoubled the understanding that the Federal discovery and litigation process, overseen by sophisticated judges with broad powers and a history of dealing with the subject matter and the parties involved is not only preferable, but indeed necessary, in order to properly adjudicate disputes and rate cases with respect to the licenses attendant to performance of musical works.

In their response to the Copyright Office’s recent Music Licensing Study,<sup>33</sup> ASCAP explicitly acknowledged that they are seeking to have the rate-setting procedures applicable to ASCAP

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<sup>33</sup> <http://www.copyright.gov/docs/musiclicensingstudy/>

under the Consent Decree converted to private arbitration with limited discovery<sup>34</sup> and including a presumption that direct deals are reflective of Fair Market Value.<sup>35</sup> BMI's response also alludes to the same concerns.<sup>36</sup> In addition, both ASCAP and BMI are calling for the repeal of §114(i),<sup>37</sup> a provision of the Copyright law that ASCAP and BMI both lobbied to have included,<sup>38</sup> which limits the applicability of sound recording royalties in consideration of musical work rate-setting proceedings. If this amendment passes, it will require massive amounts of additional evidence, by all parties, to demonstrate the significance of the differences between the sound recording industry and the music publishing industries, and the distinctions between sound recording royalties and musical work performance royalties.

Arbitration of rates and other issues involving musical works and sound recordings have proven no more cost effective – and have resulted in far less consistent results – than the ASCAP and BMI rate cases have. Recent rate-setting arbitrations have taken years to adjudicate, cost multiple millions of dollars for each of the involved parties to be litigated, led to wildly disparate rates among competing services, been subject to numerous appeals and even Congressional interventions.<sup>39</sup>

Finally, the Consent Decrees themselves, and following that, any proposed modification, are subject to the continuing jurisdiction of the Federal Courts of the Southern District of New York. It would seem unlikely that the Federal Court with continuing jurisdiction over the Consent

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<sup>34</sup> ASCAP Comments in Response to Copyright Office Notice of Inquiry, [http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014\\_3/](http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/), at page 23

<sup>35</sup> Id, at page 24

<sup>36</sup> BMI Comments in Response to Copyright Office Notice of Inquiry, [http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014\\_3/](http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/), at pages 8 and 16.

<sup>37</sup> ASCAP Comments in Response to Copyright Office Notice of Inquiry, at page 27, BMI Comments in Response to Copyright Office Notice of Inquiry, at page 9

<sup>38</sup> H.R. Rep. 104-274, at 24 (1995) (describing 114 (i) as dispelling “the fear that license fees for sound recording performance may adversely affect music performance royalties”); In Re Petition of Pandora Media, Inc., fn 30, at page 37

<sup>39</sup> H. R. 7084 the "Webcaster Settlement Act of 2008" amending section 114 of title 17, United States Code, following the Copyright Royalty Board Order which set sound recording royalty rates for webcasters in 2009, to provide for agreements for the reproduction and performance of sound recordings by webcasters.

Decrees would entertain a modification of them that would effectively end that continuing jurisdictional oversight. While it is possible that the Judges who will ultimately decide the applicability of any proposed modifications to the Consent Decrees might be convinced to pass some or all of the rate-setting process under the Consent Decrees to a Special Master or arbitrator, for the reasons outlined above, having these sophisticated proceedings shifted out of the full Federal Court process and over to a less comprehensive process would provide neither a cost savings nor yield any better results.

**b) Procedures That May Be Considered to Expedite Resolution of Fee Disputes May Include Appropriate Interim Fees that Should be Set at a Very Low Minimum to Ensure Continued Negotiations**

BMI, in their response to the Copyright Office’s inquiry into music licensing, suggested that one area where the procedures may expedited is in the area of fee disputes is with respect to interim fees.<sup>40</sup> Indeed, the only minor issue that could represent how the Consent Decrees might be “not suitable for the digital age,” could be the allegation that some small services may have acquired a license on an interim basis and gone out of business before making complete payment under the interim license. While we are skeptical of the amounts – both in terms of the number of these “transient” licensees that have come and gone and the actual dollar losses that may have been incurred, as a result - we nonetheless acknowledge that perhaps, following demonstration of the significance of this problem, a limited interim fee payment, to be held in escrow, might be warranted. Where the Performing Rights Organization can unequivocally demonstrate that a prospective licensee lacks any recognizable ability to make full payment of appropriate license fees, when set, some minimum interim license fee might be appropriate. When considering such an amendment, it is important to ensure that any such minimum interim license fee be set at a

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<sup>40</sup> BMI Comments in Response to Copyright Office Notice of Inquiry, at pages 3 and 16.

rate that does not either dis-incentivize the Performing Rights Organization from, or exhaust the resources of the licensee, preventing, continuation of diligent efforts to set a fully-applicable rate for the service in question.

**c) Payment of Appropriate Interim License Fees Can Begin in the First Regular Payment Period Following Issuance of the License**

Again, while we believe that the prevalence of disappearing licensees that utilize significant numbers of works and go out of business prior to making payment for the use of those works - and we are even more certain that any actual monetary damage resulting from any such un-paid licenses is miniscule - DiMA sees no reason why, following demonstration by the Performing rights Organization of the likely inability of a prospective licensee to make an appropriate minimum payment, the Department of Justice should not entertain the possibility of requiring appropriate interim fee payments, payable upon the first regular payment period set forth in the prospective license, with the interim fee payment being held in an escrow account.

**7) Should the Consent Decrees be Modified to Permit Rights Holders to Grant ASCAP and BMI Rights in Addition to “Rights of Public Performance”?**

**If the Consent Decrees Are to be Modified to Permit Rights Holders to Grant ASCAP and BMI Rights in Addition to “Rights of Public Performance,” any Such Modification Must be Accompanied by Significant Oversight**

The modification of the Consent Decrees to permit rights holders to grant ASCAP and BMI the authority to license rights in addition to “rights of public performance” (such as the right to license “mechanical reproductions” or “synchronization” rights) may present a way to serve competitive purposes with respect to those additional rights. Allowing the “bundling” of disparate rights available (and necessary, in many cases) to be licensed under a small group of licensors that can provide many rights necessary and/or desirable can create sorely-needed efficiencies in the music licensing marketplace.

Notwithstanding what are potential benefits of potentially reducing the number of licensors in the marketplace from which licensees must seek the multitude of licenses for the various separate uses of musical works, it is clear that any consideration of allowing ASCAP or BMI to effectively become central way-points within the broader musical works licensing market absolutely must be subject to the type of oversight that the Consent Decrees currently provide, with respect to the performance license for musical works.

As has been discussed at length in this response, above, within the limited authority of representing only the public performance license for musical works, both ASCAP and BMI have demonstrated significant, repeated and ongoing propensities to engage in what is disturbingly pervasive anti-competitive behavior. Providing these entities with the authority to aggregate and negotiate for even more rights, including very significant rights, within the music industry, must be coupled with a continued – and indeed, increased – level of oversight, to ensure that they do not abuse what would necessarily be even more significant market power, over a larger set of rights.

Those restrictions must include, at a minimum:

- A complete extension of the requirement that ASCAP and BMI issue licenses to potential licensees upon request, thereby averting threats of copyright infringement for failure to accede to ASCAP or BMI's license fee demands;
- Requiring that ASCAP and BMI license similar users similarly, prohibiting ASCAP and BMI from price discriminating within a group of users;
- Requiring ASCAP and BMI to maintain accurate, timely and publicly available to any and all licensees and prospective licensees, databases of all of the works and rights that they represent and are authorized to license, that are machine-searchable by catalog, publisher/administrator and writer, as well as by song. To enable users to make fully informed licensing decisions and facilitate substitution of music from one PRO for another or direct licensing from rights holders. With appreciable consequences for failure to maintain such public disclosures;
- Conferring the jurisdiction of the Federal Court of the Southern District of New York, which currently supervise the ASCAP and BMI Consent Decrees, to act as a "rate court" in



setting reasonable license fees for all licenses being offered by ASCAP or BMI, under the same terms and conditions as are applicable under the Consent Decrees currently;

- Barring ASCAP and BMI from obtaining exclusive rights to license any of the rights of their affiliated copyright owners' works, preserving the right of potential licensees to secure rights licenses for any rights that ASCAP and BMI are authorized to offer directly from composers and music publishers;
- Prohibiting ASCAP and BMI from licensing any of the rights they represent on a fixed-fee blanket license, unless requested by the licensee, so that licensees are able to secure license rights to portions of the catalogs represented by ASCAP and BMI in transactions directly with rights holders (and requiring ASCAP and BMI to recognize and give credit for any such direct licenses, when calculating the fees due for the remainder of their catalog).

Once again, if the Department of Justice is going to consider allowing ASCAP and BMI to engage in the licensing of multiple-rights, it is incumbent upon the Department to examine its merger guidelines with respect to music publishing. The Department should demand significant oversight authority, to ensure that neither ASCAP, nor BMI, nor large music publishers are empowered by the aggregation of even more rights under their authority, to acquire greater catalog and amass even greater market power.

## **Conclusion**

DiMA and its members fully support the Department of Justice in its mission to examine the effectiveness of the ASCAP and BMI Consent Decrees. We are pleased to see the Department invite all interested persons, including songwriters and composers, publishers, licensees, and service providers, to provide the Department with information, comments and perspectives relevant to whether the Consent Decrees continue to protect competition and we remain eager to continue to be involved in the Department's review of these important Antitrust Decrees.

We believe that there is little that needs to be done to ensure that the Consent Decrees remain an important and viable element in the music licensing marketplace. Given that the Department has undertaken this review, there may be opportunity to make clarifications to the language and pursue consistency in the form of the individual Consent Decrees, to ensure that they are clear, comparable and fostering competition. Significant changes however, such as those sought by ASCAP and BMI to relax the rate-setting process, allow partial withdrawals of rights from ASCAP and BMI licensing repertory, and the possible joint licensing of performance rights with other music rights by the Performance Rights Organizations, are substantial and raise significant concerns.

The Department of Justice should carefully consider the requests for substantive changes that fundamentally alter the character and purpose of the Consent Decrees. ASCAP and BMI have managed to flourish, including reaping ever-greater revenues from digital music services, while operating under the Consent Decrees. A call for significant changes to the Consent Decrees at this time seems largely unwarranted and, if undertaken at all, should be done with the utmost caution.

Respectfully submitted,

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