SONY/ATV MUSIC PUBLISHING LLC

COMMENTS SUBMITTED TO THE DEPARTMENT OF JUSTICE

IN CONNECTION WITH ITS REVIEW OF THE ASCAP AND BMI CONSENT DECREES

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Sony/ATV Music Publishing LLC submits this memorandum in response to the Department's invitation for comments in connection with the Department's review of the consent decrees, as amended, in *United States v. ASCAP*[1] and *United States v. Broadcast Music, Inc.*[2] (the "Consent Decrees"). The Consent Decrees regulate the operations of the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), the two major "performing rights organizations" (PROs) in the United States. It is our understanding that the Department has initiated its review of the Consent Decrees, which have been substantially unchanged in their basic structure for more than sixty years, in light of the tectonic shift in how music is delivered to and experienced by consumers due to the digitalization of music and its distribution over the Internet and on mobile devices.

Sony/ATV respectfully submits that the Consent Decrees should clarify, whether by amendment or otherwise, that each copyright owner (i.e., a music publisher) may, in its discretion, designate particular types of users or uses that the owner will authorize ASCAP or BMI (as the case may be) to include in their respective collective licenses, with the copyright owners exclusively reserving the right for themselves to license such rights to all other users or uses.[3] ASCAP and BMI also should be required, on a nondiscriminatory basis, to accept these limited grants of public performance rights from copyright owners. This arrangement will ensure the availability of multiple independent sources to license performance rights while still

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1 No. 41 Civ. 1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) ("Seconded Amended Final Judgment" or "SAFJ").

2 No. 64 Civ. 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

3 In this memorandum, we refer to designations of limited grants of rights to ASCAP and BMI, but we could have referred to limited withdrawals of rights from ASCAP and BMI. Since one is the complement of the other, either formulation could have been used. Indeed, EMI originally contemplated fully withdrawing from ASCAP and then providing ASCAP with only a limited grant of its public performance rights. When ASCAP promulgated its rules, it wrote them in terms of withdrawing partial rights.

preserving the essential role for which ASCAP and BMI were created: servicing those markets that continue to be best served by collective licensing.

Sony/ATV expects a number of tangible benefits to result from clarifying the Consent Decrees to confirm each copyright owner's right to designate which public performance rights it may retain for exclusive licensing to specific types of users or uses, including:

- Providing more flexibility in setting licensing terms to meet the licensee's specific needs
- Fostering the development of new sources of music distribution
- Licensing services more quickly
- Reducing administrative costs
- Providing better administrative solutions
- Reducing the costs and uncertainty of rate disputes
- Allowing greater transparency and efficiency in royalty distributions to songwriters
- Creating increased competition among publishers to sign songwriters

This memorandum contains four parts. Part I briefly examines the history of ASCAP and BMI, their respective interactions with the antitrust laws, and the purpose of the Consent Decrees. Part II explores the recent emergence of technology-driven music companies and shows that a market can exist, and in fact has existed, between these music services and at least some music publishers, without the intermediation of ASCAP or BMI. Part III discusses how the public interest will be served if the Consent Decrees are clarified to confirm the rights of copyright owners to specify which types of music users or uses their PROs may license on the owner's behalf. Part IV briefly comments on three proposals we understand may be advanced by others in the Department's review: (1) an expedited arbitration process to replace the current rate court mechanism in order to reduce the cost and duration of resolving licensing rate disputes

between a PRO and a licensee; (2) allowing ASCAP and BMI to acquire and license rights in musical compositions in addition to performing rights; and (3) periodically reviewing the Consent Decrees to ensure that they are structured to promote the purposes of the antitrust laws and further the public interest.

I. Markets, market failures, and the antitrust regulation of the PROs

ASCAP and BMI are aggregators of the right to negotiate and license, on a nonexclusive basis, the "small" (i.e., non-dramatic) public performing rights of the musical compositions written by their composer/author members and whose copyrights are owned and/or administered by their publisher members.[4] These organizations also police the exploitation of these public performance rights on behalf of ASCAP members or BMI affiliates.[5] The PROs collect license fees and, after deducting costs, remit royalties to the copyright holders and the composers and authors.[6] Together, ASCAP and BMI license the music performance rights to most domestic copyrighted music in the United States.[7]

ASCAP was formed in 1914 to overcome a failure in the market for the licensing of performing rights. At that time, public performances of music occurred in tens if not hundreds of

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[4] To simplify the exposition in this memorandum, we will simply call this the "right to license." If we mean something else, we will make that clear in the text. Similarly, when we say "performing rights" we mean the right to publicly perform a musical composition, unless the text indicates otherwise.

[5] ASCAP is a nonprofit unincorporated membership association whose members are songwriters (composers and lyricists) and publishers (owners) of copyrighted musical compositions. BMI is a corporation owned and governed by the broadcast industry that also operates on a nonprofit basis. Songwriters and publishers that license their performing rights for relicense by BMI are called affiliates.

[6] In general, the PROs divide the public performance income, after expenses, equally between copyright holders on the one hand and authors and composers on the other.

[7] SESAC, Inc. is the third PRO operating in the United States. SESAC, originally the Society of European Stage Authors and Composers, was founded in 1930 to serve European composers not adequately represented in the United States. Although growing rapidly, SESAC is much smaller than either ASCAP or BMI and is not subject to regulation under an antitrust consent decree. A songwriter can only be affiliated with one performing rights organization at a time and typically the copyright owner of such songwriter's songs will similarly be affiliated with the same PRO.

thousands of geographically scattered bars, restaurants and concert halls, and copyrighted music was controlled by thousands of owners. Without a central licensing source for public performance rights, it was impossible for users to secure licenses for the musical compositions they wanted to perform and equally impossible for copyright owners to license and police the use of their music. ASCAP was able to reduce search and license negotiation costs by assembling a large body of compositions, the performing rights of which it could license on behalf of the copyright owners and then bundling the performance rights in these copyrights into a blanket license. As a result, each establishment had "one-stop shopping" for the rights it needed to publicly perform all the compositions it wanted to play. ASCAP also was able to spread the joint costs of administration, monitoring license usage, and bringing infringement actions against unlicensed usage across all of its participating copyright owners. BMI was formed in 1939 by the radio industry as an alternative source of licensing and administering performing rights to provide a counterweight to ASCAP in negotiating ASCAP licenses. As a result, BMI functions in a manner similar to ASCAP for reducing transaction and enforcement costs in licensing the "small" performing rights in musical compositions.

By as early as the mid-1920s, ASCAP's activity as an aggregator and its exercise of control over its members attracted the scrutiny of the Department. While the Department recognized ASCAP's essential procompetitive role in creating a functioning market for the licensing of public performing rights, the Department was also concerned that an organization that exclusively controlled the licensing of essentially all such rights of popular copyrighted music could exercise market power and charge supracompetitive rates to music users.

While this concern was ameliorated in the late 1910s and 1920s by the startup and legal obstacles ASCAP faced—which resulted in ASCAP earning little to distribute to its members,

hardly a sign of the exercise of market power—by the time ASCAP had established itself in the 1930s the concern was more real. In the late 1930s, ASCAP sought to raise its aggregate fees by 70% to the radio industry, which then accounted for $4 million of ASCAP's $6 million in annual revenues.[8] By late 1940, license negotiations collapsed, and starting on January 1, 1941, ASCAP's music was essentially removed from the airwaves.

The Department aggressively intervened to force consent settlements to regulate ASCAP and the newly created BMI. The 1941 consent decrees, among other things, prohibited ASCAP and BMI from acquiring exclusive rights from their members and affiliates, required the PROs to offer (in addition to their blanket licenses) a "per program" license to radio broadcasters and a "per piece" license to everyone else, prohibited the PROs from charging fees based on programming that did not contain their music, required the PROs to license radio network programming "at the source" and through to the audience, prohibited the PROs from discriminating in price or terms among similarly situated licensees, and required ASCAP to reduce its membership requirements.[9]

In 1950, in the wake of further allegations of anticompetitive conduct by ASCAP, the Department intervened again, obtaining a modification of the 1941 ASCAP consent decree. The 1950 amended decree, known as the Amended Final Judgment (AFJ), limited ASCAP's operation to licensing performance rights (so as to prevent it from leveraging its power over public performance rights to extend into other rights where functioning markets already existed); reduced its power as an aggregator of public performance rights in hundreds of thousands of compositions from thousands of copyright owners by reinforcing the rule that ASCAP could not

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[8] *See* Sol Taishoff, *NAB Creates $1,500,000 Music Project*, BROADCASTING, Sept. 15, 1939, at 84.

[9] *See United States v. ASCAP*, Civ. No. 13-95, [1940-1943] Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. Mar. 4, 1941); *United States v. Broadcast Music, Inc.*, Civ. No. 459, [1940-1943] Trade Cas. ¶ (CCH) ¶ 56,096 (E.D. Wis. May 14, 1941).

obtain exclusive rights from members; significantly strengthened the protection of ASCAP members to license directly on their own without interference, regulation, or profit participation by ASCAP; reinforced the decree's nondiscrimination provisions; limited ASCAP licenses to five years or less (to permit licensees more opportunities to change licensors and members more of an opportunity to withdraw from ASCAP); required ASCAP to issue mandatory blanket licenses to all music users that request them (to deprive ASCAP of the bargaining power that comes from the ability to refuse to deal); and, provided, in the event that ASCAP and a licensee cannot agree on the license fee, for a court determination of a "reasonable fee" where ASCAP has the burden of proof.[10]

In 1964, the Department filed a new suit against BMI alleging that BMI engaged in monopolistic conduct.[11] After two years of litigation, BMI and the Department reached a settlement which imposed a new consent decree.[12] Ultimately, the 1966 Decree entered against BMI was "largely similar" to the 1941 Decree entered against ASCAP.[13] BMI's decree was perhaps most noticeably distinct from ASCAP's decree in that the BMI decree did not create a "rate court" to adjudicate the inevitable disputes which would arise concerning the fees BMI would charge to its customers.[14] Such a provision was only incorporated into the BMI decree after BMI moved to amend its decree in 1994.[15] The rate court provisions, including the

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[10] Amended Final Judgment, United States v. ASCAP, No. 13-95, [1950-1951] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. Mar. 14, 1950) (amending 1941 ASCAP consent decree).

[11] Complaint, United States v. Broadcast Music, Inc., Civ. No. 64 Civ. 3787 (S.D.N.Y. filed Dec. 10, 1964).

[12] *See* United States v. Broadcast Music, Inc., Civ. No. 64 Civ. 3787, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966) [hereinafter 1966 Decree].

[13] Broadcast Music, Inc. v. DMX Inc., 683 F.3d 32, 36 (2d Cir. 2012).

[14] *See* United States v. Broadcast Music, Inc., 275 F.3d 168, 172 (2d Cir. 2001).

[15] *See* United States v. Broadcast Music, Inc., No. 64-CV-3787, 1994 WL 901652, 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. Nov. 18, 1994).

definition of "BMI repertory" and the licensing obligations under the 1994 amendment were taken, almost verbatim, from AFJ.

The ASCAP decree attained its current form after ASCAP and the Department jointly moved to amend the decree in 2000.[16] The Department summarized the substantive changes in the decree in its memorandum urging the court to adopt the proposed second amended judgment:

> The proposed modifications would make a number of significant substantive changes to the current [decree]. First, the [amended decree] expands and clarifies ASCAP's obligation to offer certain types of music users, including background music providers and Internet companies, genuine alternatives to a blanket license, *and strengthens certain provisions intended to facilitate direct licensing by ASCAP's members*. Second, it streamlines the "rate court" provisions of the [current decree] in order to facilitate faster and less costly resolution of rate disputes between ASCAP and various music users. Third, the [amended decree] modifies or eliminates many of the detailed restrictions governing ASCAP's relations with its members.[17]

In sum, since the first consent decree was entered in 1941 against a PRO, the Department and the Court have sought to encourage direct licensing by copyright owners to improve the performance of the market. The problem is that, until recently, the costs of direct licensing of public performances were so great that the effort was largely futile. With today's technology, however, that is no longer true in what are the most important new methods of delivering music to consumers.

II. Technology-driven music services

Notwithstanding the considerable benefits, both for music users and music owners, provided by ASCAP and BMI in the licensing of performing rights in musical compositions, the regulation put in place to restrain the market power of the PROs has ended up significantly

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[16] Notice of Joint Motion to Enter Second Amended Final Judgment, United States v. ASCAP, No. 41-1395 (S.D.N.Y. filed Sept. 1, 2000).

[17] Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment at 3-4, United States v. ASCAP, No. 41-1395 (S.D.N.Y. filed Sept. 1, 2000) (emphasis added) [hereinafter 2000 U.S. Memorandum].

burdening the income payable to writers, composers and copyright owners by imposing significant costs not replicated in a free market. In addition, at least in the view of copyright owners, the rate court process has not successfully resulted in license rates and terms that realistically correspond to what would be produced in a free market. Indeed, the strictures of the Consent Decrees, which limit the differentiation in license terms, has stifled the ability of copyright owners to experiment with new delivery systems for music and to support the growth of competition in the delivery of music to consumers.

As a consequence, whenever it is possible for licensing sources to operate in the market independently of ASCAP and BMI, it is in the public interest to permit and encourage them to do so. The Department recognized this in its memorandum in support of the 2001 amendment to the ASCAP consent decree:

> Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of the justifications for collective licensing of performance rights by PROs. The Department is continuing to investigate the extent to which the growth of these technologies warrants additional changes to the antitrust decrees against ASCAP and BMI, including the possibility that the PROs should be prohibited from collectively licensing certain types of users or performances.[18]

Sony/ATV respectfully submits that the technological developments that the Department anticipated in 2001 are here today. In the areas of interactive and non-interactive streaming, music video streaming, and satellite-based radio, for example, providers are small in number (but large in both revenue base and subscriber usage), can programmatically track every performance

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[18] Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment 9 n.10, United States v. ASCAP, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) [hereinafter DOJ 2001 Supporting Memorandum].

of every song they play, and can—and have during the time when certain digital rights had been withdrawn from the PROs by certain copyright owners—readily negotiate directly with music publishers to license public performance rights.

Unlike the geographically far-flung small businesses that have historically characterized the market for licensing public performance rights (and which precipitated the rise of the PROs to begin with), many media services today do not present the same insurmountable transaction, monitoring, and enforcement costs that have historically characterized the market for performing rights licenses. To the contrary, today's technology-driven music services operate nationally or even internationally from a single location while servicing hundreds of thousands or even millions of consumers. Unlike local bars and restaurants, many of these services are well-financed, having been acquired or developed by large public companies (such as Google, Clear Channel Communications, Amazon and Apple) or have become public companies themselves, thereby providing them with access to capital. These services also have detailed computer records that track every song performed on the service, so no sampling is required to determine usage. At least for some copyright owners, a well-functioning market can readily exist (under the proper regulatory framework) for the direct licensing of performance rights without the intermediation or other involvement of a PRO in licensing those rights.

So-called "new media services" are examples of these technology-driven music companies that can efficiently obtain performing rights licenses directly from some copyright owners without involving a PRO. These "new media services" include interactive and non-interactive music streaming services, music video streaming services, and "cloud" music services.[19] Streaming services link the consumer's computer or other device with a server and

[19] We wish to emphasize that new media services are only an example. With the rapid evolution of technology and its adoption by music services, the landscape for music services is likely to be ever-changing. For

allow the consumer to listen to each song in succession as temporary copies of the songs are transmitted (or "streamed") by the service in real time (as opposed to a download, which permanently stores a digital file on the consumer's device) from the server of the service to the consumer's computer or mobile device. Because such transmissions constitute public performances of the compositions, the service must obtain performing rights licenses from the copyright owners of the compositions.

Streaming services may be interactive or non-interactive. Interactive services, such as Spotify, Rhapsody, Beats Music, Google Play, and Amazon Prime Music, allow the consumer to specify a specific song, a sequence or "playlist" of songs, or an album that the service will transmit to the consumer's device, and to listen to that song or those songs "on demand," much like a digital jukebox. Non-interactive services, such as Pandora, Clear Channel's iHeartRadio, and Apple's iTunes Radio, are essentially highly personalized and curated radio stations. Such services allow users to specify their preferences for artists and types of music and, by means of various algorithms, curate the music to the consumer's anticipated tastes and deliver music that satisfies the consumer's preferences. Non-interactive streaming services, however, do not allow the consumer to specify particular songs to be transmitted to the consumer's device.[20]

Services that stream music videos can also be interactive or non-interactive (although they are usually the former), and in many cases the music videos are uploaded to the service by the end users, such is the case with YouTube and other so-called "user-generated video" services. These services also require public performance licenses from the copyright owners to

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this reason, any change in the language of the Consent Decrees to permit copyright owners to make limited grants of rights to ASCAP or BMI should *not* be restricted to a particular class of music licensees or a particular use. A copyright owner should be entirely free to limit the rights it grants a PRO in any way it wants in order to permit it the maximum amount of freedom to license its rights directly to users. Accordingly, although "new media services" was a defined term in the ASCAP rules in effect in 2013, we are using the term much more colloquially here.

[20] Non-interactive services generally must comply with the "sound recording performance complement" set forth in Section 114(j)(13) of the Copyright Act.

transmit the compositions, as well as synchronization licenses to record or "synchronize" the music in timed relation with the visual images and lyric reprint licenses which allow them to display the lyrics associated with the musical compositions.

Cloud music services, sometimes called music "lockers," such as Apple's iCloud and Amazon's Cloud Player, are services that stream music from digital music files that are either uploaded by the consumer to the service's server or matched from a file on the consumer's device to a digital music file on the service's server.[21]

Licensing performing rights to interactive or non-interactive streaming music services or cloud music services—or, for that matter, to satellite radio or streaming music video—does not involve the costs associated with licensing and policing thousands of widely dispersed restaurants, bars, hotels, and cabarets, which necessitated the creation of the PROs. The number of technology-driven music services is small, easily identifiable, and readily reachable (and frequently of substantial magnitude), so that the costs of search—matching a new media service with the copyright owners of musical compositions—and license negotiation are manageable in the ordinary course of business. There are sufficiently few technology-driven music services that each such service can readily negotiate licenses directly with those copyright owners that elect to license performance rights directly and with the PROs for those copyright owners who prefer to entrust licensing such rights to the PROs, thereby assuring the users access to effectively the full

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[21] Some services combine some or all three features of interactive or non-interactive streaming and cloud streaming and may also provide a limited or permanent downloads. The particular features of a service are not important to these comments since, in general, the transaction and other costs associated with licensing of performing rights do not vary materially with the particular services offered (although the license fees may). Note, however, that where a service provides more than one feature that includes musical compositions, for example, interactive audio and video streaming and cloud functionality, it needs to obtain rights to use those compositions in addition to public performance rights, which rights it cannot get from the PROs but only from the copyright owner or, in some cases, an agent (such as the Harry Fox Agency for mechanical (reproduction) rights). For these services, the copyright owners are the most efficient licensors. For a comparison of the various new media services, see, for example, Matt Peckham, *13 Streaming Music Services Compared by Price, Quality, Catalog Size and More*, TIME.COM (Mar. 19, 2014), http://time.com/30081/13-streaming-music-services-compared-by-price-quality-catalog-size-and-more/.

music universe. Since there are economies associated with licensing, only those copyright owners that have sufficient scale are likely to license directly, while the rest will continue to license their rights through a PRO, which is likely to keep the total number of licensors with which a new media service would have to negotiate small.

Moreover, many technology-driven music companies are already effectively and successfully negotiating with many copyright owners for other rights—such as synchronization rights for music videos or print rights for lyrics—which further reduces the incremental costs of search and negotiation. For example, Sony/ATV has successfully negotiated directly with many of the most significant technology-driven music services in business today, including:

- Google Play Interactive Streaming
- Google Play Locker
- Apple iCloud Locker
- Amazon Locker
- Amazon Prime Music
- YouTube

Unlike bars, restaurants, and television stations, for which music is largely incidental to their other activities or programming, technology-driven music companies operate services that are built almost entirely on music and exploit music on a concentrated basis even exceeding the exploitation of music in terrestrial radio broadcasts. Music licensing is central to their existence and the need to negotiate directly with significant copyright owners as well as with the PROs would be a normal cost of doing business, just as in other businesses that must negotiate with multiple suppliers.

Further, the costs of monitoring and enforcement are low. Technology-driven music services are marketed and accessed nationally (or even internationally) over the Internet. They are readily and inexpensively identifiable by copyright owners and can be monitored for infringement through computer-driven programmatic means. Moreover, these services maintain digital data that track every song that is played, how often, by whom and when. Copyright owners can utilize these data, or can hire an administrator to utilize these data, to prepare accurate accountings to songwriters and other rightsholders. This is in stark contrast to the situation with bars, clubs and restaurants, which do not retain or provide such rich data and for which the PROs must resort to using complex, proprietary algorithms in order to estimate which songs are played and how often for the purpose of accounting and payment.

In light of the low transaction costs of licensing performing rights to technology-driven music services, as well as other music providers that certain music publishers believe they can effectively license and administer directly, a well-functioning and more efficient market in these rights would exist if copyright owners reserved the licensing of these rights exclusively to themselves, consistent with the rights granted to them under the Copyright Act.

Experience proves the point. Effective January 1, 2013, Sony/ATV withdrew its new media rights from ASCAP and from BMI pursuant to the respective PRO rules then in effect. In the course of 2013, Sony/ATV entered into four significant direct licensing deals for performance rights in compositions it owns and/or administers: YouTube, iTunes Radio, Pandora and Google Play. Sony/ATV observed no problems in the functioning of the market during this time. Each music service that wished to play Sony/ATV music knew that it needed to obtain a license from Sony/ATV (in the event it did not already have a license) and Sony/ATV had an interest in licensing its repertory to generate income for itself and for its authors and composers.

License negotiations followed in the normal course on an arm's length basis. In every case the market cleared and no music service that desired to obtain a license from Sony/ATV failed to get one.

EMI's experience was similar. EMI withdrew its digital performance rights from ASCAP in May 2011. In June 2011, EMI licensed the performance and mechanical rights to its songs to Apple for use in Apple's iCloud locker service for a one-year term with automatic one-month renewals. In March 2012, EMI negotiated a digital performance license to Pandora that ran through December 31, 2013 and covered all works owned or controlled by EMI that were formerly licensed through ASCAP. In both cases, license negotiations followed on an arm's length basis, and in each case the parties reached an agreement on a license arrangement. No intermediation by ASCAP was necessary in either case for the market to clear.[22]

Indeed, today it is even easier for music users to deal with Sony/ATV than it was in 2013, since a listing of Sony/ATV's global music catalog is now available online.[23] The company's entire music list, which contains more than two million songs (including those of EMI Music Publishing, which Sony/ATV administers), can be viewed and downloaded at one time on the company's website by music services and other interested parties. The list includes the titles, alternative titles, writer/composer country of origin and, to the extent available, ISRC codes, which enable users to match a musical composition to a particular master recording. This is an unprecedented level of transparency which gives current and prospective licensees a clear

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[22] In 2012, following an in-depth merger review by the Federal Trade Commission, which closed the review without taking any enforcement action, a consortium of investors led by Sony Corporation of America and Mubadala Development Company acquired EMI Music Publishing from Citigroup. Sony/ATV is the exclusive administrator of the EMI Music Publishing catalog.

[23] Sony/ATV Music Publishing, Press Release, Sony/ATV Makes Entire Catalog Available Online (July 16, 2014).

window into all of the compositions owned or controlled by Sony/ATV, thereby enabling licensees to make more informed licensing decisions.[24]

III. The need for clarification of the Consent Decrees

There is no dispute that there are marketplaces where the PROs perform a necessary function that is beneficial to both copyright owners and music users. Many copyright owners, for example, lack the scale or wherewithal to enter into individual licenses efficiently and to police the large number of geographically scattered bars, clubs, restaurants, concert halls, and other small performing venues. Even for large publishers such as Sony/ATV, the costs associated with developing an infrastructure to effectively license public performance rights for such a dispersed marketplace would be significant. But those copyright owners that wish to license exclusively and directly to particular classes of music users—whatever those classes may be—should be permitted and encouraged to do so.

As currently interpreted by the ASCAP and BMI rate courts, however, the Consent Decrees do not permit ASCAP or BMI to accept any type of limited grants (or partial withdrawals) of performance rights from copyright owners. Instead, under these interpretations the Consent Decrees stifle rather than promote independent licensing and increase the aggregation of rights in ASCAP and BMI by requiring that copyright owners are either "all in or all out" with respect to granting performance rights in their musical compositions to ASCAP or BMI. That is, even if it is possible for a copyright owner to effectively engage in arm's length negotiations with music users in a free market environment and even if such negotiations would likely increase the range of different economic arrangements available for licensees—thereby

[24] The trade press reports that Universal Music Publishing Group will shortly be making its complete catalog similarly available. *See* Ed Christman, *Sony/ATV Makes Organized Catalog Available Online*, BILLBOARDBIZ.COM (July 16, 2014); Ed Christman, *UMPG to Make Entire Database Easier for Licensees*, BILLBOARDBIZ.COM (June 27, 2014).

encouraging the growth of uses and users and increasing competition among music services for the benefit of music consumers—the rate courts have construed the Consent Decrees to require that if the copyright owner provides a PRO with the ability to license *any* performance rights in its compositions, the owner must provide the PRO the right to license *all* the public performance rights in its compositions. Consequently, the copyright owner must choose between permitting ASCAP or BMI to license the performance rights to its composition to all users or to no users—the Consent Decrees having been interpreted to permit nothing in between.[25]

Significantly, both courts reached their interpretations by finding the language of the Consent Decrees unambiguous. As a result, both courts performed only a textual analysis and did not examine the seventy-year history of the decrees, investigate the purpose of the decrees or the competitive implications of their interpretations, or consider the consistency of their interpretation with the copyright owners' rights accorded by the Copyright Act. When these extrinsic factors are considered, these interpretations need to be abrogated to recognize that copyright owners, in their discretion, may make limited performance rights designations in their compositions to ASCAP and BMI.[26]

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[25] The BMI Court has interpreted the BMI Consent Decree as requiring that where a copyright owner provides only a limited grant of public performance rights, BMI cannot license any public performance rights in the owner's compositions. The ASCAP court has interpreted the ASCAP Consent Decree as granting ASCAP all public performance rights in an owner's compositions if any public performance rights are granted. Regardless of the mechanism, the result is the same: the owner cannot limit the users to whom ASCAP or BMI can licenses performance rights in the owner's compositions if they wish to grant ASCAP or BMI any right to license at all. The owner is either "all in or all out." *Compare In re Pandora Media, Inc.*, Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013) (ASCAP Consent Decree) and *Broadcast Music, Inc. v. Pandora Media, Inc.*, Nos. 13 Civ. 4037(LLS), 64 Civ. 3787(LLS), 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013) (BMI Consent Decree). While these interpretations are subject to appeal, we will accept them for the purpose of these comments.

[26] The ASCAP court's determination is currently the subject of an appeal. As the Department is aware, ASCAP, UMPG, Sony/ATV and EMI filed their initial briefs challenging the rate court's ruling with the Second Circuit on July 28, 2014.

Sony/ATV expects a number of benefits to come from enabling copyright owners to designate which public performance rights in their compositions they retain for exclusive licensing to specific types of licensees, including:

1. *Providing more flexibility in negotiating licenses.* The PROs are large organizations that license a large variety of music users, have demanding oversight over their licensing, and lack flexibility in the types of licenses they are willing (and permitted) to issue. For example, the PROs must license on an identical basis to "similarly situated" licensees, even though some "similarly situated licensees (especially startups) may wish to be licensed in very different ways to satisfy their particular needs or work best with their individual business models. Sony/ATV believes that technology-driven music services will be the most predominant means of music distribution in the future. But at the same time, new media services operate in a very competitive environment. Sony/ATV, and most likely other copyright owners that would engage in direct licensing, could negotiate licenses much better tailored to the specific requirements of these individual services—especially new entrants—than can the PROs, encouraging the growth of additional users and fostering greater competition in the new media service marketplace.[27]

2. *Fostering the development of new sources of music distribution.* Songwriters and publishers want their compositions performed as many times as possible, as more performances, regardless of the rates being paid, equate to greater revenues for songwriters and publishers than fewer performances. It is in the interests of songwriters and publishers to encourage the development of diverse, innovative music services in order to reach the largest audience. With more flexibility to negotiate license terms to meet a music service's specific needs, quicker times to contract signing, and lower administrative costs than ASCAP or BMI, publishers licensing directly have the ability and incentive to encourage and promote new sources and new models of music distribution, thereby providing greater income to writers and their heirs (many of whom are wholly dependent on such income).

3. *Reaching deals more quickly.* Sony/ATV believes that it—and other motivated publishers—can negotiate deals more quickly than can the PROs with all of their internal controls. This both saves costs and frees up management resources, especially for the licensee, which surely can be put to better use in running the music service. The ability to quickly come to closure on a license negotiation and the increased cost certainty, especially where the licensor also can be flexible in its terms and conditions can be very valuable to all parties and especially valuable to startup music services. It also means songwriters can be paid more promptly.

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[27] Most ASCAP and BMI licenses charge some percentage of the licensee's revenues or a flat dollar amount, and do not depend on the amount of PRO music played. A copyright owner licensing directly, for example, could charge on an entirely different basis, and could customize its fee arrangement depending on the particular needs and circumstances of each licensee.

4. *Reducing administrative costs*. The PROs each levy a sizable administration fee to cover their operating costs, which includes the costs of negotiating and administering agreements, monitoring overhead, legal fees and other costs (especially high in the rate court context), and distributing revenues. ASCAP's and BMI's U.S. administrative fees, for example, are effectively 17-18%. Sony/ATV believes that it can reduce administrative costs significantly below this level, thereby creating greater efficiency in licensing and greater net royalty income for songwriters, even without any rate change.

5. *Providing better and more efficient administrative solutions*. Dealing with a PRO gives the licensee only those administrative solutions that the PRO is offering. There are, however, third party services in the market that offer alternative administrative services. If copyright owners license directly, they can choose the best among the available administration solutions. Especially when these administrative solutions are outsourced, competition to provide better and more efficient administrative solutions will intensify among third-party providers as well as ASCAP and BMI (and also incentivize the PROs to improve their services to provide more cost effective administrative solutions in order to compete with new market entrants), with the result that licensees, songwriters and music publishers will all benefit from better services.

6. *Reducing the costs and uncertainty of fee disputes.* When license fee disputes cannot be resolved with ASCAP or BMI, the recourse is lengthy and costly "rate court" litigation. Rate court proceedings can be years in duration and cost the parties millions, if not tens of millions, of dollars. These are costs that are passed through to and ultimately paid by the songwriters and publishers when incurred by the PRO and by users when incurred by a music service. In addition, there can be considerable uncertainty during the pendency of the dispute as to the licensing rate that will ultimately be charged. Even if an expedited arbitration is adopted as a dispute resolution mechanism—which should sharply reduce the massive costs of rate court litigation, resulting in far lower administration costs burdening the performance income payable writers, composers and copyright owners—it is still in the interest of Sony/ATV to negotiate mutually agreeable deals.

7. *Allowing greater transparency in royalty distributions*. Contrary to the concerns that have been expressed by some, Sony/ATV believes that direct licensing offers greater transparency in how royalties are calculated, collected and distributed. While there are writers and writer associations that may believe that ASCAP and BMI's respective allocation and distribution methodologies for royalty payments are "transparent," in reality, the methods used by ASCAP and BMI to allocate payments to the various music publishers and writers are complicated and often opaque. The "transparency" of which some writers and writer associations speak is typically the division of royalties between publisher members and songwriter members; however, this division is only a small piece of the transparency equation. Direct licensing gives Sony/ATV and other copyright owners a better

ability to demand detailed accountings, monitor payments, conduct audits, and provide more detail to their writers in regard to compensation.[28]

8. *Creating increased competition among publishers to sign songwriters*. Publishers that retain the exclusive rights to license will have an important new dimension on which to compete in the signing of songwriters. Today, the PROs conduct essentially all of the licensing of public performance rights for musical compositions. This homogenizes licensing as a service and removes it as a quality on which publishers compete. If publishers are permitted to designate uses or users to which they will have the exclusive right to license, publishers will begin to compete to attract and retain songwriters on the basis of their success not only in negotiating financially attractive direct licensing deals but also their success in supporting and nurturing new providers and models of music services, gaining broader and deeper penetration of their songs to wider audiences, reducing administrative costs, and providing better services to songwriters. This competition among publishers for songwriters is likely to intensify as technology-driven music services gain a greater share of the music marketplace and direct licensing becomes a more important element of music publishing. Moreover, since entry into music publishing is relatively easy—as demonstrated by the entry of over twenty significant new entrants since 2002 (including BMG, Kobalt, Imagem, Reservoir Media Management, Songs Music Publishing, and Primary Wave)—a significant dimension on which new entrants into publishing are likely to compete is the success that an entrant has in signing new media deals that both earn revenues and exposure for their songwriters.

Sony/ATV is also concerned that in today's regulated environment the fees paid to songwriters and publishers for public performance rights for musical compositions streamed over technology-driven music services do not reflect the value that a less regulated, more open market would produce. In assessing value, it is important to keep in mind that the performing right to a musical composition is an essential requirement for a music service to be able to perform a song on its platform. In the absence of a performing license to a composition, the service cannot play any recording of that composition by any performer. Yet under the ASCAP and BMI new media licenses, songwriters receive surprisingly little even for compositions that are performed millions of times.

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[28] Again, as noted, because most technology-driven music services maintain and provide accurate digital data regarding which works have been transmitted and how often, no complex algorithms need to be used to estimate performances in order to allocate payments to writers and other rights holders, providing for greater transparency.

For example, in a widely cited Internet post, David Lowery of the band Cracker published his BMI royalty statement for the fourth quarter of 2012 showing that his 40% ownership of the song "Low" earned him only $16.89 for 1.159 million plays on Pandora. Since Lowery had only a 40% interest, the total amount received by all songwriters in distributions was about $42.25.[29] Likewise, Linda Perry, the songwriter who wrote 100% of Christina Aguilera's hit song "Beautiful," earned only $349.16 for more than 12.7 million plays on Pandora during the first three months of 2012.[30] Pandora is a significant music service. In the second quarter of 2014, Pandora accounted for 8.9% of all listening hours on terrestrial, Internet and satellite radio[31] and was the number 1 station in fourteen of the top fifteen local radio markets in 2013.[32]

Perhaps more telling, although Pandora requires a performing rights license from the music publisher and from the master recording owner for every song it plays (so that there is a one-to-one correspondence between the rights necessary to perform the sound recording and the rights necessary to perform the underlying composition), 92.5% of Pandora's content acquisition costs in 2013 were paid for the rights to the sound recording—more than twelve times what Pandora paid for the performing rights for the underlying composition.[33] Viewed another way, in the three months ended June 30, 2014, Pandora paid approximately $103.1 million to acquire

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[29] These numbers exclude BMI's U.S. administrative fee. The publisher also receives one-half of the licensee's payment for the public performance right, so it received another $42.25.

[30] Greg Sandoval, *Pandora's Web Radio Bill Is Doomed—Well, for Now*, CNET.COM (Nov. 29, 2012), *available at* http://www.cnet.com/news/pandoras-web-radio-bill-is-doomed-well-for-now/.

[31] Pandora Media, Inc., Historical Financial Results: Three Months Ended June 30, 2014 (July 24, 2014), at 9, available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjQzNzA1fENoaWxkSUQ9LTF8VHlwZT0z&t=1

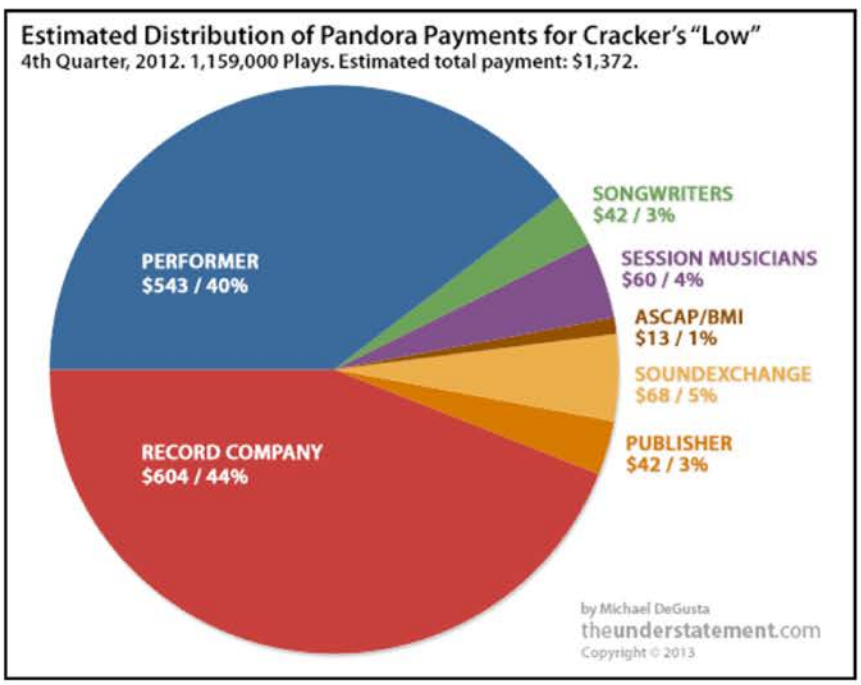
[32] Pandora Media, Inc., Investor Presentation Q1 CY 2014, at 10, 23, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTkxNTM1fENoaWxkSUQ9LTF8VHlwZT0z&t=1.

[33] In its analysis of Pandora's second quarter results, Morgan Stanley calculated Pandora's content costs for compositions as 7.5% of total content costs. Morgan Stanley Research North America, *Pandora Media, Inc. 2Q Results: Seasonality or Signs of Maturity?* July 25, 2014, at 16.

rights to play sound recordings, but only $8.4 million to acquire performance rights for compositions.[34]

Michael DeGusta, analyzing the distribution of Pandora's payments for Cracker's song "Low," makes a similar point about the unevenness in the distributions with the graph in Figure 1.

Figure 1



Indeed, as Figure 1 shows, Pandora pays *more* to SoundExchange, a nonprofit administrative organization that collects and distributes digital performance royalties to recording artists and record labels than it pays to the songwriters and publishers. It is difficult to make sense of a rate structure that pays more to a collection agency than to the creators and owners of the musical compositions that are embodied in the recordings.

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[34] Pandora's total content acquisition cost for this three-month period was $111,461,000. Pandora Media, Inc., Form 10-Q for the quarterly period ended June 30, 2014, at 28. Of this, approximately 7.5% related to content costs for compositions. *See supra* note *33.*

These types of statistics suggest that the fees paid by technology-driven companies for the performing rights for musical compositions—an essential input into any music service that plays copyrighted songs—do not reflect the fair market value of these rights.[35] But only a more open market will tell if the (regulated) fees paid by Pandora and other technology-driven music services for the performing rights for musical compositions reflect fair value or not. This is a market question, which the market should be permitted to answer.

While there is no dispute that copyright owners have an interest in increasing the income payable for the use of their compositions—it is a basic economic truth that all parties seek to maximize their returns when transacting in a market—they also need to assure that their compositions are licensed and to maximize the number of prospective licensees to whom they license. Thus, it is important to emphasize that copyright owners have a substantial incentive to see that new media services not only succeed but that competition among such entities increases and to license them accordingly. While revenues from technology-driven music services may be comparatively small today, they are the most promising potential source of growth in the music industry as streaming music companies increasingly replaces the prior business models that have existed in the music industry for decades. This is particularly the case given the increasing ownership and usage of smart phones and other Internet-enabled mobile devices that allow consumers to play music anywhere, even "on the go," either from a vast library offered by a streaming service, or from their own music collections digitally stored in "the cloud."

For well over a decade the music industry has seen a dramatic and continued decline of physical album sales, sharply reducing mechanical income, which accounted for much of music publishing revenues over the last 20 years through the sale of compact discs. The RIAA reports

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[35] *See, e.g.*, Burt Bacharach, *What the Songwriting World Needs Now*, WALL ST. J., Jan. 22, 2014; Paul Cashmere, *Bette Midler Criticizes Pandora and Spotify Business Models*, Vintage Vinyl News.com (Apr. 5, 2014), available at http://www.vintagevinylnews.com/2014/04/bette-midler-criticizes-pandora-and.html.

that CD sales in the United States totaled $13.2 billion at their peak in 2000, yet only earned $2.1 billion—a drop of 84%—in 2013.[36] Except for streaming, the numbers continue to decline. In its 2014 mid-year report, Nielsen SoundScan reported that for the first six months of 2014 CD album sales declined 19.6%, digital track sales (which until last year had shown continuous growth) declined 13.0%, and digital album sales declined 11.6% compared with the same six-month period in 2013.[37] Streaming, on the other hand, continues to grow rapidly. Compared with the same six-month period in 2013, interactive audio streaming increased 50.1%,[38] while video on-demand increased 35.2%.[39] Together, this resulted in over 70 billion streams.[40] During the same six-month period, non-interactive streams on Pandora alone increased 20.4%, as measured by listener hours.[41] Sony/ATV believes that these trends (which are illustrated in Figure 2 below) will continue, and that technology-driven music services that offer streaming models will be the leading driver of growth in the foreseeable future.

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[36] The RIAA maintains a proprietary database that tracks shipments and purchases of musical recordings. An overview of the database, and information regarding how to access this data, is available on the RIAA website. See Key Research, RIAA, https://www.riaa.com/keystatistics.php?content_selector=research-about.

[37] Nielsen, Nielsen Entertainment & Billboard's 2014 Mid-Year Music Industry Report, *available at* http://www.nielsen.com/content/dam/corporate/us/en/public%20factsheets/Soundscan/nielsen-music-2014-mid-year-us-release.pdf. LP album sales did increase, but the unit sales are so small as to be insignificant.

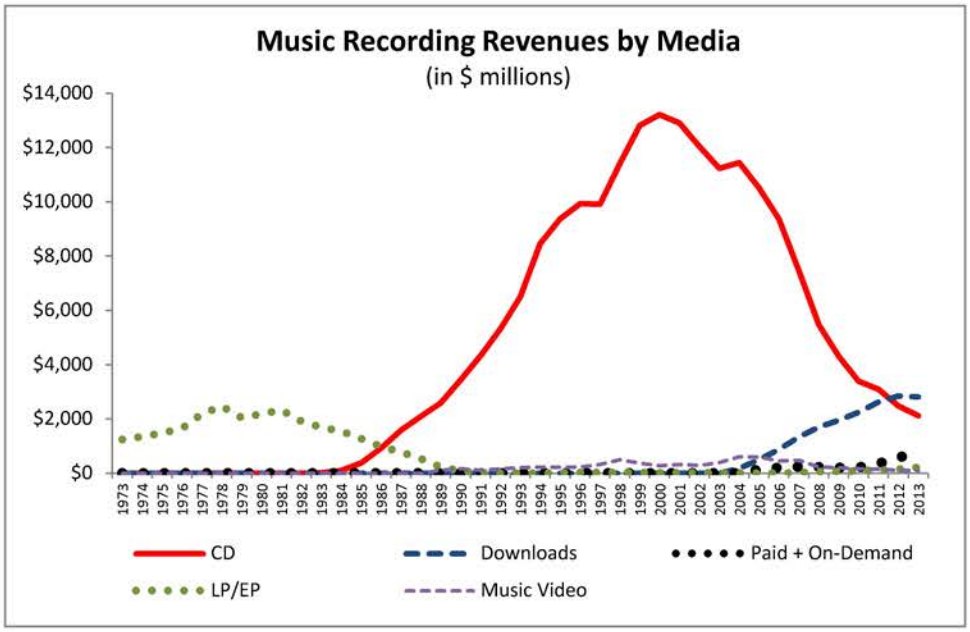
[38] For clarity, this interactive audio streaming number excludes non-interactive audio streaming (*e.g.*, Pandora) numbers.

[39] Nielsen, *supra* note 37.

[40] *Id.*

[41] *See* Pandora Media, Inc., Form 10-Q for the quarterly period ending June 30, 2014, at 23.

Figure 2



Sony/ATV strongly believes that it should have the ability to advance its interests and the interests of its songwriters by gaining the benefits, and taking the associated risks, of competing on its own for licenses that it can efficiently service, while continuing to license other music users that can be served most efficiently through a PRO collective license. Sony/ATV should not, as a matter of public policy generally or the U.S. antitrust laws in particular, have to choose between being "all in" or "all out" at either ASCAP or BMI as the current interpretations of the Consent Decrees require. Given the history of the Consent Decrees, it defies credulity to believe that the framers of any of the consent decrees since 1941 would have adopted such a position.

The Consent Decrees should be clarified to confirm that each copyright owner, in its discretion, has the right to designate particular types of uses or users that the owner will authorize ASCAP or BMI to include in their respective collective licenses. Moreover, to assure that ASCAP and BMI are prevented from discouraging owners from limiting their grant of licensing rights by penalizing those copyright owners that choose to engage in direct licensing

(whether through surcharges or increased fees or otherwise), ASCAP and BMI should be required, on a nondiscriminatory basis, to accept these limited grants of public performance rights from copyright owners in their musical compositions.

IV. Other proposals

A. Expedited arbitration for resolving licensing rate disputes

Sony/ATV strongly supports the efforts of ASCAP, BMI, and others to amend the Consent Decrees to reduce the costs and duration of resolving licensing rate disputes between the respective PRO and a licensee. Under the existing Consent Decrees, these disputes are ultimately resolved—often at the end of a lengthy application process (during which the applicants have full use of the PROs catalogs)—through a formal adjudication in federal district court with all the costs and burdens that come with litigation under the Federal Rules of Civil Procedure.

The entire duration of this licensing process, dictated by the Consent Decrees, can be very lengthy. The *Pandora* ASCAP licensing/rate process, for example, commenced on October 28, 2010 when Pandora terminated its existing ASCAP license and applied for a new license to commence on January 1, 2011. Pandora did not actually initiate the rate court proceeding itself until November 12, 2012 and it was not tried until January 2014. The rate court determination is currently on appeal to the Second Circuit and it is unlikely that there will be any appellate adjudication until at least some time in 2015. In other words, the process will have taken some five years. The corresponding BMI rate court proceedings are similar in their duration.

In both cases, the aggregate fees for the litigation must have totaled in the tens of millions of dollars, all eventually passed on to subscribers and advertisers (in the case of Pandora) and to the songwriters and publishers (in the case of the PROs). An expedited arbitration process would go a long way to reducing the cost and duration of resolving rate disputes, thereby reducing the

PRO costs and increasing the performance income payable to songwriters and copyright owners as well as reducing costs to music services and hence to their customers. It would also relieve the federal courts of the burden of these proceedings. The Department has incorporated arbitration as a means of resolving disputes in several recent consent decrees.[42] It should incorporate arbitration as the dispute resolution mechanism in the Consent Decrees.

B. Additional rights

Sony/ATV understands that ASCAP and BMI are seeking to expand into the licensing of rights in musical compositions other than performance rights. At present, ASCAP is limited by its consent decree to licensing only performance rights.[43] The BMI consent decree has no similar restriction, but historically BMI has only licensed performing rights. As discussed earlier in this memorandum, the central purpose of these PROs is to overcome a market failure in the licensing of performing rights in musical compositions. The markets for other types of rights (e.g., synchronization, mechanical, print) are functioning well and there has never been any suggestion that they have not operated effectively and efficiently. There is no market failure for ASCAP and BMI to overcome and hence no consumer benefit in having ASCAP and BMI operate in these other markets. Indeed, given the extensive regulatory regime that governs ASCAP and BMI that unquestionably would have to extend to any other rights ASCAP and BMI were permitted to license, the introduction of such regulated entities into the markets for these other rights would be costly and disruptive. Moreover, if the scope of rights to be licensed by ASCAP and BMI is expanded, this would likely require even *greater* regulation because of the prospect that the

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42 *See, e.g.*, United States v. Google, Inc., No. 1:11-cv-00688 (D.D.C. Oct. 5, 2011) (Google/ITA); United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Sept. 9, 2011) (Comcast/NBCUniversal); *see also* United States v. Thomson Corp., Civ. No. 96-1415 (CRR) (D.D.C. Mar. 7, 1997) (Thomson/West) (employing arbitration as the mechanism for resolving disputes in decree-required licensing).

43 *See* SAFJ, *supra* note 1, at § IV(A).

PROs could leverage the licensing of one right into increased rates in another right. The Department may well (and justifiably) be loath to agree to free the PROs from oversight by the rate court at the same time that the PROs are seeking to expand the scope of rights they wish to license collectively, particularly when there is no experience with such licensing as the PROs are requesting. The Consent Decrees should not be amended or clarified to permit ASCAP or BMI to license any rights in musical compositions other than performing rights.

C. Periodic review

Sony/ATV understands that others (including the National Music Publishers' Association (NMPA)) are proposing that the Consent Decrees be reviewed periodically to ensure that they continue to be structured in a way that best promotes the purposes of the antitrust laws and the public interest. Licensing public performance rights in musical compositions and motion picture production and exhibition are the only two industries that remain regulated by wide-reaching antitrust consent decrees. The Consent Decrees regulating the licensing of public performance rights were first entered in 1941, while the consent decrees regulating motion picture production and exhibition were entered between 1949 and 1951.[44] Although these decrees have been reviewed and amended on occasion, sometimes decades pass before the decrees are reviewed again by the Department. Especially given the tremendous rate of change in the music business with the decline of traditional media and its replacement by streaming music services, and the extent to which the Consent Decrees impose a comprehensive regulatory regime on licensing public performance rights in musical compositions, these decrees should be reassessed regularly (at least every five years) and with public participation. To this end, the Consent Decrees should be amended to include a provision for such a reassessment.

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[44] The most prominent motion picture consent decree, which as amended is still in effect, is reported in United States v. Paramount Pictures Inc., Eq. No. 87-273, 1949 Trade Cas. (CCH) ¶ 62,377 (S.D.N.Y. 1949)

V. Conclusion

Sony/ATV respectfully asks the Department to (1) support amending the Consent Decrees to clarify that copyright owners may limit the scope of the rights they grant to ASCAP and BMI in their musical compositions to particular types of music uses or users in its discretion, and to require ASCAP and BMI to accept these grants and treat them on a nondiscriminatory basis; (2) support amending the Consent Decrees to provide for expedited arbitration for resolving licensing rate disputes in place of the current rate court process; (3) prohibit ASCAP and BMI from licensing rights in musical compositions other than the right to publicly perform the work for profit; and (4) provide that the Consent Decrees be reviewed periodically to ensure that they continue to be structured in a way that best promotes the purposes of the antitrust laws and the public interest.