

Public Comments of Broadcast Music, Inc.
U.S. Department of Justice, Antitrust Division
Review of Consent Decree in *United States v. Broadcast Music, Inc.*

August 6, 2014

Broadcast Music, Inc. (BMI) submits these public comments in response to the solicitation of public comments by the Antitrust Division of the U.S. Department of Justice (Department) as part of its current review of the consent decrees in *United States v. Broadcast Music, Inc.* and *United States v. American Society of Composers, Authors and Publishers*.¹

INTRODUCTION

The 1966 BMI consent decree, last amended 20 years ago, is outdated and in need of comprehensive reform. It reflects legal theories that have been rejected in modern antitrust cases and commentary, and predates subsequent court decisions that have repeatedly found that BMI's non-exclusive blanket licensing of performance rights in its repertoire does not violate the antitrust laws. The BMI decree also fails to account for the vast changes in the technology and markets for the public performance of music in which BMI operates.

The digital revolution in information processing and communications has completely transformed the way music performances are heard by the public and equally changed the way in which information *about* music performances is collected and processed. In particular, the rise of Internet streaming as a principal way the public hears performances of music has created market needs that are now not being met because of inefficient and anticompetitive restrictions in the BMI consent decree that serve no sound purpose today.

1. As a party to the decree in *United States v. BMI*, BMI stands on unique legal ground, not shared by any other members of the public, concerning the decree in that case. See, e.g., *United States v. Am. Soc. of Composers, Authors and Publishers*, 341 F.2d 1003, 1007 (2d Cir. 1965) (non-party to decree lacks standing to move in antitrust action against defendant). In submitting these comments, BMI reserves all of its rights as co-equal party to the decree with the Department.

There is an urgent need for action now. BMI agrees with the Register of Copyrights' recent testimony characterizing music licensing as "broken,"² and certain aspects of the BMI consent decree have contributed to that breakdown. The decree creates rigidities and restrictions in the way BMI must operate that undermine BMI's efficiency as a resource for both music users and music copyright owners in the digital world. The existing rate court mechanism has proven too slow, too expensive, and too legalistic to keep up with the speed of change in real-world markets today. The need is so dire that, rather than press for comprehensive reform at this point, in these public comments BMI urges the Department to prioritize particular changes that address these immediate needs.

BMI strongly urges the Department to support modifications of the decree that would expressly (i) "permit . . . BMI to license [its] performance rights to some music users" even if the music owners withhold the right to issue licenses to other users, (ii) "permit rights holders to grant . . . BMI rights in addition to 'rights of public performance,'" so that BMI can offer one-stop shopping to digital music platforms, allowing clearance of any and all necessary mechanical and synch rights as well as performance rights, and (iii) change "the rate-making function currently performed by the rate court . . . to a system of mandatory arbitration" to provide a quicker, less expensive, and more commercially-oriented process for dealing with pricing disputes.³

BMI has repeatedly called for reforms to its decree. Most recently it has made its views known in testimony in the House of Representatives and in comments in response to the Notice

2. *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (testimony of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80067/html/CHRG-113hhrg80067.htm> (last visited Aug. 6, 2014).

3. See Antitrust Div., U.S. Dep't of Justice, *Antitrust Division Opens Review of ASCAP and BMI Consent Decrees*, available at <http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html> (last visited Aug. 6, 2014).

of Inquiry published by the U.S. Copyright Office and participation in roundtables sponsored by the Copyright Office.⁴

BMI welcomes the consent decree review that the Department has initiated, pledges to work together with the Department to implement the procompetitive changes that so urgently must be made, and hopes that it can reach agreement on consensual modifications to the decree to be implemented in the next few months so that commerce in music performance rights can flourish again.

BACKGROUND

Historical and Legal Perspective

BMI was organized in 1939 to serve as an alternative source of music to ASCAP. At that time ASCAP was locked in a bitter price dispute with the radio industry that kept a large share of all popular music off the air throughout the United States for more than half a year. ASCAP was the subject of an investigation by the Department because, among other things, it obtained exclusive rights from its members, who were thereby prevented from competing with each other.⁵ BMI's entry into the market was without question strongly procompetitive. According to the Department itself, the original 1941 BMI consent decree was understood to be a "friendly"

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4. See *Music Licensing Under Title 17 Part One: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Michael O'Neill), <http://judiciary.house.gov/cache/files/5394fa46-9650-4ea9-a168-89043ca17270/oneill-bmi-music-licensing-testimony.pdf> (last visited Aug. 6, 2014); Comments in Response to the March 17, 2014 Notice of Inquiry, *Broadcast Music, Inc.'s Comments on Copyright Office Music Licensing Study*, Docket No. 2014-03 (May 23, 2014), available at http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/BMI_MLS_2014.pdf (last visited Aug. 6, 2014); Music Licensing Public Roundtable, Library of Congress Copyright Office 47-51 (New York, NY Jun. 23-24 2014) (comments of Michael G. Steinberg, Broadcast Music, Inc.).
 5. See *United States v. ASCAP*, 1940-1943 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941); see also *Columbia Broad. Sys., Inc. v. Am. Soc. of Composers, Authors & Publishers*, 620 F.2d 930, 933 (2d Cir. 1980) (describing the evolution of ASCAP's licensing practices).

counterpart to the decree that ended the Department's investigation of ASCAP.⁶ The 1941 BMI decree did not impose any sort of compulsory licensing or price limitation on what BMI could charge.

When the ASCAP consent decree was substantially amended in 1950 to add a compulsory licensing and rate-court regime, no such thing was imposed—or sought to be imposed—on BMI.

In 1964, the Department sued BMI at the urging of ASCAP.⁷ The gravamen of the complaint in that case was that BMI was illegally acting to *lower* prices for music performances. By 1966, the Department conceded internally that it had no proof to support its legal theory.⁸ The current BMI consent decree settled that litigation but provided almost none of the relief sought in that complaint. Aside from certain modifications including broadening the decree to include the broadcasting medium of television and adding a prohibition on BMI acting as a music publisher or record company, the decree mainly took up the provisions of the “friendly” 1941 decree (which was vacated). It did not contain a compulsory licensing or price regulation provision, despite the rapid growth in the size and popularity of the BMI repertoire in the 1950s and 1960s due to BMI's receptivity to the creators of rhythm and blues, country and western music, and rock and roll.

Between 1969 and 1991, BMI fought and won four plenary antitrust suits brought by music users who were unhappy with the fees BMI wished to charge and the structure of the

6. Memorandum from Hugh P. Morrison, Jr., General Litigation Section to Donald F. Turner, Assistant Attorney General, Antitrust Division, *United States v. Broadcast Music, Inc., et al.* 64 Civ. 3787 (S.D.N.Y.) (Nov. 22, 1966) at 1 (“The suit is often considered to be a ‘friendly’ suit, since these events occurred during ASCAP’s heyday, and the Department supposedly did everything possible to insure BMI’s success against the monopolistic ASCAP.”).

7. *See id.* at 2.

8. *See id.* at 5.

licenses it offered.⁹ Music users as small as the Triple Nickel Saloon and as large as CBS (referred to by the court in that case as the “giant of the world in the use of music rights”) challenged BMI under the Sherman Act, and courts in three circuits and the Supreme Court all ultimately ruled in favor of BMI, finding efficiencies created by collective licensing. Among other holdings, the Second Circuit held that BMI and ASCAP’s blanket licenses did not restrain trade “at all” because “copyright proprietors would wait at CBS’ door” if offered the opportunity to have their music played on national television.¹⁰ In another Second Circuit case four years later, Judge Winter observed in a concurrence that, given BMI’s (and ASCAP’s) non-exclusive contracts with composers and publishers, it could not be in violation of the antitrust laws.¹¹

The 1994 amendment to the BMI consent decree added the compulsory license and rate court mechanisms—at the instance of BMI and not the Department. BMI wanted to add this provision to channel pricing disputes into a forum where they could be dealt with substantively, with the hope that this would prove quicker and less expensive than the antitrust cases that cable television networks and others had been using as a form of fee-negotiation-by-other-means.¹² In

9. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979), remanded to sub nom. *Columbia Broad. Sys., Inc. v. Am. Soc. of Composers, Authors & Publishers*, 620 F.2d 930 (2d Cir. 1980); *Buffalo Broadcasting Co. v. Am. Soc. of Composers, Authors & Publishers*, 744 F.2d 917 (2d Cir. 1984); *Nat’l Cable Television Ass’n v. Broad. Music, Inc.*, 772 F. Supp. 641 (D.D.C. 1991); *Broad. Music, Inc. v. Moor-Law, Inc.*, 484 F. Supp. 357 (D. Del. 1980).

10. *Columbia Broad. Sys., Inc.*, 620 F.2d at 935, 938.

11. *Buffalo Broadcasting Co.*, 744 F.2d at 934.

12. Many countries have governmental bodies, such as the Copyright Board of Canada, to set performing rights rates, by statute. In the United States, the Copyright Royalty Board sets fees for performances of musical works by noncommercial public broadcasters, but for commercial performances Congress gives the copyright owner the right to charge whatever a willing buyer is prepared to pay. Importantly, Congress gave record labels the exclusive right to license public performance of sound recordings to interactive digital music services, and where SoundExchange collects compulsory license fees for non-interactive performances, its rates have been informed by marketplace benchmarks negotiated by labels in the free, unregulated market. See, e.g., *In the Matter of Digital Performance in Sound Recordings and Ephemeral Recordings*, Docket No. 2009-1 CRB Webcasting III, at 41 (January 5, 2011) (“[W]e accept the interactive benchmark as suggesting an increase in royalty rates for non-interactive webcasting over or by the end of the period 2011-2015 . . . [and we have]

the late 1980s and early 1990s, organized groups of music users with bargaining power at least equal to BMI's, such as the Television Music License Committee, the Radio Music License Committee, and the National Cable Television Association all insisted, in the course of finally reaching license agreements with BMI, that BMI agree to seek a decree modification to provide for a rate court.¹³ At first, the Department balked and suggested that instead of using the federal district court as a fee arbiter, BMI and its customers could agree to private arbitration (a proposal we return to later in these comments). Concerned that the existing ASCAP rate court would be regarded as a more legitimate forum than private arbitration, BMI pressed for a rate court mechanism identical to (but separate from) ASCAP's, and the Department acquiesced.

In sum, the courts have repeatedly found that BMI creates efficiencies, lowers costs, and increases output by allowing commerce to flow—and music to be enjoyed—where substitutes would not. The rate court provision in the decree was inserted as a dispute resolution provision, and not to prevent the recurrence of any supposed misconduct by copyright owners or BMI.

There Have Been Vast Technological and Market Changes

It is black letter law that when conditions that previously justified an injunction—including one entered on consent—have changed, the injunction too should be modified or vacated. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992). Recognizing that few markets in our dynamic economy remain in stasis for very long, the Department has in

identified the \$0.0036 rate as the upper boundary for a zone of reasonableness for potential marketplace benchmarks”), available at <http://www.loc.gov/crb/proceedings/2009-1/docs/final-determination-rates-terms.pdf> (last visited Aug. 6, 2014).

13. *See* Memorandum of User Community Constituents in Response to Motion of Broad. Music, Inc. to Modify Consent Decree, *United States v. Broad. Music Inc.*, 1994 WL 16189515 (S.D.N.Y. Nov. 4, 1994).

recent decades incorporated this proposition into its own practices, making it routine that antitrust consent decrees automatically terminate after not more than 10 years.¹⁴

It is beyond dispute that the technological, economic, and market conditions that defined BMI's business back in 1994—not to mention 1966 and 1941—have since changed in revolutionary ways. Whatever the factual premises of the decree in those earlier times, current conditions bear them little resemblance.

First, the emergence of the digital age has revolutionized the entertainment world in general and the music world in particular. BMI's business has been transformed by the digital revolution in at least two different dimensions: (i) the ability to gather and use information about music and performances of music and (ii) the way in which performances of music reach the public.

The radical lowering of costs to gather, store, and manipulate information has made it possible for new firms to enter the music licensing field. Firms such as Google, Music Reports, Inc. and Amazon have built large databases concerning music usage and ownership in recent years. Any suggestion that entry barriers make it impossible to compete with BMI is simply incorrect.

The rise of the Internet has also profoundly transformed the way the public hears and consumes performances of music. The proliferation of digital outlets has, among other things, greatly increased the number of firms making public performances at any given time. It has also increased the number of public performances exponentially.¹⁵ The sheer number of copyrighted

14. Antitrust Div., U.S. Dep't of Justice, *Antitrust Division Manual*, III-146 (5th ed. 2014), available at <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf#page=146> (last visited Aug. 6, 2014).

15. For instance, “[l]istener hours for Pandora during the month of May 2014 were 1.73 billion, an increase of 28% from 1.35 billion during the same period last year.” Press Release, Pandora, *Pandora Announces May 2014 Audience Metrics* (June 4, 2014), available at <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol->

songs publicly performed on any given day has increased dramatically due to the much deeper playlists possible in the digital space as compared to terrestrial radio. In addition, the instant availability to the public of the widest possible choice of recorded music by means of streaming technology—at the expense of a great and accelerating drop-off in the sale of recordings (hard copies and downloads)—has made public performances of the kind licensed by BMI the most important source of compensation for songwriters and composers.

The technology of the Internet has also brought together several parts of the copyright bundle of rights that formerly applied to separate uses of music. Traditionally, public performers of music only needed performing rights licenses under section 106(4) of the Copyright Act, and did not also need permission to make and distribute reproductions of the musical works under sections 106(1), 106(3), and 115. Similarly, performers of music did not need display rights under section 106(5) because they did not transmit graphic copies of the lyrics. Various forms of webcasting have changed that, and so music users now need to acquire licenses not only to the performance rights that BMI has always licensed but also these additional rights—rights that BMI has not heretofore offered for license and that ASCAP’s consent decree forbids it from licensing.¹⁶ As a result, the PROs have not offered a one-stop shopping experience to address the licensing needs of this rising class of music users, placing their affiliated smaller publishers at a competitive disadvantage to those who have the resources to offer bundled rights.

[newsArticle&ID=1937243&highlight](#) (last visited Aug. 6, 2014). Likewise, “over 6 billion hours of video are watched each month on YouTube” (YouTube, Statistics, <https://www.youtube.com/yt/press/statistics.html> (last visited Aug. 6, 2014)) and YouTube’s “Music” channel is its most popular, with over 86 million subscribers. See <https://www.youtube.com/channel/UC-9-kyTW8ZkZNDHQP6FgpwQ> (last visited Aug. 6, 2014). Pandora’s and YouTube’s individualized offerings result in separately calculable performances for each listener or viewer.

16. In particular, conditional downloads are often offered in combination with interactive streams by subscription services.

Second, the advent of the Internet in combination with many other developments has changed dramatically the markets in which BMI operates. For instance, since 1994, the broadcast television and radio industries have consolidated substantially; likewise the cable television and satellite radio industries. The Internet has given rise to various platforms for the performance of music, including by new giants such as Apple, Amazon, and Google that are among the most powerful firms in our economy. Some of those firms, unlike older media companies, have compiled their own databases to assist in complying with their copyright obligations for their large-scale uses of music and audiovisual works. In addition, a slew of firms have entered the business of aggregating content for Internet platforms.

The musical works market has also seen enormous change. The music publishing business has seen some consolidation including the effective merger of the EMI Music Publishing catalogs with those of Sony/ATV Music Publishing, yet there remain thousands of active independent publishers—including many small firms who publish the works of major songwriters and composers. A variety of firms have entered the business of assisting publishers and songwriters in making their music available on the Internet, such as Tunecore, CD Baby, Ingrooves, and The Orchard. Since 1994, SESAC, the third American PRO, has been transformed from an afterthought into a for-profit entrepreneurial force; a 75% interest in SESAC was sold at the beginning of 2013 to private equity fund Rizvi Transverse Management for a reported price of approximately \$600 million.¹⁷

Also in 2013, Madison Square Garden Co. invested \$125 million to become a 50% shareholder of Azoff MSG Entertainment, a new venture with the stated purpose of representing

17. Anupreeta Das, *Music Rights Company SESAC Sells Majority Stake*, Deal Journal, Wall St. J. (Jan. 2, 2013 6:14 PM), available at <http://blogs.wsj.com/deals/2013/01/02/music-rights-company-sesac-sells-majority-stake/> (last visited Aug. 6, 2014).

the rights of songwriters “a different way” as a rival to BMI and ASCAP.¹⁸ In late July 2014, Billboard Magazine described the venture’s Global Music Rights division as a “boutique performance rights organization.”¹⁹

Likewise, the Harry Fox Agency, which previously dealt in processing mechanical rights payments from record labels for music publishers, has been rebranded as “hfa” and become deeply involved in licensing bundled rights needed for digital uses through its Slingshot offshoot, acting as an agent for Google in clearing mechanical and synchronization rights. It describes itself today as “the nation’s leading provider of rights management, licensing and royalty services for the music industry.”²⁰

It is fair to say that the competitive landscape in which BMI finds itself bears little resemblance to the markets it faced in 1994 when the compulsory license and rate court provisions were added to the decree, and none whatsoever to the conditions that prevailed when the main provisions of the decree went into force.

18. Hannah Karp, *MSG, Azoff Unveil New Entertainment Venture*, Wall St. J., Sept. 4, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323893004579055590298180458> (last visited Aug. 6, 2014).

19. See Ed Christman, Gail Mitchell and Andrew Hampp, *Pharrell to Leave ASCAP for Irving and Grimmets's Global Music Rights*, Billboard, July 25, 2014, available at <http://www.billboard.com/articles/business/6188942/pharrell-to-leave-ascap-for-irving-and-grimmets-global-music-rights> (last visited Aug. 6, 2014).

20. See, e.g., Press Release, Harry Fox Agency, *HFA Licensing Services Support the 55th Annual GRAMMY Awards* (Feb. 6, 2013), available at https://www.harryfox.com/public/userfiles/file/PressReleases/GRAMMY_PR_Final.pdf (last visited Aug. 6, 2014).

BMI'S IMMEDIATE REQUESTS

As a result of these seismic changes to the music rights landscape, BMI believes its consent decree is ripe for a comprehensive review and modification, if not termination. That said, there are urgent marketplace needs that must be addressed on an expedited basis. For this reason, BMI advocates three immediate modifications, which we now describe.

1. The BMI Consent Decree Should Be Modified Expressly to Permit Partial Withdrawal of Digital Rights.

In recent years, several large music publishers have determined that it is in their best economic interests to withdraw certain digital licensing rights from PROs and instead to license those uses directly to digital music providers. Those publishers approached BMI to request such “partial withdrawal,” and one of them informed BMI that it had also approached the Department for guidance.

As an accommodation, and in a competitive response to ASCAP’s prior determination to provide such an accommodation, BMI agreed to allow the publishers to withdraw their digital rights while remaining affiliated with BMI, subject to detailed guidelines BMI developed to ensure that the process would be both orderly for BMI and fair to BMI licensees. However, in a 2013 decision involving digital music service Pandora, BMI’s rate court held that under the BMI consent decree, a publisher must use BMI for *all* public performing rights purposes or *none*, stating that “the BMI Consent Decree requires that all compositions in the BMI repertoire be offered to all applicants,” but “[i]f BMI cannot offer those compositions to New Media applicants, their availability does not meet the standards of the BMI Consent Decree, and they cannot be held in BMI's repertoire. Since they are not in BMI's repertoire, BMI cannot deal in or license those compositions to anyone.” *Broad. Music, Inc. v. Pandora Media, Inc.*, 13 CIV. 4037 (LLS), 2013 WL 6697788, at *3-4 (S.D.N.Y. Dec. 19, 2013). Earlier in the year, ASCAP’s

rate court issued a similar decision putting publishers in the position of having to leave ASCAP entirely if they wished to retain any licensing right exclusively for themselves.

Four significant publishers seeking partial withdrawal have reached short-term “suspension” agreements with BMI, allowing their works to be licensed by BMI for all purposes, including digital platforms, through no later than the end of 2014. But they have stated that they are reluctantly working on plans to withdraw their works from the BMI repertoire altogether if the BMI consent decree is not modified to allow for partial withdrawal.²¹ For the reasons set forth below, putting publishers to this “all in” or “all out” choice is bad policy under both copyright law and antitrust principles, and would be potentially catastrophic for smaller publishers and songwriters who depend on BMI for their livelihood, and for BMI’s hundreds of thousands of customers who depend on BMI to fulfill their copyright obligations.

BMI urges the Department to prioritize amendment of the BMI consent decree to allow publishers to withdraw defined digital rights from the BMI repertoire, while allowing BMI to license all other music uses. Copyright law provides copyright owners the fundamental right to withhold their works from the public, as a means of obtaining fair market value in the free market. *See, e.g., Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) (“[N]othing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work. . . . The limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use.”). Obviously, publishers can forego joining BMI altogether, which would allow

21. *See, e.g., Ben Sisario, Sony Threatens to Bypass Licensers in Royalties Battle*, N.Y. Times, July 11, 2014, at B2, available at http://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html?_r=0 (last visited Aug. 6, 2014).

them to negotiate directly in the marketplace and hold out for market-based license rates unconstrained by the BMI rate court; but publishers should not have to forego entirely the efficiencies of BMI as the cost of engaging in these direct negotiations.

The withdrawing music publishers apparently believe that they have the capacity to negotiate digital direct licenses efficiently, but the growing interest in rights withdrawal also reflects publisher dissatisfaction with the current rate-setting process. Although BMI's decree requires the rate court to set blanket license rates approximating prices that would be negotiated by a willing buyer and willing seller in a free market negotiation,²² recent PRO rate court decisions have set what many publishers reportedly consider below-market rates. Though others may disagree, the salient point is that these publishers have lost confidence in the efficacy of the rate court process to determine fair market value. That loss of confidence is driving publishers to move away from BMI and other PROs in order to license digital uses directly.

The rate court's mandate of "all in" or "all out" limits the flexibility of publishers, their representatives, and licensees to determine the most efficient way to license a music service. The mandate effectively prohibits multiple distribution channels for performing rights, even though the use of diverse channels of distribution is a common, efficiency-promoting feature of our economy.²³ It is the worst of both worlds.

22. *United States v. Broad. Music, Inc.*, 426 F.3d 91, 95 (2d Cir. 2005) ("The rate court is responsible for establishing the fair market value of the music rights, in other words, the price that a willing buyer and a willing seller would agree on in an arm's length transaction.") (internal quotation marks omitted).

23. Recently, an FTC publication criticized state and local regulations restricting auto manufacturer Tesla from direct-to-consumer sales rather than sales through independent dealers, noting that "[s]uch blanket bans are an anomaly in the broader economy, where most manufacturers compete to respond to consumer needs by choosing from among direct sales to consumers, reliance on independent dealers, or some combination of the two." Andy Gavil, Debbie Feinstein, and Marty Gaynor, Federal Trade Commission, *Who Decides How Consumers Should Shop?*, Competition Matters, (Apr. 24, 2014, 11:00 AM), available at <http://www.ftc.gov/news-events/blogs/competition-matters/2014/04/who-decides-how-consumers-should-shop> (last visited Aug. 6, 2014).

“All in” favors, even forces, collective licensing, instead of allowing individual publishers the opportunity to experiment with direct licensing in the free market. This squarely contradicts the fundamental premise of the BMI consent decree and the procompetitive goals of antitrust law. Under the decree, BMI undertakes collective licensing, but provisions are made for direct licensing as a competitive alternative. The only reason there *is* a consent decree is that BMI undertakes collective licensing, instead of publishers licensing their catalogs individually. For the consent decree to be read to restrict publishers from licensing in the free market simply stands the rationale for the decree on its head.

On the other hand, if publishers are forced to go “all out,” the market loses all the efficiencies that BMI’s blanket license provides for the many categories of traditional music users. Because publishers lack BMI’s expertise and infrastructure to monitor and distribute performance rights royalties, there is reason for concern that “all out” publishers would be unable or unwilling to spend the time or resources licensing smaller users or general licensing categories, such as restaurants, hotels, clubs, and concert halls. Such users, through no fault of their own, would be forced to choose between two equally problematic options: operating under a dark cloud of infringement, or reconfiguring their entire use of music to avoid infringement. Either scenario would unnecessarily disrupt these establishments’ accustomed freedom to lawfully perform whatever music they wish with PRO licenses in hand.

The district court’s holding that publishers must be “all in” or “all out” imposes a regime that is at odds with the Second Circuit’s key ruling that the BMI blanket license did not restrain trade precisely because a direct license remained available to users. *Columbia Broad. Sys., Inc. v Am. Soc. of Composers, Authors & Publishers*, 620 F.2d 930, 936 (“[I]f copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to

deal with them, the blanket license is not a restraint of trade.”). In the absence of any antitrust holding against BMI under the Rule of Reason with respect to its blanket license, there is simply no basis to prohibit partial withdrawal.²⁴

In fact, partial withdrawal would serve only procompetitive purposes. First, it retains the efficiencies that BMI and its blanket license provide for traditional music users, and for publishers and songwriters who choose not to withdraw even partially.²⁵ Second, it would empower publishers to engage in direct licensing for digital music uses outside the shadow of the rate court without disrupting their ability to use BMI to license for non-digital uses. In this sense, partial withdrawal allows rates for digital users to be set more by market forces and less by a finder of fact,²⁶ without sacrificing the efficiencies associated with BMI. Third, the direct licenses resulting from partial withdrawal will provide improved benchmarks for any finder of fact, since they will not be negotiated in the shadow of the rate court or arbitration.²⁷

24. To the extent that digital music users oppose dealing with publishers in free market negotiations, there is hypocrisy in that position. Users cannot both claim that BMI is a monopoly extracting supracompetitive prices on the one hand, and seek to avoid negotiating directly with publishers on the other. Insofar as these users are arguing that BMI must be regulated by the consent decree, it follows that those same users should be eager to deal with publishers individually.

25. If permitted, the proposed digital rights withdrawal would not impact any of BMI’s licensing activities that fall outside certain objective thresholds in terms of users and/or revenue, to be determined periodically by BMI. Specifically, under its current proposal, BMI would continue to license digital media services with less than \$1.25 million in annual revenues and/or with less than 10 million tuning hours per month. In addition, digital rights withdrawal does not affect BMI’s right to license performances by traditional broadcast (radio and television), cable and satellite providers, and their related digital transmissions, nor does it affect BMI’s general licensing customers such as restaurants, hotels, clubs, and concert halls..

26. This is equally true to the extent arbitration should replace rate court. *See* pages 19-22, *infra*.

27. Earlier this year, the European Parliament and the Council of the European Union expressly encouraged partial grants and withdrawals of rights in its “Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market”, which provides that “[r]ightholders shall have the right to terminate the authorisation to manage rights, categories of rights or types of works and other subject-matter granted by them to a collective management organisation *or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice . . .*” Council Directive 14/26, 2014 O.J. (L. 84) at Art. V, ¶ 4 (emphasis added), available at <http://www.wipo.int/edocs/lexdocs/laws/en/eu/eu193en.pdf> (last visited Aug. 6, 2014).

Conversely, an exodus of large publishers from PROs would vastly increase the proportion of royalties devoted to costs of administration instead of compensating songwriters and composers. The cost of BMI's operations would have to be borne by a much-diminished royalty flow. That result can only harm the thousands of non-withdrawing (primarily smaller and independent) publishers and songwriters who depend upon the PROs to locate and enter into agreements with the many thousands of music users throughout the country, enter into reciprocal agreements with PROs throughout the world, collect royalties, count performances, match the royalties to the performances, and provide an equitable, transparent distribution of royalties to both writers and publishers. For these publishers and songwriters, BMI provides a suite of vital services that they cannot replicate easily or efficiently.

If these many publishers could not rely on a robust BMI, they would find it much harder, if not impossible, to compete with larger publishers for songwriters and composers. This in turn would create incentives for greater consolidation and fewer publisher options for songwriters and composers.

2. The Licensing of Additional Rights, Such As Mechanical, Synch, and Lyric Rights, Should Be Permitted Expressly Under the BMI Consent Decree.

Historically, BMI has licensed only performing rights and, to a very limited extent, those synchronization rights needed to facilitate broadcasts.²⁸ But multiple rights — performing rights, mechanical rights, lyric display, distribution and reproduction rights, and synchronization rights — are often necessary in order to disseminate music on the Internet. BMI should therefore be permitted (at the option of the publisher) to license other copyright rights in musical compositions to music users (at the option of the music user), either as part of a single offering

28. BMI also administers digital audio recording tape ("DART") royalties awarded by the Copyright Royalty Board pursuant to 17 U.S.C. § 1001 *et seq.* for its songwriters and publishers who so collect.

bundled with the right of public performance or à la carte. The BMI consent decree — unlike the ASCAP decree (*see United States v. Am. Soc. Composers & Publishers*, 2001-2 Trade Cas. ¶ 73,474 (S.D.N.Y. 2001) at Section IV(A)) — does not contain a provision limiting the rights that BMI can license. However, to the extent any uncertainty exists, the BMI decree should be modified to recognize, explicitly, BMI’s ability to license other rights.

The advent of digital music, in particular, has created an industry-wide demand for bundling of rights. For years, digital music services have complained about the difficulty of licensing mechanical rights under Section 115. These services have called for a blanket license under Section 115, as well as the ability to obtain multiple types of rights to a musical composition from a single source, that is, a one-stop shop for music licensing.

Indeed, one of the reasons that some large publishers seek to withdraw from the PROs is, reportedly, their desire to offer bundled rights directly to users. However, smaller, non-withdrawing publishers likewise stand to gain from the efficiencies created by a BMI one-stop shop offering, and will need these tools in order to compete on an equal footing with larger publishers. Therefore, bundling of multiple rights should be expanded to all licensees under the BMI consent decree.

Various arms of the Government have long recognized the inefficiencies of the current, disaggregated process. Over nine years ago, Register of Copyrights Marybeth Peters noted that “it seems inefficient to require a licensee to seek out two separate licenses from two separate sources in order to compensate the same copyright owners for the right to engage in a single transmission of a single work.”²⁹ More recently, Register Maria Pallante testified before

29. *Music Licensing Reform: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. of the Judiciary*, 109th Cong. (2005) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), available at <http://www.copyright.gov/docs/regstat062105.html> (last visited Aug. 6, 2014).

Congress that “[m]usic licensing is so complicated and broken that if we get that right, I will be very optimistic about getting the entire [copyright] statute right.”³⁰ In its 2013 report on digital copyright policy, the Commerce Department Internet Policy Task Force noted — citing to the ASCAP consent decree — the problem that “antitrust law constrains the PROs from licensing the mechanical rights for works in their repertoire” and agreed that bundling of reproduction rights with performing rights to create a one-stop shop solution was desirable, concluding that “collective licensing, implemented in a manner that respects competition, can spur rather than impede the development of new business models for the enjoyment of music online.”³¹

Allowing bundling of rights will have clearly procompetitive effects. Large, withdrawing publishers were already meeting the demands of users and achieving these efficiencies by bundling mechanical and performance rights. By entering the market for reproduction rights licensing, BMI would be introducing additional competition and consumer choice into a market currently relying primarily on the Harry Fox Agency, which is already bundling rights, or in-house efforts by publishers themselves.³² This increased competition, in turn, would incentivize service and product innovation in digital music. Indeed, in other countries where PROs routinely bundle these rights together, the efficiencies of bundling are readily apparent. Finally, because

30. *The Register’s Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80067/html/CHRG-113hhrg80067.htm> (last visited Aug. 6, 2014).

31. Internet Policy Task Force, U.S. Dep’t of Commerce, *Copyright Policy, Creativity, and Innovation in the Digital Economy* 81-82, 85 (July 2013), available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (last visited Aug. 6, 2014).

32. Just last week, micro-licensing service Rumblefish, Inc. announced its acquisition by SESAC, describing it as “a key element of SESAC’s pursuit of a broader vision within music licensing across multiple rights categories and license-types.” See Press Release, Rumblefish, *SESAC Acquires Leading Music Tech and Micro-Licensing Firm Rumblefish, Provides Growth Round of Funding* (July 31, 2014), available at http://rumblefish.com/sesac_acquires_rumblefish/ (last visited Aug. 6, 2014).

BMI's proposal would be wholly optional for both publishers and users, there is no basis for antitrust concerns.

There is no rational basis for the current regulatory rigidity prohibiting bundling by PROs. BMI is simply requesting a clear mandate to offer a service that its market counterparties—both publishers and users—are seeking.

3. The Rate Court and Compulsory Licensing Should Be Reformed.

The procedures put into place for fee dispute resolution under the BMI consent decree in 1994 fail to facilitate prompt payment of reasonable license fees to BMI and, ultimately, to its affiliated songwriters, composers, and publishers. Under the BMI decree, upon written request for a license, a licensee has an automatic right to a blanket license to use any, some, or all of BMI's music. This allows licensees the opportunity to obtain performing rights licenses by simply sending a letter availing themselves of the rate court process—in good faith or otherwise. However, where the parties cannot agree on an interim fee, the road for BMI to obtain an order setting interim fees for this instant access to repertoire can be long and expensive. Rate court proceedings often result in delayed, undervalued, or altogether unpaid license fees to BMI, while licensees enjoy immediate, unhindered access to BMI's repertoire.

BMI has great respect for its rate court judge, Hon. Louis L. Stanton, Jr., who has presided ably and impartially over the many challenging cases before BMI's rate court over the past 20 years. However, the rate court process itself has proven ill-suited to the task of determining a fair market rate quickly and accurately. This has been particularly true in recent years with the emergence of digital music.

First, a rate court case is extremely expensive for both BMI and users. In the last five years alone, BMI has spent millions in legal fees and expenses on rate court proceedings, on top

of thousands of hours of BMI personnel assisting in these efforts. Because of these costs, and the impact of such costs on the royalties BMI can distribute to its affiliates, it would be impractical for BMI to resort to rate court whenever needed. As a result, many music users are able to perform BMI music for years without paying BMI, and it is not unheard-of for a user to go out of business before paying even a dime to BMI for its use of music.

When rate proceedings are commenced, the process is unacceptably slow—each case entails one or two years of pre-trial discovery and motion practice and further years of appellate review. The extensive pre-trial discovery permitted under the Federal Rules of Civil Procedure has been the main cause of expense and delay in rate court proceedings. Even with the supervision of an able judge who is wary of lawyers' proclivity to use whatever discovery tools are available, a typical case involves massive document production, numerous fact witness depositions, subpoenas of non-parties, and rafts of industry and economic experts. Despite its comprehensive nature, such discovery has done little or nothing to further the goal of the rate court—setting a reasonable license fee for the license the user has requested.

The rate court's determination of fair market rates has been based primarily on past court decisions, or prior agreements by BMI and ASCAP that are themselves the products of previous court decisions. Even to the extent direct licenses can be used as benchmarks, those rates have been negotiated in the shadow of the rate court and thus do not represent a true test of the market. Such a backward-looking approach does not reflect the dynamic forces at work in the entertainment and media markets, and does not allow rates to keep pace with the changes to those markets.

There are additional problems with the current rate court mechanism. As noted above, under the current decree, if parties to a rate court proceeding cannot agree on an interim fee, BMI

must bring a motion in the BMI rate court—with up to four months of discovery, motion practice, and other maneuvering – to have the court set the interim rate. Only then are the parties at the starting line for the actual final rate setting process; they have to start all over to litigate their final license rate.

At the same time, BMI has had to respond to open-ended “rate court letters” from new media users seeking an automatic license to protect them from infringement for any uses that might require one, without describing what uses they intend to engage in and without limitation on how they might wish to use the music. This ill-defined “application” makes it difficult for BMI to comply with its consent decree obligation to provide a quote for such uses. Moreover, some letters take the position that the users require no license whatsoever, and accordingly will not negotiate over interim or final fees, while enjoying the protection and benefits that the application’s mandatory access to the repertoire affords. Given the costs and time-consuming nature of rate court, it is not cost-effective for BMI to litigate with all such letter writers.

The BMI consent decree should be modified to replace fee-setting in the district court with mandatory arbitration. Arbitration offers multiple efficiencies, and can be tailored to the unique features of the performing rights marketplace while meeting the needs of BMI and music users. Under BMI’s proposed arbitration framework, rate disputes would be fast-tracked with limited discovery, presentations unbound by the formal rules of evidence, and a shorter, mandatory timeframe. Rather than relying heavily on past court decisions and past agreements as the primary guide in setting rates, arbitrators would be directed to apply a fair market value (*i.e.*, willing buyer, willing seller) rate-setting standard and would be encouraged to look at current market conditions and to consider any rates agreed to in the free market, including direct

licenses by publishers with the same or similarly-situated music users, in addition to previous decisions of the rate courts, Copyright Royalty Board, or other arbitral tribunals.

Arbitration is clearly suited for performing license rate disputes, having been endorsed previously by the Department of Justice and Federal Trade Commission in a number of analogous circumstances.³³

If businesses can obtain instant, licensed access to BMI's music, it is only fair that they pay some license fee from the moment they use the music, even if it may take longer to come to a final agreement or decision on terms. The BMI consent decree should therefore also be modified to impose an automatic interim license fee for every applicant. Music users whose previous BMI licenses have expired should be required to continue paying license fees at the rates and times contained in their previous licenses. New music users should be required to make interim payments in advance at rates BMI has been charging other similarly-situated licensees. The decree should also be modified to (a) require applicants to be clear and specific regarding all intended uses of the BMI repertoire sufficient to mark clearly which performances are or are not licensed and compensable and (b) prohibit applications where the applicant contends that no license is required.

33. *See, e.g., United States v. Comcast Corp.*, 808 F. Supp. 2d 145 (D.D.C. 2011); *United States v. Google Inc. & ITA Software, Inc.*, Case No. 1:11-cv-00688-RLW (D.D.C. Oct. 5, 2011); *In re Motorola Mobility LLC, & Google Inc.*, C-4410, 2013 WL 3944149 (F.T.C. July 23, 2013).

BMI'S DEFERRED REQUESTS

BMI believes that other changes to the Decree are warranted, either now or in the near future. In the interest of expediting the three changes outlined above, BMI is prepared to defer them. Nevertheless, BMI thinks it worthwhile to mention some of them now.

1. Current Line-of-Business Restrictions on BMI Are Unjustified.

Although BMI has no present intention to act as a music publisher or record label, it should not be prohibited under the consent decree from doing so in the future. Should BMI identify an efficiency to be achieved through expanding its business into these fields, the consent decree's existing line-of-business restrictions would serve only anticompetitive purposes.

The consent decree's current bans on BMI's right to act as a music publisher or record label were put into place in 1966, and are out-of-date remnants of the Government's concerns in the 1960s to protect ASCAP and its publisher-members from the broadcaster-owned BMI. Those concerns have long since disappeared. The possibility of any substantial market foreclosure by BMI's entry into music publishing or recording is unrealistic. Moreover, vertical antitrust theories have fundamentally evolved in the 50 years since this provision was entered. The current decree provision is anticompetitive and should be eliminated.

2. Upon Partial or Total Withdrawal by Large Publishers, BMI License Terms Should Be Deregulated

BMI anticipates withdrawal by multiple large publishers in the coming months, whether such withdrawal will be partial and limited to certain digital performances under a modified BMI consent decree, or total, in the form of termination of affiliation, in the absence of such modification. In either scenario, however, BMI will lose a significant portion of its performing rights licensing market share, and with such diminution the justification for antitrust regulation

of BMI will be likewise diminished. At a certain point, the basis for regulated rates and terms would no longer exist, at least vis-à-vis music uses as to which a substantial share of repertoire has been withdrawn from BMI.

With respect to digital rights, significant publisher withdrawal is a real possibility. Those publishers will be able to negotiate in free-market rate negotiations with music users, and therefore hold a distinct advantage over BMI. Such a state of affairs would prevent BMI—and critically, by proxy, all the independent and smaller publishers who choose to remain affiliated with BMI—from competing on a level playing field with these withdrawing or terminating publishers. They will be at a competitive disadvantage in attracting and holding songwriters and composers unless they can negotiate for the use of their catalogs in the same manner as the withdrawn or terminating publishers.³⁴

Under these circumstances, BMI should be deregulated. Ideally, the Department would agree in advance to automatic deregulation if specified, objective criteria were met, so there would be no lag time in BMI's ability to stay competitive in a world of withdrawn or partially withdrawn publishers. But if no such advance conditional deregulation is possible, BMI would look for prompt Department action if, as, and when publishers do withdraw in whole or in part.

3. The Consent Decree Should Be Vacated Unless a Continued Need for Regulation Is Shown.

The BMI consent decree is a creature of equity and should only stay in effect so long as the facts and law justify it. As noted, the Department itself recognizes that markets inevitably

34. Viewed another way, BMI questions the justification for regulation in light of the strong functional similarity between the regulated PROs and unregulated major publishers, both of which aggregate and administer copyright rights on behalf of numerous individual copyright holders.

change and, for that reason, has adopted the practice of having all new antitrust consent decrees expire in 10 or fewer years.³⁵

Given the benign history of the BMI decree and the origin of its rate court regime, BMI's repeated court victories under the Rule of Reason, the vast changes in the law and market conditions since it was adopted, and the dynamic forces now at work in the music market, BMI questions whether such a decree would be entered today. In particular, the compulsory licensing provision of Section XIV stands at odds with the exclusive right to make public performances — and hence the right to charge market rates — that has been granted to songwriters by Congress.

BMI believes it is in the public interest for the Department to reconsider the need for the Consent Decree at least every five years with the goal of vacating it at an appropriate time.

OTHER COMMENTS IN RESPONSE TO THE GOVERNMENT'S REQUEST FOR PUBLIC COMMENTS

1. Regulatory Parity with ASCAP Is Not Itself a Sufficient Basis to Regulate BMI.

Although differences between the BMI and ASCAP consent decrees can at times create complications in the regulatory or legal process, BMI would oppose any effort to regulate BMI solely in order to conform its consent decree to ASCAP's. As detailed above, BMI — along with its consent decree — has a distinct history. Of course, BMI's and ASCAP's current efforts to modernize their respective consent decrees overlap significantly, in response to the fundamental changes resulting from digital music that affect all PROs equally. To that end, BMI has no objection to substantively identical modifications of the BMI and ASCAP consent decree.

35. Antitrust Div., U.S. Dep't of Justice, *Antitrust Division Manual*, III-146 (5th ed. 2014), available at <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf#page=146> (last visited Aug. 6, 2014).

However, BMI does object to any modification that further restricts BMI only for the purpose of parity with ASCAP or to any delay in the modifications it seeks due to issues unique to ASCAP.

2. The Network “Through-to-the-Audience” Licensing Provision Should Not Be Extended to the Internet.

Unlike the ASCAP decree, the BMI consent decree contains no provision requiring it to grant a “through-to-the-audience” license with respect to Internet-based music performances. BMI’s decree only addresses traditional networks, and stations on those networks. This should remain the case, as any such requirement would be impracticable and overly rigid, and fail to fairly compensate publishers and songwriters for actual use. Unlike in traditional media with a single, vertical chain of distribution, distribution of content on the Internet follows multiple paths including widgets, framing, and links, rather than a one-way path downstream. Moreover, it is common on the Internet for revenue generated downstream not to be recognized or shared upstream. As a result, Internet-based music companies are changing their business models rapidly, but in some instances users may be unable to identify use of their content downstream. BMI should not be *required* to attempt to value all subsequent platforms in negotiating a license agreement with the particular firm in the distribution chain that chooses to apply for a license. Rather, BMI should be permitted to use its business judgment to determine which performing firms in the digital space should be licensed and the scope of their licenses.

3. Transparency of Ownership Records Should Be Balanced Against BMI’s Right to Proprietary Business Information.

In the Department’s request for public comments, it asked about the “transparency” to the public of the current BMI repertoire.

The impending partial or total withdrawal by some publishers will necessitate that BMI provide both withdrawing publishers and digital users reasonable access to certain information

regarding the withdrawn repertoire, and BMI is willing to do so. At the same time, one of BMI's principal assets is the information infrastructure that BMI has built and continues to develop. For this reason, BMI would support transparency procedures that allow publishers and users access to necessary information, while protecting BMI's proprietary business interests. BMI has long been open to making its repertoire available to the public.

CONCLUSION

The BMI consent decree must be amended in the ways we propose if it is to serve the Sherman Act's procompetitive goals. As things now stand, the decree has contributed to a "broken" market for music licensing. BMI pledges to work in good faith with the Department to repair that market for the benefit of songwriters and composers, publishers, the licensees who perform BMI music, and the listening public.