Comments from

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on

"Review of ASCAP and BMI Consent Decrees"

before the

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FOREWORD

My name is Bart Herbison, Executive Director of the Nashville Songwriters Association International (NSAI). When I accepted this position in 1997 the songwriting profession in Nashville and around the United States was at its apex. There were several thousand professional songwriters in Nashville who earned a living writing songs, songs that defined American culture, were one of our country's largest balance-of-trade export items and touched people's emotions at life's most important moments.

Things quickly changed. First came Internet music piracy and file sharing. Songs were essentially free to anyone who wanted them online. Getting an album cut was no longer a significant income source for songwriters since there were vastly fewer albums and sales on the remaining releases declined dramatically. Mechanical royalties fell by 70% or more for most songwriters.

Most of the Nashville music industry has historically been located on three streets called "Music Row". After piracy and file sharing became prevalent, FOR SALE signs were so common that the Nashville Songwriters Association decided to create a poster to highlight the plight of the American songwriter. Those signs were so prevalent that NSAI had to create two posters which still showed only a few of the buildings that once housed working songwriters… buildings where iconic songs had been written. The FOR SALE signs are no longer there. The buildings are now non-music industry related offices, condos or have been torn down.

Following the decline in mechanical royalties, songwriters prayed for a broadcast radio single in order to generate enough royalty income to feed their family. That revenue disappeared as streaming music became the new consumer model. Songwriters who had earned a few pennies from record sales or a broadcast radio performance, pennies that were split between co-writers and their music publishers, now earned micro-pennies through digital streaming. Once again, many more of America's great songwriters were forced out of the profession.

Continuing economic pressure dictated that even if the developing artist had limited writing ability, the remaining staff writers had to write with them to have any real chance of getting songs on their projects and making money. Approximately four thousand staff songwriting positions at Nashville music publishing companies dwindled to a few hundred.

Every day great songwriters come to my office, asking if I know of any possible opportunity. I do not because the opportunities no longer exist.

Digital delivery models continue to evolve while more great American songwriters fall by the wayside. Nashville has lost 80% or more of those who claimed songwriting as a fulltime occupation since the year 2000. This startling statistic alone demands changes in an antiquated royalty system. Consent decrees crafted in World War II could not have possibly anticipated the current and rapidly developing delivery mechanisms for music. Our Founding Fathers believed authors deserved real opportunities in a free market because they understood the promise of our new Nation was its ideas and intellectual creations. It is time for fairness. It is time to provide songwriters and composers the same economic opportunities that recording artists, book authors and inventors have in a free marketplace.

DOJ QUESTIONS:

Do the Consent Decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Are there provisions that are ineffective in protecting competition?

The Consent Decrees are not only outdated, they are obsolete. Rules created more than sixty years ago to govern the collection of America's performance royalties for songwriters cannot possibly function in 2014. With new delivery systems for music emerging almost daily, the only possible way to keep pace is in the marketplace. Even Members of Congress acknowledged their limited ability to keep abreast of technological developments for the delivery of music during hundreds of individual meetings with the Nashville Songwriters Association over recent years and during hearings on the subject of Music Licensing before the Subcommittee on Courts, the Internet and Intellectual Property in June 2014.

Allowing the marketplace to develop new and innovative music licensing and collection models is the path to establishing true competition. The ability of ASCAP andBMI to compete in the music-licensing marketplace is increasingly difficult under the current Consent Decree structure. This was recently illustrated when some music publishers attempted to remove portions of their song catalogues to directly license with digital music providers. The inability or lack of clarity imposed by Consent Decrees to allow ASCAP and BMI to collect more than just performance royalties is also an economic disincentive to competition in the music licensing arena.

Competitive oversight can best be accomplished within a free marketplace by sunsetting the ASCAP and BMI Consent Decrees or with the creation of a meaningful arbitration system to replace the current Rate Court structure.

What, if any, modifications to the Consent Decrees would enhance competition and efficiency?

NSAI recommends complete elimination by sunsetting the Consent Decrees or dramatically altering them. In 1979, the U.S. Department of Justice ("DOJ") determined that entering into perpetual consent decrees was not in the public interest. Such a dramatic change will take time, but is the only way to let the market develop a system that out of necessity will eventually enhance competition and efficiency. Government de-regulation of other industries such as airlines resulted in lower consumer costs (when adjusted for inflation), greater efficiency and more consumer choice.

How can future competition be fostered in the music-licensing arena under antiquated Consent Decree restrictions? Further, how can restrictions on the kinds of royalties ASCAP and BMI collect and bundle foster competition? (For example: ASCAP and BMI's inability to collect mechanical royalties. BMI contends and NSAI agrees that they can collect mechanical royalties under their Consent Decree now). Such restrictions not only stifle competition in the music-licensing marketplace, they also result in higher collection costs. Lower costs translate to savings that could potentially be passed to consumers in a free

market environment. SESAC, operating in a free market environment, has been able to establish rates very effectively. Synchronization agreements have worked well in the private market.

The compulsory rules in the Consent Decrees have severely limited the ability of American songwriters and composers to see the worth of their compositions keep pace with inflation. Record labels now employ a 360 contract model with artists which see the artist share sources of income that were not traditionally part of the agreement between a label and artist. This can include music publishing, which puts great economic pressure on artists to write songs, further diminishing the songwriter/publisher share of the music revenue pie.

There are two kinds of songwriters. Artist-songwriters such as Elton John, Bruce Springsteen or Taylor Swift earn significant income beyond royalties through ticket sales, merchandise and lucrative endorsements.

Non-performing songwriters such as Hal David, Jimmy Webb, Johnny Mercer and Leiber & Stoller relied entirely on royalties from recorded music. Non-performing songwriters have scraped by while losing traditional income through the advent of file sharing, Internet piracy and music streaming becoming the new delivery model. At tens of thousandths of a penny per stream for Internet radio, the non-performing songwriter cannot survive. Some of America's greatest performers, such as Frank Sinatra, Elvis Presley and Madonna have depended on non-performing songwriters and composers for the music that shaped their careers.

Do differences between the two Consent Decrees adversely affect competition?

The impact of the differences between the two Consent Decrees will be marked and dramatic if DOJ rules that BMI can collect mechanical royalties (which NSAI believes is allowed under BMI's current consent decree) and ASCAP cannot. DOJ should allow both ASCAP and BMI to collect all royalty streams. The efficiencies gained by bundling mechanical, performance and other royalties collections will increase efficiency which could produce dramatic savings that would allow pricing flexibility in a free market.

How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?

ASCAP and BMI represent a very efficient system in terms of collective licensing. Obviously improvements can be made to any such system, particularly by standardizing the data among the different databases worldwide, which are engaged in music licensing and collections. ASCAP and BMI are already involved in such efforts.

Songwriters/composers deserve transparency too. Creators who are clients or members of current or future collection bodies should have full transparency and dispute resolution mechanisms that ensure they are being paid in a fair and timely manner. Songwriters should be represented on dispute resolution bodies that should have an ability to look at pertinent payment records at little or no cost when resolving disputes. This should apply to any entity licensing music and collecting all or a portion of a songwriter/composer's royalties. The DOJ should consider forming any music licensing/collection body under a not-for-profit type structure to ensure accurate payments to songwriters and composers.

However, great caution must be exercised when it comes to providing too many details of proprietary information in licensing/collection databases. Providing such data, to an Internet service provider, for example, could result in the same kind of monopolistic power that the creation of the Consent Decrees sought to prevent. Keeping information proprietary under appropriate circumstances will protect creators from unfair exploitation of their works.

Should the Consent Decrees be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others? If such partial or limited grants of licensing rights to ASCAP and BMI are allowed, should there be limits on how such grants are structured?

If music publishers begin a partial or whole withdrawal of rights from ASCAP and BMI there is a near certainty that those collective licensing models would suffer greatly or collapse entirely. NSAI believes that the U.S. Department of Justice and/or Congress should sunset or substantively change the ASCAP and BMI Consent Decrees and let the marketplace work. Absent that result, and absent an effective arbitration system replacing the current ASCAP and BMI rate courts, songwriters have no other effective marketplace instrument to negotiate rates than for music publishers and self-published songwriters to withdraw partial or whole rights.

There are two issues to address. First is the ability for either ASCAP and BMI, or alternatively music publishers, to negotiate fair rates for songwriters and composers under a willing buyer-willing seller model.

If DOJ does not sunset or effectively alter ASCAP and BMI Consent Decrees and the only marketplace rate mechanism is for music publishers to choose direct licensing, many troublesome questions emerge. How can songwriters/composers who are self-published, or have regained the rights to their songs and administer them outside a publishing agreement, competitively utilize direct licensing unless a collective agency such as ASCAP and BMI acts on their behalf? Can smaller publishing companies effectively negotiate the same rates as publishers with greater market shares through direct licensing? How efficient can direct licensing be if music publishers cannot represent any title written or co-written by a member of a foreign performing rights society? How efficient can direct licensing be if each music service must deal individually with each music publisher instead of a collective society? How efficient can direct licensing be when you consider many songs have co-writers, often multiple co-writers, each represented by different publishers? In such circumstances ASCAP and/or BMI can still play a vital role in administering direct licenses. The performing rights societies still have the most efficient systems in order to carry out such administration in a cost effective and timely manner.

Second is the issue of rules that would govern the distribution of funds negotiated under wholly or partially withdrawn rights. ASCAP and BMI essentially act as not-for-profit collection arms for songwriters and composers. The issues of the ability to negotiate in a free market, and the rules governing how funds are distributed, must be considered separately.

If other licensing/collection agencies evolve for either whole or partial administration of songwriters' rights, the not-for-profit concept should be considered essential. At minimum future licensing entities should be subject to strict rules of transparency and direct distribution of performance royalties to songwriters, including a dispute resolution body, independent audits or some kind of arbitration that would give songwriters an equitable voice in ensuring all advances or similar payments resulting from direct licensing agreements are being fairly distributed to songwriters/composers.

Some existing publisher agreements with songwriters and composers allow publishers to directly license, others do not or are absent on this issue.

Consent Decrees, if continued, should allow for denial of certain rights. Such latitude is already possible for record labels and artists in the music industry, to screenwriters, book authors and other creative copyright holders. Free market choice is necessary to allow creators to make strategic career decisions. This includes denying licenses to certain users or the ability to make exclusive deals for a period of time. Garth Brooks recently announced that his new album would finally be available in digital format, a format he did not choose to utilize for earlier records. He chose specific businesses such as Wal-Mart for previous releases as part of a strategy that proved to be financially beneficial to him. This example is illustrative of inequities between the underlying work and sound recording copyrights. If a music licensing-collection agency could benefit its songwriter-composer members by licensing rights only to specific providers, or making exclusive deals for a given period of time, they should be allowed that freedom.

Should the rate-setting function currently performed by the rate court be changed to a system of mandatory arbitration? What procedures should be considered to expedite resolution of fee disputes? When should the payment of interim fees begin and how should they be set?

An arbitration system would constitute a vast improvement over the current Rate Court system of resolving differences between ASCAP, BMI and licensees.

Digital services have often used the Consent Decrees Rate Court mechanisms to manipulate payments in the marketplace. In many cases, if fair market value evidence were admissible in setting their royalty rates, songwriters would have otherwise received higher compensation.

ASCAP points out in a recent filing to the U.S. Copyright Office:

"ASCAP must grant a license to all the musical works in its repertory upon written request, but applicants for an ASCAP license are not compelled to provide ASCAP with the information necessary to set a fee for the requested license.

In the absence of a negotiated license, ASCAP is compelled to resort to a very costly and time-consuming rate court process which due to ambiguities in the substantive standards set by the Consent Decree and restrictions under Section 114(i) of the Copyright Act have resulted in license fees that do not track those reached through competitive market negotiations and result in an unprincipled disparity in the compensation provided to songwriters for the use of their songs, as compared to the compensation provided to record companies for the use of their sound recordings.

Specifically, because ASCAP licenses are compulsory and fees can be set retroactively, certain music users have strategically delayed or extended the negotiating process, choosing to remain applicants or interim licensees indefinitely—in some cases a decade or longer—without paying fees to ASCAP or providing ASCAP with the information necessary to determine a reasonable final fee. In some cases, established digital companies know that interim license rates are more favorable than anticipated rate increases, and have made strategic choices to stay on interim terms until ASCAP determines it must commence an expensive rate court proceeding.

In other cases, new applicants have applied for a license—claiming the shelter of the Consent Decree's guarantee of a right to perform ASCAP members' music while an application is pending—while simultaneously disclaiming the need for such a license and refusing to provide the information necessary for ASCAP to formulate a fee proposal.

Finally, it should be stressed that as ASCAP is required to offer the same substantive license rates and terms to all "similarly situated" users, ASCAP may be effectively restrained from devising creative solutions to resolve licensing impasses. The "similarly situated" standard is often used against ASCAP as both a sword and a shield."

BMI submitted to the U.S. Copyright Office:

"As but one example, the requirement that a music user may access the PROs' repertoires by the mere making of a written license application has led to abuses in certain situations. Although access to the repertoire is instantaneous, there is no default requirement that the applicant pay an interim fee pending the determination of a final license fee. Rather, the burden is on the PRO to make a motion for the imposition of an interim fee – a motion that is, like the rate court proceeding itself, expensive and time-consuming.

Particularly in the emerging digital marketplace, unless BMI brings expensive motions against each and every license applicant, BMI runs the risk of not being compensated by many of its license applicants. In fact, it is not unheard of for an applicant to go out of business before a fee is ever set; as a result, the PROs (and, of course, in turn, our writers, composers and publishers) are never compensated for the use of their valuable repertoires.

We believe the solution is for all parties who use our repertoire to pay interim fees. This can be accomplished by a system that requires users to pay, as an interim rate, the rate they paid under their last license or, for new users, the going industry rate."

NSAI concurs with BMI on this point.

Should the Consent Decrees be modified to permit rights holders to grant ASCAP and BMI rights in addition to "rights of public performance"?

Absolutely. If ASCAP and BMI are allowed to license and collect all royalties, including mechanical royalties, competition would be fostered and songwriters, composers and artists would pay lower collection costs; savings that could be passed on to the consumer. Many new music distribution business models need to acquire multiple licenses. Efficiencies would be created because of the micro-penny nature of royalties in interactive streaming and payees being able to deal with a single entity.

BMI has said: "Online, each transmission may implicate multiple rights. The most efficient music licensing model, therefore, is one where PRO's have the ability to provide "one stop" solutions to music users."

Artists who write their own songs could achieve significant savings on collection costs by allowing entities to collection both performance and mechanical royalties. Competition would be fostered in the process because collecting multiple royalties is a more attractive business proposition for an entity interested in entering that market.

NSAI quotes ASCAP on this point:

"Allow(ing) the bundled licensing would be beneficial to the rights holders and music users. For example, services that stream music on an on-demand basis—those considered "interactive" within the meaning of the Copyright Act—must obtain both a public performance license and a mechanical license under Section 115, which allows the service to make reproductions of the work that are ancillary to the streaming process. At the moment, services typically license performance rights through a PRO such as ASCAP and mechanical rights directly from the copyright owner, administrator or a designated agent.

Mechanical licenses under Section 115 are obtained on a song-by-song basis. ASCAP, in contrast, licenses public performance rights on a blanket repertory-wide basis, and could do the same for mechanical rights.

The licensing of musical works by interactive music services would be more efficient if such services could negotiate with ASCAP for both rights in a single transaction. Indeed, because bundled licensing could extend the benefits of collective licensing to wide range of additional music users, this change should be made more broadly, so that PROs could accept grants of and license all rights in musical works—namely, mechanical, synchronization and print rights in addition to public performance rights.

Modifying the Consent Decree in this way would respond to consumer demand for simplification of the licensing process. Music users that need multiple copyrights are increasingly seeking the efficiency and convenience of "one-stop shopping" for their licenses, and would prefer to avoid the delay and costs of multiple transactions. A unification of the licensing process would also encourage innovation by reducing the licensing burden on new music users. Songwriters, composers, lyricists and independent music publishers would also benefit from this change because the increased administrative efficiency of utilizing ASCAP as a one-stop-shop would greatly reduce transactional costs and administrative expenses, ultimately providing them a greater monetary return for the use of their works.

Furthermore, amending to permit licensing of multiple rights in musical works would allow ASCAP to compete more effectively in both the domestic and international licensing marketplace."

NSAI QUESTION: HOW DOES THE PRESENT SYSTEM FAIRLY VALUE A SONGWRITER'S WORK?

The present system does not fairly value a songwriter's work. In fact, adjusted for inflation, a song's worth is grossly undervalued compared to the sound recording copyright.

BMI notes in comments to the U.S. Copyright Office: "When multiple rights implicate both the sound recording and the underlying musical work, it is critical that there be a fair and equitable relationship between the compensation afforded sound recordings and the songwriters and publishers whose underlying works provide the foundation for those recordings. Currently, for the transmission of sound recordings containing musical works, recording artists are paid as much as seven times what songwriters and publishers are paid for the mechanical rights, and as much as twelve times for the public performance right."

The best free marketplace willing buyer-willing seller valuation is decades of privately negotiated synchronization agreements which almost always value the two copyrights equally.

This is why NSAI strongly supports the "Songwriter Equity Act" (SEA). SEA is an important step forward in bringing fairness and modernizing the rate structure for American songwriters and composers. However, a free market is the best solution. We respectfully ask that DOJ sunset the ASCAP and BMI Consent Decrees or make dramatic changes to them. NSAI is confident that under a willing buyer-willing seller marketplace the music industry will advance to benefit both creators and consumers.

THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL

ABOUT NSAI

The Nashville Songwriters Association International (NSAI) is the world's largest not-for-profit trade association for songwriters. NSAI was founded in 1967 by 42 songwriters including Eddie Miller, Marijohn Wilkin, Kris Kristofferson, Felice and Boudleaux Bryant and Liz and Casey Anderson as an advocacy organization for songwriters and composers. NSAI has around 5,000 members and 165 chapters in the United States and ten other countries.

The Nashville Songwriters Association International is dedicated to protecting the rights of songwriters in all genres of music and addressing needs unique to the songwriting profession. The organization recently created the first "group" copyright infringement insurance policy for songwriters and formed a partnership for affordable health care for its members.

The association, governed by a Board of Directors composed entirely of professional songwriters, features a number of programs and services designed to provide education and career opportunities for songwriters at every level.

NSAI owns The Bluebird Café, a legendary songwriter performance venue in Nashville, Tennessee. The Music Mill, at 1710 Roy Acuff Place in Nashville, where the careers of Alabama, Reba McEntire, Toby Keith, Shania Twain and Billy Ray Cyrus were launched, serves as headquarters for the Nashville Songwriters Association International.