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VIA EMAIL

John R. Read
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 4000
Washington, DC 20001

Re: Comments of Music Choice Regarding PRO Consent Decree Review

Dear Mr. Read:

Arent Fox LLP submits this letter on behalf of Music Choice in response to the review ("Consent Decree Review") undertaken by the U.S. Department of Justice Antitrust Division, to examine the operation and effectiveness of the Final Judgments in United States v. ASCAP, 41 Civ. 1395 (S.D.N.Y.), and United States v. BMI, 64 Civ. 3787 (S.D.N.Y.) (collectively, "Consent Decrees"). Music Choice appreciates the opportunity to participate in the Consent Decree Review. As the very first digital music service, and one of the few early services to survive to the present day, Music Choice is in a unique position to provide a perspective informed by long experience.

Background

Music Choice began as a residential cable radio service. It was started by David Del Beccaro in 1987 as a project within Jerrold Communications, which was a division of General Instrument Corporation. General Instrument was a cable/satellite equipment supplier, and the technology underlying the Music Choice service was initially developed to sell equipment to cable operators.

Jerrold started providing the Music Choice service to the public on a test basis in July 1988. After approximately four years of product development and market testing within Jerrold, Mr. Del Beccaro helped secure financing for the digital music service concept through a partnership of major cable and technology companies, and beginning in 1991 the company was spun off as a stand-alone entity

called Digital Cable Radio Associates. At the same time, the cable radio service was launched nationwide.

When Music Choice first launched, it was an a la carte service, i.e., the consumer paid specifically for the Music Choice service in the same way that some cable subscribers pay specifically for HBO today. Cable affiliates charged subscribers $9.95 per month in the early stages, during a time when the basic cable package generally cost around $20 per month and there were very few channels that a cable subscriber could purchase separately, aside from HBO and Showtime. The need to charge $9.95 per month arose, in part, from the fact that a separate digital audio tuner, in addition to the cable box, was required to transmit the service into the home. As the first digital music service, Music Choice had to create the necessary digital audio technology because it did not exist in the marketplace.

The service did relatively well for the first year. But once the most avid music fans had signed up for the service (representing a small, i.e., single digit, percentage of total homes), the cost of the service deterred additional subscribers while customer acquisition and retention costs remained high (as they always have been for music subscription services), and Music Choice's service proved to be unprofitable. As it became clear that Music Choice would take longer than anticipated to become profitable, and requiring additional capital investment to continue operations, Music Choice sought out new investors, specifically ones that would have a strategic interest in the success of the enterprise, such as music companies. In 1993-94, Music Choice took affiliates of certain of the music companies (namely, Warner, Sony, and EMI) on as partners.

Music Choice's business model underwent significant transformation as home entertainment technology and infrastructure continued to modernize. In the mid-nineties, with the introduction of the first cable television boxes that could receive a digital audio signal, Music Choice was able to eliminate the need to manufacture and sell separate digital audio receivers to cable subscribers. The ability to transmit the service to the cable operator's cable box allowed Music Choice to reach a much larger audience than it could when the service required the sale of a separate digital receiver. As Music Choice's market penetration into homes served by cable, satellite and other multi-channel video programming distributors ("MVPD's") increased in the mid-1990s, however, the price it was able to obtain from MVPDs as part of a bundled, basic cable package plummeted. That pricing trend continues today. The Music Choice service is now available in 56 million homes, accounting for a majority of digital MVPD subscribers, with 57 million

monthly listeners on average. Yet at the same time, the average price per subscriber paid to Music Choice by the MVPDs has dropped significantly, as Music Choice has faced increasing competition from other MVPD channel providers.

Music Choice currently provides a residential service comprising 50 channels of diverse audio programming, thousands of music videos, original produced content and a music video network (Music Choice Play) to customers of cable operators and other MVPDs via TV and connected devices. The Music Choice residential service is transmitted to customers primarily by cable operators and other MVPDs as part of a bundled package of television channels (e.g., the Music Choice service is included by MVPDs as part of their digital basic television service to their customers). Music Choice also provides a background music service to commercial establishments such as bars, restaurants, retail stores and offices, which is also transmitted through MVPDs as well as sold by local dealers.

Overview

As a participant in the music licensing industry for over two decades, Music Choice respectfully offers its unique perspective on the various issues raised in the Consent Decree Review.

As a preliminary matter, Music Choice notes that the music industry is a complex "ecosystem," which requires a comprehensive, holistic approach when considering changes. Any effective solution needs to enable **all** industry participants, including (i) the copyright owners (e.g., music publishers), (ii) the songwriters from whom the copyright owners obtain their rights, and (iii) licensees that create new revenue streams for copyright owners and new markets for consumers to enjoy music, to thrive and earn a fair income. A solution that works solely to the benefit of the copyright owners while excluding any fair return to the licensees solves nothing.

In evaluating the rhetoric and proposals advanced by the PROs and music publishers, it is important to be mindful of the distinction between a "fair market" and a "free market." Music Choice understands that this Consent Decree Review has been driven largely by copyright owners' repeated claims that the existing consent decree regimes have deprived copyright owners of either "fair market" or "free market" royalty rates. The copyright owners use these terms interchangeably, yet these terms are not synonymous. Remembering the difference is crucial to the

extent the DOJ considers any modifications of the Consent Decrees that would impact the music licensing ecosystem.

At the most basic level, "free market rates" are the rates that a seller would obtain in an idealized market, free from any government intervention in the form of taxes, subsidies, or regulation. "Fair market rates" are typically defined as rates that would be agreed to in an arms-length transaction in a workably competitive market between a willing buyer and a willing seller, each having reasonable knowledge of any relevant information and neither being under any compulsion to act. In a truly competitive market, where neither party is compelled to act and both parties have adequate information, free market rates may be the same as, or close to, fair market rates. The market for blanket music copyright performance licenses, however, is unique and inherently devoid of competition. This is, in part, due to the bundling of thousands of individual copyrights in a blanket license. Moreover, no PRO's blanket license is a substitute for any other PRO's blanket license, and licenses covering the entire catalog from each of (at least) the major music publishers are necessary for a music service to avoid massive infringement liability. Consequently, in an idealized "free market," copyright owners can, and will, use their resulting market power to extract rates much higher than the true fair market value of those licenses. Evidence of the abuse of market power that immediately resulted when the major publishers thought they were allowed to operate without consent decree oversight is provided in the recent Pandora/ASCAP rate court case. See In re Pandora Media, Inc., No. 12-8035, 2014 WL 1088101, at *35 (S.D.N.Y. Mar. 18, 2014). Of course, even trying to conceive of the market for digital music performance rights as a free market is problematic, given that (unlike typical markets for goods and services) the performance right itself is purely the product of government intervention in the form of the Copyright Act. As the DOJ considers potential modifications to the Consent Decrees that would impact royalty rates, it is imperative that the focus be on fair, as opposed to free.

In such a complex ecosystem, it is easy to fall victim to the "sound bite" of the day and the "spin" from whichever interested party has captured the public's attention and lose sight of the larger picture. Recently, the focus has been on the struggles of songwriters and their alleged loss of income, which they blame on performance rates set "fair market value" in the rate courts. Music Choice empathizes with the songwriters and has helped support and promote many thousands of songwriters over its 25 years of programming music. However, songwriters' and music publishers' attempts to eliminate the consent decrees and

rate courts governing public performance licenses are based upon false premises. With respect to songwriters' alleged loss of income, Music Choice is unaware of any evidence supporting a substantial loss of songwriters' income on an industry-wide basis, especially with respect to performance license income. Indeed, ASCAP, BMI, and SESAC each have reported increased membership, revenues, and distributions over the past few consecutive years (with the exception of one temporary, small dip for BMI in 2012 due solely to settlement payments reversing overcharges to broadcasters in prior years). Moreover, overall music publishing industry revenues have increased from $3.9 billion in 2011 to approximately $4.2 billion in 2013, and by 2017 those revenues are projected to increase to approximately $4.4 billion, according to independent market research. Notably, typical music publishing agreements with songwriters provide for songwriters to get an equal, 50% share of revenue from music publishers (and an even higher percentage in co-publishing and administration deals, common for successful songwriters). If music publishing revenues are stable, or even increasing, yet songwriters claim that their revenues are sharply decreasing, either the songwriters are wrong or the music publishers and PROs are failing to pass along the songwriters' proper shares. Either way, the answer is not to re-write the copyright or antitrust law to raise performance rates paid by licensees.

Music publishers' and songwriters' second premise, that the consent decree rate courts have imposed rates below fair market value, is also false. The legal standard employed for decades by the rate courts is, in fact, fair market value. ASCAP and BMI have had several different opportunities, in several different rate cases, to prove (if they could) that the higher rates they desire were consistent with fair market value. Time and time again, before two different, neutral, sophisticated federal district court judges, the PROs failed their burden of proof. Each of these decisions was appealed and affirmed by different panels of federal appellate judges. There can be no question that the current rates have been fairly determined to be fair market rates. The real grievance of the music publishers and songwriters is that they are not happy with the results of these cases. Of course, a seller would always prefer to be paid more than fair market value for their goods or services. But the rate courts, with all the procedural and substantive due process afforded therein, provide a far superior venue to determine fair market value (which is a fact-intensive issue often litigated in federal commercial cases) than a private arbitrator.

Music Choice's issue is not with the songwriters, but the way in which their story has been characterized by their trade associations and the major music publishers, along with the tendency to attribute all of their alleged troubles to one factor (performance royalties), rather than looking at all the factors. Indeed, to the extent that music publishers and songwriters have not done as well as they would have liked in recent years, the causes of any such underperformance have nothing to do with performance royalties (which, as noted above, have actually increased), but instead have been driven by a large number of unrelated factors, such as the recent extended recession (which affected everyone, including Music Choice) as well as changing music consumer dynamics. With less disposable income, it is natural that consumers would buy less music. Record sale revenues have been further decreased by the advent of digital single downloads, which have freed consumers from having to purchase a bundle of recordings (i.e, an album) that they do not want, and on-demand streaming services, which have in some cases supplanted the need to buy digital downloads. However, there is no data suggesting that Music Choice, or any other non-interactive music service, contributed to such sales and revenue declines – in fact, services like Music Choice promote the sale of songwriters' (and record companies') music and have been a source of additional, incremental revenue. Music Choice has had its own challenges with its average subscriber license fee revenue declining year over year, and no other music streaming service over the past 15+ years has ever turned a profit with most having failed. When so many music licensees have failed one can no longer blame such repeated failure on bad business models, but rather one must question the sustainability of existing royalty rates, particularly the sound recording performance rates. Notably, the industry players who have fared the best during this period are the music publishers and record companies, each of whom has remained profitable where digital music services have not.

With respect to the specific issues raised in the DOJ's request for public comments, Music Choice respectfully submits the following:

1. The Consent Decrees continue to serve important competitive purposes today and remain vital to the functioning of the music industry ecosystem.

Purposes of the Consent Decrees

The current process for collective licensing of musical composition performance rights through ASCAP and BMI pursuant to the Consent Decrees works well, even if not perfectly, and should not be changed.

Musical composition performance rights are offered through licenses from three performing rights organizations: the American Society of Composers, Authors and Publishers ("ASCAP"); Broadcast Music, Inc. ("BMI"); and SESAC.

Each PRO aggregates and licenses a large collection of copyrights from various songwriters and music publishers to a wide variety of businesses that publicly perform music, such as local television and radio stations, bars, restaurants, and digital music services. The repertories of the three PROs are to some degree exclusive of one another (there is some overlap when co-writers are represented by different PROs) but, collectively, represent nearly all commercially significant copyrighted musical composition in the United States and its territories.

In theory, allowing a PRO to perform these functions creates economies of scale for both licensees and copyright owners. On the one hand, licensees can access a large portfolio of copyrighted music through a single license – as opposed to contracting with each individual copyright holder. On the other hand, copyright owners benefit from the PRO's experience and resources in monitoring the market, negotiating licenses, and distributing the revenue.

In practice, the benefits of working with collectives such as the PROs, as between licensees and copyright owners, tend to favor the copyright owners – so much so that oversight was quickly deemed necessary. For over seventy years, the United States Department of Justice has regulated the collective licensing of musical composition performance rights through consent judgments, which bind both ASCAP and BMI. The DOJ, with court approval, periodically has modified and updated the Consent Decrees to address new problems and adapt to developing technologies and other changing market conditions.

In 1941, the DOJ filed a complaint against ASCAP, alleging that ASCAP's blanket license was an illegal restraint of trade under § 1 of the Sherman Act, eliminating competition among ASCAP's member-affiliate copyright owners and allowing them to fix prices for their music. See Complaint, United States v. Am. Soc. of Composers, Authors & Publishers, No. 41-1395 (S.D.N.Y. Feb. 26, 1941). Shortly after the complaint was filed, the case was settled by entry of a consent decree. Although liability was not conceded, the decree imposed extensive restrictions on ASCAP designed to minimize the inherent anti-competitive effects of collective licensing. These restrictions required ASCAP to (1) offer a per-program license, in addition to the blanket license; (2) issue a license upon request; and (3) allow membership to any composer of at least one work. See United States v. ASCAP, 1940–1943 Trade Cases ¶ 56,104 (S.D.N.Y. 1941).

The 1941 ASCAP consent decree was amended and expanded in 1950 in connection with United States v. Am. Soc. of Composers, Authors & Publishers, No. 42–245, 1950 WL 42273 (S.D.N.Y. Mar. 14, 1950). Article IX(A) in the amended decree, referred to as the "Amended Final Judgment," established "rate courts" as a venue for applicants seeking a license from ASCAP who believe they are being overcharged " to apply to the District Court for the determination of a 'reasonable' fee. " See Buffalo Broad. Co., Inc. v. Am. Soc. of Composers, Authors & Publishers, 744 F.2d 917, 923 (2d Cir. 1984) (citing Buffalo Broad. Co., Inc. v. Am. Soc. of Composers, Authors & Publishers, 546 F. Supp. 274, 278-279 n. 6 (S.D.N.Y. 1982)). The Amended Final Judgment was further amended twice in 1960, and over a dozen more times over the subsequent forty years. The latest iteration of the ASCAP consent decree, issued in 2001, is referred to as "AFJ2." See Second Amended Final Judgment at 9-11, United States v. Am. Soc'y of Composers, Authors, Publishers, No. Civ. 41-1395, 2001 WL 1589999, at *5 (S.D.N.Y. June 11, 2001). AFJ2 continues to provide rate court supervision over royalty negotiations. AFJ2 also prohibits ASCAP from discriminating in pricing or with respect to other terms or conditions between "similarly situated" licensees.

BMI's evolution followed a similar path. In 1941, shortly after BMI was formed to compete with ASCAP, BMI entered into a consent decree with the DOJ. United States v. Broadcast Music, Inc., 1940-1943 Trade Cases ¶ 56,096 (E.D. Wis. 1941). In 1966, the DOJ filed a complaint against BMI. The complaint alleged that BMI constituted a combination both to restrain trade and to monopolize, and was thereby able to, among other things, coerce composers to join BMI, harming competition. That same year, BMI and the DOJ settled the case by entry of an amended consent decree, with restrictions similar to the ASCAP consent decree.

See United States v. Broadcast Music, Inc., 1966 Trade Cases ¶ 71,941 (S.D.N.Y. 1966). Since 1994, BMI has also been subject to the jurisdiction of a rate court, to which licensees or BMI may apply to determine a reasonable fee. See Order Modifying The 1966 Consent Decree, United States v. Broadcast Music, Inc., et al., No. 64-3787, 1994 WL 901652, 1996–1 Trade Cases ¶ 71,378 (S.D.N.Y. Nov. 18, 1994).

Provisions of the Consent Decrees

As alluded to above, the Consent Decrees control how ASCAP and BMI may issue licenses in a variety of ways to address anti-competitive concerns over PRO consolidation of music licenses. First, the Consent Decrees require ASCAP and BMI to grant a license to any entity that requests such a license to perform any, some or all of the musical compositions in their respective repertories. AFJ2 § IX; BMI Consent Decree § XIV(A).

Music publishers may also direct-license the performance rights in their work to music users without interference from the PROs. AFJ2 § IV(B); BMI Consent Decree § IV(A).

The Consent Decrees prohibit the PROs from discriminating in pricing or with respect to other terms or conditions between "similarly situated" licensees. AFJ2 § IV(C); BMI Consent Decree § VIII(A). And, the Consent Decrees also prohibit ASCAP and BMI from discriminating in its membership; any writer with at least one published work or any actively engaged publisher whose publications have been used or distributed on a commercial scale for at least one year must be admitted as a member. AFJ2 § IX(A); BMI Consent Decree § V(A).

Importantly, the Consent Decrees also establish a "rate court" mechanism under which the District Court for the Southern District of New York maintains jurisdiction to hear and/or determine reasonable license fees when the parties are unable to reach agreement on the fee. See AFJ2, § IX(A); BMI Consent Decree, § XIV(A). The PRO – either ASCAP or BMI – bears the burden of establishing the reasonableness of its fee it seeks; and, if it fails to satisfy that burden, the court will determine a reasonable rate. AFJ2, § IX(D); BMI Consent Decree, § XIV(A). Furthermore, upon a final court-determined fee, all other similarly-situated applicants who have not yet executed a license agreement must be offered a comparable fee to the court-determined fee. AFJ2, § IX(G); BMI Consent Decree, § XIV(C).

The Consent Decrees Today

ASCAP and BMI, themselves, have recently acknowledged the need for, adaptability, and continued vitality of the Consent Decrees. United States Copyright Office, STELA §302 Report 94 (2011) ("STELA Report") ("ASCAP and BMI responded that their critics fail to acknowledge that the music collectives legally operate under carefully negotiated consent decrees that protect licensees and prevent [ASCAP and BMI] from engaging in anti-competitive behavior.[1] They noted that ASCAP's consent decree was recently amended based upon the comments from the same parties who criticized collective licensing in this proceeding."). Nothing has changed since the time of these acknowledgments that would make them less true today. To the contrary, the Consent Decrees and related rate courts remain essential to the functioning of the music performance licensing market today.

In the recent Pandora rate case, ASCAP and certain of the major publishers provided a preview of how they would behave if the Consent Decrees or the rate courts were eliminated. In that case, the ASCAP court found disturbing evidence of collusion and abuse of market power by ASCAP and its member publishers. See In re Pandora Media, Inc., 2014 WL at *35. For the past several years, both ASCAP and BMI have consistently lost rate cases because they requested rates that were deemed, by impartial federal judges based upon a full evidentiary record, to be supracompetitive and outside the reasonable range of fair market value. See, e.g., Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Incorporation, 681 F.3d 76, 88 (2d Cir. 2012) (affirming the district court's rate determination, which considered and rejected ASCAP's fee proposals.); Broadcast Music, Inc. v. DMX Inc., 683 F.3d 32, 46 (2d Cir. 2012) ("[T]he district court, after making detailed findings of fact and carefully considering the issues, properly rejected ASCAP and BMI's overall proposals as unreasonable because they did not reflect rates that would be set in a competitive market."). In response to this string of losses, and at the insistence of certain of its major music publisher members, ASCAP had changed its membership rules to allow a member to selectively withdraw its catalog of music from ASCAP's repertory for only some types of "new media" licensees, such as webcasters, while allowing ASCAP to continue licensing those works to other licensees.

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[1] Indeed, even the Copyright Office has acknowledged that collective, blanket licensing by the PROs inherently raises anti-competition issues requiring regulation and oversight. U.S. Copyright Office, *Satellite Television Extension and Localism Act § 302 Report*, 95-96 (Aug. 29, 2011) ("there is a significant risk that the collective may exploit its market power by charging supra-competitive rates or discriminating against potential licensees").

This strategy was specifically created to allow publishers to circumvent rate court supervision for certain types of licensees that could be more easily managed and pressured, while allowing the publishers to keep all the benefits of collective licensing for other types of licensees (like radio and television stations, bars and restaurants) where the transaction costs of negotiating direct licenses would be prohibitive. Perversely, with respect to the "new media" direct licenses, the withdrawing publishers negotiated deals with ASCAP providing that ASCAP would continue to have the burden of administering the direct licenses after they were negotiated, but at a substantially lower fee than that charged to ASCAP members. In re Pandora, 2014 WL 1088101 at *17. Although this strategy was widely opposed by songwriters as contrary to their interests, ASCAP eventually buckled to the pressure of the major publishers and amended its rules to allow partial withdrawal. Id. at *14-16.

Thereafter, major music publishers purported to withdraw their "new media" rights from ASCAP. After EMI Music Publishing ("EMI") withdrew, the withdrawal of Sony/ATV Music Publishing LLC ("Sony") and then Universal Music Publishing Group ("UMPG") followed. Although negotiations with EMI (which was subsequently sold and is now administered by Sony), the first to withdraw, were not contentious and carried forward the same top-line rate as Pandora's existing ASCAP license, later negotiations with Sony and UMPG were oppressive, and resulted in substantially higher royalty rates. Id. at *18-29.

Prior to its final rate decision, the court ruled that the purported partial withdrawals clearly violated the ASCAP consent decree, and were therefore legally ineffective. The court found that "under the terms of [the consent decree] ASCAP did not have the right to permit the partial withdrawals of rights at issue and thereby acquiesce to a regime in which some music users could not obtain full public performance rights to works in the ASCAP repertory." In re Pandora Media, Inc., No. 12-8035, 2013 WL 5211927, at *7 (S.D.N.Y. Sept. 17, 2013). In a parallel rate case before the BMI rate court, that court similarly ruled that the purported partial withdrawals violated the BMI consent decree, but held that the result of that violation was that the withdrawing publishers had effectively withdrawn their catalogs completely from BMI's repertory, for all future licensees. Broadcast Music, Inc. v. Pandora Media, Inc., No. 13-4037, 2013 WL 6697788, at *4 (S.D.N.Y. Dec. 19, 2013). In light of this ruling, all of the major withdrawing publishers opted to "withdraw their withdrawals" and return their catalogs to the BMI repertory for all licensees. http://www.bmi.com/licensing/entry/drw.

At trial, the ASCAP court was presented with proposed benchmarks, including Pandora's direct licenses with Sony and UMPG. In its final rate decision, the court rejected these benchmarks, finding that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices." In re Pandora Media, Inc., 2014 WL 1088101 at *35. Even worse, the court determined that the "evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying [the ASCAP consent decree] . . ." Id. Further, the court determined that "[b]ecause their [ASCAP, Sony, and UMPG] interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." Id.

The examples of collusive and oppressive conduct by Sony, UMPG, and ASCAP were overwhelming. For example, the day after Pandora filed its ASCAP rate court petition, Zach Horowitz (Chairman and CEO of UMPG) personally called the law firm representing Pandora, warning "as a 'friend' of the firm" that the firm would suffer repercussions from its representation of Pandora in connection with its representation of writers and artists in other matters. Id. at *20. Mr. Horowitz continued to call the firm with similar veiled threats. At the same time, Mr. Horowitz was sending emails to ASCAP negotiators, as well as his counterpart Marty Bandier, CEO of his competitor Sony, and other key publishing industry leaders, reporting with glee on his attempts to pressure Pandora's counsel, including:

> My take: [Pandora's outside counsel] and Pandora are scared. They just want to settle with ASCAP and settle fast. Be strong. Time is on your side. Pandora is now under intense pressure to settle with ASCAP. They have to put this behind them. You can really push Pandora and get a much better settlement as a result. They are reeling. They will pay more, and a lot more than they originally intended, to do that.

Id. at *20. Mr. Horowitz later reported to John LoFrumento, CEO of ASCAP, that "Pandora's outside counsel 'has been spending hours on fallout from their repping Pandora. They are embarrassed. [Pandora's counsel] said they will withdraw from repping Pandora in the next few weeks if the [rate court litigation with ASCAP] doesn't settle." Id. Notably, Pandora's outside counsel for the ASCAP rate

litigation subsequently moved, along with the representation of Pandora, to a different law firm.

Other anti-competitive conduct noted by the court included Sony's coercion of ASCAP to scuttle a deal it had finished negotiating with Pandora just so that it could not be finalized prior to the effective date of Sony's purported withdrawal from ASCAP (id. at *21); veiled threats from Sony that it would "shut down Pandora" if Pandora did not agree to its royalty demands (id. at *22); Sony's refusing repeated requests for lists of their catalogs so that Pandora could at least try to remove its music from Pandora's service if no agreement could be reached, even though Sony had such a list prepared and available (id. at *23-25); Sony's inflexible demand for a 25% increase in Pandora's royalty rate (id. at *25); Mr. Bandier's bragging to his Board of Directors that "Sony had leveraged its size to get this 25% increase in rate" (id.); Sony's subsequent leak of key deal terms to the press (and therefore to other publishers), in violation of a confidentiality agreement (id.); implicit threats from UMPG that it would put Pandora out of business if Pandora did not agree to its demanded rate, which was even higher than that demanded by Sony (id. at *26); UMPG's knowledge and use of the confidential Sony deal terms against Pandora (id.); and UMPG's provision of a list of UMPG's songs pursuant to an NDA that prohibited Pandora from using the information to remove UMPG's songs if no agreement was reached (id. at *27-28).

The court first rejected the Pandora-Sony license as a benchmark: "In sum, the combination of the looming January 1, 2013 deadline and the lack of information about the Sony catalogue meant that Pandora was compelled to conclude a licensing agreement with Sony at the end of 2012." Id. at *38 (emphasis added).

With an even greater distaste for the Pandora-UMPG license, the court also rejected it as a benchmark: "there were virtually no meaningful negotiations between Pandora and UMPG because UMPG, controlling roughly 20% of the music market, began with and insisted upon a demand that bore no relation to the then-existing market price." Id. (emphasis added). In the end, the court kept Pandora's rate the same as its rate during the prior license period, which both parties agreed was within the range of reasonable rates. Id. at *33, 49.

Misleading assertions criticizing the Consent Decrees

Dissatisfied with their inability to obtain supracompetitive rates in the rate courts, ASCAP, BMI, and the major music publishers have issued press releases and talking points, claiming that the cases demonstrate that the Consent Decrees (and the rate courts) are no longer necessary and should be abolished.[2] This claim could not be more obviously or completely wrong. The past several years of rate court decisions, culminating in the recent Pandora decision, all demonstrate the continued need for the consent decrees and the rate courts. Without the rate courts, ASCAP and BMI would have been free to demand the supracompetitive rates rejected by the courts and licensees' only options would be to either pay those unfair rates or go out of business. The publishers' argument is the equivalent of a driver repeatedly getting ticketed for running the same red light arguing that the high number of tickets proves that the traffic light should be removed.

Their mischaracterizations have not stopped with the press. In recent submissions to the Copyright Office in connection with the Office's music licensing study, ASCAP and BMI continue to falsely depict the Consent Decrees as inadequate to address the supposedly unique challenges presented by "new media" music services – a transparent pretext for seeking the ability to allow its members to withdraw a subset of their performance rights, and to selectively circumvent the rate courts for a subset of licensees least able to resist the major publishers' market power, while still keeping the benefits of the PROs for other licensees.[3]

In their Copyright Office submissions, both ASCAP and BMI allege that rate court proceedings somehow deprive music publishers of either "fair market" or "free market" rates for their performance licenses. ASCAP Comment at 24-27; BMI Comment at 14. As a preliminary matter, the very standard used by the rate courts to determine reasonable rates **is fair market value**. United States v. Broadcast Music Inc., 316 F.3d 189, 194 (2d Cir. 2003). Thus, any claim that the rate court have set rates below fair market value is legally incorrect, and merely reflects the

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[2] *See, e.g.*, http://www.ascap.com/press/2014/0314-ascap-statement-on-pandora-rate-court-decision.aspx.

[3] *See, e.g.*, Comments of the American Society of Composers, Authors and Publishers, *Music Licensing Study*, Docket No. 2014-03, at 15 (May 23, 2014), http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/ASCAP_MLS_2014.pdf (the "ASCAP Comment"); *see also* Broadcast Music, Inc's Comments on Copyright Office Music Licensing Study, *Music Licensing Study: Notice and Request for Public Comment*, Docket No. 2014-03, at 13 (May 23, 2014), http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/BMI_MLS_2014.pdf (the "BMI Comment").

PROs' dissatisfaction with having failed to prove that their proposed rate increases reflected fair market value.

As noted above, moreover, the terms "fair market" and "free market" are not synonymous, especially in the market for collective, blanket public performance licenses. These arguments conflate coerced agreements in a market lacking competition with "fair market value." In the Pandora litigation, ASCAP made similar arguments about the rate court's impact on the "fair market rate" for its license, which the District Court rejected as lacking in support:

> There is one remaining issue to address. ASCAP, Sony, and UMPG witnesses expressed frustration with the Consent Decree and the rate court process, both in their communications with each other and in their trial testimony. LoFrumento explained that this frustration arrived with the digital age and reflects a fear that the record industry will grab all of the available revenue from the digital transmission of music. According to ASCAP, AFJ2 and its processes, in particular the requirement that ASCAP issue a license to any applicant, hamper ASCAP's ability to negotiate a fair market rate. Sony and UMPG witnesses asserted that they had to withdraw their licensing rights from ASCAP in order to negotiate effectively with Pandora and achieve appropriate parity with sound recording licensing rates. They expressed skepticism that the rate court proceedings could determine a fair market value for a Pandora license.

In re Pandora Media, Inc., supra, No. 12-8035, 2014 WL 1088101, at *49 (S.D.N.Y. Mar. 18, 2014). The district court acknowledged that "the Consent Decree regime produce[s] challenges for all parties"; however, "ASCAP did not show that the upshot of the negotiations conducted by either Sony or UMPG with Pandora was a competitive, fair market rate." Id. (emphasis added).

The bottom line is that ASCAP, BMI, and the major music publishers have had (and continue to have) every opportunity to present evidence to neutral, sophisticated, federal judges in the rate courts to support their claims that the existing license rates are lower than fair market value. They have repeatedly failed

to produce any such evidence. The fact that they wish the rates were higher is not evidence of higher fair market value (except in the mind of a monopolist).

In their Copyright Office submissions, ASCAP and BMI complain about other features of the Consent Decrees, including the requirement that the PROs issue licenses to digital music services upon request and before interim rates are established, which allows the licensee to negotiate rates "without the threat of infringement." ASCAP Comment at 15-16. See also BMI Comment at 16-17. This provision remains essential to mitigate the inherent market power of the PROs. In the Pandora case, Sony/ATV and UMPG both used the threat of imminent and catastrophic infringement litigation during negotiations to extract supracompetitive rates from Pandora. ASCAP and BMI also allege that some licensees have temporarily avoided paying royalties be refusing to agree to the interim rates demanded by the PROs. ASCAP Comment at 15-16; BMI Comment at 17. The Consent Decrees allow the PROs to obtain interim rates from the rate courts on an expedited basis, however, and after final rates are set (or negotiated) the interim payments are adjusted retroactively, with interest. It is hard to see how this system unduly prejudices the PROs.

ASCAP goes so far as to seek the power to unilaterally set interim rates, which would then shift the burden onto licensees to either pay those rates or endure expensive rate court proceedings. ASCAP Comment at 16-17. Such a result would have a profoundly disruptive effect on licensees, especially smaller companies like Music Choice. In Music Choice's experience (and consistent with the recent string of rate court losses by the PROs), both ASCAP and BMI always take the position that rates should significantly increase. The burden of rate court litigation is felt far more severely by a single licensee (especially a small company like Music Choice) than by large businesses like ASCAP or BMI, which can fund rate court proceedings out of license revenue streams and can spread that burden among a large number of constituents. If the PROs were given the power to unilaterally set interim rates, Music Choice would be under extreme pressure to accept unreasonable rate increases merely to avoid the cost of litigation. The current system is more equitable, and acts as a modest check on the PROs' market power.

ASCAP and BMI also seek to eliminate the through to the audience license requirement, arguing that they should be able to extract a separate license fee from each link in the chain of transmission of a single performance. ASCAP Comment at 19-20; BMI Comment at 17-18. The prohibition on collecting fees at more than one level for a particular use (and corollary requirement of licensing at the source) is

longstanding, and has been an essential feature of the ASCAP Consent Decree from its inception. See United States v. ASCAP (In re Application of Turner Broadcasting System, Inc.), 782 F.Supp. 778, 790-95 (S.D.N.Y. 1991), aff'd, 956 F.2d 21 (2d Cir. 1992). Contrary to ASCAP's assertions, the ASCAP rate court was not "unable to solve the problem of valuing through-to-the-audience licenses" in the MobiTV case. ASCAP Comment at 20 n.27. To the contrary, the court (as affirmed by the Second Circuit) determined that the rate proposed by MobiTV, based upon the "wholesale" revenues it received from downstream cellular carriers, fully captured the value of the performances at the "retail" level:

> Mobi has shown that the value of the public performance of the music at the retail level is indeed captured at the wholesale level, not just theoretically by the concept of derived demand, but also functionally from the fact that the cable television networks principally generate their revenue by measuring the number of subscribers for their programming. To the extent that a channel's content becomes popular among consumers, the seller of content demands a higher rate of compensation from advertisers and from purchasers of the content.

In re Application of MobiTV, Inc., 712 F. Supp. 2d 206, 246-47 (S.D.N.Y. 2010), aff'd, 681 F.3d 76, 84-85 (2d Cir. 2012).

As with their "fair market value" argument, the PROs seek to misrepresent the results of rate court proceedings. Neither ASCAP nor BMI has been able to prove that the rates set at the source of music programming do not adequately capture the value of the ultimate performance to the audience. The requirement of granting through-to-the-audience licenses must not be abandoned.

Nor should the Consent Decrees be subject to any sunset provisions. While Music Choice understands that recent DOJ policy generally favors such provisions, the PRO consent decrees are unique in ways that should render the general policy inapplicable. As a preliminary matter, the music publishing performance right licensing market has been regulated by the Consent Decrees for many decades, essentially from the very birth of that market. That market has developed and adapted over many years with the Consent Decrees, and entire licensee industries have been created in reliance on the protections afforded by the Consent Decrees. Additionally, the blanket licenses subject to the Consent Decrees are inherently

anti-competitive. The real danger of the PROs' abuse of market power has not lessened one bit since 1941; in many ways it has only increased as the PROs have grown in size and the music publishing market has become more concentrated. There is simply no reason to believe that within any particular amount of time the numerous problems necessitating the Consent Decrees will in any way lessen, much less disappear. As previewed in the Pandora decision, the moment that the PROs are no longer subject to the Consent Decrees, whether fve years in the future or fifty, they will abuse their market power to drive up rates in a way that will be catastrophic to all music licensees (and even to their own long term interests).

2. Consent Decree regulation of public performance licensing should be expanded to cover all blanket licensing of the public performance right for musical compositions.

As noted above, the Consent Decrees remain vital to the functioning of the musical composition performance licensing market, and should not be abolished or restricted. To the contrary, they should be expanded. Unlike ASCAP and BMI, SESAC – the third PRO – is not yet subject to any consent decree or rate supervision. This is due primarily to the fact that at the time the DOJ was active in pursuing ASCAP and BMI for antitrust violations, SESAC's repertory was commercially insignificant.

Founded in 1932, SESAC for years focused on narrow sectors of the music performance market. Meredith Corp. v. SESAC LLC, No. 09-9177, 2014 WL 812795, at *5 (S.D.N.Y. Mar. 3, 2014). In 1992, after a change of ownership, SESAC significantly expanded its repertory. Id. It did so in part by recruiting from ASCAP and BMI high-profile composers and publishers, including ones whose music was embedded in syndicated television programs. Id. As a result of SESAC's success in expanding its repertory, it is no longer possible to program around that repertory. This problem is amplified by SESAC's refusal to disclose (in any usable or meaningful way) the identity of the songs it represent, and more importantly the songs for which licenses are not available from the other PROs due to the affiliations of co-writers. Nor will SESAC provide evidence of its total market share compared to ASCAP and BMI.

Music Choice has experienced SESAC's abuse of market power first hand. After SESAC expanded its repertory, Music Choice had to obtain its blanket license. In the negotiation of every renewal, SESAC demands substantially higher fees and argues that the increase is justified by the increased size and value of its repertory.

At the same time, SESAC has, as noted above, always refused to disclose (1) what percentage of the overall musical composition market is covered by its license and (2) a complete listing of which songs, including which portions of those songs, it represents. In 1999, Music Choice attempted to remove SESAC music from its playlists and pursue a direct licensing strategy for those songs, but was unable to do so because of the lack of information from SESAC. This led to threats of litigation by SESAC's outside counsel, and Music Choice was forced to enter into a settlement and license with SESAC. Again, in each subsequent renewal period SESAC has demanded outrageously high increases for each year. Music Choice contemplated pulling SESAC music again in 2007 due to these outrageous demands, but was simply unable to do it because SESAC refused to provide the information necessary to pull all of the songs. At the same time, SESAC has strategically poached certain key songwriters from ASCAP and BMI by paying large advances and premiums, which also impacts Music Choice's ability to program around the loss of SESAC's repertory. Consequently, Music Choice has been forced to accept continual rate increases, far in excess of any demostrated increase in the fair market value of the SESAC repertory, and with no equivalent decrease in the rates Music Choice must pay ASCAP and BMI.

Music Choice is not alone in bearing the brunt of SESAC's anti-competitive conduct. As noted in the most recent ASCAP rate court decision, SESAC used many of the same tactics, including using licensees' inability to determine SESAC's actual market share, to extract supracompetitive rates from Pandora. In re Pandora Media, Inc., 2013 WL 5211927 at **29-30, 39. Moreover, SESAC is currently subject to two antitrust lawsuits, brought by the Radio Music Licensing Committee ("RMLC") and the Television Music Licensing Committee ("TMLC"), respectively, seeking relief from SESAC's anti-competitive behavior. The court in the TMLC case recently denied in part SESAC's motion for summary judgment, finding, inter alia, that "[t]he evidence would . . . comfortably sustain a finding that SESAC . . . engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." Meredith Corp., v. SESAC, LLC, 2014 WL 812795, at *10. In the RMLC action, the court recently found that radio broadcasters were likely to succeed on the merits of their antitrust claims against SESAC. http://www.billboard.com/biz/articles/news/legal-and-management/5855056/ruling-in-sesac-radio-music-license-committee-lawsuit.

Given the current state of SESAC's repertory, the same facts supporting the continued need for rate court regulation of ASCAP and BMI apply equally to

SESAC, and SESAC should be subject to similar regulation and rate court supervision as the other PROs.

Indeed, as the recent Pandora decision demonstrates, even if the major publishers were to withdraw their catalogs from the PROs entirely and force music licensees to obtain direct licenses, each of the major (and even the larger independent) music publishers would also require regulatory oversight and rate supervision to mitigate the inherent anti-competitive effects of such collective licensing and prevent the collusive conduct the major publishers have demonstrated in the past. Major publishers in direct blanket licenses are effectively the same as PROs because each one (like each PRO) has aggregated from the original copyright owners (the songwriters) and controls a large enough catalog to render its blanket license necessary to a programmed music performance service like Music Choice, and most publishers (also like the PROs) administer licenses for many songs that they do not actually own. For example, recent estimates state that Sony/EMI controls approximately 26% of the market with Kobalt, UMPG, Warner/Chappell and BMG/Chrysalis controlling 17%, 16%, 14% and 6%, respectively. Notably, Kobalt (like ASCAP, BMI, and SESAC) acts entirely as an administrator of the songs in its catalog, and does not own any of the copyrights. Consequently, the same concerns over PRO conduct apply with equal force to the major publishers and therefore they should also be subject to conduct-regulating consent decrees (or other form of regulatory oversight) if they were to withdraw their catalogs from any regulated PRO.

3. Lack of adequate, reliable, and usable information concerning the repertories of all three PROs amplifies the anti-competitive effects of the PROs' blanket licensing conduct.

One of the most significant challenges for licensees is the lack of access to any accurate or comprehensive source of copyright ownership information for musical compositions and sound recordings. Lack of access to such information has hindered licensing activities, both direct and collective, giving undue leverage to copyright owners.

In a specific example noted above, SESAC has repeatedly used Music Choice's inability to identify and pull SESAC music (or obtain direct licenses) to extract rate increases far in excess of any proven increase in the size or fair market value of its repertory. In order to even attempt to obtain direct licenses, and to negotiate fairly with these collectives, licensees need access to all pertinent rights

ownership information for each musical composition and sound recording, including the identity and contact information for all copyright owners (including any ownership splits), administrators, and other entities (such as collectives) authorized to license each sound recording and musical composition.

While the Consent Decrees require ASCAP and BMI to disclose their repertory in some limited manner, the PROs only provide a single-song lookup. An electronic database that only provides a song-by-song search does not suffice; nor is it useful in any meaningful way. Without bulk access to the entire repertory in a usable format, music users cannot attempt to assess the value of the entire repertory. Any such valuation is rendered even more difficult without a consolidated database, including information concerning the splits among various co-songwriters and publishers. Moreover, ASCAP's and BMI's database search tools are subject to numerous disclaimers, rendering the accuracy of the information uncertain.[4]

There is no dispute that the collectives have this information. They should at least be required to make this updated information publicly available in searchable, electronic form and, more importantly, in bulk form such that the entire repertory can be evaluated. Although this information will not fully mitigate the competitive harm to licensees from the PROs' exercise of market power inherent in collective, blanket licensing or otherwise eliminate the need for the Consent Decrees, it will at least provide some relief to licensees in certain circumstances.

4. The Consent Decrees should not be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others.

PROs serve as a clearing house to music users to license songs without entering into separate, individual licenses with the many hundreds of thousands of different songwriters and publishers for millions of songs. Despite providing the economies of scale that individual copyright owners cannot otherwise achieve but need, the inherent anti-competitive problem with collective music licensing organizations is their exercise of undue market power. The Consent Decrees are thus necessary and premised on a compromise: the PROs are allowed to continue licensing, notwithstanding their market power and potential for anticompetitive

[4] *See, e.g.*, http://www.ascap.com/ace-title-search/about.aspx; *see generally* http://www.bmi.com/search..

effects, but only subject to the restrictions in the Consent Decrees, which are designed to help mitigate those effects.

Allowing either ASCAP or BMI to license their respective performance rights to some music users but not others would directly undermine the fundamental underpinnings of the Consent Decrees. A hallmark of the Consent Decrees is that any music user must be granted access to ASCAP's or BMI's entire repertory – i.e., music users could obtain full public performance rights to works in a PRO's repertory. See AFJ2 § IX; BMI Consent Decree § XIV(A). Additionally, one of the more significant restrictions under the Consent Decrees is the prohibition against discriminatory terms.

While the PROs now seek to shed the restrictions of the Consent Decrees, they ignore that their aggregated collection of rights continues to provide them with tremendous and undeniable market power: the ability to fix prices at supracompetitive rates. So long as the prospect of the abuse of market power by PROs looms, the restrictions in the Consent Decrees must also endure.

The PROs' and publishers' abuse of market power in the absence of rate court oversight is not merely hypothetical. The Pandora rate case provides direct evidence of the actual conduct that resulted when certain major publishers thought they had the ability to selectively withdraw their catalogs with respect to only certain licensees. The rate court in that case found that the coordinated efforts between ASCAP and two major publishers – Sony and UMPG – resulted in the deliberate leveraging of market power – market power magnified from that which each holds individually – over Pandora to artificially create purported benchmark license agreements with higher rates:

> Pandora has shown that the Sony and UMPG licenses were the product of, at the very least, coordination between and among these major music publishers and ASCAP. Sony and UMPG justified their withdrawal of new media rights from ASCAP by promising to create higher benchmarks for a Pandora–ASCAP license and purposefully set out to do just that. They also interfered with the ASCAP–Pandora license negotiations at the end of 2012. UMPG pressured ASCAP to reject the Pandora license ASCAP's executives had negotiated, and Sony threatened to sue ASCAP if it entered into a license with

> Pandora. With only a few business days remaining in the year 2012, ASCAP refused to provide Pandora with the list of Sony works without Sony's consent, which Sony refused to give. Without that list, Pandora's options were stark. It could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms. Then, despite executing a confidentiality agreement with Pandora, Sony made sure that UMPG learned of all of the critical terms of the Sony–Pandora license. And LoFrumento admitted at trial that ASCAP expected to learn the terms of any direct license that any music publisher negotiated with Pandora in much the same way.
>
> There is no need to explore which if any of these actions was wrongful or legitimate. Nor is there any reason to explore here the several justifications that ASCAP, Sony, and UMPG have given for at least some of this conduct. What is important is that ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified. But, since the UMPG and Sony license agreements constitute poor benchmarks even in the absence of coordination, it is not necessary to engage more deeply with the implications of this evidence.

In re Pandora Media, Inc., supra, 2014 WL 1088101, at *35 (emphasis added).

As logic and past behavior confirm, the safeguards of the Consent Decrees against anti-competitive conduct would be wholly undermined if publishers were permitted to selectively withdraw performance rights from the PROs for some music licensees but not others.

5. The rate-making function currently performed by the rate court should not be eliminated in favor of a system of mandatory arbitration with reduced discovery.

Rate courts remain essential to fee dispute resolution

Although the rate court process is not perfect, it is essential to the fair market collective licensing of musical composition performance rights. Having been forced to litigate a rate case against BMI lasting several years, including two appeals, before finally settling with BMI, Music Choice is well aware of the costs associated with rate court. Indeed, such costs are disproportionately burdensome on individual licensees, especially small companies like Music Choice. The PROs, on the other hand, fund these costs out of the royalty stream provided by the licensees, with any indirect burden spread among their vast constituencies of individual copyright owners. For this reason, among others, even with recourse to rate court, the pressure to accept supracompetitive rates is strong. This was certainly the case with Music Choice, which could not continue to endure the years of litigation costs and settled with BMI for a rate significantly higher than that paid by radio, or even webcasters.

Negotiating these licenses without recourse to rate court would be even worse, however. ASCAP and BMI each control the rights to such a high percentage of the music played by Music Choice that there is simply no way for Music Choice to operate without licenses from both. The ASCAP and BMI repertories have no competition; one is not a substitute for the other. Nor is direct licensing a viable option, as discussed further below. Consequently, ASCAP and BMI would enjoy (and abuse) absolute market power if negotiations were not regulated by the rate courts, and Music Choice would have no choice but to pay any supracompetitive rates demanded by the PROs or go out of business. Recent history has repeatedly proven that, even when they are subject to rate court supervision, ASCAP and BMI consistently seek unreasonably high (i.e., above fair market) rates.

Indeed, the Second Circuit has confirmed the need for the rate courts because of the extreme pressure PROs are able to exert on licensees with their market power:

> The [consent decrees] were established as a result of the government's antitrust challenges to ASCAP and BMI's licensing practices. Their purpose was to, in part, promote

> free competition in the music licensing industry and minimize the "danger of unreasonable activity" resulting from ASCAP and BMI's market power and potential restraints on trade. See K–91, 372 F.2d at 4; accord Showtime, 912 F.2d at 570. The rate court mechanism must be considered within this context. See Showtime, 912 F.2d at 570. The ability of users of music rights to avail themselves of a reasonable rate through the rate court mechanism when ASCAP and BMI's market power might otherwise subject them to unreasonably high fees "would have little meaning if that court were obliged to set a 'reasonable' fee solely or even primarily on the basis of the fees [a PRO] had successfully obtained from other users." Id. "The disinfectant [of the rate courts] need not be a placebo."

Broadcast Music, Inc. v. DMX Inc., 683 F.3d at 49.

Based upon its many years of experience both litigating rate disputes and negotiating rates with ASCAP and BMI, Music Choice can vouch for the truth of the Second Circuit's conclusion. Without the Consent Decrees, including the availability of a license on request and recourse to rate court, the PROs would have been free to extract supra-competitive rates, far in excess of the true fair market value of the licenses. Given the negotiating positions that ASCAP and BMI have taken with Music Choice in the past, even with the moderating effects of the Consent Decrees, there is no question that the rates demanded in the absence of the Consent Decrees would have put Music Choice out of business.

> The objective of setting reasonable, fair market rates would be undermined by trading the due process and efficiency of the rate courts for a more limited and compromised system of private arbitration

As a preliminary matter, Music Choice strongly disagrees with any suggestion by the PROs that rate court litigation is inefficient or unnecessarily burdensome on the PROs. Both of the rate courts have implemented various procedures that effectively streamline the cases and yield relatively fast decisions, without unduly compromising the due process afforded by federal courts. Given the amounts at stake in these cases, it would be inappropriate to lessen the due process

afforded by these courts in favor of a further expedited private arbitration process, with little or no discovery or appellate review.

Indeed, any diminution in discovery would asymmetrically prejudice licensees in rate disputes, given that the PROs and their publishers already have the most relevant information concerning potential benchmarks, while licensees have no access to this information absent discovery.

Rate court proceedings also have decades of precedent and, therefore, have predictability. In ASCAP and BMI rate court proceedings, the governing standard is a reasonableness standard, which has been construed by the District Court for the Southern District of New York and explained by the Second Circuit Court of Appeals. The cases proceed under a uniform set of rules familiar to all counsel – the Federal Rules of Civil Procedure and Evidence. Eliminating the rate courts in favor of private arbitration would sacrifice this history and predictability.

The use of federal judges to decide rate cases is also far preferable to the use of private mediators. Rate court litigation takes place before two different District Court judges – presently, District Judge Denise Cote for ASCAP and District Judge Louis B. Stanton for BMI – who as federal judges routinely preside over many of the most complex commercial litigations in the country. They have life tenure and are presumptively neutral and unbiased. As federal judges they have significant experience with both copyright and antitrust law, and also are accustomed to hearing complex expert testimony from economists and industry specialists, which are important components of rate cases. Moreover, by having different judges preside over the ASCAP and BMI rate courts, but having each judge hear every rate case involving one PRO, the judges become very experienced and efficient in handling rate cases, while still allowing two different judges to decide similar issues at the trial level. These decisions are also subject to review by the entire Second Circuit Court of Appeals.

Taking these disputes away from experienced and highly qualified federal judges and giving them to private arbitrators would significantly reduce the quality of rate decisions. As a preliminary matter, very few (if any) private arbitrators could match the experience of the rate court judges with respect to the adjudication of rate disputes and the unique combination of copyright and antitrust issues raised in such disputes. Moreover, any private mediator with relevant music industry experience would necessarily have represented either music copyright owners or

licensees (but not both). The nature of this experience would tend to undermine at least the appearance of impartiality necessary to a fair and reliable adjudication.

Music Choice also disputes the premise that private arbitration would necessarily be faster and less expensive than rate court litigation. Again, the stakes involved in these disputes lead to vigorous litigation, whether before a court or an arbitrator. Music Choice has participated in both rate court cases and proceedings before the Copyright Arbitration Royalty Panels (and now the Copyright Royalty Board), and the CARP proceedings were at least as expensive (if not more so) than rate court.

For the past several years, both ASCAP and BMI have consistently lost rate cases because they requested rates that were held (and, in some instances, affirmed), by impartial federal judges based upon a full evidentiary record, to be supracompetitive and outside the reasonable range of fair market value. See, e.g., In re Pandora Media, Inc., No. 12-8035, 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014); Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Incorporation, 681 F.3d 76, 88 (2d Cir. 2012) (affirming the district court's rate determination, which considered and rejected ASCAP's fee proposals.); Broadcast Music, Inc. v. DMX Inc., 683 F.3d 32, 46 (2d Cir. 2012) ("[T]he district court, after making detailed findings of fact and carefully considering the issues, properly rejected ASCAP and BMI's overall proposals as unreasonable because they did not reflect rates that would be set in a competitive market."). That the results for ASCAP and BMI have been unfavorable is no reason, however, to get rid of the rate courts and substitute arbitration – particularly when no credible challenge to the adequacy of the rate-court process has been substantiated.

6. The Consent Decrees should not be modified to permit rights holders to grant ASCAP and BMI rights in addition to "rights of public performance"

The Consent Decrees were designed to implement protections to help mitigate the extraordinary market power obtained by the PROs from the aggregation of performance rights alone. Allowing PROs to aggregate even more rights would grant them even more market power.

Although the PROs now seek such an expansion of their market power, it should be noted that in connection with earlier legislative proposals, ASCAP and

other music industry representatives firmly rejected the notion. Specifically, ASCAP had argued that

- "we have lived comfortably under the consent decree in the licensing of performing rights for over fifty years"
- "ASCAP and BMI do not have any administrative structure in place to deal with mechanical rights"
- "there are many concerns regarding both digital and physical goods mechanical licensing. ASCAP does not license and has never licensed these rights"

Copyright Office Views on Music Licensing Reform, Hearing Before The Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives One Hundred Ninth Congress, Serial No. 109–28, at 98-100 (June 21, 2005).

Moreover, it is ironic that ASCAP and BMI are asking for more rights and more market power at the same time they are asking for less regulatory oversight. It would simply be inconsistent, however, to eliminate or reduce the efficacy of the Consent Decrees, as the PROs request, while simultaneously allowing the PROs to increase their market power.

CONCLUSION

Music Choice thanks the Department of Justice for this opportunity to provide its unique perspective on the various antitrust issues raised in the Consent Decree Review, and looks forward to ongoing participation in the Consent Decree Review.

Respectfully submitted,

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