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

Comments of Pandora Media, Inc. In Response to the Department of Justice's Review of the ASCAP and BMI Consent Decrees

Pandora Media, Inc. ("Pandora") welcomes the review of the Department of Justice (the "Department") of the consent decrees that govern the American Society of Composers, Authors, and Publishers ("ASCAP"), and Broadcast Music, Inc. ("BMI"). We recognize that this process is part of a broader review of whether these consent decrees should remain in effect and/or be modified, and we are sensitive to the Department's concerns about the status of these decrees. Our central message is this: while other decrees may be outdated, these decrees are relevant and needed more than ever in light of increasing market concentration in the music publishing industry. They remain critical to constraining ASCAP's and BMI's overwhelming market power and the Department's continued involvement in this area is necessary. The demands of certain music publishers and the performance rights organizations ("PROs") to eliminate or relax the decrees should be rejected.

INTRODUCTION

The apparent cause of the Department's review of these consent decrees is revealing. There has been no outcry from the licensee community that the decrees are no longer necessary or no longer protect them from the collective market power of the PROs.[1] Rather, only one side is demanding that the decrees be eliminated or relaxed: the PROs and the major music publishers who are their members, such as Sony/ATV[2] ("Sony") and Universal Music Publishing ("Universal"). They believe that the rate-making process conducted by the two supervising courts – district courts responsible for setting reasonable, fair market prices and preventing the PROs from charging supracompetitive rates – sets prices for ASCAP and BMI blanket licenses that are too low *for digital media users*.[3] They shroud their desire to raise prices in vague assertions about a rapidly changing marketplace and the "extraordinary evolution in the ways in which music is now distributed and consumed."[4]

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[1] In contrast, licensees were largely in support of the 1994 modification to the BMI consent decree, which provided for a rate court similar to the ASCAP consent decree to resolve license fee disputes.

[2] In June 2012, an investor group led by Sony Corporation of America acquired EMI Music Publishing and announced that Sony/ATV Music Publishing, a joint venture between Sony and the Estate of Michael Jackson, will administer EMI Music Publishing on behalf of the investor group, available at (http://www.sony.com/SCA/company-news/press-releases/sony-corporation-of-america/2012/investor-group-including-sony-corporation-of-ameri.shtml). The combined market share of Sony/ATV and EMI is more than 31%. *See* Music & Copyright, "UMG leads the new order of recorded-music companies, Sony dominates music publishing, available at http://musicandcopyright.wordpress.com/2013/05/01/umg-leads-the-new-order-of-recorded-music-companies-sony-dominates-music-publishing/.

[3] Notably, the PROs and major publishers do not complain of the rates ASCAP and BMI are able to obtain for more 'traditional' media services, such as television and terrestrial radio. For example, John LoFrumento, ASCAP's CEO, recently testified that he does not receive complaints from publishers regarding the rates ASCAP obtains from traditional media services. *In Re Petition of Pandora Media, Inc.*, __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) (hereinafter "*In Re Pandora* Slip Op."); Trial Tr. (Jan. 23, 2014) at 289-90.

[4] *See* Paul Williams, Statement to the House Judiciary Committee, Music Licensing Under Title 17—Part Two, June 25, 2014. Because these consent decrees are long-standing, they have withstood the advent of numerous 'extraordinary evolutions' of the ways in which music is distributed and consumed. For example, the consent decrees were able to adapt to the adoption of broadcast television, cable television and satellite television, as well as cable radio and satellite radio. . The PROs and their publisher affiliates did not include any of these types of

This is just rhetoric. The publishers and the PROs are frustrated by the extent to which the decrees fulfill their purpose. More to the point, the PROs and publishers are unhappy because the consent decrees prevent them from implementing a scheme that has the purpose (and would have the effect) of raising prices across the board without regard to competitive constraints.

In the end, the catalyst for this consent decree review boils down to dissatisfaction among the two largest music publishers, namely Sony[5] and Universal, which are owned by even larger multinational media conglomerates, which themselves own the world's two largest record labels, with the *relative* fees Pandora pays to record labels.[6] These publishers are not arguing that their catalogs are significantly more valuable to Pandora than their catalogs are to traditional terrestrial or satellite radio. Rather, these publishers argue that it is 'unfair' that Pandora would pay so much *more* to the owners of the sound recordings that embody their musical works.[7]

These publishers have demonstrated no inclination to work with the sound recording copyright owners (which are controlled by the same corporate parent) to

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services in the partial withdrawals and continued to license these services at their historical rates. *See In re Pandora*, Trial Tr. (Jan. 23, 2014) at 345-46.

[5] *See* Ben Sisario, Deals to Split EMI Spur Scrutiny and Criticism, available at http://www.nytimes.com/2012/02/20/business/media/emi-consolidation-with-sony-and-universal-prompts-scrutiny-and-opposition html

[6] Ironically, the rates Pandora pays to record labels to publicly perform sound recordinds are themselves the subject of a compulsory license and judicial rate-setting; *see, e.g.,* National Music Publishers' Association Petition to Participate in the Copyright Royalty Board Proceeding, available at http://www.loc.gov/crb/proceedings/14-CRB-0001/NMPA.pdf.

[7] Evidence introduced during the recent rate-setting proceeding between ASCAP and Pandora revealed that an executive at a major publisher indicated that if Pandora were paying record labels 25% of revenue (the alternative fee structure under the Pureplay Webcaster license under which Pandora pays record labels for the public performance of sound recordings), the publishers would "probably be okay" with the rates Pandora was then paying ASCAP and BMI (i.e., approximately 4% of revenue). *In re Pandora*, Trial Tr. (Jan. 20, 2014) at 1087-1088.

reallocate the total royalties Pandora pays based on the relative values of each copyright owners' contribution to the creation of the music Pandora performs. Instead, these publishers and PROs have attempted to create sham 'withdrawals' from the PROs, use the enhanced market power these largest publishers have been allowed to accumulate under the current regulatory regime to obtain supracompetitive fees, and use those supracompetitive fees to obtain across-the-board increases for everyone. Simply put, they want the Department to endorse a new system that does not resemble a competitive market in any sense of the term. In a truly competitive market not distorted by the collective power of publishers acting in concert by and through the PROs, some publishers would inevitably suffer while others might benefit.[8] And now, if they do not get their way, these publishers have publicly threatened to withdraw entirely from ASCAP and BMI.[9]

The PROs and these publishers' unilateral efforts to weaken or eliminate the consent decrees demonstrate that the decrees continue to serve a critical pro-competitive purpose. The truth is that the consent decrees are just as important today as they were seventy years ago, if not more so. Without the protection the decrees provide, music users would be at the mercy of the PROs and the largest publishers, who now appear to control them. Pandora respectfully urges the

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[8] *See* Phil Galdston, Maria Schneider and David Wolfert, Why Songwriters (and Indie Publishers) Need the PROs, July 29, 2014 10:54 AM EDT (noting that, in the event of large publisher withdrawals from the PROs, "users like Pandora will demand to negotiate lower fees for smaller repertoires. As a result, those writers and independent publishers who remain with the PROs are likely to earn less.") (http://www.billboard.com/biz/articles/news/publishing/6193399/why-songwriters-and-indie-publishers-need-the-pros).

[9] *See* Sony Threatens to Bypass Licensers in Royalties Battle (Jul. 10, 2014), available at http://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html?_r=0; *see also* Statements of David Kokakis in the Transcript for the Copyright Office Los Angeles Roundtable (June 17, 2014) at 32-35.

Department to reject the proposals to modify the decrees, and provides responses to the Department's specific questions below.

I. Background

A. Pandora and the PROs

Pandora is an Internet radio service with a listener base of tens of millions of active users. As an active participant in the rate court process and a company that interacts frequently with the PROs and the major publishers, Pandora is well situated to provide comments on proposed modifications to the ASCAP and BMI consent decrees.

This review of the decrees should start with the obvious: the PROs possess enormous market power. Together, ASCAP and BMI control approximately ninety percent of the public performance rights in musical compositions.[10] Over the years, ASCAP and BMI have frequently competed with each other for songwriter members.[11] Because songwriters can only be members of one PRO, while music publishers almost always have catalogs in ASCAP and BMI (and SESAC)[12], the PROs typically do not "compete" for publishers. The PROs even less infrequently

[10] *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 79-80 (2nd Cir. 2012) ("ASCAP represents about half of the nation's composers and music publishers. . . [and] Broadcast Music, Inc. ('BMI') represents most of the remaining composers."). *See also* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, Sept. 4, 2000 at 6-7 ("ASCAP has in excess of eight million compositions in its repertory. These compositions comprise between 45 and 55 percent of the music performed in most venues. . . BMI has between four and five million compositions in its repertory, also comprising between 45 and 55 percent of the music performed in most venues.").

[11] For example, Neil Diamond and Bob Dylan, formerly ASCAP writers, moved to SESAC in 1995. Eagles members Glenn Frey and Don Henley switched from ASCAP to BMI in 1996. James Taylor and Joni Mitchell, formerly BMI writers, joined ASCAP in 1997.

[12] SESAC LLC is the smallest U.S. PRO and is not presently governed by a consent decree. Presently SESAC is the defendant in two separate antitrust lawsuits. *See Radio Music License Committee , Inc. v. SESAC LLC*, 12-cv-05807-CDJ (E.D. Pa.) and *Meredith Corp. v. SESAC LLC*, 09-cv-09177-PAE (SDNY).

compete with each other for licensees, as services such as Pandora typically require a license from all three PROs to operate.[13]

Although that lack of competition would be expected to yield the highest possible prices, the consent decrees have successfully constrained the PROs' market power. Key protections in the consent decrees include:

- Users' ability to obtain a blanket license upon request (the effective compulsory license provisions) (AFJ2 § VI; BMI Consent Decree §XIV);
- Non-exclusive grants of rights: PROs must allow individual member rights-holders to offer direct licenses to users (and to provide per-program and adjustable-fee blanket licenses as alternative license forms which facilitate such direct licensing activities) (AFJ2 §§ V-VIII; BMI Consent Decree § VIII);
- Users' ability to obtain "through to the audience" licenses (AFJ2 § V; BMI Consent Decree § IX);
- Transparency requirements (albeit weak) (AFJ2 §§ X, XII; BMI Consent Decree §§ VII, XI, XIII); and
- Users' ability to obtain a "reasonable" fee determination from the rate courts overseeing ASCAP and BMI in the absence of a negotiated agreement with a PRO. (AFJ2 § IX; BMI Consent Decree § XIV).

Without these protections, the PROs would be able to combine their market power – along with the threat of copyright infringement liability – to extract supracompetitive rates from licensees.

It is important to situate the consent decrees within the broader context of music licensing. Although the licensing of public performance rights takes place under the strictures of the consent decrees, compulsory statutory licensing regimes

[13] Because the PROs have repertories of copyrighted music that are exclusive of one another (expect for so-called 'split works' which are within both the ASCAP and BMI repertoire), Pandora must obtain a license from both ASCAP and BMI in order to perform all of the music on its service.

are commonplace in the broader music licensing space, including for certain non-interactive sound recording performance rights (and the making of related ephemeral phonorecords) and publishers' mechanical licensing rights for personal, non-commercial use.[14] Because copyright law is primarily intended to encourage the widest dissemination of creative works and licensees need broad access to music rights in order to operate their businesses, Congress has created mechanisms (compulsory licenses) to facilitate efficient licensing of copyrighted music.[15] If the ASCAP and BMI consent decrees had never been established, Congress almost certainly would have created a similar compulsory licensing regime for public performance rights in compositions. In this context, it is inconceivable that Congress and the Department would have enabled a licensing framework along the lines that the PROs and publishers are now urging: one in which the PROs would be free to license (or withhold licenses) in any manner they see fit. The PROs (and certain publishers) insistence that the decrees are "outdated" creatures from a bygone era ignores the reality that music rights historically have been subject to compulsory licensing structures of one form or another.[16]

The proposed modifications to the consent decrees may also create a (unintended) significant market inefficiency in the way music is currently licensed.

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[14] See, e.g., 17 U.S.C. §§ 112, 114, 115.

[15] *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and the useful Arts.'"); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.).

[16] Moreover, as discussed in more detail below, any change to the process for licensing public performance rights should take into account effects on the broader music licensing market. The availability of other rights subject to statutory licensing regimes raises the question whether it is sound public policy for the Department to make changes to what amounts to just one part of a more complicated market. That is particularly true because Congress created the compulsory licensing regime for sound recordings against the broader backdrop of the consent decree *status quo* and has recently been conducting hearings into the music licensing marketplace.

Specifically, the licensing practice of publishers separating the right to make a sound recording (e.g., the right to make a reproduction of the musical work) from the right to perform the musical work embodied in the sound recording once it is made introduces the potential for an additional "hold-up" inefficiency into the market. Because the owner of the performance right in the musical work does not include this right of public performance in the reproduction license granted to the record label when a record label makes a sound recording, users like Pandora must deal with two parties instead of one. Said differently, if music publishers granted to record labels *both* the right to reproduce *and* the right to perform its musical works, services such as Pandora could obtain all the rights necessary to operate its service solely from the record labels. This is the same basic problem dealt with in the "source" or "through-to-the-audience" license mandated for licensing music in motion pictures.[17]

Because sound recording performance fees and PRO fees are set separately, the result is a ratcheting effect where digital media services are in the middle of a tug-of-war between rights owners (many of whom are under common ownership).[18] ASCAP's and BMI's otherwise economically unjustifiable insistence that digital music services should pay higher rates is an example of this ratcheting effect. In fact, the PROs and certain publishers have freely admitted, even under oath, that

[17] Courts have characterized similar practices as improperly extending the copyright monopoly, *see e.g.*, *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 848-50 (D. Minn. 1948).
[18] *In re Pandora Media, Inc.*, Slip Op. at 62-63.

the genesis of their recent campaign to raise rates for new media arises from "envy" over the rates paid for sound recording performance rights.[19]

B. The major publishers and the partial withdrawals

When the consent decrees were first created, the publishers had not accumulated the market shares they have today. BMI's market share when it entered its consent decree was less than Sony (which now controls the EMI catalogs as well), Universal, and Warner-Chappell, the third major publisher, which is owned by Warner Music Group.[20]

Today, the landscape has changed. Under the combined compulsory licensing regime of Section 115 of the Copyright Act and the ASCAP and BMI consent decrees, major publishers like Sony and Universal have consolidated publishing rights that surely would have raised antitrust concerns absent the consent decrees and statutory compulsory licensing protections to users. Even with these protections, however, smaller publishers and songwriters have felt threatened by this "concentration of the publishing industry."[21]

Dissatisfied with the consent decrees — particularly the effective compulsory license and rate-setting provisions — but unwilling to abandon joint licensing entirely, certain publishers invented the concept of a "partial withdrawal."[22] As Judge Cote explained, "[t]he publishers believed that AFJ2 stood in the way of their

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[19] *Id.* at 120-21.
[20] *See* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, Sept. 4, 2000 at 16.
[21] *See In re Pandora*, Slip Op. at 42-43 (discussing songwriter fears that withdrawn publishers would be less accountable and transparent when administering their rights).
[22] *Id.* at 41. It should be noted that never in the 100 year history of ASCAP or 75 year history of BMI have publishers sought to "partially withdraw" rights from the PROs.

closing" the gap between rates for sound recording rights and public performance rights.[23] "They believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publicly perform a composition."[24] The publishers sold skeptical songwriters on the partial withdrawal idea by promising that "if the major publishers could get higher license rates by direct negotiations with new media companies outside of ASCAP then those rates could be used in rate court litigation to raise the ASCAP license fees."[25] In reality, the selective "new-media" withdrawals were intended to let the publishers target users who could credibly be threatened with copyright infringement damages that could put them out of business, with the result being "hold-up" prices that could then be used to recalibrate the consent decree rates across the board. This threat was even more credible because ASCAP (and BMI) agreed to continue to provide administrative services for the partially withdrawn publishers (and, in the case of ASCAP, at discounted rates which ASCAP's other members effectively subsidized), thereby eliminating any pain the publishers might have experienced by withdrawing from the PROs.[26]

Pandora's experience vividly confirms the anticompetitive results of the partial withdrawals. Predictably, Sony and Universal leveraged the upheaval

[23] *Id.*
[24] *Id.*
[25] *Id.* at 45.
[26] *Id.* at 49 ("the Administration Agreements meant that the withdrawing publishers faced little downside in withdrawing new media rights. They could continue to enjoy the benefits of having ASCAP perform burdensome back-office tasks while licensing internet music entities directly.").

created by their sudden new-media withdrawals from ASCAP – including the threat of massive-scale copyright infringement, and the vacuum created by the sudden absence of consent decree protections for affected PRO interim licensees like Pandora – to establish dramatic, short-term price increases.[27] Then, according to plan, ASCAP tried to use those price increases to benchmark a higher rate for its blanket license.

Judge Cote's opinion describes this anticompetitive behavior in detail, including the following. Sony began the negotiations with Pandora with a "not-too-veiled threat."[28] In response, Pandora repeatedly requested a list of Sony's works so that Pandora could seek to remove them from its service if the parties failed to reach agreement.[29] Despite having such "a list readily at hand," Sony refused to provide it.[30] As Judge Cote found, "Sony decided quite deliberately to withhold from Pandora the information Pandora needed to strengthen its hand in its negotiations with Sony."[31] Without a list of Sony's works, Pandora faced an impossible dilemma: either shut down its service entirely to avoid the risk of crippling copyright infringement liability or agree to significant price hikes in a direct license with Sony. Pandora chose the latter.

The Universal negotiations were to the same effect. Universal's then-CEO Zach Horowitz began the negotiations by "uttering what [Pandora] took to be an

[27] *Id.* at 96-101.
[28] *Id.* at 62.
[29] *Id.* at 64-66.
[30] *Id.* at 66.
[31] *Id.*

implicit threat."[32] Horowitz then proposed an industry-wide rate of eight percent of revenue, which he thought was "reasonable, particularly in light of what Pandora was paying to the record labels for sound recording rights."[33] Pandora's attorney was "aghast. He told Horowitz that in his 20 years in the music industry he had never encountered a situation in which a licensor suggested that rates should effectively double overnight, going from 4% to 8%."[34] Universal ultimately provided Pandora with a list of its works, but required Pandora to sign a confidentiality agreement that prevented "it from using the list to remove the [Universal] works from its service."[35] So Pandora faced the same impossible choice: either shut down its service altogether or agree to a dramatic price hikes. As with Sony, Pandora chose the latter.

All the while, Sony and Universal interfered with Pandora's efforts to conclude a license with ASCAP short of litigation. In her decision determining that the deals negotiated between Pandora and certain withdrawing publishers could not serve as valid benchmarks for Pandora's ASCAP royalty rate, Judge Cote found that "the evidence at trial revealed troubling coordination between Sony, [Universal], and ASCAP, which implicates a core antitrust concern underlying AFJ2[.]"[36] In particular, the evidence showed that:

- "Sony and [Universal] 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";

[32] *Id.* at 74.
[33] *Id.* at 75.
[34] *Id.* at 75-76.
[35] *Id.* at 77.
[36] *Id.* at 97.

- "[Univeral] 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";

- "ASCAP refused to provide Pandora with the list of Sony works without Sony's consent, which Sony refused to give"; and

- "despite executing a confidentiality agreement with Pandora, Sony made sure that [Universal] learned of all of the critical terms of the Sony-Pandora license" and "ASCAP expected to learn the terms of any direct license that any music publisher negotiated with Pandora."[37]

In sum, "ASCAP, Sony, and [Universal] did not act as if they were competitors with each other in their negotiations with Pandora," which meant that "the very considerable market power that each of them holds individually was magnified."[38]

Judge Cote ultimately held that ASCAP's decree did not permit partial withdrawals and that ASCAP members' works would continue to be available to all licensees upon application. Nevertheless, ASCAP tried to use the Sony and Universal direct licenses as benchmarks in the rate-setting proceeding with Pandora, which licenses Judge Cote rejected.

Meanwhile, the major publishers attempted to orchestrate similar new-media withdrawals with BMI. Like Judge Cote had determined of the ASCAP decree, Judge Stanton held that BMI's decree did not permit such partial withdrawals. In his opinion, however, Judge Stanton went a step further, declaring that the partial withdrawals would in fact operate as full withdrawals.[39] The major publishers, with BMI's assistance, created similar upheaval, uncertainty, and short-term leverage by

[37] *Id.* at 97-98.
[38] *Id.* at 112.
[39] *Broadcast Music, Inc. v. Pandora Media, Inc.*, 13-cv-4037 Order and Op. at 11-12 (Dec. 18, 2013).

purporting to completely withdraw from BMI in late December 2013. Certain publishers then negotiated direct agreements with Pandora, only to "rejoin" BMI days later. By performing that maneuver, the publishers were able to circumvent Judge Stanton's ruling that partial withdrawals are impermissible and extract supracompetitive prices from Pandora once again. Unsurprisingly, BMI has openly discussed its intent to rely on these flawed licenses as benchmarks in its proceedings against Pandora.[40]

Pandora's experiences demonstrate that the complaints about the consent decrees and the partial license grant proposals are not meant to promote more competitive pricing, but rather to circumvent the rate court check on unreasonable license fees.

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

A. The consent decrees continue to serve critical pro-competitive purposes.

The competitive concerns arising from the market power the PROs have acquired through the aggregation of public performance rights held by member songwriters and publishers are as real and significant now as they were when the

[40] *See* BMI on Rights Withdrawal, an Open Letter to the Music Industry, by Del Bryant (Feb. 12, 2013), available at http://www.billboard.com/biz/articles/news/legal-and-management/1538785/bmi-on-rights-withdrawal-an-open-letter-to-the-music. ("We have already cited these marketplace agreements [from Sony/ATV and EMI] in our negotiations with our licensees and we will encourage our Rate Court to consider them as a new indicator of market value."). *See also*, *Broadcast Music, Inc. v. Pandora Media, Inc.*, Pet. for the Determination of Reasonable License Fees (Dkt. 31) at 14 ("The rate quoted by BMI to Pandora is reasonable in light of the several free market licenses negotiated directly between withdrawn publishers including: (i) the license agreement recently negotiated between Sony and Pandora; (ii) the license agreement between EMI and Pandora; (iii) any other agreements between a publisher which has withdrawn its digital rights from BMI's catalog that may be negotiated with Pandora prior to the finalization of the license at issue. . . ").

decrees were established. The PROs are ongoing collaborations among competitors, so the suspect conduct persists. This is not a case of a consent decree proscribing conduct in which the defendant no longer engages. The obligations and restrictions that the consent decrees impose on ASCAP and BMI are still necessary to ensure that the PROs offer the procompetitive user benefits that justify their existence. Indeed, over the years, conditions have become more conducive to anticompetitive behavior. Market concentration has increased significantly among music publishers, and opportunities for exchanging and acting on competitively sensitive information have increased and have become entrenched.[41]

Pandora's experience in the recent ASCAP case provides strong evidence that the decrees are serving their intended purposes. Judge Cote's 136-page decision makes evident the importance of the consent decrees in constraining the market power of ASCAP and BMI.[42] Importantly, as Judge Cote found, the publishers and PROs have demonstrated a propensity toward coordinated anticompetitive behavior.

The PROs and the publishers repeatedly insist that reform is necessary because for some unspecified reason digital media transmissions of musical works warrant higher rates. The PROs and publishers never explain *why* digital media services should be disadvantaged relative to, for example, their terrestrial radio competitors. As Judge Cote held and the Second Circuit affirmed in the earlier

[41] *In re Pandora*, Slip Op. at 42-43, 96-98.
[42] The recent SESAC antitrust cases show that antitrust concerns can arise even with a PRO that has a much smaller share of available works than ASCAP, BMI, or even the major publishers. *See RMCL v. SESAC*, Report and Recommendation, 12-cv-5807 (Dec. 23, 2013).

MobiTV litigation, PRO licenses traditionally have not and should not discriminate against licensees based on the mode of distribution by which the licensee transmits content to users.[43] Whatever the mode of distribution of particular types of content (whether audio/radio content or audiovisual content), the PROs contribute the same input; i.e., a blanket license to perform musical works in its repertoire. Consumers may prefer receiving content through one mode of distribution over another, but the technology enabling such preferred mode of distribution is supplied by the service, not the PRO. If, for example, Internet radio is inherently more or less valuable than terrestrial radio in terms of generating revenue, percentage-of-revenue license fees will naturally reflect that since the royalty payment will grow on a linear basis with the revenue base. There is no reason to charge media companies engaged in the distribution of the same or similar forms of programming discriminatory percentage-of-revenue rates based on the manner in which their programming services reach the consumer.

Indeed, there have been no changes in "how music is delivered to and experienced by listeners" that bear on the "competitive concerns arising from . . . the aggregation of music performance rights held by" ASCAP and BMI.[44] The advent of "new" digital media has increased music distribution; e.g., in the context of radio programming consumers are no longer limited to AM/FM broadcast radio and they can hear music on more devices and enjoy wider programming options. But non-interactive digital media providers (like Pandora) operate for all intents and

[43] *In re Pandora*, Slip Op. at 124.
[44] U.S. Department of Justice, Antitrust Consent Decree Review, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html

purposes like terrestrial and satellite radio – they select and play sound recordings using formulas that will attract listeners in ways that will support advertising and user subscriptions and generate revenue in the same way that revenue is generated by terrestrial and satellite radio. In fact, new media providers represent a more fragmented base of providers than terrestrial radio (which negotiates with PROs on an industry wide basis via the RMLC) or satellite radio, with a single provider (Sirius XM), implying that new media firms have less bargaining power in dealing with licensors and that publishers would incur higher transaction costs dealing directly with new media firms than they would dealing directly with the RMLC or Sirius XM, which are not targets of the partial withdrawals at issue here.

In the end, the Department should not lose sight of the realities of the marketplace. This is not a world of atomistic competition, where individual rights holders negotiate with users in a competitive marketplace.[45] The PROs are duopolies that control the marketplace for blanket licenses to their respective repertories, which have over time grown dramatically in size, and the large publishers such as Sony and Universal can exercise enormous market power.

III. 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?

As Pandora's experience vividly illustrates, partial withdrawals should not be permitted. The partial withdrawals were designed to enable publishers with enormous market power to selectively participate in PROs, evading the compulsory

[45] *See In re Pandora*, Slip Op. at 102.

licensing and rate court protections for targeted licensees.[46] For a limited subset of licensees, the partial withdrawals remove the decree protections designed to mitigate the anticompetitive effects of collective licensing by the PROs without providing any mechanisms to ensure a competitive environment. This harm is compounded by the fact that the long history of the availability of public performance rights from the PROs has allowed publisher market shares to balloon without much scrutiny. Allowing for *en masse* withdrawal of over 50% of the works available via the PROs (which would be the case if Sony and Universal were to withdraw from either ASCAP or BMI) threatens to create short-term upheaval that, if unchecked, could cause irreparable harm to existing new-media entities.[47]

A. From an antitrust perspective, partial withdrawals are anti-competitive

Pandora recognizes that partial withdrawals may be appealing in theory. That is because, in the abstract, partially withdrawn publishers should compete with each other (not only directly, but also through competition with the very PROs they would still belong to with respect to other users). But reality belies theory. In the real world, partial or limited grants of licensing rights to ASCAP and BMI will not create competition, competitive rates, or valid benchmarks for blanket license rates, as has been suggested (without support) by the PROs and publishers. Indeed, Pandora's experience with the PROs' current efforts to permit "partial withdrawals"

[46] *Id.* at 97–99.

[47] That upheaval would be particularly acute because music publishing rights are often split between two or more songwriters or publishers, making it difficult to identify who holds all of the performing rights. The performing rights in sound recordings, on the other hand, typically are not split between multiple licensors but are controlled by a single record label.

demonstrates that their purpose is to raise prices and not to create or foster competition.

There are a number of reasons why the consent decrees should not be modified to permit partial license grants. *First*, continued publisher involvement in a PRO for some users but not others is a recipe for coordination. Both PROs are operated for benefit the publishers and songwriters, not users. In such a situation, and as Pandora's experience shows, it is unrealistic to think that the PRO will compete against the publishers. The testimony of ASCAP's CEO was that he did not even consider the possibility of charging lower prices than those obtained by withdrawing publishers in an attempt to increase revenues for ASCAP by driving higher amounts of usage of its remaining repertory.[48] Partial withdrawals thus allow publishers to escape the constraints of the rate court without replacing it with the constraints of competition.[49]

It is telling that not all publishers are in favor of partial license grants (or would exercise such a right if given to them). Indeed, Pandora's experience is that some publishers threatened to withdraw but ultimately did not, and those that did withdraw re-entered the PROs after they signed direct deals with Pandora. Presumably, many publishers believed that they would do worse under a regime of partial license grants.[50] The scheme the publishers and the PROs worked out on their own allowed publishers to opt out or not, with the expectation (as publicly

[48] *In re Pandora*, Trial Tr. (Jan. 23, 2014) at 246-47.

[4949] This is particularly true where PROs and music publishers insist on most-favored-nations provisions ("MFNs"), which they sometimes refer to as "schmuck insurance." PROs will often demand MFNs not only against other PROs, but against individual publishers.

[50] *See. e.g.,* Council of Music Creators, Comment to Copyright Royalty Board Notice of Inquiry Regarding Music Licensing.

stated by industry leaders) that all publishers would benefit from higher blanket license prices that would be benchmarked to license agreements negotiated by the few largest publishers who sought to exercise partial withdrawals.

Second, a publisher's continued involvement in the PRO, or the ability to partially withdraw and rejoin at will, creates a perverse incentive for PROs not to compete with withdrawing publishers and instead to use withdrawn publisher rates as benchmarks in rate court. [51] It makes no economic sense to apply the rates that the large publishers can extract through the exercise of their market power to all of ASCAP or BMI. That would give the remaining and, likely smaller, publishers the benefit of the prices obtained by the largest publishers. That would be economically backwards. If larger publishers get more money on the theory that their repertory is more valuable, the smaller publishers should get less money.

In its comments to the Copyright Office's Notice of Inquiry Regarding Music Licensing, ASCAP proposed amendments that would, *inter alia*, among other things, "establish[ ] an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders who have withdrawn rights from a PRO and similar licensees provide the best evidence of reasonable rates[.]"[52] In other words, ASCAP seeks through the proposed evidentiary presumption to achieve equality of outcomes for withdrawing publishers and those catalogs left for licensing by ASCAP. The courts have consistently held that such an attempt to achieve

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[51] *See* Del R. Bryant, BMI on Rights Withdrawal: an Open Letter to the Music Industry, Feb. 13, 2013 ("We have already cited these marketplace agreements in our negotiations with our licensees and we will encourage our Rate Court to consider them as a new indicator of market value."), http://www.bmi.com/news/entry/bmi_on_rights_withdrawal_an_open_letter_to_the_music_industry.

[52] *See* Comments of ASCAP (May 23, 2014) at 4.

equality of outcomes, when done through private agreements, comprises a *per se* unlawful price-fixing conspiracy.[53]

Rather than carry an evidentiary presumption, the rate courts should continue to weigh the evidence surrounding direct licenses. For example, as Judge Cote's opinion carefully explains, the direct licenses that Sony and Universal negotiated with Pandora did not reflect fair market value because the circumstances surrounding the negotiations were not indicative of a competitive market. In particular, Judge Cote found that Pandora was effectively compelled to transact.[54] Her conclusion noted that this was in part the result of asymmetries in the information available to the negotiating parties, as exemplified by Sony and Universal depriving Pandora of repertory information during negotiations. For these and other reasons recounted in her decision after trial, Judge Cote declined to rely on those direct licenses as benchmarks for rate-setting.[55] On the other hand, the evidence demonstrated that EMI[56] did not seek to leverage its withdrawal or the threat of infringement in the same manner as Sony and Universal. And the rate in the EMI agreement, which was the same rate as Pandora's prior ASCAP agreement, became the rate set by Judge Cote.

For these reasons, among others, the Department should reject the PROs' proposal to adopt an "evidentiary presumption" that all direct licenses entered into by publishers "who have withdrawn rights from a PRO" reflect fair market value.

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[53] *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003) ("Defendants' concern for the weakest among them has a quaint Rawlsian charm to it, but we find it hard to square with the competitive philosophy of our antitrust laws.").
[54] *In re Pandora* Slip Op. at 101.
[55] *Id.* at 97–111.
[56] Pandora executed a direct license with EMI for its ASCAP repertoire in 2012, before Sony acquired EMI.

Third, permitting partial withdrawals would impose significant costs on users and the Department. Some examples are set out below:

Users. It is self-evident that permitting publishers to make partial license grants to the PROs would impose significant new costs on users. Users would need to negotiate licenses from more parties. Moreover, although their investments were made in the context of compulsory music licensing, affected users would be subject to the threat of injunctions and statutory damages in dealing with the subset of rights holders who would benefit from partial withdrawals from the PRO blanket licenses. In addition, users would be subject to entrenched licensing practices that have shifted transaction costs from copyright owners to users. For example, the practice of multiple copyright owners each agreeing to license only their share of a single work (contrary to the normal operation of copyright law as embodied in the consent decrees and the PROs' longstanding membership agreements) could require a user to obtain a license at a different negotiated rate from each co-publisher. In a more competitive market, a user could take a license from one of the copyright owners and let that owner deal with allocating the royalties among the other co-owners.

Similarly, the entrenched practice of requiring services to directly secure public performance rights from music publishers when sound recording companies already secure from music publishers reproduction and distribution rights for the sale of sound recordings requires a service such as Pandora to obtain a license at a separately determined rate from both the record label and the music publisher.

Under the *status quo*, the adverse impact of this fragmentation has been ameliorated by the compulsory blanket license system; i.e., Section 114 of the Copyright Act for sound recording performance rights and the ASCAP and BMI consent decrees for musical work performance rights. Looking at the market from a broader perspective, changing one aspect of the U.S. music licensing regime after a long history of business practices and legislation that developed under that regime would impose serious adverse consequences on services, with no discernible benefit to consumers.

The Department. When a publisher grants only partial licensing rights to a PRO, the publisher is still part of the decision-making process at, and will be receiving distributions from, the PRO. As a result, there may be opportunities for publishers and PROs to co-mingle or otherwise adjust the PROs' internal rules in ways that can be used to frustrate competition. The Department will, therefore, have to take measures to ensure that such co-mingling does not take place.

It should be noted that in AFJ2 the Department abandoned efforts to monitor how ASCAP divides profits among its members, claiming that it had limited ability to untangle how ASCAP accounted for its distributions.[57] Thus, modifying the Decrees to permit partial license grants would require the Department to exercise greater oversight than is currently required over an aspect of PRO operations that the Department is admittedly ill-equipped to police.

[57] *See* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, Sept. 4, 2000, at 40.

In sum, the undefined proposal of allowing "rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others" is so fraught with anticompetitive risk that it should not be permitted. The only policy reason to permit such a change to the consent decrees is to inject competition into what has been a regulated market. As detailed above, the partial withdrawal of rights from PROs would not increase competition, either among publishers or between publishers and PROs.

Moreover, insofar as publishers and PROs assert that partial withdrawals are necessary to facilitate direct licensing transactions, that is simply not the case. There have been numerous instances of direct licensing within the current consent decree framework, ranging from those that were the subject of the *DMX* case to the many direct licenses that have developed in the local television and cable television marketplaces in conjunction with per-program licensing.[58]

Beyond the macro problem of altering one aspect of a more complicated overall market, there are many reasons why letting publishers make partial license grants to PROs is problematic from an antitrust standpoint. The conditions for true competition do not exist. Publisher concentration has increased significantly. The current PRO structure encourages the exchange of competitively sensitive information and coordinated action among PRO member publishers. From the perspective of what the PROs are set up to do (grant blanket/per-program and

[58] *See, e.g., Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32 (2d. Cir. 2012); *United States v. ASCAP (Buffalo Broadcasting Co.)*, 1993-1 Trade Cas. ¶70,153 (S.D.N.Y. 1993) ("*Buffalo Broadcasting I*"); *United States v. ASCAP (Capital Cities/ABC)*, 157 F.R.D. 173 (S.D.N.Y. 1994) ("*Capital Cities/ABC II*"); *United States v. ASCAP (Capital Cities/ABC)*, 831 F.Supp. 137 (S.D.N.Y. 1993) ("*Capital Cities/ABC I*"); *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1985), *cert. denied*, 469 U.S. 1211 (1985) ("*Buffalo Broadcasting II*").

AFBL licenses covering *all* works in their repertories), such information sharing and collective action may be sensible; but it cannot be permitted among the same publishers where the purpose of "partial" licensing is assertedly to foster competition.

As this discussion shows, the PROs' and the publishers' proposal that the consent decrees "sunset" after ten years should similarly be rejected. The consent decrees continue to serve critical pro-competitive purposes, and there is no reason to install a time bomb inside them. For so long as the anticompetitive behavior (actual or potential) that is regulated by the consent decrees persists, the consent decrees should remain in full force and effect.

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

For the reasons cited above, the Department should reject the requests of the PROs and major publishers to modify the consent decrees because such requests would not enhance competition or efficiency.

V. Do differences between the two Consent Decrees adversely affect competition?

In a perfect world, the material terms of the two consent decrees would be identical. Although the terms of the decrees vary, in Pandora's experience, these differences have not resulted in materially different outcomes. For example, although the remedy awarded by Judge Stanton was different from the remedy awarded by Judge Cote, both courts concluded that publishers are not entitled to partially withdraw from the PROs. Recent history suggests that, even though set by different judges, similar rates are obtained by ASCAP and BMI in rate-setting

proceedings—as they should be. If the Department determines that the consent decrees should be modified, then the language of the decrees should be harmonized.

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

Pandora shares the PROs' concerns about the costs of rate court litigation. While the PROs complain of having to litigate with multiple licensees, services such as Pandora often have to litigate rate settings against both ASCAP and BMI. That said, all but one of the rate court cases since 2005 that ASCAP bemoans in its Comments to the Copyright Office were initiated by ASCAP or BMI. Indeed, over the long history of the rate courts, few rate court cases have gone to trial. The rate courts fulfill their intended purpose and have served the PRO and license community well. Their decisions are reliable and create precedents upon which parties can rely; and the cost of litigation encourages settlement.

Abolishing the rate courts, on the other hand, would unjustifiably strengthen the PROs' hand and prejudice applicants. As Pandora has learned from its own experiences, the PROs are in a demonstrably better position at the beginning of any rate case dispute. The PRO knows far more about the marketplace than the licensee because the PRO has access to the details of all its agreements with myriad licensees. The PRO may also know much about the applicant's business, which is often publicly available (as is surely the case with Pandora). The licensee, on the other hand, knows only the terms of the agreements to which it is a party. This huge information deficit requires federal court supervision and application of the

federal rules of civil procedure and evidence (not typical arbitration rules) to cure. It is unlikely that Pandora could have unearthed the critical evidence upon which Judge Cote relied in the kind of short-form arbitration that the PROs now advocate.

It is also noteworthy that Judge Cote repeatedly invited ASCAP to propose ideas to reduce the cost of rate court litigation. We are not aware of any proposals ASCAP has made to Judge Cote on this front. In Pandora's view, every efficiency of private arbitration that ASCAP cites in its Copyright Office Comments could be accomplished via streamlined procedures in the rate court. That should be the focus of discussion and dialog, as Judge Cote has invited. Elimination of the federal rules and principles of *stare decisis*, to the contrary, would be a huge setback to the licensee community.

VII. 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?

Pandora submits that the existing transparency requirements adversely affect competition because they are too weak. Transparency is key to a competitive marketplace for performance rights. The Department need look no further than Judge Cote's decision to understand why. Her decision underscores how publishers (and ASCAP) took advantage of the lack of transparency regarding ownership of publishing rights. As explained earlier, Sony and Universal capitalized on Pandora's lack of information about the works in their catalogs. Because Pandora could not identify who owned which works, it faced the dilemma of either shutting down entirely or agreeing to significant price increases.

To solve this problem, the consent decrees should require that PROs post information to the public on a searchable basis in commercially usable formats; e.g., real-time, application programming interface-enabled and searchable work-by-work, publisher-by-publisher, writer-by-writer, and also available in bulk. Both the ASCAP and BMI publicly available databases include information identifying the recording artist(s) associated with the sound recording(s) embodying a musical work. This information is critically important to services such as Pandora and should be included whenever available. This would enable the user community to more readily determine (i) who owns/controls the works they may wish to license and (ii) what works (and sound recordings in which they are embedded) they must avoid using to avoid infringement claims if they do not wish to accept the terms offered by a publisher/writer whose works are not available through a PRO (*e.g.,* after a PRO "withdrawal").

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CONCLUSION

Pandora supports the Department in its review of the ASCAP and BMI consent decrees. We look forward to working with the Department, along with other stakeholders and interested parties, the Copyright Office and the House Judiciary Committee's Subcommittee on Intellectual Property, on the important issues surrounding music licensing.

Respectfully submitted,

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