Before the
UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C.

In the Matter of:
ASCAP and BMI Consent Decree Review

COMMENTS OF THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE

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Introduction and Summary

The National Religious Broadcasters Music License Committee ("NRBMLC" or the "Committee") offers this initial submission in response to the Department of Justice's June 4, 2014, request for comments concerning the ASCAP and BMI consent decrees (the "Consent Decrees"). The NRBMLC appreciates the opportunity to comment in connection with this important review.

The NRBMLC offers the following thoughts:

- The market for music performance rights is not competitive and the Consent Decrees remain critical to restraining anticompetitive behavior by ASCAP and BMI;
- ASCAP and BMI continue to resist licenses that offer the prospect of competition;
- SESAC exercises collective market power that should be regulated; its licensing practices provide an example of what music licensing would be without the Consent Decrees;
- Direct licensing is an important check on ASCAP's and BMI's abuses but it cannot replace the Consent Decrees due to the lack of competition among major publishers;
- The Consent Decrees should continue to include essential procedural and rate-setting protections;
- The Consent Decrees should continue to require economically significant alternatives to blanket licenses; and
- The Consent Decrees should be amended to increase the transparency of ASCAP and BMI.

The NRBMLC elaborates on these points below.

The NRBMLC is a standing committee of the National Religious Broadcasters. The NRBMLC represents approximately 900 full-power commercial and noncommercial AM and FM radio stations in their musical licensing litigation and negotiations. The Committee has experienced first-hand the importance of the Consent Decrees and the anticompetitive market power that even a small performing rights organization ("PRO") such as SESAC, Inc. is able to exercise when it is not subject to a consent decree.

The NRBMLC originally was formed in 1985 to provide a more focused effort on behalf of religious-formatted stations that performed relatively little copyrighted music, but that performed enough music that they could not effectively use the per-program licenses from

ASCAP and BMI that were negotiated by the Radio Music License Committee (RMLC). Later, classical music and other similarly situated stations joined.

ASCAP's and BMI's persistent resistance to a meaningful per-program alternative to their preferred blanket licenses forced the Committee into litigation in the ASCAP Rate Court, which ultimately resulted in a more useful license. *United States v. ASCAP (Application of Salem Media)*, 981 F. Supp. 199 (S.D.N.Y. 1997). Since that time, the Committee has continued to seek reasonable licenses from ASCAP, BMI, and SESAC in its negotiations. The Committee also filed an amicus brief in *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2nd Cir. 2012), supporting the pro-competitive adjustable rate blanket license alternative.

In sum, the NRBMLC has a direct interest in the issues raised by the NOI. Those issues will have significant ramifications for the public and for NRBMLC-represented radio broadcasters.

I. The ASCAP and BMI Consent Decrees Remain Critical To Restraining Anti-Competitive PRO Market Power and Protecting Competition, and SESAC Also Should Be Subject to Regulation.

The Department's Notice of the Consent Decree Review (the "Notice") asks about the continued effectiveness of the Consent Decrees. The Notice specifically notes that the Consent Decrees were last amended in 2001 and 1994 and inquires whether the Consent Decrees "need to be modified to account for changes in how music is delivered to, and experienced by, listeners."

The NRBMLC respectfully submits that the clear answer to this question is that the Consent Decrees remain essential to foster competitive market pricing for music performance rights. This view is supported by recent decisions of the ASCAP and BMI Rate Court Judges, who have extensive experience with the PRO's behavior. Moreover, SESAC exercises substantial market power as a licensing collective and should be subject to regulation comparable to that to which ASCAP and BMI are subject.

The NRBMLC understands that the Radio Music License Committee ("RMLC") and the Television Music License Committee ("TMLC"), which represent mainstream radio and television broadcasters, are submitting comments that demonstrate the necessity of the existing Consent Decrees and the need to regulate SESAC. The NRBMLC will not burden the record by repeating their comments, but agrees with their key points. The NRBMLC writes separately to describe its experiences and provide additional insights.

A. The Market for Music Performance Rights Is Not Competitive.

Copyright law principles and market structure coalesce to eliminate competition in the marketplace for music performance rights. These combined factors give the PROs enormous market power insulated from competitive forces.

First, ASCAP, BMI and SESAC aggregate extremely large numbers of musical works, owned by a large number of copyright owners who would, in a competitive market, compete for market share. Second, the large music publishers have been allowed to merge to the point that

the publishing industry is now highly concentrated. Three major publishers now control the vast majority of musical works.

Third, copyright law allows rights to be licensed separately. Thus, when programs or commercials that are intended for public performance are produced, the producers obtain only reproduction and distribution rights and need not obtain public performance rights. Indeed, the PROs typically will not grant public performance rights to program producers because they do not actually perform the programs they produce. Thus, it falls to the entity making the performance to clear the performance right.

Unfortunately, however, once a program or ad is produced, or "in the can," the entity making the performance is unable to engender competition among possible suppliers of the performance right. The performing entity must take the program as is and cannot alter it. This gives the licensor of the performance right the ability to exercise "hold up" power – the licensor can seek to charge up to the full value of the entire program or ad, unconstrained by the actual value contributed to that program or ad by the licensor's music.

Fourth, the PROs typically only offer licenses to their entire repertory. Thus, they effectively eliminate any competition that may exist among their members, among the PROs, between the PROs and their members, or, for that matter, between the use of music and other programming matter. The NRBMLC's own experience, discussed in Part II.B, below, demonstrates the consistent resistance of the PROs to any license in which the price of the license varies meaningfully with the amount of licensed music that is used or with that varies with the amount of music that is licensed through competing sources other than the PRO.

Fifth, these problems are compounded by the near-impossibility of identifying the potential licensors of any particular performance right. Although the PROs offer on-line searches of their databases, they do not provide a reliable or effective means of identifying the content of each PRO's repertory. As the Magistrate Judge considering a preliminary injunction against SESAC found, SESAC's online search tool "does not provide a reliable means for determining what is SESAC's repertory." Report and Recommendation at 15, *Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5087 (E.D. Pa. Dec. 23, 2013). The court noted that the tool "expressly disclaims that it is accurate, advises stations that it could change on a daily basis, and limits the user to 100 searches per session." *Id.* at 15 n.13. ASCAP's search tool contains a similar disclaimer, stating that "ASCAP makes no representations as to its [search tool's] accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database." All of the search tools limit searches to one work at a time, making searches for numerous works impractical.

As a result, it is effectively necessary for an entity engaging in substantial numbers of public performances, such as a radio broadcaster or a service making streamed performances, to obtain licenses from all three PROs. The major publishers, of course, understand the anticompetitive effects of the same behavior. Even where they seek to license their catalogs directly, they strategically withhold information about their content. *See In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2014 WL 1088101, at *35, *36, *38 (S.D.N.Y. Mar. 18, 2014)

(describing significance of publisher refusals to provide Pandora with usable lists of their catalogs).

The judges that oversee the PROs' conduct have continued to recognize the PROs' market power and to curb their abuses, long after "the changes in how music is delivered" referenced in the Notice. In 2005, the United States Court of Appeals for the Second Circuit, which oversees the Rate Courts that oversee the Consent Decrees, recognized that the "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." *United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005). As recently as 2012, that same court stated that "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012); *United States v. ASCAP (Application of Real Networks, Inc. & Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010).

Courts examining SESAC's market power also have concluded that SESAC functions as a monopolist and that there is evidence that SESAC has acted unlawfully. *See, e.g.*, *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(PAE), 2014 WL 812795, at *36 (S.D.N.Y. Mar. 3, 2014) ("In sum, there is sufficient evidence upon which a jury could find that SESAC took action to maintain and fortify its monopoly over licensing of its affiliates' work, by adopting licensing practices that eliminated all realistic competition with its blanket license."); *Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5087, Report and Recommendation, 31-33 (finding that Plaintiffs had made a prima facie case of a violation of Sherman Act sections 1 and 2, and noting that "SESAC has 100% of the market power over the unique collection of works in their repertory and there are no 'real' alternatives to SESAC's blanket license").

The only protection that users have against ASCAP's and BMI's monopoly power is the protection provided by the Consent Decrees. Those should be retained and, as discussed below, strengthened.

B. The PROs Continue To Resist Any License that Offers the Prospect of Competition.

The NRBMLC was created in response to the resistance of ASCAP and BMI to any license with a price that varied based on the amount of the PRO's music that a user performed. Although the ASCAP and BMI Consent Decrees required those PROs to offer "per program" licenses that provided a "genuine choice," ASCAP and BMI priced those licenses for the radio industry so that they were economically meaningful only for news and talk radio stations that made virtually no feature performances of music.[1] ASCAP contended that it had negotiated these licenses with the RMLC and that the NRBMLC stations were "similarly situated" in the words of the Consent Decrees, so the PRO was obligated to offer only its standard licenses to all radio stations, regardless of the stations' music use.[2]

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[1] A "feature performance" is a performance that is the focus of the audience's attention, and does not include background music, advertising jingles, program themes, interstitial music between program segments, or ambient music at public events.

[2] BMI offered an alternative form of license that proved to be difficult to use and provided limited relief.

The prevailing ASCAP and BMI per program licenses were priced so that any radio station that made even a single feature performance of the PRO's music in 30% or more of its weighted programming time paid would be required to pay essentially the same fee that it would pay under the blanket license, as if it were a 24/7 rock or country music station. The stations represented by the NRBMLC, many of which used copyrighted music in 30% to 50% of their weighted programming time, did not believe this was fair. The PROs were well aware that their pricing system destroyed most of the incentive to seek alternative sources of music or music licenses, or to create competition between the PROs.

ASCAP's intransigence forced the NRBMLC to seek relief in the ASCAP Rate Court in 1996. Although the Court found that ASCAP was not required to offer a more usable per program license, it found that the NRBMLC stations were not "similarly situated" to those represented by the RMLC and it ordered ASCAP to reduce the "base" fee under its per program license for incidental uses of music. *Application of Salem Media*, 981 F. Supp. 199. As a result of the court's decision, and contemporaneous legislative efforts to require ASCAP and BMI to offer more reasonable per program licenses, the NRBMLC was able to negotiate a new set of licenses that allowed stations that featured music in less than 55% of their weighted programming time to reduce their license fees substantially below what they would have paid if they were an all-music station.

ASCAP and BMI have continued to resist competitive alternatives to their blanket licenses, and the Rate Courts have continued to provide an essential check on the PRO's anticompetitive preferences. For example, when DMX sought a blanket license that included fee reductions for competitive licenses that it obtained directly from publishers, both ASCAP and BMI resisted, arguing that they had no obligation to grant such licenses. The Rate Courts disagreed, and the Second Circuit affirmed.[3] *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2nd Cir. 2012). Absent the Consent Decrees and the Rate Courts, ASCAP and BMI would be able to pursue their anticompetitive ambitions unchecked.

C. SESAC's Licensing Practices Provide an Example of what Music Licensing Would Be Without the Consent Decrees.

The SESAC experience provides an example of what the world would look like without the ASCAP and BMI Consent Decrees – a world of unconstrained price increases unrelated to the value of the music that is performed and insistence on blanket licensing that eliminates any incentive for competition. SESAC functions as a seller with which all radio stations must deal. It thus exercises true monopoly power.

This power is not constrained by any regulatory oversight or neutral fee-setting process and is exacerbated by SESAC's consistent refusal to offer any license other than a blanket

[3] The NRBMLC filed an amicus brief in support of the more competitive adjustable fee licenses.

license. SESAC does not offer any license that varies with the amount of SESAC music that is used, so there is no incentive to develop alternative sources of music rights.[4]

SESAC's market power is demonstrated by the history of SESAC's license fee increases. During the period from 1999 to 2003, SESAC more than doubled its license fees unilaterally. SESAC then again increased its fees from 2004 to 2008. The changes made by SESAC during that period had the effect of again approximately re-doubling SESAC's fees. SESAC again increased its fee schedules by roughly 50% between 2008 and 2013.[5]

SESAC has consistently failed to demonstrate any justification for these large increases. In a study performed in 2004, the NRBMLC showed that SESAC represented only about 2.1% of titles chosen from playlists of NRBMLC stations, and more than half of the titles licensed by SESAC were also licensed by ASCAP and BMI, so they did not require a SESAC license.[6] Nevertheless, at the time, mixed format stations (with some music and some talk programming) operated by the largest group represented by the NRBMLC were paying SESAC more than 15% of the sum of their payments to ASCAP and BMI, which licensed many, many times more of the music those stations played than SESAC. Those ratios had not changed dramatically as of 2011. In a 2011 study of Contemporary Christian Music (also known as 'CCM'), the most popular genre of religious music, the Committee discovered that SESAC licensed only 1.15% of the music played by certain NRBMLC stations that was not also licensed by ASCAP and BMI. Despite SESAC's minuscule share of music, a large NRBMLC Group – Salem Communications, paid SESAC more than 1/3 of the fees it paid to each of ASCAP or BMI in 2013.

To be fair to SESAC, it has agreed to significant reductions to the price of its blanket license for NRBMLC stations that use both the ASCAP and BMI per program licenses. That is a good first step and suggests some sensitivity to fundamental fairness. Unfortunately, in light of SESAC's general fee increases, NRBMLC licensees still are required to pay far more than is justified by the size of the SESAC repertory. Moreover, SESAC still does not offer its own per program license or any other license with a fee that varies according to the amount of SESAC music that is used. Thus, there remains no competitive form of license for SESAC music.

As a result of its behavior, SESAC has been sued for antitrust violations by both the Television and Radio Music License Committees. As discussed above, early decisions in both cases confirm that SESAC possesses collective market power, takes steps to eliminate competitive licensing by its affiliated publishers, and acts to ensure that it is able to extract supra-competitive license fees.

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[4] As discussed below, SESAC does offer variations in its blanket license pricing for all-talk and certain mixed format stations that are licensed under the ASCAP and BMI per program licenses.

[5] Because SESAC fee schedules establish fees based on market size and the station's spot advertising rate, increases in a station's spot rate over time would lead to further increases in SESAC fees.

[6] It is not uncommon for a song written by multiple writers to be licensed by multiple PROs. Such works are referred to as "split" works and performances of such works are licensed as long as they are authorized by one copyright owner.

Due to the costs and burdens of private antitrust litigation, it took years of market power abuse by SESAC to provoke these suits. Those costs and burdens make it impractical for most music users to challenge SESAC's unlawful conduct. Justice Department action is needed to protect competition and the public. SESAC should be subjected to effective antitrust regulation comparable to that imposed on ASCAP and BMI.

D. While Direct Licensing Remains an Important Check on PRO Abuses, it Cannot Replace the Consent Decrees Due to the Lack of Competition Among Major Publishers.

The Notice asks whether rights holders should be allowed to limit their grant of licensing authority to ASCAP and BMI in order to license certain uses of their works directly. The NRBMLC respectfully submits that the lack of competition among the major music publishers counsels against allowing such partial withdrawals from ASCAP and BMI.

As the Rate Courts found in the DMX cases, direct licensing, particularly by smaller independent publishers, provides an important check on the PROs' market power and offers some competition. Unfortunately, however, the major publishers have been allowed to merge under the cover of the Consent Decrees to the point that the industry is highly concentrated. Moreover, due to this consolidation in the industry, the major publishers offer catalogs that every user must license, so they are no longer substitutes. Thus, the major publishers do not compete with each other. Rather, as the ASCAP Rate Court found in the recent Pandora case, the major publishers exercise extraordinary non-competitive market power and are willing to abuse that market power to extract supra-competitive license fees. In other words, direct licensing is an important alternative to the PRO blanket licenses under the Consent Decrees that helps to protect music users against supra-competitive fees; direct licensing is not a substitute for the Consent Decrees.

In the recent Pandora case, the ASCAP Rate Court found in no uncertain terms that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices" in their negotiations with Pandora. *Pandora Media*, 2014 WL 1088101, at *35. The court found that the negotiations were conducted in a manner that left Pandora with no alternative: "it could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms." *Id.* According to the court, "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." *Id.* at *35-36.

As further evidence of the flaws in a direct-license only regime, when the major publishers tried to withdraw their digital rights from ASCAP and BMI and license them directly, they found it virtually impossible to administer their own rights. Instead, they reverted to ASCAP and BMI to administer the withdrawn rights for the vast majority of users. *See id.* at *17-18. This showed the withdrawal for what it was: an effort by the major publishers to exercise enormous market power free from the constraints of the Consent Decrees. They should not be allowed to do so.

The major music publishers exercise substantial market power free from competitive constraints. The NRBMLC commends the Department's decision to open a review of their conduct. The Department should take all available steps to constrain the major publishers' supra-competitive market power, which was gained through a series of mergers over recent years.

II. Key Provisions of the Consent Decrees Should Remain in Force and Should Be Strengthened

The Consent Decrees contain numerous provisions that protect users from the potential market power of the PROs. The NRBMLC highlights the following provisions that have been particularly important in restraining that market power.[7]

A. The Consent Decrees Should Continue To Include Essential Procedural and Rate-Setting Protections.

The rate-setting and procedural protections provided to music users are at the heart of the Consent Decrees. They should be retained.

The existence of the rate court mechanism for determination of reasonable fees is the most important of the protections provided by the Consent Decrees. As described above, recent cases decided by the ASCAP and BMI Rate Courts have shown how the PROs, absent rate regulation, would abuse their market power, and how the Rate Courts have constrained that market power. The Committee cannot overstate the importance of Federal judges that understand their role in protecting the public from otherwise unconstrained collective market power.

Also important are the provisions of the Consent Decrees that ensure that a licensee can be licensed simply by asking for a license. Thus, a PRO is not able to exercise "hold up" power. At least one PRO, however, is known to take the position that requests cannot be made to cover performances made prior to the request. That position appears to be an attempt to obtain added leverage over un-wary music users. There is no reason not to allow a music user to request a license from the start of its performances, at least when it does so voluntarily and not under threat of infringement suit.

The requirement that the PROs offer through-to-the-audience licenses also is important, particularly for transmission media that rely on intermediaries, such as Internet transmissions. Competition is best fostered by licenses that are granted as far upstream as possible. Downstream providers should not require duplicative licenses.

The Consent Decree prohibitions on discrimination among similarly situated users are also important to protect users that may not have the wherewithal to engage in rate court litigation. Conversely, the Consent Decrees should make clear that the non-discrimination provisions are not a sword to be wielded by the PROs against users after the PRO has negotiated

[7] The Committee's decision not to include a provision on this list does not mean that provision is not important. Rather, its goal is to highlight provisions the importance of which it has experienced.

an agreement it views as favorable. Rather, the provisions should be clearly established as shields to be invoked by users where appropriate.

The PROs' request to eliminate the Federal Rate Courts in favor of local arbitration should be rejected. The NRBMLC's experience, and the experience of other users, make clear that full discovery under the Federal Rules of Civil Procedure is essential to a fair and meaningful rate proceeding. Absent discovery, there would be a fundamental information disparity that would badly slant the proceedings and the outcomes in favor of the PROs. The NRBMLC has experienced similar problems in sound recording fee proceedings before the Copyright Royalty Board, which offers limited discovery that is not available to assist a party in preparing their case in chief.

That said, there are tweaks that could improve the process. For example, there is no reason for two rate courts. Proceedings for ASCAP and BMI licenses should be consolidated before a single judge. Moreover, smaller users should have the option of local arbitration if the user wants it. Many smaller users can't afford the cost of litigation in Manhattan. Thus, a local option should be made available. The Committee stresses, however, that such local arbitration should not replace the primary relief of rate litigation under the Federal Rules before the Rate Court.

B. The Consent Decrees Should Continue To Require Economically Significant Alternatives to the PROs' Blanket Licenses.

The Consent Decrees contain numerous provisions designed to ensure that the PROs offer competitively significant alternatives to blanket licenses, with fees that vary based on music use or alternative licensing arrangements. These provisions are essential to limit PRO market power and to foster license fees that approximate those that would prevail in an effectively competitive market. They should be retained and, where possible, strengthened. These provisions include the following:

- The prohibition on PROs obtaining exclusive or effectively exclusive licenses (*e.g.*, ASCAP Section IV(A));
- The prohibition on interference with direct licensing where a blanket license exists (*e.g.*, ASCAP Section IV(B)); and
- The provisions mandating per-program licenses that offer a genuine choice (*e.g.*, ASCAP Sections VII(A)(1) and VIII(A)).

Many of these provisions are missing from the BMI decree, or are weaker in the BMI decree than they are in the ASCAP decree. The BMI decree should be strengthened to include similar provisions.

The SESAC experience demonstrates the importance of fostering competitive alternatives. It also demonstrates that licenses that are "non-exclusive" in name, can be exclusive in effect. The Consent Decrees should prohibit the PROs from taking steps that interfere with direct licenses or create de facto exclusive licenses. For example, when a PRO

member grants a direct license, that member should lose only the payments that the PRO would make to that member from the directly licensed user.

Moreover, the obligation to offer per-program and per-segment licenses should be part of ASCAP and BMI's cost of doing business. Licensees should not be required to bear the costs of administering those licenses. Thus, Section VII(B) of the ASCAP decree should be removed.

C. The Consent Decrees Should Be Amended To Increase PRO Transparency.

One issue on which the Consent Decrees fail, is in the requirements for disclosure by the PROs of their membership and repertories. The online databases made available by the PROs are difficult to use, allow only single works to be searched at a time, and are unreliable. The PROs themselves disclaim the accuracy of their databases.

The Consent Decrees should require the PROs to offer databases that allow users to submit lists of compositions that can be matched. The PROs should be required to stand behind their databases. If a composition is included in the database, it should be deemed to be within the PRO's repertory. If it is not included in the database, the PRO should not be permitted to pay its members for performances of that composition. The Consent Decrees should also require the PROs to provide publicly accessible databases of their writer and publisher members, to foster potential direct deals.

Conclusion

The NRBMLC appreciates the Justice Department's consideration of these comments and looks forward to working with the Department on these important issues.

Respectfully submitted,

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