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Music Licensing Study: Notice and Request for Public Comment	)	Docket No. 2014-03

BROADCAST MUSIC, INC.'S COMMENTS ON COPYRIGHT OFFICE MUSIC LICENSING STUDY

On March 11, 2014, the Copyright Office (the "Office") issued a Notice and Request for Public Comment (the "Notice") in connection with its Music Licensing Study. 78 Fed. Reg. 14739 (Mar. 17, 2014). In the Notice, the Office listed 24 questions covering a wide array of topics relating to the licensing of musical works and sound recordings in the United States.

Broadcast Music, Inc. ("BMI") is one of three music performing rights organizations ("PROs") operating in the United States whose principal roles are to license the public performing rights in musical works on behalf of their members. BMI applauds the Office for its interest in helping creators and music users improve the licensing landscape through necessary changes and modifications in the current legal and regulatory framework.

As the Office well knows, BMI's blanket licensing has been endorsed over the decades by virtually all parties across the copyright licensing spectrum and has been embraced by Congress as a model for statutory licensing and applauded by the Registers of Copyright in several reports presented to Congress. That being said, there are numerous obstacles and challenges to the efficient licensing of musical works in the digital online environment. The Notice poses a number of questions that address these areas of concern, and we respond to the questions affecting the licensing of musical works below.

SUMMARY

The Notice comes at a unique time in the music industry, in the area of music licensing and for PROs in particular.

The transition from traditional analog content delivery systems to digital transmissions of all content is such a reality that the term "new media" is, at this point, almost an anachronism. With this transition, it is appropriate and timely to consider whether the models that have served music licensing well over the decades translate into this new world.

To be sure, many of the traditional concepts of copyright should and do survive and translate to digital media. However, in many other ways, the digital world has its own dynamics that compel new approaches.

- Online, each transmission may implicate multiple rights. The most efficient music-licensing model, therefore, is one where PROs have the ability to provide "one-stop" solutions to music users.

- When multiple rights implicate both the sound recording and the underlying musical work, it is critical that there be a fair and equitable relationship between the compensation afforded sound recordings and the songwriters and publishers whose underlying works provide the foundation for those recordings. Currently, for the transmission of sound recordings containing musical works, recording artists are paid as much as seven times what songwriters and publishers are paid for the mechanical rights, and as much as twelve times for the public performance right. We propose, through the pending Songwriter Equity Act, that PRO rate courts no longer be prohibited from considering the fair-market-value rates paid for the digital transmissions of sound recordings. We believe that once this critical market information is put before the rate courts, the indefensible disparity between fair-market-value sound recording rates and musical work rates will begin to close.

- The PRO consent decrees were entered, by and large, not only before the age of the Internet, but before the growth of cable television, satellite radio, and a wide range of other delivery platforms. According to recent decisions by the PRO rate courts, the decrees do not permit digital rights withdrawal – that is, the ability of publishers to grant the right to license certain uses to PROs while retaining exclusive licensing power over other, digital-based uses. This has resulted in forcing publishers to choose to either (a) abandon the PROs despite the value they bring to the marketplace, or (b) abandon the ability to engage in free marketplace negotiations to properly set the value of their works in order to avail themselves of the utility of the PROs. Moreover, the decrees, it might be argued, force the PROs to license to a

> single online user on a through-to-the-user basis – that is, for all subsequent transmissions of the works, despite the fact that all subsequent online users cannot even be identified nor the value of their uses quantified. Finally, the current rate court system – a process itself in need of comprehensive review – does not provide for an inexpensive, effective way to set interim fees to compensate creators while the long rate-setting process plays out. For these and other reasons discussed in our submission, the decrees must be reviewed with an eye towards modernization.

Ultimately, BMI's mission and its values remain the same. Songwriters, composers and publishers create work whose value must be recognized and properly compensated. To that end, we favor free market negotiations over statutory or judicial models to set compensation for songwriters, composers and publishers; where statutory processes are in place, they should replicate market-value compensation. The simple and self-evident notion that creators should be paid at a fair-market-value rate is the thread that runs through our comments below.

We are exceedingly optimistic regarding the opportunities presented by the transition to digital delivery systems. We do not believe the Internet is the enemy of PROs, or creators, in any way. We only seek to enable our songwriters, composers and publishers to enjoy their fair share of compensation for their creative works, and the proposals we offer in our response, below, all share this goal.

RESPONSE TO THE NOTICE

BMI's responses to Questions 1-4 address issues raised about the compulsory licensing of mechanical rights under Section 115 and the fair-market-value pricing issue addressed by the recently introduced Songwriter Equity Act. We address the related issue of the increasing marketplace need to license multiple rights, including public performance, reproduction and distribution rights. We additionally discuss the rate court and broader consent decree issues in responses to Questions 5-7. Finally, we respond to questions about changes in the music licensing marketplace and initiatives to improve data gathering and processing for the important

goal of achieving accurate, timely payments of royalties to creators. (*See* responses to Questions 11-19, 22.)

Musical Works

1. **Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works.**

2. **Please assess the effectiveness of the royalty rate-setting process and standards under Section 115.**

3. **Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis? If so, what would be the key elements of any such system?**

The Section 115 mechanical compulsory license is over 100 years old and is long overdue for re-examination. At a minimum, the rate-setting standard should be corrected. In this regard, BMI has joined with the American Society of Composers, Authors and Publishers ("ASCAP"), SESAC, Inc. ("SESAC") the National Music Publishers' Association and the National Academy of Recording Arts and Sciences, to propose a modest amendment to Section 115 to change the statutory rate-setting standard. These efforts culminated in the introduction of the Songwriter Equity Act of 2014 (H.R. 4079) ("SEA") on February 26, 2014 by Rep. Doug Collins (R-GA), joined by an original cosponsor Rep. Marsha Blackburn (R-TN).

Section 115 of the Copyright Act requires songwriters and publishers to accept fees for mechanical licenses determined by the Copyright Royalty Judges ("CRJs"), pursuant to the standard set forth at 17 U.S.C. § 801(b)(1). This statutory standard is widely acknowledged to produce below-market rates, including serving as an artificial limit for mechanical rights.[1] By

[1] *See* Jeffrey A. Eisenach, *The Sound Recording Performance Right at a Crossroads: Will Market Rates Prevail?*, 22 COMMLAW CONSPECTUS 1 (2004); *Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 109th Cong. 1st Sess. at 6 (2005) (statement of Marybeth Peters, Register of Copyrights).

comparison, record labels have been able to negotiate and collect fees for their sound recordings in the unregulated marketplace that are as much as ***seven times*** greater than the amount songwriters and publishers collect under Section 115 for the transmissions of the same music.

The SEA adjusts the mechanical compulsory license fee standard to a fair-market-value standard. Replacing the parameters of Section 801(b)(1) with a fair-market-value, "willing-buyer/willing-seller" standard for digital services will help ensure that songwriters and publishers receive fairer compensation.

Beyond the compelling logic of updating the rate standard to one of fair-market-value, digital music services have complained about the difficulty of licensing mechanical rights under Section 115 and, specifically, the inability to license mechanical rights on a blanket basis. The Section 115 compulsory license is a work-specific license, whereas digital music services need access to a large volume of works to launch competitive music offerings. These services have called for a blanket license under Section 115, as well as the ability to license in a bundle the various music publishing rights they need through "one-stop shops." Under these circumstances, we believe it is advisable to consider a revision of the mechanical compulsory license to make blanket licenses available as an option. (*See* responses to Questions 4 and 7 for further comments on allowing PROs to offer bundle rights.)

4. For uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner? How might such a unified process be effectuated?

In addition to re-examining the premises of Section 115, BMI believes that Congress should confirm that BMI can be designated as an agent by publishers to collect compulsory mechanical license fees from digital music services. BMI's collective-license business structure

is designed to handle large volumes of transactions on a cost-efficient basis. BMI is capable of processing requests for mechanical rights with a similar efficiency and administering royalties generated through such licenses.

Licensed music users trust BMI as an authoritative entity to collect and distribute royalties to the proper rights holders. Despite these demands of the marketplace for bundled-rights solutions, neither BMI nor ASCAP currently license mechanical rights, synchronization rights or lyrics rights for digital music services, either separately or as a complement to their blanket licensing of public performing rights.

While we believe that the BMI consent decree permits BMI's licensing of the mechanical right, the ASCAP consent decree expressly prohibits ASCAP from licensing, administering or handling any of the other copyright rights (such as the reproduction and distribution rights) that are implicated by certain digital music transmission services.

We discuss the need for consent decree modification in response to Question 7 below, but another way to address this issue would be for Congress to clarify that the antitrust exemption currently in Section 115 permits copyright owners and their designated representatives to negotiate and agree on bundled rights solutions. This can be accomplished even if Section 115 were to continue to give the CRJs authority to set and readjust compulsory mechanical rates in the absence of voluntary marketplace agreements.

Permitting the bundling of multiple rights will bring the United States into line with collective licensing practices in Europe, where collective music rights organizations ("CMOs") and publisher consortia often handle the licensing of both performance and mechanical rights. In this regard, it is a common practice for those CMOs to offer "one-stop-shop" licensing for multiple copyright rights. We believe that U.S. PROs, similarly, ought to have no restrictions on

the product lines they can offer to users who need multiple rights. It must be stressed that even if BMI were so empowered, publishers would ***not*** be ***required*** to grant BMI the mechanical right, ***nor*** would music users be ***obligated*** to license them from BMI.

Empowering PROs to contribute to viable marketplace solutions for independent music publishers and songwriters also would ensure the continued diversity and competition in the music publishing sector, which has seen marked consolidation in recent years. PROs should be authorized explicitly to handle reproduction and distribution rights required by digital services, either separately or as part of bundled rights. Such capabilities will also bring the United States into greater harmony with foreign laws and global collective licensing models.

5. Please assess the effectiveness of the current process for licensing the public performances of musical works.

For its licensed music users, BMI offers an easy, friction-free, authoritative, transparent and extremely efficient solution for clearing the public performing rights to its works through the mechanism of a blanket license for one modest annual license fee. BMI's core competency is as a trusted intermediary in licensing the public performing right of musical creators to a broad range of entities that incorporate music into their products or services. To be successful in this mission, BMI has developed an understanding of and appreciation for the business models and programming needs of hundreds of thousands of businesses across the nation that bring our creators' music to the public.

Notwithstanding the obvious utility of collective licensing, the PROs in the United States have been characterized by some industry negotiating groups of music users as monopolists that can or will charge supra-competitive rates if their activities are not constrained. Ironically, these claims are most often made by large media industries that negotiate with PROs through their

own industry-wide music licensing committees; indeed, the PRO rate courts have recognized that these user groups possess considerable bargaining power in acquiring music rights. As a legacy of this history, BMI and ASCAP each operate under separate consent decrees and are subject to the jurisdiction of separate rate courts; SESAC is currently the subject of two pending antitrust lawsuits brought by the television and radio industries.

BMI believes that its consent decree is outmoded. Recent developments in the digital marketplace suggest that its decree is in need of modernization. The decree now needlessly hobbles the hundreds of thousands of songwriters, composers and large and small publishers who are affiliated with BMI.

As a result of recent PRO rate court decisions that have found that partial withdrawals are not permitted by the PRO consent decrees, many publishers may find themselves compelled to choose between: (a) remaining with PROs and foregoing the competitive opportunities that may exist for their own licenses in the free market; or (b) withdrawing their catalogs from PROs entirely in order to explore activities prohibited by the PROs' consent decrees (*see* response to Question 7), and thus forego the efficiencies of blanket licensing.

6. Please assess the effectiveness of the royalty rate-setting process and standards applicable under the consent decrees governing ASCAP and BMI, as well as the impact, if any, of 17 U.S.C. 114(i), which provides that "[l]icense fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works."

a. <u>The PRO Rate-Setting Standard:</u>

Recent developments demonstrate that the rate court proceeding mandated by the BMI consent decree is a poor fit for the needs of the rapidly-evolving digital marketplace. Federal rate court litigation is an exceptionally slow process to set prices to keep up with the rapidly-

evolving digital marketplace, and it is exceedingly expensive for all participants, with the costs of such proceedings typically in the multiple millions of dollars for each party. Moreover, a typical rate court case can take many years to be resolved, which includes the inevitable, potentially multi-year, appeal of the trial court's decision.

The BMI consent decree requires the rate court to set blanket license rates approximating prices that would be negotiated by a willing buyer and willing seller in a fair market negotiation.[2] However, recent ASCAP and BMI rate court decisions have set what many publishers consider below-market rates. This trend has led to decisions by some larger publishers to attempt to withdraw the digital rights to their catalogs from BMI and ASCAP.

Whether others might disagree with this characterization of these recent rate court decisions, the salient point is that many knowledgeable publishers ***do*** agree with the characterization, and have lost confidence in the efficacy of the rate court process to yield fair-market-value. That loss of confidence is driving publishers to move away from the PROs to avoid this perceived inadequacy.

b. <u>The Impact of Section 114(i):</u>

The goal of the SEA, insofar as it relates to PROs, is simple: it removes the prohibition against rate courts' consideration of the fair-market-value rates set by the CRJs as market value benchmarks. The bill, by removing the prohibition, permits the rate courts to consider the CRJ rates, which may lead to a more reasonable comparative valuation for music compositions. The bill is silent on the appropriate rate and leaves all aspects of rate determination to the rate court. By modifying Section 114(i) in this way, Congress would afford rate courts the ability to address the rates for musical works based on a more complete examination of marketplace factors.

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

The reason we seek passage of this amendment to the Section 114(i) savings clause is because we believe that a PRO rate court, given all relevant benchmarks, would set rates that could reduce the current inequitable disparity between: (a) the low public performing rights fees paid by Internet music webcasters (such as Pandora) to songwriters for the public performance of musical works, and (b) the far higher, fair-market-value fees paid by these same Internet music services to SoundExchange and record labels for the public performance rights of sound recordings under Sections 106(6) and 114 of the Copyright Act.[3]

There is a roughly 12-to-1 disparity in the license fees paid to SoundExchange by large digital music services like Pandora compared to the license fees paid to songwriters and PROs by those same services.[4] We believe that the prohibition against the PRO rate courts considering the rates set for sound recordings provides in part an explanation for this unintended disparity. The situation must be remedied.

To be clear, the proposed legislation does ***not*** mandate rate increases for the PROs or digital music services. Indeed, it does not even require the rate courts to give ***any*** weight whatsoever to sound recording rates. Rather, the bill simply permits PRO rate courts to examine and consider all marketplace benchmarks, which is something the CRJs can already do for sound recording rates.

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[3] License rates for "non-interactive webcasting" of sound recordings are subject to a statutory license. In the absence of a voluntary negotiation, they can be set by the CRJs under Section 114 using a standard that reflects fair-market-value. This standard is referred to as the "willing buyer/willing seller" standard. Voluntarily-negotiated interactive licenses have been considered as benchmarks in CRJ proceedings. Digital music services like Pandora are thus required to pay license fees to SoundExchange for the right to stream the sound recordings containing the underlying musical works at fair-market-value. These fees are in addition to separate license fees to the PROs and/or music publishers for the right to stream the musical works contained in the sound recordings.

[4] According to its most recent 10-K, Pandora paid 4% of its total revenue during the eleven-month period from February 1, 2013 to December 31, 2013 to the PROs. *See* Pandora Media, Inc., Transition Report (Form 10-K) 24 (Feb. 14, 2014).

Since nothing in the SEA compels a higher rate for PROs, reduction of the rate disparity is neither a foregone conclusion nor, certainly, a requirement of the SEA. If performing rights rates increase, it will not be because the SEA compelled it but rather because the rate courts gave weight to this new evidence.

The changes to Section 114(i) we propose are consistent with Section 114(i)'s intended purpose. Section 114(i) currently provides:

> License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

17 U.S.C. Section 114(i). The legislative goal, at the time of enactment of the original Section 114(i) savings clause, was to ***protect*** songwriters, because of the concern at the time regarding the potential that Section 114 royalties for sound recordings would cannibalize performing right royalties for musical works. Congress accomplished this goal by ensuring that a music service could not cite its newly-created sound recording performing right royalty obligations as the basis for ***adversely affecting*** the royalties paid to songwriters under the traditional performance right that compensates songwriters, composers and publishers.

This intent to protect songwriter income from adverse effects that could otherwise result by the introduction of a new parallel public performing right is confirmed by the second sentence of Section 114(i). The first sentence of the clause must be read in that context, but it is being cited by certain music users for a wholly different purpose – which is to prevent songwriters

from receiving fair-market-value compensation. The intent of the second sentence was to prevent citation of sound recording royalties as the basis for eroding songwriter royalties.[5]

While ASCAP's rate court recently announced a blanket license rate of 1.85% of Pandora's net revenues to be paid to ASCAP for an approximate 45% share of the music performances,[6] the same licensee is paying approximately 50% of its revenues for all sound recording public performing rights royalties to SoundExchange.[7] In short, two different rate-setting authorities (the ASCAP rate court and the CRJs), each setting fees for the very same transmission of the same music by the same music user – Pandora – have reached dramatically different views of the value of a public performance of prerecorded music. There is no basis in law or economics for such a skewed result.

We believe that one of the reasons for this disparity is the language in Section 114(i) cited by the ASCAP rate court decision expressly ***forbidding*** the court from considering the fair-market-value rates paid or set by the CRJs for sound recording performance rights as additional benchmarks for musical works fees.

Indeed, this difference in the value of sound recording and musical work copyrights is out of sync with global music licensing norms. Internationally, performance rights in sound recordings are considered "neighboring" rights that are not the same as "authorship" rights under copyright. Rights of authorship vested in such creative works as musical compositions are

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[5] *See* DIGITAL PERFORMANCE RIGHT IN SOUND RECORDING ACT OF 1995, H.R. REP. NO. 104-274, at 24 (1995) ("To dispel the fear that license fees for sound recording performance may adversely affect music performance royalties, subsection (i) make an express statement . . . that license fees for music performance shall not be reduced by reason of obligations to pay royalties under this bill.")

[6] *See* Opinion & Order, *In re Petition of Pandora Media, Inc.*, No. 1:12-cv-8035-DLC (S.D.N.Y. Sept. 17, 2013), *appeal docketed*, No. 14-1158 (2d Cir. Apr. 16, 2014).

[7] According to its most recent 10-K, Pandora paid 48% of its total revenue for the eleven-month period from February 1, 2013 to December 31, 2013 to SoundExchange. *See* Pandora Media, Inc., Transition Report (Form 10-K) 23 (Feb. 14, 2014).

viewed as having equal or greater value since they represent the foundational creative elements upon which other intellectual property is derived. This approach recognizes the undeniable fact that there can be no sound recording without an underlying musical composition.

7. Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternatives that might be adopted?

The BMI consent decree has its origins as far back as 1941, with virtually all its modern provisions adopted in 1966. In the intervening 50 years, society has seen the rise of a plethora of new media for the transmission of content – including but not limited to cable television, satellite radio, commercial music services and, of course, the Internet.

These are not just new distribution platforms operating under traditional rules. Rather, particularly in the case of the Internet, the demands of the market have changed, leaving the current BMI consent decree ill-equipped to meet these needs.

In 1979, the U.S. Department of Justice ("DOJ") determined that entering into perpetual consent decrees was not in the public interest. Since then, new decrees have included "sunset" provisions that automatically terminate them after a term of years, not to exceed ten years. However, most decrees entered before 1979, like the ASCAP and BMI decrees, do not contain these provisions. What follows is an overview of the modifications we believe should be made to the PRO decrees.

a. Publishers want to be able to withdraw works for certain defined uses.

Publishers, of course, have the right to directly license works under the BMI consent decree. However, some publishers believe that they can license certain users, including in particular Internet-based users, without the need to avail themselves of the licensing services of BMI or another PRO. Unlike many traditional media music users, it appears that certain

Internet-based music users can readily be licensed by those publishers themselves without the participation of a PRO. Those publishers can bundle the rights needed by Internet-based music users (which PROs currently cannot do), suggesting that they believe direct licensing is more efficient for them in dealing with these customers. Those publishers may believe that, if their digital rights are removed from the PROs, they can better achieve rates that reflect fair-market-value.

If the rates that publishers would achieve in unregulated direct licensing negotiations do turn out to be higher than the rates realized by the PROs from the same user, that is not a reason to prevent publishers from engaging in rights withdrawal; rather, it is further evidence that the rates achieved by PROs do not reflect fair-market-value.

As the Office is well aware, publishers are currently unable to withdraw their works for certain defined uses. In decisions in 2013, both the BMI and ASCAP rate courts determined that the PROs' respective consent decrees do not allow publishers' works to be licensed by PROs for certain uses but unavailable to PRO customers for other uses.[8]

We believe that unless the BMI consent decree is modified to permit publishers to withdraw the licensing of digital rights by PROs, some publishers may feel compelled to terminate their affiliations with BMI and ASCAP in order to achieve fair value for their songwriters and composers for online uses. If forced into an "all-or-nothing" choice, publishers could be compelled to turn their backs on the efficiencies and value the PROs bring to wide

[8] *See* Opinion & Order, *In re Petition of Pandora Media, Inc.*, No. 1:12-cv-8035-DLC (S.D.N.Y. Sept. 17, 2013), *appeal docketed*, No. 14-1158 (2d Cir. Apr. 16, 2014); Opinion & Order, *Broad. Music, Inc. v. Pandora Media, Inc.*, 13-cv-4037-LLS (S.D.N.Y. Dec. 18, 2013).

Although the BMI rate court did not agree, BMI believes that nothing in the BMI decree mandates such an "all-or-nothing" arrangement. Publishers have granted BMI reproduction and distribution rights for selected purposes ever since the 1960s in BMI's standard affiliation agreement. There is no reason to believe an all-or-nothing approach is mandated by the compulsory nature of the rate court. The court exists to set rates for such catalog rights as BMI possesses, nothing more or less. (The rate court's decision is interlocutory, and subject to appeal at the conclusion of the ongoing rate setting case.)

swaths of the music licensing market in order to explore market opportunities for certain rights. Such a choice, we believe, would ultimately fail to serve the interests of most music users, the PROs and publishers as well as consumers – all participants in the rights marketplace.

b. BMI should be able to bundle rights to meet marketplace demand.

The process of digital rights withdrawal, before it was declared invalid by the ASCAP and BMI rate courts, enabled publishers to combine market-priced performing rights with any other right(s) needed to license online music users. Specifically, digital rights withdrawal was only undertaken for pure-play Internet audio services, including uses that, by their nature, required a combination of rights. For example, digital rights withdrawal occurred where the use in question also required a mechanical or synchronization right.

If digital rights withdrawal were permitted under the PRO consent decrees, we expect that some larger publishers would take the opportunity to license – and bundle – rights to certain music users outside of the PROs. (Conversely, as discussed above, if such digital rights withdrawal was not permitted, we believe some important publishers might simply leave the PROs.) However, most publishers – primarily smaller and independent publishers – would likely opt to remain with BMI, as they may lack the resources necessary to explore such licensing opportunities or may simply prefer to avail themselves of the value provided by BMI.

It is therefore critical that the BMI consent decree ensure that these smaller and independent publishers – through BMI – are able to bundle rights in the same way as their larger competitors do. In this way, smaller publishers will be able to offer the same licensing products as large publishers.[9] Indeed, the U.S. Commerce Department recently recognized the importance and efficiency of multiple rights clearance to digital music services in its recent Green Paper.[10]

[9] Similarly, under changes to the copyright law enacted effective in 1978 and just now becoming operational, songwriters who gave their rights to publishers in or after 1978 can recapture their copyrights after 35 years. This

Again, we stress that the BMI consent decree does not prohibit BMI from selling multiple rights, and BMI's position is that no decree modification is needed to enable BMI to bundle rights on behalf of its affiliated writers and publishers. However, the ASCAP consent decree expressly prohibits ASCAP from licensing anything other than the performing right.[11] Since the DOJ often takes the view that BMI and ASCAP should operate under similar rules, the PRO decrees should be clarified to expressly provide the PROs with the ability to offer bundled rights.

It should be stressed that BMI does ***not*** intend to seek a mandatory grant of additional rights from publishers, nor would it require that any of its licensees license any right beyond the performing right from BMI. Any grants to BMI, or multi-right licenses to music users, would be entirely voluntary.

c. Adjustments to the rate court mechanism are necessary.

In addition to the problems discussed above, there are important issues to address with the operation of the rate court. As but one example, the requirement that a music user may access the PROs' repertoires by the mere making of a written license application has led to abuses in certain situations. Although access to the repertoire is instantaneous, there is no default requirement that the applicant pay an interim fee pending the determination of a final license fee. Rather, the burden is on the PRO to make a motion for the imposition of an interim fee – a motion that is, like the rate court proceeding itself, expensive and time-consuming. Particularly in the emerging digital marketplace, unless BMI brings expensive motions against

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will create an ever-growing universe of songwriters who may choose to become, essentially, their own publishers, and, just like the small and independent publishers, may want the resources of the PROs to fully exploit their works and compete with the larger publishers who offer bundled rights products outside of the PROs.

[10] *See* DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT, CREATIVITY, AND INNOVATION IN THE DIGITAL ECON. 80-85 (2013) (describing various instances where multiple, bundled rights are required).

[11] *See* Second Amended Final Judgment, *United States v. Am. Soc'y of Composers, Authors and Publishers*, Civ. Action No. 41-1395 (WCC) (S.D.N.Y. Jun. 11, 2001).

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

We believe the solution is for all parties who use our repertoire to pay interim fees. This can be accomplished by a system that requires users to pay, as an interim rate, the rate they paid under their last license or, for new users, the going industry rate.[12]

Another example involves the application of a consent decree provision referred to as the "through-to-the-audience" provision. Under this provision, BMI must issue licenses upon demand to broadcast and cable television networks that authorize music performances not only by the networks but also by their affiliated stations and cable systems that further transmit those performances to the public. Given the mature and stable structure of these industries, and particularly given the linear relationship among all links in the chain of distribution, BMI is for the most part able to price those network licenses to take into account the value of those downstream performances.

By contrast, in the digital world, there can be multiple, non-linear streams of distribution, and the consideration exchanged for distribution can be hard to predict, calculate, or even identify. In fact, it is often the case that many of these "downstream" music users (if the term "downstream" can even be applied to a user in this multi-directional model) are completely unknown to the music user licensed by BMI. On the Internet, a content creator or distributor has the ability to monetize content through multiple, malleable platforms that can include links,

[12] There is precedent for this approach. Congress addressed a similar problem when it adopted the Circuit Rate Court provision in 1998 as part of the Fairness in Music Licensing Act. 17 U.S.C. § 513. Under this section, any individual proprietor has to pay the going industry standard rate as a condition for accessing the fast-track court proceeding.

embedded players, clips, framing, mobile versions, and other variations. The consideration can come from a variety of sources including advertising, subscriptions, commissions, and in-kind consideration. As a result, realizing the full value of all uses throughout the chain of distribution – a goal of the through-to-the-audience license – cannot be achieved for online licenses.

Music users routinely now request through-to-the-audience licenses, but they refuse or are unable to identify those downstream entities and applications for which they are seeking such a license. This has created confusion in the marketplace as BMI attempts to license web properties where they may (or may not) be covered by upstream licenses. In view of this uncertainty, it is unreasonable to require BMI to grant a license that encompasses performances that cannot be identified or valued at the time of contracting.

More important perhaps than sheer confusion is the inability to target the retail value of music copyrights when they are bundled in a lengthy chain of products to the end consumer. ASCAP's case with MobiTV[13] is an emphatic example of the difficulties in identifying the appropriate rate base and taking into account the full value of all performances in the digital ecosystem. In that case, the music was obtained by program producers whose programs were packaged by cable networks to the general public and then repackaged by a satellite delivery company that acted as a middleman to telecom giants using entertainment content as strong attractions for lucrative cell phone subscriptions.

While BMI's decree does not expressly apply the through-to-the-audience concept to online licensing, it is critical that any ambiguity be resolved in favor of removing or sharply curtailing such open-ended obligations for BMI's licensing of online music users.[14]

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[13] *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010).

[14] There are even instances where music users submit written license applications with vague, non-committal descriptions of their services. Some of these applications even disclaim the need for licenses at all under the

BMI should be free to license the actual music user in the digital world, as defined by the Copyright Act, rather than be compelled to price a license for unanticipated and/or opaque uses and economic arrangements. BMI must have the flexibility to license music users on various platforms as market conditions and information dictate.

It is not a simple task to correct the various problems associated with the rate court and its interplay with the BMI decree's licensing provisions. In order to cure the cost and expense problems, BMI is considering advocating a number of options, such as: (a) setting of a prompt deadline by which a hearing must occur; (b) setting a default interim fee – either the last fee paid by a previous licensee or the industry rate for first-time users; (c) limitation of pretrial discovery in rate-setting proceedings; and (d) shifting the rate-setting body from the district court to an arbitration panel.

d. Partial deregulation should be explored.

As things stand now, it is a possibility that one or more larger publishers will partially or totally withdraw their catalogs from the PROs. Either this will occur because the consent decrees are modified to permit publishers to explore marketplace deals without granting such rights to the PROs or because publishers will terminate their affiliations with the PROs in order to be able to pursue such deals on their own terms.

If – when – rights withdrawal is a standard marketplace practice, it follows that the hypothesized market power of the PROs will necessarily diminish. Specifically, as the relative market shares of the PROs decrease significantly, antitrust doctrine tells us that their purported market power would also diminish.

Copyright Act (and hence reject payment of any fee obligation) even while obtaining the benefit of the consent decree's automatic license feature, the ultimate "have-your-cake-and-eat-it-too" scenario.

Therefore, BMI is in favor of a mechanism whereby, when its market share in a particular market falls below a stated threshold, it becomes deregulated in that market. Simply put, where BMI lacks market power, it should not be regulated. Since its consent decree is the result of a contention that BMI has market power, it should not be regulated once that contention loses its factual underpinning.

We also believe that the DOJ should re-examine the basis for what, in effect, has been a perpetual consent decree, with an eye toward a sunset of the current decree if its existence can no longer be justified overall, or in any market in which BMI lacks market power that is the predicate for its current regulation. Our view is consistent with recent initiatives to expedite review of old consent decrees.[15]

The substantive provisions of BMI's current consent decree were negotiated and entered into in 1966, with the lone change since then being the addition of the compulsory license/rate court mechanism in 1994. This nearly 50-year span is several generations in human years, but in digital years, it is eons removed from the current marketplace. While the ASCAP consent decree was amended in 2001, its key licensing provisions were not changed, and that document still reflects in large measure the mindset of the 1950 decree.

The current decree assumes that BMI has significant market power that needs to be curbed. However, a more likely future is one in which one or many substantial publishers are partially withdrawn from the PROs (in the event that partial rights withdrawal is permitted under an amended decree) or have left the PROs entirely. With these events, BMI's purported market power would become a memory. When this occurs, and once BMI lacks the dominant market position presupposed as a basis for its consent decree restrictions, why should BMI continue to

[15] *See* Antitrust Division Manual (5th ed.), last updated March 2014, http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf.

be regulated? In short, the competitive landscape has changed so substantially that the consent decree should be terminated unless, after periodic review every five years, it affirmatively shows that its continuation is justified under then-current market conditions.

e. Line-of-business restrictions should be lifted.

Similarly, BMI should no longer be precluded from entering into any line of business, including those from which it is currently restricted. Specifically, Section IV(B) of the BMI consent decree provides that BMI is enjoined and restrained from "[e]ngaging in the commercial publication or recording of music or in the commercial distribution of sheet music and recordings."[16] These restrictions speak to a competitive landscape, and anticompetitive concerns, that no longer exist.

While BMI is not expressly prevented from licensing other copyright rights in music beyond public performing rights to musical compositions, these provisions are somewhat vague and may raise problems. In the digital era, activities of music publishers and record companies are converging in many ways, and the Internet era has spawned a large number of individual artists who control all rights to their creations and often do not have label and/or publishing deals. Does it make any sense for BMI to be prohibited from dealing with these individual artists in an effort to remain compliant with arguably antiquated restrictions in its consent decree?

Although BMI has no specific, current interest in pursuing such opportunities as owning musical work or master sound recording copyrights or issuing records, as a regulatory matter, BMI should no longer be barred from these businesses.

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[16] *United States v. Broad. Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. Dec. 29, 1966), as amended 1996-1 Trade Cas. ¶ 71,378 (S.D.N.Y. Nov. 18, 1994).

Sound Recordings

11. Is the distinction between interactive and non-interactive services adequately defined for purposes of eligibility for the Section 114 license?

BMI believes that the distinction made in Section 114 between interactive and truly non-interactive services has an important impact on the music licensing marketplace. However, the market has evolved to a point where the binary distinction is not sufficiently nuanced. The current definition is vague and has led to litigation. Some services – such as Pandora – may not be as interactive as others but certainly include a significant degree of customer input and cannot truly be characterized as non-interactive. What degree of customization is necessary to turn a non-interactive service into an interactive service?

It has become apparent that offering only two choices, interactive or non-interactive, is not enough. Pandora is clearly dominating the Internet radio category. It characterizes itself as non-interactive, yet it uses a genome software that makes use of massive amounts of customer input, and, indeed, it works better the more input it receives. This service is clearly interactive as a music consumer would use that term. We are seeing a convergence in the marketplace in this regard. It would be worthwhile for the Office to study these developments and determine whether the line drawn in 1995 is no longer sufficiently nuanced.

Platform Parity

12. What is the impact of the varying rate-setting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms. Do these differences make sense?

BMI generally takes no position on the rate-setting standards in Sections 112 and 114, beyond a firm belief that, other than in cases where the extraordinary circumstances exist requiring a statutory license, the fair-market-value for such licenses is the appropriate standard.

BMI strongly believes that it is time to correct the Section 115 mechanical license standard in this regard.

To this end, the current SEA bill addresses the mechanical compulsory license fee standard in Section 115. Section 115 currently requires songwriters and publishers to accept fees for mechanical licenses determined by the CRJs, pursuant to a standard found in 17 U.S.C. § 801(b)(1) that is widely acknowledged to produce below-market rates for publishers and songwriters for the sales of sound recordings containing their works. In comparison, record labels have been able to negotiate and collect fees for their sound recordings in the unregulated marketplace that are as much as seven to nine times the amount songwriters collect under Section 115 for the transmissions of the same music.

The SEA seeks to replace the 801(b)(1) standard with the fair-market-value "willing-buyer/willing-seller" standard for digital services. This will help to ensure that songwriters receive fairer compensation by attempting to replicate free-market conditions to the extent possible.

13. How do differences in the applicability of the sound recording public performance right impact music licensing?

Differences in the applicability of the public performance right in digital audio transmissions of sound recordings have a profound impact on the market. There are three categories of note: (1) interactive services which permit exclusive rights; (2) non-interactive streaming which is governed in certain cases by a compulsory license; and (3) exempt areas (*e.g.*, over-the-air radio broadcasts and transmissions to business establishments). As we discuss in response to Question 11, the starkness of these terms should be re-examined in light of evolving technology and the impact it has on the applicability of exclusive rights.

Changes in Music Licensing Practices

14. How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?

Direct licensing of musical works by music publishers is quite prevalent as a competitive alternative to licensing through a collective such as BMI. Local television stations have directly licensed music for decades and claimed reductions in their PRO blanket license fees via the per-program rate formulas offered by BMI and ASCAP. ESPN has entered into direct licenses with many publishers in an effort to reduce its music blanket licensing fees to PROs. DMX, the background music service, went into the market and entered into more than 500 direct licenses with publishers as part of a successful gambit in the BMI and ASCAP rate courts to depress the price of music in the marketplace.[17] In Europe, in the wake of a European Commission decision in favor of rights owners having the choice for multi-territorial representation, several larger publishers have created their own entities or partnered with one or more CMOs to offer pan-European licenses to their Anglo-American catalogs. Some contend this development adds to the complexity of licensing for users overseas, rather than diminishing it. There is no doubt now that direct licensing is a vibrant and prevalent activity for certain applications that actively compete with collective licensing of music public performing rights.

Even more recently, as discussed above, a few larger publishers elected to withdraw the digital public performing rights to their catalogs from BMI and ASCAP entirely to enable them to license larger music services such as Pandora directly in the marketplace.

[17] *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 355, 360 (S.D.N.Y. 2010).

In general, we believe that competition from direct licensing has been and will continue to be an important part of the landscape. Compared to the first few decades of broadcasting, digital technology has made it easier for creators and distributors, including unregulated competitors to PROs, to identify performances and their owners. As a result, outmoded views of the purported monopoly power of regulated collectives such as BMI and ASCAP need to be discarded.

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

BMI does not believe that the federal government should get involved with micro-licensing platforms. The marketplace should be allowed to work on its own, but there are a number of ways that the federal government can assist the marketplace to operate more smoothly. For example, clarification and expansion of the antitrust exemptions that permit pooling of multiple rights would be an important step in facilitating more efficient licensing in the marketplace. In addition, we understand that the Office is continuously improving its databases of ownership information and, in particular, the recordation of assignments. Improvements to the marketplace such as these will enable better and easier access to users who seek licenses from copyright owners. Together, this type of assistance from the government can be of great assistance.

16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?

Copyright owners and their representatives have been working on a number of innovations that have been or will be developed to make music licensing, and, in particular, the administration of music licenses, more effective.

Several of the largest international music publishers, together with representatives from collective rights managers, creators, and digital service providers have also been participating at varying degrees in the Global Repertoire Database ("GRD") initiative. This initiative has, among other things, the aim of assisting licensees and potential licensees with identifying the individual or entity from whom they need to secure a license for different types of exploitations in different territories. While the form that a GRD may ultimately take is not yet agreed to among all of the stakeholders, the industry has made a significant investment through the initiative to understand the current and prospective informational needs of the marketplace and the existing business processes and workflows that can cause data discrepancies among licensors and, as a result, uncertainty for licensees.

Moreover, we are actively engaged as a Board Member in the work of the Digital Data Exchange (or "DDEX"), which develops and maintains standards to automate the exchange of information across the digital supply chain, including record label release notifications to digital service providers and digital service provider usage reports to licensors. We also utilize the International Standard Work Code (or "ISWC") to uniquely identify musical works, and through our umbrella organization of collective rights managers, CISAC, have been exploring ways to more widely disseminate these identifiers to improve efficiencies in the licensing and administration of the musical works that we represent.[18]

[18] In addition, for nearly 20 years now, BMI and ASCAP, for example, have maintained searchable song title databases available through their web sites with public access to core metadata on the works that they represent. Licensees or potential licensees can search these databases to determine whether particular works are licensed by the PRO and can also find contact information for the music publisher from whom the licensee or potential licensee can license directly or secure other rights.

17. Would the music marketplace benefit from modifying the scope of the existing statutory licenses?

BMI opposes the expansion of the scope of existing statutory licenses. In particular, BMI does not believe that expanding the scope of the Section 115 compulsory license to add performing rights is the right solution. The CRJ process is, if anything, slower and more expensive than the rate courts. The digital marketplace is evolving so rapidly that copyright owners cannot wait five years for periodic "rate adjustment" proceedings to occur.

As a general proposition, BMI subscribes to the view that compulsory and statutory licenses should be an exception to the copyright law that is used only in extraordinary circumstances.[19]

In this regard, the Office has consistently and appropriately found that compulsory licenses should receive narrow construction. For example: "Compulsory licenses are limitations to the exclusive rights normally accorded to copyright owners and, as such, must be construed narrowly to comport with their specific legislative intention."[20]

Revenues and Investments

18. How have developments in the music marketplace affected the income of songwriters, composers, and recording artists?

Developments in the music marketplace have adversely affected the income of songwriters, composers and recording artists. Piracy of sound recordings has been epidemic in the past decade, contributing to a drastic decline in the market for physical sales of recorded music. This has put pressure on record companies to diversify their business models and become

[19] *Fame Publ'g Co. v. Alabama Custom Tape*, 507 F.2d 667, 670 (5th Cir. 1975) (". . . the compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule.").

[20] *See* U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT § 302 REPORT 1 n. 1 (2011). *See also* Compulsory License for Cable Systems, 49 Fed. Reg. 14944, 14950 (Apr. 16, 1984); Cable Compulsory License: Definition of Cable Systems, 56 Fed. Reg. 31580, 31590 (Jul. 11, 1991).

licensing entities rather than primarily focusing on the sale of physical product. Labels have turned to "360 deals" where they share in a number of artist-related revenue streams (*e.g.*, from touring, merchandise, publishing). These deals are transforming the face of the industry. In response to this pressure, large music publishers have merged and are becoming more active in the direct licensing marketplace, both in the United States and Europe.

The growth in revenues from sales of digital downloads has helped to offset the decline in music industry revenues, to a degree. However, this past year, download sales have declined for the first time. This can be attributed in part to the rapid growth of digital streaming services such as Pandora, which transmitted 4.8 billion hours of music in the first quarter of 2014 alone.[21]

This development – which demonstrates the ever-growing demand for and popularity of music in the marketplace – is only positive for songwriters and creators if the digital music services pay fair-market-value rates. Unfortunately, those services are not yet monetizing the content in a way that results in meaningful royalties to composers and publishers, whose royalty levels are minuscule. The explanation for this is that their need to compete with "free" is limiting the monetization opportunities for the services, but this is not an adequate justification for low rates for creators and essentially shifts the burden of this risk to the creators on whose backs the services are built.

Another explanation is the depressive effect of the Digital Millennium Copyright Act ("DMCA") safe harbors, which shield Internet service providers ("ISPs") from liability for certain user activities. The case law under the DMCA has afforded web sites with enormous traffic to effectively claim that they are not responsible for the millions of streams of tracks of music posted by their users. YouTube, for example, has invested its capital in developing a

[21] Press Release, Pandora Media, Inc., Pandora Reports Q1 2014 Financial Results (Apr. 24, 2014) (*available at* http://press.pandora.com/phoenix.zhtml?c=251764&p=irol-newsArticle&ID=1922126&highlight).

Content ID service and launched a prototype sync licensing monetization program with publishers, and these are positive steps. However, a great many ISPs are streaming works without any attempt to license, in reliance purely on the notice-and-takedown protections in the DMCA. This also exerts a depressive effect on the royalty income of songwriters.

On the positive side, the advent of the Internet and user-generated web sites has provided a platform for music artists to reach their audiences directly. This has led to new outlets for creative products for creators. Unfortunately, without strong copyright protection or a clear business model, these services have been minimizing the economic return from those new offerings. It has become part of the folklore that 100 million performances on a digital video site will yield less than $10,000 to the artist.

Overall the digital era has changed the dynamic between artists and record labels as well as publishers. The impact of digital streaming and downloading on physical record sales has further shifted the paradigm of the music business toward a licensing model and away from a manufacturing and shipping business. Labels claim that it is difficult to make advances to artists without the hope of financial success, and this may hurt professional A&R activities. Although we remain optimistic regarding the opportunities afforded by the growth of digital streaming and downloading, we believe it would benefit all the interested parties (artists, songwriters, publishers, record labels, as well as ISPs and digital music services) to work together to develop licensing structures and enforcement programs that preserve a value stream for music, and for that music's creators, in this new age.

19. Are revenues attributable to the performance and sale of music fairly divided between creators and distributors of musical works and sound recordings?

The answer to this question requires clarifying its context. If the focus of the question is on how revenues attributable to the performance of musical works are divided between the

creators and the users of musical works, then it poses a question of whether current PRO license rates are reasonable. As we have discussed above, we believe the current rates for public performance of musical works by digital music services are below market.

If the question instead focuses on comparing the relative royalties being paid by users to creators of musical works and to sound recording copyright owners and artists, we similarly believe that the current situation is unfair.

As stated above in our discussion of the SEA bill, there is a roughly 12-to-1 disparity in the license fees paid for the public performance of sound recordings by large digital music services like Pandora, compared to the license fees paid to writers and publishers for the public performance of musical works. Regarding royalties for sales of music recordings, there is roughly a 7-to-1 disparity in the license fees paid for sound recordings (in the free marketplace) compared to the compulsory mechanical license fees paid for the same musical works under Section 115. Further, as explained in greater detail above, we believe that passage of the SEA may be one way in which to help remedy these inequities. (*See* response to Question 12.)

Data Standards

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

As more fully-described in the response to Question 16 above, the industry as a whole is actively engaged in a variety of key initiatives aimed at facilitating the efficient and effective licensing and administration of music in today's rapidly evolving digital marketplace. However, each of these initiatives requires a commitment of resources and/or the acceptance of standard processes and protocols, which may be impractical or undesirable for individual entities, both large and small, within our industry. Accordingly, in looking at ways to encourage the adoption

of universal standards, the federal government should be careful not to condition any existing rights or protections on such adoption.

CONCLUSION

BMI commends the Office for both initiating a study on the effectiveness of licensing music and seeking public input on the topic. Use of information in a report to Congress will not only benefit the Office in its analysis but will also be helpful to the Judiciary Committees of the House of Representatives and Senate as they consider potential revisions to the Copyright Act in light of technological, marketplace, and other developments that impact the creation, public performance, and use of copyrighted works.

Respectfully Submitted,

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