

**BEFORE THE  
U.S. COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
WASHINGTON, D.C.**

**Music Licensing Study**

**Docket No. 2014-03**

**COMMENTS OF THE AMERICAN SOCIETY  
OF COMPOSERS, AUTHORS AND PUBLISHERS**

The American Society of Composers, Authors and Publishers (“ASCAP”) respectfully submits comments in response to the U.S. Copyright Office’s (the “Office”) March 17, 2014 Notice of Inquiry (the “NOI”) for written comments on issues related to its study to evaluate the effectiveness of existing methods of licensing music. ASCAP’s comments respond generally to the following NOI topics: Musical Works (questions 5-7); Changes in Music Licensing Practices (question 14); Revenues and Investment (questions 18-19); and Data Standards (question 22).

**I. INTRODUCTION**

For 100 years, ASCAP has defended and protected the rights of songwriters and composers and kept American music flowing to millions of listeners worldwide. Today, our 500,000 songwriter, composer and music publisher members depend on ASCAP to negotiate licenses, track public performances, distribute royalties and advocate on their behalf. Through a century of innovation, ASCAP has served as the primary gateway to music for businesses seeking to perform copyrighted music, ensuring that they may obtain licenses to do so at reasonable market rates. As we consider our next 100 years, we firmly believe that ASCAP’s collective licensing model is the most effective, efficient

and compelling model to serve the needs of music creators, businesses that perform music, and music listeners everywhere.

New technologies, however, have dramatically transformed the way people listen to music, a transformation that, in turn, is greatly changing the economics of the music business, particularly for songwriters and composers, who do not share the same revenue streams as recording artists. Streaming music through services such as Pandora, Spotify, and iTunes Radio is quickly surpassing physical music sales and digital downloads in popularity. Digital audiovisual services such as Netflix and Amazon are revolutionizing the ways in which the world watches television and movies, changing the traditional media landscape. Music is now enjoyed by more people, in more places and over more devices. But the outdated regulatory system that governs how such new services are licensed has failed to keep pace, making it increasingly difficult for music creators to earn a living at their craft. As a result, it is becoming increasingly difficult for music creators to realize a competitive return for their creative efforts, and for organizations such as ASCAP to appropriately serve the needs of its members (music creators), its customers (music licensees) and the music listening public.

Collective licensing by performing rights organizations (“PROs”) such as ASCAP and Broadcast Music, Inc. (“BMI”) plays an essential function in the music marketplace. However, to preserve the benefits of collective licensing, a number of changes must be made to the current legal and regulatory system. First and foremost, the antiquated ASCAP and BMI Consent Decrees must be updated, if not eliminated. Instead of ensuring that copyright owners and licensees are negotiating on equal footing, the current ASCAP Consent Decree has allowed licensees—particularly those that are considered

new media services—to exploit certain provisions to the detriment of the songwriters, composers and music publishers who depend on public performance royalties for their livelihoods. For example, ASCAP must grant a license to all the musical works in its repertory upon written request, but applicants for an ASCAP license are not compelled to provide ASCAP with the information necessary to set a fee for the requested license. Moreover, licensees are increasingly interested in licensing all of the rights needed to operate their services in one transaction, but ASCAP is prohibited from licensing rights in musical works beyond the right of public performance. And when ASCAP’s members sought more control over the licensing of the musical works in their catalogs by retaining for themselves the exclusive right to license certain music users, the ASCAP rate court rejected the solution mutually negotiated by ASCAP and its members, mandating instead an “all or nothing” approach to ASCAP membership. Simply put, with the shackles of the Consent Decree, ASCAP can no longer meet the evolving needs of writers, publishers, music licensees and ultimately the consumers.

The effectiveness of the collective licensing of public performance rights is also hindered by the rate court process established by the ASCAP Consent Decree. Rate court proceedings have become extremely time- and labor-intensive, costing the parties millions in litigation expenses. In addition, because of ambiguities in the substantive standards set by the Consent Decree, rate court proceedings have resulted in license fees that do not track those reached through competitive market negotiations. And evidentiary limitations imposed by Section 114(i) of the Copyright Act have perpetuated an unprincipled disparity in the compensation provided to songwriters for the use of their

songs, as compared to the compensation provided to record companies for the use of their sound recordings.

If left unchecked, these developments threaten the continued viability of collective licensing in the United States. Indeed, without changes to the Consent Decree, ASCAP may face the complete resignation of certain of its largest publisher members, a result that could be as damaging for music users as it could be for ASCAP and its remaining members. Without a robust collective licensing system, the increased cost of having to negotiate licenses with hundreds of thousands of individual copyright owners would likely be passed on to consumers and stymie the growth of innovative new services that would benefit consumer choice and experience.

The simplest solution to these problems is the elimination (or sunset) of the Consent Decree, which no longer serves its intended purpose, and puts ASCAP and its members at a competitive disadvantage. In the alternative, ASCAP proposes a number of changes to the Consent Decree and the Copyright Act to reflect the realities of the modern music marketplace and that would result in more efficient and effective collective licensing, including: (1) shifting to rate-setting through expedited private arbitration; (2) establishing an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders who have withdrawn rights from a PRO and similar licensees provide the best evidence of reasonable rates; (3) allowing new media services to secure licenses from PROs on a bundled basis; and (4) allowing PROs to accept partial grants of rights from its members.

These proposed changes, which are discussed in more detail below, will benefit all constituencies in the music licensing marketplace. For consumers, these changes will

ensure access to a broad range of music at a fair price. For music licensees, they will ensure continued access to the music they want at a reasonable rate. And for the songwriters and composers who are the foundation of the rapidly changing music ecosystem, they will ensure fair compensation for their creative works so that they can continue to write the songs we all enjoy.

## **II. HISTORY OF ASCAP AND THE ASCAP CONSENT DECREE**

### **A. ASCAP and Performing Rights Organizations**

Founded in 1914, ASCAP is the oldest and largest music PRO in the United States and the only one still operated and governed by its members—the writers and publishers who make their living creating music.

Today, ASCAP represents more than 500,000 composers, songwriters, lyricists and music publishers and licenses a repertory of millions of copyrighted musical works. PROs such as ASCAP negotiate and administer licenses for the non-dramatic public performance rights in works in their repertories, monitor music usage by and collect fees from licensees, distribute royalty payments to their members and protect from infringement of their members' exclusive public performance rights. ASCAP licenses the public performance rights in the musical works in its repertory on a non-exclusive basis to a wide range of licensees, including broadcast television stations and networks, cable television operators and networks, radio stations, Internet sites and digital music services, performance venues and other public establishments that play music, such as bars, restaurants, hotels and retail stores. The majority of ASCAP's songwriter, composer and publisher members depend on the performing right royalties collected by ASCAP as a major source of income, particularly as digital music streaming services

account for an increasingly large portion of music revenues in the U.S. and other sources of royalties decline.

ASCAP operates on a non-profit-making basis, distributing all license fees collected, less operating expenses, as royalties to its songwriter, composer and music publisher members whose works are publicly performed. In 2013, ASCAP distributed to its members as royalties approximately 88% of all royalties it collected, making it the most efficient PRO in the world.

When ASCAP was founded, its membership included virtually all songwriters and music publishers whose works were performed in the United States. Yet for many years, ASCAP has competed for members with two other U.S.-based PROs, BMI and SESAC. Founded in 1939, BMI manages a repertory of musical works that is now nearly as large and performed nearly as often as ASCAP's. SESAC, founded in 1930 as a private family-owned business, has become a more significant competitor of ASCAP's and BMI's in the past twenty years, since its purchase by investors in 1992. ASCAP and BMI are both governed by antitrust consent decrees with the U.S. Department of Justice (the "DOJ"), whereas SESAC is not. In addition, ASCAP and BMI are now competing against new organizations, such as Global Music Rights, another unregulated for-profit entity recently launched by longtime music industry executive Irving Azoff in conjunction with MSG Entertainment, which have emerged in an effort to exploit opportunities in the marketplace created by outdated music licensing regulations. These organizations are actively vying for the right to license multiple rights to music users on behalf of songwriters and music publishers.

The benefits of collective licensing through PROs have long been acknowledged.<sup>1</sup> A bulk license offered by a PRO provides efficiencies for both rights holders, who would otherwise struggle to individually license or enforce the millions of performances of their works on an individual basis, and licensees, who would otherwise find it difficult to clear the rights for their performances. Consider, for example, the many thousands of bars, nightclubs and concert venues that perform live music, recorded music (*e.g.*, CDs or DJs) and music in audiovisual form. No single copyright owner could efficiently license all such users, and no such establishment could ever efficiently clear all of its performances if forced to negotiate separately with each individual copyright owner. Moreover, apart from a collective licensing organization, no entity could efficiently monitor the billions of performances that occur annually—in a plethora of ways and across various media—in order to distribute the fees paid for such performances. Collective licensing permits copyright owners to spread the costs of licensing and monitoring music usage among all members, thereby reducing costs to a manageable level and ensuring that more of the money collected is paid to songwriters and publishers as royalties.

Of course, licensees also benefit tremendously from their own ability to negotiate for the right to perform music on a collective basis. PROs routinely negotiate licenses with larger industry representatives or associations such as the Radio Music Licensing Committee and Television Music Licensing Committee, which respectively represent thousands of commercial radio and television broadcast stations, as well as associations representing hotels, universities and other businesses.

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<sup>1</sup> See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

However the music licensing system evolves in the future, it is safe to say that collective licensing will remain a necessary component if that system is to operate efficiently and smoothly for the benefit of music creators, licensees and listeners alike.

**B. ASCAP Membership**

ASCAP is a membership organization governed by a Board of Directors elected by and from the membership. The ASCAP Board is comprised of an equal number of songwriters/composers and music publishers.<sup>2</sup> ASCAP's Board establishes the rules and regulations that govern ASCAP membership.<sup>3</sup> While ASCAP's rules have changed over time to reflect industry developments, ASCAP has remained steadfast in its central paradigm of ensuring that songwriter and publisher members are treated equally. Specifically, for every royalty dollar that ASCAP distributes for performances of a given song, 50 cents are paid to the song's writer(s) (often referred to as the "writer's share") and 50 cents to the song's publisher(s) (often referred to as the "publisher's share"). This direct payment of royalties to ASCAP's writer members occurs irrespective of agreements entered into between songwriters and publishers that may provide for a different division of other types of royalty income (such as mechanical or synchronization royalties) or that may provide for recoupment of advances against such other royalty streams.<sup>4</sup> Indeed, the right to license through and receive remuneration

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<sup>2</sup> See ASCAP, Articles of Association of the American Society of Composers, Authors and Publishers (2002), available at <http://www.ascap.com/~media/files/pdf/members/governing-documents/articles.pdf>.

<sup>3</sup> See ASCAP, Compendium of ASCAP Rules and Regulations, and Policies Supplemental to the Articles of Association (2013), available at <http://www.ascap.com/~media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf>.

<sup>4</sup> Historically, songwriters relied on music publishers to handle all business aspects of their creative efforts and entered into songwriter agreements with music publishers that assigned to the publishers their copyrights in return for a share in the resulting income (traditionally fifty percent). While such songwriter agreements are still in place, songwriters and composers are more likely to rely less on publishers for their business services and utilize publishers mainly for administration services (e.g., registration of songs, collecting royalties, engaging sub-publishers abroad). Songwriters often create their own publishing



from ASCAP for the public performance of their works is so central to song creators, that it has long been standard industry practice to exclude performance royalties from composer work-for-hire agreements.<sup>5</sup>

ASCAP's membership is as varied as its repertory, which represents every genre of music available. And, true to its principles of fairness, ASCAP's licensing is agnostic to its repertory; a blanket license permits a licensee equal access to all or any types of music in the repertory, whether top-40 hits or older, rarely-performed catalog works. Similarly, ASCAP is agnostic with regards to its distribution of royalties. ASCAP values a performance for distribution purposes no differently whether the specific performance in question is of a number-one single or an unknown song. More extensive information regarding ASCAP's membership, distribution process and other benefits of ASCAP membership is available at ASCAP's website at [www.ascap.com](http://www.ascap.com).

### **C. Relationship With Foreign PROs**

ASCAP represents not only U.S. songwriters and publishers, but also hundreds of thousands of foreign songwriters and publishers through reciprocal license agreements with over 90 foreign PROs, which represent, in the aggregate, nearly every developed country in the world. Under such reciprocal agreements, foreign societies authorize ASCAP to license their repertories on their behalf, and ASCAP remits a portion of its

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company to retain partial or total ownership of their copyrights, and enter into either co-publishing agreements with publishers that share the publisher's share of royalties or administration agreements with established companies under which the administration company receives a small portion of the publisher's share. In such cases, ASCAP divides the publisher's share of royalties between the publisher owner and the publisher administrator.

<sup>5</sup> In this manner, a film composer who provides its services to a producer on a work-for-hire basis, traditionally in consideration of an "up-front" fee, may realize "back-end" performance royalties through ASCAP when the films are streamed online or performed on television or via other non-theater media (ASCAP is not permitted to license performances by motion picture exhibitors as discussed *infra*). Performance royalties comprise a substantial share of income for most film and television composers.

domestic receipts to the foreign societies for performance of their members' works in the U.S. Similarly, ASCAP authorizes foreign societies to license the ASCAP repertory in their territories. Considering the importance of U.S. music around the world, ASCAP's ability as a PRO to negotiate these reciprocal agreements provides substantial benefit to the U.S. economy. For example, in 2013, ASCAP paid foreign societies \$66 million, but ASCAP received payments from foreign PROs of approximately \$330 million, or almost one-third of its total revenue, for the performance of ASCAP members' music abroad.

**D. The ASCAP Consent Decree**

In 1941, the DOJ brought suit against ASCAP for alleged violations of federal antitrust laws. The case was settled with the entry of a consent decree that prohibited ASCAP from receiving an exclusive grant of rights from its members and required ASCAP to charge similar license fees to music users that are "similarly situated." The ASCAP Consent Decree has only been amended twice—in 1950 and 2001—and, as discussed below, it is now apparent that the Decree has failed in certain respects to accommodate the rapid and dramatic changes in the music licensing marketplace brought about by the extraordinary evolution in the ways in which music is now distributed and consumed. As a result, the collective licensing model that has, for the past century, benefited music creators, licensees and consumers alike, and which is necessary for a viable music licensing system in the future, is at risk. ASCAP believes that in addition to consideration of changes to the copyright laws, further modifications to, if not the complete elimination of, the Consent Decree are needed to ensure ASCAP's licensing can meet the needs of today's competitive marketplace.

## 1. *The 1950 Amended Final Judgment*

ASCAP and the DOJ agreed to the entry of a revised consent decree, known as the Amended Final Judgment (“AFJ”), in 1950.<sup>6</sup> AFJ included and clarified the provisions of the original decree in several respects. Section V(A) of AFJ required ASCAP to issue licenses upon request to all applicants, thus strengthening the mandate of the 1941 Consent Decree that ASCAP may not refuse to offer a license to any applicant. AFJ also established more specific restrictions on ASCAP with respect to music licensing, including the express prohibition against ASCAP’s acquiring or licensing rights other than for the public performance of musical works.<sup>7</sup> ASCAP was also prohibited by AFJ from discriminating in license fees between similarly situated licensees.<sup>8</sup> In addition, AFJ prohibited ASCAP from granting a license of more than five years duration.<sup>9</sup> Perhaps the most important innovation of AFJ was Section IX, which created a “rate court” to determine ASCAP’s fees when ASCAP and prospective licensees could not reach a negotiated agreement.

## 2. *The Second Amended Final Judgment*

In the late 1990s, ASCAP and the DOJ recognized that substantial changes in the music industry, including the growth of cable television and the emergence of the Internet, as well as shifts in antitrust enforcement policies, necessitated additional

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<sup>6</sup> *United States v. Am. Soc’y of Composers, Authors & Publishers*, 1950-51 Tr. Cas. (CCH) ¶¶62,595, 63,756 (S.D.N.Y. 1950).

<sup>7</sup> *Id.* § IV(A). This restriction, however, does not apply to rights other than those associated with musical compositions. See Dep’t of Justice, Mem. of the United States in Response to Public Comments on the Joint Mot. to Enter Second Amended Final Judgment 7, *United States v. American Soc’y of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. Mar. 16, 2001) (explaining that AFJ2 § IV(A) does not enjoin ASCAP from administering rights other than those associated with musical compositions).

<sup>8</sup> *Id.* § IV(C).

<sup>9</sup> *Id.* § IV(D).

changes to the ASCAP Consent Decree. They negotiated a third iteration of the decree, known as the Second Amended Final Judgment (“AFJ2” or the “Consent Decree”), which took effect in 2001, prior to the biggest developments of the digital music era, including the introduction of Apple’s iPod.

Under AFJ2, as with the prior iterations of the decree, ASCAP members may only grant to ASCAP the non-exclusive right to license non-dramatic public performances of their works, and ASCAP is prohibited from interfering with its members’ right to license directly.<sup>10</sup> ASCAP must, upon written request, grant a music user either a blanket license that allows that user to perform all of the works in the ASCAP repertory for a fee that “does not vary depending on the extent to which the music user in fact performs ASCAP music,” or a “per-program” or “per-segment” license, the fee for which will vary depending on which programs or segments contain ASCAP music not otherwise licensed.<sup>11</sup>

AFJ2 also carries forward from previous decrees the requirement that blanket and per-program or per-segment licenses be priced in a manner that ensures that users will have a “genuine choice” between the different license forms. Prior to AFJ2, the rate court had interpreted this requirement to mean that each license should be an economically viable option for users, but application of this approach resulted in

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<sup>10</sup> AFJ2 § IV. ASCAP is also prohibited from licensing to movie theaters the right of public performance for music synchronized with motion pictures. *See United States v. Am. Soc’y of Composers, Authors & Publishers*, 41 Civ. 1395 (WCC), 2011 WL 1589999, § IV(E) (S.D.N.Y. June 11, 2001). The basis for this prohibition stems from an antitrust suit concerning the means by which ASCAP and its members licensed the performances of ASCAP music in audiovisual works exhibited in motion picture theaters.

<sup>11</sup> *Id.* §§ II(E), II(J)-(K), VII(A)(1). Although they provide the same effective structure, “per-program” licenses are currently available for broadcasters while “per-segment” licenses are available for online and background/foreground music services. Both operate in a manner that provides music users savings when much of their discrete programming does not require licensing from ASCAP (either because the programs have no ASCAP music or all ASCAP music performed has been licensed directly).

confusion and litigation. AFJ2 clarifies the concept by mandating that “for a representative music user, the total license fee for a per-program or per-segment license shall, at the time the license fee is established, approximate the fee for a blanket license.”<sup>12</sup>

In addition, AFJ2 requires ASCAP to issue licenses on a “through-to-the-audience” basis, which allows broadcasters, digital services and background/foreground music services to cover with one license all public performances along the chain of transmission, so long as the fee paid to ASCAP reflects “the value of all performances made pursuant to the license.”<sup>13</sup> Finally, AFJ2 eliminated the regulation of ASCAP’s relationship with its members, vacating what had been referred to as the “1960 Order,” which controlled the manner by which ASCAP determined royalty distributions to its members.<sup>14</sup>

#### **E. Rate Court Proceedings under the ASCAP Consent Decree**

Section IX of AFJ2 details the rate court process for the resolution of fee disputes between ASCAP and music users that have applied for an ASCAP license. It provides that, within 60 days of a music user’s written request for a license, ASCAP must either propose a fee or formally request additional information that may be needed to make such a proposal.<sup>15</sup> If the parties are still unable to negotiate a license fee, the applicant may commence a rate court proceeding 60 days after ASCAP issues its rate proposal or

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<sup>12</sup> *Id.* § VIII(B).

<sup>13</sup> *Id.* § V. This scope of license would obviate, for example, a local broadcast network affiliate station’s need to obtain a separate license to cover the programming broadcast by the network which obtained the through-to-the-audience license.

<sup>14</sup> See *United States v. Am. Soc’y of Composers, Authors & Publishers*, 1960 Trade Cas. (CCH) ¶69,612 (S.D.N.Y. 1960).

<sup>15</sup> AFJ2 § IX(A).

request for additional information, whichever is later.<sup>16</sup> ASCAP may file its own application with the rate court 90 days after issuing its rate proposal or information request.<sup>17</sup> Section IX also provides that either an applicant or ASCAP may apply to the rate court to fix interim fees pending the negotiation or litigation of reasonable final fees.<sup>18</sup> The court must set interim fees within 90 days of an application, while proceedings to determine final fees must be trial-ready within one year of the initial rate court petition.<sup>19</sup> These rate court proceedings are held in federal district court in the Southern District of New York, before a judge appointed for an open-ended term. There have been only two judges appointed in the past 30 years.<sup>20</sup>

Before the entry of AFJ2, a resort to rate court was typically used only to spur further negotiations. This has changed in recent years, as rate court applications have increasingly led to trials, court-determined rates, and full appellate review. Over the last 30 years, ASCAP has been engaged in more than 30 rate proceedings; of those, nearly half (14) have been filed since 2005, costing music creators tens of millions of dollars to defend their interests.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* § IX(F).

<sup>19</sup> *Id.*

<sup>20</sup> While the Southern District has jurisdiction over the ASCAP Consent Decree, Section 513 of the Copyright Act provides special optional procedures for small proprietors that own or operate fewer than seven establishments and that wish to have reasonable license rates and terms determined by a rate court. 17 U.S.C. § 513 (2006). Those procedures allow proceedings to be held in federal district courts that are closer to applicants located outside of the New York area. This provision has been utilized only once since its enactment, with confusion on the part of the local district court. That case quickly settled. ASCAP does not see any continued benefit to this section of the Copyright Act.

### **III. CHANGES IN MUSIC LICENSING PRACTICES**

Since 1914, ASCAP's licenses have evolved to meet changes in music use brought on by advances in the technologies used to perform music. For example, as the radio, television, cable and satellite industries emerged and developed, ASCAP ably met their licensing needs. Although the methods through which ASCAP licenses music on behalf of its members are, in most instances, technology-neutral, ASCAP has recently experienced a number of complications particular to its negotiations with "new media" music services—services that perform music over the Internet or wireless networks, and that typically play far more music than traditional media licensees—a number of which bear special mention.

#### **A. Negotiating Rates with New Media Users**

Under AFJ2, ASCAP must grant a license to any music user who requests one, and the user is entitled to begin performing ASCAP music as soon as a written license request is submitted.<sup>21</sup> This allows the user to perform all of the works in the ASCAP repertory, without the threat of infringement, before fees are negotiated by the parties or set by the rate court. However, the Consent Decree does not currently compel either ASCAP or an applicant to commence a rate court proceeding in the absence of agreement on final license terms, nor does it establish a definite timeline for the negotiation of a final fee, elements of the licensing process that certain users have begun to exploit as a dilatory tactic to avoid paying fair market value to perform the ASCAP repertory.

Specifically, because ASCAP licenses are compulsory and fees can be set retroactively, certain music users have strategically delayed or extended the negotiating

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<sup>21</sup> AFJ2 § VI.

process, choosing to remain applicants or interim licensees indefinitely—in some cases a decade or longer—without paying fees to ASCAP or providing ASCAP with the information necessary to determine a reasonable final fee. In some cases, established music users have decided that interim license rates are more favorable than anticipated rate increases, and have made strategic choices to stay on interim terms until ASCAP determines it must commence an expensive rate court proceeding.<sup>22</sup> In other cases, new applicants have applied for a license—claiming the shelter of the Consent Decree’s guarantee of a right to perform ASCAP members’ music while an application is pending—while simultaneously disclaiming the need for such a license and refusing to provide the information necessary for ASCAP to formulate a fee proposal.

In the scenarios above, ASCAP must decide whether to use its limited resources to pursue a lengthy and arduous rate court proceeding, or, alternatively, accept what it believes is a sub-optimal outcome and permit users to remain as applicants or interim licensees longer than would be preferred. This problem is particularly pronounced for new services or services that are particularly susceptible to changing market conditions, such as digital services. As compared to traditional music users like terrestrial radio stations or television broadcasting networks, the potential scale and type of music use can now vary widely among new media licensees, complicating the process through which

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<sup>22</sup> Until final fees are negotiated or set by the rate court, ASCAP and a license applicant may enter into an “interim” license as a placeholder. In such cases, however, “interim” fees are set only by mutual agreement or rate court determination, and still do not represent final value. In the case of new services without a history of licensing with ASCAP—particularly new digital services that have failed to earn revenues—interim fees are often contested, allowing such users the benefit of access to ASCAP’s millions of songs without paying any fee. Even where an interim fee is paid, it is often at less than full value. When such interim fees continue for a period, ASCAP risks such applicants exiting the marketplace, whether due to bankruptcy, dissolution or otherwise, leaving ASCAP with an inability to set final fees and true-up the balance.



ASCAP values the requested license.<sup>23</sup> Moreover, the speed with which new media licensees enter and exit the market has increased. As a result, ASCAP's need for information from an applicant regarding its plans for a particular service has increased, both to calculate a reasonable fee but also—in the event that the applicant refuses to provide information—to assess the potential costs and benefits of petitioning the rate court to set a reasonable fee. When applicants ignore ASCAP's requests for information, ASCAP can lack even the basic information necessary to determine whether rate court litigation is justified.

Finally, it should be stressed that as ASCAP is required to offer the same substantive license rates and terms to all “similarly situated” users, ASCAP may be effectively restrained from devising creative solutions to resolve licensing impasses. The “similarly situated” standard is often used against ASCAP as both a sword and a shield. For example, a license ASCAP fashions for one applicant may be argued by another to be a binding precedent for its application, even though it is clear to ASCAP that the applicants are not “similarly situated” music users. In other situations, an applicant will go to great lengths to distinguish itself from another ASCAP licensee in order to avoid license terms that should otherwise apply based on similarities between the two. In either case, ASCAP's efforts to finalize a license are hindered.

#### **B. Licensing of Multiple Rights in Musical Works**

The public performance right licensed by ASCAP on behalf of its members is only one of several exclusive rights provided to copyright holders of musical

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<sup>23</sup> So, too, has the wide variance in the nature of new media users made it impossible for ASCAP to engage in industry-wide negotiations such as those that have traditionally resulted in negotiated, uniform license terms.

compositions.<sup>24</sup> Other rights include the right to reproduce and distribute musical works as phonorecords (often referred to as the “mechanical right”); the right to use a recording of a musical work in timed relation with visual images, for example as part of a motion picture or television program (the “synchronization” or “synch right”); and the right to print or display a composition’s lyrics (the “print right”). At present, AFJ2 prohibits ASCAP from accepting grants of or licensing any right beyond the right of public performance.<sup>25</sup> Mechanical and synch licenses are negotiated individually by music publishers or their agents (such as the Harry Fox Agency), with fees typically paid to music publishers, who in turn pay the requisite royalties to songwriters under their separate songwriter agreements.

This division of licensing was sufficiently convenient in the traditional analog world in which licensees rarely needed licenses for multiple rights. For example, broadcast radio stations had no need for anything beyond a public performance license, while record companies only needed mechanical licenses in order to sell records or CDs. The introduction of digital technology, however, has changed the traditional licensing environment. New media music users often require licenses for multiple rights. A wide variety of digital music services display lyrics as songs are streaming, necessitating both public performance and print licenses. Digital music services that stream music on an

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<sup>24</sup> 17 U.S.C. § 106 (2006).

<sup>25</sup> AFJ2 § IV(A). As noted above, ASCAP is also prohibited from licensing to movie theaters the right of public performance for music synchronized with motion pictures. *Id.* § IV(E). As a result, the U.S. is the only developed country where PROs cannot license directly motion picture theaters for their performances of copyrighted music in their films. ASCAP’s inability to license movie theaters for such performances (while routinely licensing such theaters for other performances of music, such as music in the lobby or before the exhibition begins) has been a constant source of friction with foreign societies, who complain that the United States is not trading fairly in performing rights. A significant portion of fees received by ASCAP members from foreign societies is attributed to theatrical performances of musical works in U.S. films exhibited abroad. ASCAP’s inability to license such performances in the U.S. negatively impacts composers of musical works in motion pictures.

on-demand basis need a public performance license as well as a mechanical license.

Currently, these services must license each right separately, an outcome that is inefficient and may discourage new media users from properly licensing their services.

**C. Licensing on a “Through-to-the-Audience” Basis**

The Consent Decree requires ASCAP to offer to certain users, including online users, upon request a license that includes all further transmissions from the original transmission by users with an economic relationship with the applicant—a so-called “through-to-the-audience” license.<sup>26</sup> This form of license was developed to enable a performer, such as a network that broadcasts its programming through affiliated networks, to obtain a license that covers downstream broadcasts by its affiliates. The only obligation for the licensee that requests such a license is to pay fees that take into account the value of all performances made along the chain of transmission.

While this type of license makes sense from an efficiency standpoint, in today’s online world, where retransmissions and the embedding of content are commonplace, it is preventing composers and songwriters from realizing the full value of all performances of their works. This problem is best illustrated by services like YouTube that allow their video content (including a large number of music videos) to be freely shared and embedded on third-party websites. If such services request “through-to-the-audience” licenses, the licenses would arguably extend to the subsequent downstream performances of embedded content by any third parties. While the licenses should account for the value earned by the third parties from these performances (such as any revenue generated from separate banner ads), it is difficult to calculate the total value because third parties

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<sup>26</sup> *Id.* § V.

rarely share the necessary information with the licensed upstream service (the only party in the distribution channel with which ASCAP has direct contractual privity). In addition, the licensee website may receive substantial benefits from widespread downstream distribution, such as promotion of the licensee's own products and services, thereby limiting its incentive to ensure that the value of the subsequent performances are captured and ultimately shared with ASCAP and its members. Coupled with the automatic license received upon application, a through-to-the-audience license request can give unfettered permission to a huge number of users without the benefit of full remuneration to music creators.<sup>27</sup>

#### **IV. THE EFFECTIVENESS OF COLLECTIVE LICENSING OF PUBLIC PERFORMANCE RIGHTS IS HINDERED BY THE CURRENT COPYRIGHT ACT AND THE CONSENT DECREE**

Collective licensing through PROs generates valuable procompetitive efficiencies for both the creators and users of music. Most of ASCAP's members are individual songwriters and small music publishing businesses that otherwise would not have the resources to navigate the legal complexities of music licensing. These members are freed from individual licensing, enforcement and royalty collection obligations, and are thus able to focus their attention on creating music. Licensees are, through one license with one entity, authorized to perform any or all of the millions of songs in ASCAP's repertory (including songs that enter the repertory during the term of the license).<sup>28</sup>

Without ASCAP and other PROs, music users that perform more than a handful of

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<sup>27</sup> The ASCAP rate court grappled with, but was ultimately unable to solve, the problem of valuing through-to-the-audience licenses in its decision setting fees for the MobiTV service. *See In re MobiTV, Inc.*, 712 F.Supp.2d 206 (S.D.N.Y. 2010).

<sup>28</sup> ASCAP does not license subsets of the repertory or individual works. Section VI of AFJ2 bars ASCAP from licensing individual works unless both the user and member in interest have authorized ASCAP to do so.

musical works would face the prohibitive expense of countless negotiations with a multitude of copyright owners. Well-intentioned and law-abiding music users would risk infringement for failing to obtain licenses for every single copyrighted composition performed; less well-intentioned services, when faced with the prospect of complicated piecemeal negotiations, might simply skip the licensing process altogether. Copyright owners would also bear the burden of inefficient catalog-by-catalog, if not song-by-song, direct negotiations. Even the largest music publishers lack the information, resources and experience necessary to negotiate with each of the numerous broadcasters, Internet services, nightclubs, restaurants and other users that regularly perform their copyrighted works publicly.

ASCAP has solved many of these problems in an effective manner. In addition to the straightforward efficiencies of collective licensing, ASCAP has developed significant expertise in tracking performances, collecting license fees, and enforcing copyrights, which allows it to turn over a higher percentage of its revenues to its members (nearly 88%) than any other PRO in the world. ASCAP has also developed expertise with respect to the valuation and proper pricing of public performance licenses. The ASCAP blanket license ensures that the price of public performance rights does not discourage the performance of musical works. Because the fee for a blanket license does not vary with the number of performances of ASCAP music, music users may perform any work as often as they want during the term of the license without paying separately for incremental uses.

Unfortunately, the efficiency and effectiveness of ASCAP's collective licensing of musical works is unnecessarily hindered by the current Copyright Act and the Consent Decree. These problems, and ASCAP's proposed solutions, are discussed below.

**A. The Current Rate-Setting Process Inhibits the Effectiveness of Collective Licensing**

A number of problems have developed with the rate-setting process that have undermined the effectiveness of collective licensing, resulted in the establishment of rates that ASCAP believes do not reflect those that would be set in a competitive market.

1. *Procedural Concerns about the Rate Court Process*

The ASCAP rate court was meant to provide a forum for the efficient and timely determination of rate disputes. But in practice, rate court litigation has resulted in great expense and prolonged uncertainty for both ASCAP and license applicants. Although AFJ2 mandates that proceedings must be trial-ready within one year of the filing of the initial petition, that deadline is rarely met, largely because the parties are permitted the full range of pretrial motion practice and discovery afforded by the Federal Rules of Civil Procedure. Recent rate court proceedings have all lasted more than a year when measured from the date of the applicant's original application to the rate court's final fee determination.<sup>29</sup> This does not account for the time spent on post-trial appellate proceedings or possible proceedings on remand, which can delay the determination of a final fee even beyond the original expiration date of the license at issue.<sup>30</sup>

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<sup>29</sup> See *United States v. Am. Soc'y of Composers, Authors and Publishers (In re American Online, Inc.)*, 485 F.Supp.2d 438 (S.D.N.Y. 2007) (approximately 17 months); *In re MobiTV, Inc.*, 712 F.Supp.2d 206 (S.D.N.Y. 2010) (24 months); *In re THP Capstar Acquisition Corp.*, 756 F.Supp.2d 516 (S.D.N.Y. 2010) (just under 50 months, although some delay attributable to the transition in rate court judges); *In re Pandora Media, Inc.*, 12 Civ. 8035, 2014 WL 1088101 (S.D.N.Y. March 18, 2014) (approximately 16 months).

<sup>30</sup> For example, the final rates for ASCAP's licenses with RealNetworks and Yahoo! for license periods beginning in January 2004 and July 2002, respectively, were not determined until 2011, well beyond the

Rate court proceedings have also proven to be extremely expensive for the parties involved. Although the presiding judge can attempt to streamline the process by enforcing the timeline set by AFJ2, the parties are still entitled to broad fact and expert discovery and must adequately prepare for complicated trials. In addition to enormous internal administrative and labor costs, ASCAP and applicants have collectively expended well in excess of one hundred million dollars on litigation expenses related to rate court proceedings, much of that incurred since only 2009. Of course, each licensee bears only the expense of its own ASCAP rate court proceeding; ASCAP must bear the expense of them all.

In addition to these easily measurable costs, both ASCAP and applicants must contend with the commercial uncertainty that comes from an extended adjudication process. ASCAP must make judgments on how to distribute current revenue to its members, while facing the risk that final fee determinations might require a refund that it will be challenged to repay. Likewise, applicants must continue operating their services without certainty about their costs for the period of the license, holding funds in reserve that otherwise could be spent for capital investments or operating expenses.

The expense and delay of rate court proceedings could be avoided by the elimination of the ASCAP Consent Decree (discussed below) or mitigated by a shift to rate-setting through expedited private arbitration, which would allow only for narrowly focused discovery. Expedited arbitration proceedings would serve two purposes. First, both music creators and music users would benefit from a more definite timeline and

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five-year license term contemplated by AFJ2. Stipulation and Order of Dismissal, *United States v. Am.Soc'y of Composers, Authors and Publishers (In re RealNetworks Inc.)*, No. 09 Civ. 7761 (S.D.N.Y. Oct. 13, 2011), ECF No. 13 (stipulating to settlement); Stipulation and Order of Dismissal, *United States v. Am.Soc'y of Composers, Authors and Publishers (In re Yahoo! Inc.)*, No. 09 Civ. 7760 (S.D.N.Y. Jan. 5, 2012), ECF No. 27 (stipulating to settlement).

cheaper resolution of license fee disputes. As the DOJ has recognized, arbitration promotes the timely resolution of private rate disputes without unnecessarily burdening the courts with complex, industry-specific issues and draining public resources. Second, AFJ2 does not force the parties to resort to rate court and unlike the rate court timeline established by AFJ2, expedited arbitration would discourage applicants for compulsory licenses from indefinitely resting on mere license applications or remaining on interim licenses. Indeed, by shortening and fixing the amount of time necessary for determination of a final license fee, expedited arbitration might eliminate the need for interim fee proceedings altogether for new applicants or for existing licensees' new services.<sup>31</sup> ASCAP recommends that the Office seriously consider supporting this alternative.

## 2. *Substantive Concerns about the Rate Court Process*

ASCAP and its members are equally troubled by the lack of clarity regarding what factors the rate court should consider when setting a “reasonable fee” and the weight given to those factors. In recent proceedings, the rate court’s analysis of potential “benchmark” license agreements have highlighted the ambiguities created by AFJ2 and resulted in the setting of rates that ASCAP believes do not reflect the fair market value of an ASCAP license.

Although the Copyright Act specifies the appropriate standard for setting rates under Sections 114 and 115, neither the Act nor AFJ2 provide clear guidance regarding how a “reasonable fee” should be set for musical work public performance licenses.

Under AFJ2, the rate court must determine whether the fee ASCAP has proposed is

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<sup>31</sup> ASCAP does not suggest that the Copyright Royalty Board would serve as an adequate alternative. ASCAP understands that the CRB system is not without its own flaws, not the least of which is the high cost of CRB litigation.



“reasonable,” and, if not, set “a reasonable fee based on all the evidence.”<sup>32</sup> Because the Consent Decree does not define “reasonable,” the ASCAP rate court has often looked to the concept of “fair market value” to evaluate the reasonableness of ASCAP’s proposal. Both the rate court and Second Circuit have held that “fair market value” is “the price that a willing buyer and a willing seller would agree to in an arm’s length transaction,” and have found that this value can best be determined by the consideration of analogous licenses or benchmark agreements from a competitive market.<sup>33</sup>

Yet, as the Second Circuit has acknowledged, many of the licenses presented as benchmarks—those between ASCAP or BMI and various licensees—are inherently different from the licenses that would obtain in a free market.<sup>34</sup> This is because a seller’s ability to refuse to sell is a key requirement for a true market transaction, and neither ASCAP nor BMI are free to refuse to license their repertories under their respective Consent Decrees. In the absence of benchmark rates set through competitive market transactions involving non-compelled sellers, the rate court has often resorted to “very imperfect surrogates, particularly agreements reached either by [the] parties or by others for the purchase of comparable rights.”<sup>35</sup> ASCAP has been bound by decisions based on

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<sup>32</sup> AFJ2 § IX(D).

<sup>33</sup> *United States v. Broad. Music, Inc. (Music Choice II)*, 316 F.3d 189, 194 (2d Cir. 2003) (“In making a determination of reasonableness (or of a reasonable fee), the court attempts to make a determination of the fair market value—‘the price that a willing buyer and a willing seller would agree to in an arm’s length transaction.’ This determination is often facilitated by the use of a benchmark—that is, reasoning by analogy to an agreement reached after arms’ length negotiation between similarly situated parties.”) (internal citations omitted); *In re MobiTV*, 712 F. Supp. 2d at 232-33, 247 (same) (quoting *Music Choice II*, 316 F.3d at 194).

<sup>34</sup> *See, e.g., Am. Soc’y of Composers, Authors and Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 577 (2d Cir. 1990) (“[S]ince there is no competitive market in music rights, the parties and the Court lack any economic data that may be readily translated into a measure of competitive pricing for the rights in question.”).

<sup>35</sup> *Id.*

these “imperfect surrogates,” both in its licenses with an applicant in a given proceeding and in those subsequently offered to similarly situated licensees.

The last two years, however, have seen an increase in the number of direct licenses negotiated between music publishers and music users outside of the compulsory licensing regime imposed by the ASCAP and BMI Consent Decrees. These direct licenses provide “economic data that may be readily translated into a measure of competitive pricing” in the market for public performance rights.<sup>36</sup> Indeed, the Second Circuit and rate courts have already recognized the value of such benchmarks to the rate-setting process, acknowledging that direct licenses provide evidence of the true fair market value of public performance rights in a competitive market rather than a “hypothetical” value determined by the rate court.<sup>37</sup> Nevertheless, recent decisions indicate that the rate court has continued to focus on the hypothetical fair market value of performance rights signaled by compulsory licenses.<sup>38</sup> As a result, royalty rates have been, and may continue to be, set at rates below what the evidence indicates are market levels.<sup>39</sup> The use of compulsory license benchmarks rather than competitive market

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 569 (“Fair market value is a factual matter, albeit a hypothetical one.”). *See also Broad. Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 47 (2d Cir. 2012) (noting that where applicant did not have a direct licensing program, its rates agreed to with PROs “were less competitively set” than they would have been if applicant used direct licensing or if “music rights were more ‘scattered among numerous performing rights societies’”) (quoting *Showtime*, 912 F.2d at 570); *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 537-38 (S.D.N.Y. 2010) (considering “the existence of direct licensing relationships” in an AFJ2 rate-court proceeding); *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 360-61 (S.D.N.Y. 2010) (holding that direct licenses between applicant and several individual publishers could serve as appropriate benchmarks).

<sup>38</sup> *In re Pandora Media, Inc.*, 12 Civ. 8035, 2014 WL 1088101 (S.D.N.Y. March 18, 2014) (rejecting direct licenses as market benchmarks in favor of preexisting rates in compulsory licenses negotiated in the shadow of the rate court).

<sup>39</sup> *Id.* (setting license fee at 1.85% of revenue, even though direct licenses proposed as benchmarks established that rates as high as 3.0% of revenue would be reasonable). This, in turn, may simply encourage additional rate court litigation, as applicants seek below-market rates set by the court, rather than competitive rates that would result from out-of-court negotiations.

benchmarks may also result in very different rates for similarly situated music services, depending on whether the service entered into direct licenses with publishers, negotiated a rate with a PRO outside of rate court, or applied to have a rate set by the court. Songwriter compensation, in turn, will vary depending on whether their music publishers engage in direct licensing or license their songs through a PRO. Both outcomes are inconsistent with AFJ2's intent to guarantee similar rates for similarly situated music users.

These problems could be resolved by the establishment of an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders who have withdrawn rights from a PRO and similar music users provide the best evidence of reasonable rates. This would ensure that rates set by the court (or alternatively, an arbitration panel) are based on competitive market transactions. Such a presumption would provide more certainty for all parties involved and also encourage more out-of-court negotiations, by providing the parties a reliable preview of the rate court's ultimate benchmark analysis and discouraging the strategic use of rate court proceedings to avoid the influence of market rates.

### 3. *Particular Concerns about the Impact of Section 114(i)*

Concerns about the standards applied in and ultimate results of recent rate court proceedings are exacerbated by the evidentiary limitations imposed during those proceedings by Section 114(i) of the Copyright Act, which provides that license fees payable for the public performance of sound recordings shall not be taken into account in judicial proceedings to set or adjust fees payable for the public performance of musical works. In practice, Section 114(i) has had the effect of unfairly penalizing songwriters and music publishers who are subject to rates set by the rate court. For example, in fiscal

year 2013, Pandora paid to SoundExchange, the digital performance rights organization that collects and distributes royalties to record labels and recording artists for the use of sound recordings by digital services, *thirteen* times what it paid to songwriters and publishers for the same exact performances of their musical works (55.9% of total revenue for sound recordings but only 4.3% of its total revenue for musical works).<sup>40</sup> This disparity distorts the actual relative values of sound recordings and musical works, which in other contexts are licensed at similar, if not equal, rates.<sup>41</sup>

Section 114(i) perpetuates this disparity. Even when the ASCAP rate court is setting rates for a digital music service that, like Pandora, has built a business on the performance of musical works embodied in digital sound recordings, Section 114(i) prohibits it from considering the interplay between the two types of content costs or evaluating whether rates for one are reasonable in relation to the other.<sup>42</sup>

In addition, this limitation further complicates and undermines the effectiveness of collective licensing of public performance rights through PROs. Section 114(i) only applies in *judicial* proceedings to set fees for the public performance of musical works (*i.e.*, ASCAP or BMI rate court proceedings).<sup>43</sup> It does not prevent music users from taking sound recording royalty rates into account when *negotiating* license agreements with music publishers or PROs. Indeed, Section 114(i) has no relevance whatsoever to the negotiation of rates by SESAC or to the direct license negotiations by music

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<sup>40</sup> See Pandora Media, Inc., FY13 Form 10-K, at 7, 24 (Jan. 31, 2013).

<sup>41</sup> See Section IV(B), *infra*.

<sup>42</sup> See *In re Pandora Media, Inc.*, 2014 WL 1088101 at \*44 (observing that the ASCAP rate court could not look to the rates set for sound recording rights as support for raising rates for the public performance of musical works because of the statutory prohibition).

<sup>43</sup> We note that there is no parallel prohibition on the consideration of musical work public performance rates in judicial proceedings to set rates for the public performance of sound recordings.

publishers, neither of which are subject to judicial oversight. And public reports indicate that when negotiations take place outside the reach of Section 114(i), licensees have considered the relative cost of the two licenses and in turn, compensated musical work and sound recording copyright owners more equitably.<sup>44</sup> As a result, public performance rights may be licensed to similar music users at dissimilar rates and songwriters and music publishers who are paid pursuant to rates set by the rate court may be penalized.

Industry participants are well aware of the startling disparity between the sound recording and musical work performance royalty rates paid by digital music services, and have already publicly criticized the impact of Section 114(i).<sup>45</sup> Indeed, concerns over the impact of this provision are severe enough that some music publishers have sought to withdraw from ASCAP and BMI the right to license their works to certain digital music

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<sup>44</sup> See, e.g., Hannah Karp and Jessica E. Lessin, *Apple Spells Out iTunes Radio Terms*, Wall. St. J. (June 26, 2013), <http://blogs.wsj.com/digits/2013/06/26/apple-spells-out-itunes-radio-terms-for-record-labels/> (explaining that Apple agreed to pay record labels greater royalties than what Pandora pays for sound recordings and twice the royalties paid by Pandora to music publishers for public performance rights).

<sup>45</sup> See, e.g., *Music Licensing Part One: Legislation in the 112th Congress, Hearing Before the Subcomm. On Intellectual Prop., Competition, and the Internet of the Comm. on the Judiciary*, 112th Cong. 214 (2012) (letter from the Songwriters Guild of America, Inc., the Music Creators North America alliance, and the European Composer and Songwriters Alliance) (“Quite significantly, what has also been lost in the discussion about H.R. 6480 [the Internet Radio Fairness Act of 2012] is the astonishingly low level of royalties currently being paid to songwriters, composers and lyricists by internet radio providers like Pandora. In fact, Pandora pays only 4% of its revenue to music creators (who often must split such royalties with music publishers), while it pays nearly 50% of its revenue to labels and recording artists. Put another way, for every dollar paid in music royalties by internet radio, only 8¢ of it is going to music creators and publishers, while 92¢ is paid to record labels and recording artists. That is a ratio of more than twelve to one against music creators, representing an outrageous and indefensible disparity.”); *Music Licensing Part One: Legislation in the 112th Congress, Hearing Before the Subcomm. On Intellectual Prop., Competition, and the Internet of the Comm. on the Judiciary*, 112th Cong. 218-19 (2012) (letter from the American Society of Composers, Authors and Publishers, SESAC, Inc., Broadcast Music, Inc., and The Nashville Songwriters Association International) (“This almost 12-to-1 disparity in SoundExchange and PRO payments is unprecedented in the global music marketplace. Around the world, the opposite occurs: the public performing right in the underlying music composition is paid at far higher rates than the public performance right in the sound recording. In fact, the latter right is sometimes referred to as a ‘neighboring right,’ in recognition that rewarding the creators of the musical work — when it is publicly performed — is a central tenet: without the creation of the underlying musical work, there would be nothing to record. However, this rate disparity illustrates our point that different rights holders are subject to disparate treatment, and identifies an inequity that should be remedied by Congress after reviewing how this gross and anomalous disparity in remuneration received by these distinct sets of rights holders has evolved in the U.S.”).

services, as discussed in detail below. These publishers feel that the only way to obtain competitive rates for the use of the musical works in their catalogs is to negotiate a rate outside the context of the rate court, with the ability to use all evidence—including evidence of sound recording rates—or to withhold access to their works altogether. Similar concerns have also motivated the introduction of the proposed Songwriter Equity Act, which would rescind the restrictions placed by Section 114(i), in Congress.<sup>46</sup> ASCAP urges the Office to support this Act and lift the limits imposed by Section 114(i).

**B. The Licensing Process Would be Improved by Allowing New Media Services to Secure Licenses From PROs on a Bundled Basis**

As mentioned above, many digital music services must license multiple copyright rights in order to operate lawfully. Currently, these licenses must be obtained separately. ASCAP, which is prohibited from licensing rights other than public performance rights, strongly believes that amending the ASCAP Consent Decree or the Copyright Act to allow bundled licensing would be beneficial to the rights holders and music users.

For example, services that stream music on an on-demand basis—those considered “interactive” within the meaning of the Copyright Act—must obtain both a public performance license and a mechanical license under Section 115, which allows the service to make reproductions of the work that are ancillary to the streaming process. At the moment, services typically license performance rights through a PRO such as ASCAP and mechanical rights directly from the copyright owner, administrator or a designated agent.<sup>47</sup> As the Office noted in the NOI, mechanical licenses under Section 115 are

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<sup>46</sup> Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. § 6 (as referred to Subcomm. on Courts, Intellectual Property, and the Internet, Mar. 20, 2014).

<sup>47</sup> As discussed below, we note that some of ASCAP’s competitors, by contrast, are not prohibited from “bundling” these rights.

obtained on a song-by-song basis. ASCAP, in contrast, licenses public performance rights on a blanket repertory-wide basis, and could do the same for reproduction rights.

Accordingly, the licensing of musical works by interactive music services would be more efficient if such services could negotiate with ASCAP for both rights in a single transaction. Indeed, because bundled licensing could extend the benefits of collective licensing to wide range of additional music users, this change should be made more broadly, so that PROs could accept grants of and license all rights in musical works—namely, mechanical, synchronization and print rights in addition to public performance rights. A change of this sort would respond to consumer demand for simplification of the licensing process. Music users that need multiple copyrights are increasingly seeking the efficiency and convenience of “one-stop shopping” for their licenses, and would prefer to avoid the delay and costs of multiple transactions. A unification of the licensing process would also encourage innovation by reducing the licensing burden on new music users. Songwriters, composers, lyricists and independent music publishers would also benefit from this change because the increased administrative efficiency of utilizing ASCAP as a one-stop-shop would greatly reduce transactional costs and administrative expenses, ultimately providing them a greater monetary return for the use of their works.

Allowing ASCAP to license all rights would also prevent music users from playing one right against another. Increasingly, music users are asserting their inability to pay competitive rates for both performance rights and mechanical rights, effectively negotiating down their payments from both sides. Unitary rate negotiations would permit

copyright owners to better determine an overall market price for the use of musical works.<sup>48</sup>

Furthermore, amending AFJ2 or the Copyright Act to permit licensing of multiple rights in musical works would allow ASCAP to compete more effectively in both the domestic and international licensing marketplace. Although AFJ2 prohibits ASCAP from licensing mechanical, synch and print rights, the BMI Consent Decree does not contain a similar prohibition. Other ASCAP competitors, such as SESAC,<sup>49</sup> are also able to license multiple rights, as are ASCAP's music publisher members, when they choose to license music users directly.<sup>50</sup> Indeed, one of the reasons cited by major music publishers for their increased focus on the direct licensing of public performance rights is their interest in negotiating bundled licenses with those new media licensees who require them.

ASCAP's inability to offer bundled licenses is also placing it at a competitive disadvantage with respect to foreign PROs, many of which are already engaged in the process of licensing multiple rights. For example, PRS for Music, the UK PRO, and the Australasian Performing Right Association ("APRA"), the PRO for Australia and New

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<sup>48</sup> Indeed, the regulations promulgated to govern the Section 115 mechanical license recognize the user's desire to relate mechanical and performance rights. *See, e.g.*, 37 C.F.R. § 385.22 (2013) (requiring subtraction of "applicable performance royalties" to determine mechanical royalties).

<sup>49</sup> ASCAP is aware of efforts by Rizvi Traverse, the private equity firm that controls SESAC, to acquire the Harry Fox Agency ("HFA"), the single largest agent for managing mechanical reproduction rights. If Rizvi Traverse were to acquire HFA, it would instantly be able to combine the public performance rights it controls through SESAC with the mechanical rights controlled by HFA, creating a valuable opportunity to provide a bundled offering to licensees.

<sup>50</sup> *See, e.g., FAQ/Help*, Universal Music Publishing Group, <http://www.umusicpub.com/#contentRequest=licensefaq&contentLocation=sub&contentOptions=> (last visited May 5, 2014) (synch rights); *Licensing Request*, Warner/Chappell Music, [http://www.warnerchappell.com/TemplateAction?system\\_action=getsync\\_departments&currenttab=licensing](http://www.warnerchappell.com/TemplateAction?system_action=getsync_departments&currenttab=licensing) (last visited May 5, 2014) (synch and mechanical rights).



Zealand, license both mechanicals and public performance rights.<sup>51</sup> Similarly, GEMA, the German PRO, licenses synchronization, mechanical, and public performance rights.<sup>52</sup> ASCAP is prevented from competing with these societies over rights other than public performance rights not only in the U.S. marketplace, but abroad as well.<sup>53</sup>

The impact of this asymmetry will only intensify as foreign PROs continue to explore their options for entering new markets by issuing such bundled licenses on a multi-territorial basis. For example, the European Parliament recently issued a Directive on collective management of copyright and related rights and multi-territorial licensing that provides new rules on music copyright licensing to enable online providers to more easily obtain licenses to transmit music in more than one EU country.<sup>54</sup> In fact, ASCAP's negotiations with licensees have already been adversely impacted by these developments. In particular, ASCAP has proposed to certain digital service licensees that, if they seek to expand their services beyond the United States, ASCAP would be happy to discuss amending their licenses to include additional foreign territories. The digital service licensees have consistently declined ASCAP's offer on the basis that they

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<sup>51</sup> See PRS For Music, "Rights," available at <http://www.prsformusic.com/Pages/Rights.aspx> (last visited Mar. 11, 2014); APRA AMCOS, "About APRA AMCOS," available at <http://www.apra-amcos.com.au/About/AboutAPRAAMCOS.aspx> (last visited Apr. 8, 2014). APRA is authorized to administer its members' mechanical rights by arrangement with the Australasian Mechanical Copyright Owners Society (AMCOS). See APRA AMCOS, "The APRA AMCOS Relationship," available at <http://www.apra-amcos.com.au/About/AboutAPRAAMCOS/TheAPRAAMCOSRelationship.aspx> (last visited Apr. 8, 2014).

<sup>52</sup> See GEMA, "GEMA Membership: It's worth being a member," available at <https://www.gema.de/en/music-authors/new-here/become-a-member.html> (last visited Mar. 11, 2014).

<sup>53</sup> See AFJ2 § IV(A) (prohibiting ASCAP from holding rights in compositions other than the right of public performance both inside and outside of the United States).

<sup>54</sup> See *Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions*, European Union Press Releases Database (Feb. 4, 2014), [http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm); *Directive on collective management of copyright and related rights and multi-territorial licensing*, EU Business (Feb. 4, 2014), <http://www.eubusiness.com/topics/media/online-rights>.

could both get additional rights they required (such as mechanicals) and performance rights for the ASCAP repertory (available through reciprocal agreements) in a single bundle from foreign PROs. This situation restrains competition in a general way by hindering ASCAP's ability to compete in the global marketplace. It also directly harms ASCAP's songwriter and publisher members as foreign PROs tend to take higher deductions than ASCAP from the royalties they collect, thereby diminishing the size of the distributions that songwriters and publishers would otherwise receive if ASCAP was administering the licenses. ASCAP's members, and the U.S. music licensing marketplace overall, would be better served if ASCAP could compete on equal footing with its competitors by offering bundled licenses.

**C. The Licensing Process Would be Improved by Allowing PROs to Accept Partial Grants of Rights**

The problems with the current ASCAP rate-setting process, and the inability of ASCAP to offer bundled rights to music users, have fueled a new interest on the part of musical work copyright owners in licensing their works directly. The option to directly license works has long been a key feature of ASCAP membership. Because ASCAP can only accept grants of rights on a non-exclusive basis, ASCAP's members are free to issue licenses directly to users, and many have done so over the years. The majority of ASCAP members, however, have recognized the efficiencies and benefits of collective licensing and have traditionally licensed all of their works through ASCAP all of the time.

Despite the expressed preference for collective licensing through ASCAP, the ability to enter into direct licenses with music users has taken on new importance in recent years for a number of reasons. First, many ASCAP members became concerned

that licensing their compositions through ASCAP did not allow them to realize the full value of their copyrights, particularly with respect to the use of their works by streaming music services. In particular, some members questioned whether the rates that ASCAP was able to obtain from certain music users—specifically new media services—represented fair market value for the rights at issue. Relatedly, some members expressed concerns that, in the absence of market-based transactions between willing buyers and willing sellers, the rate court lacked sufficient benchmarks to set rates that accurately reflected the value their copyrights would command from such music users in a free and competitive market.

Second, some ASCAP publisher members wanted increased flexibility to manage their own rights and negotiate contractual terms directly with particular music users. For example, publishers might negotiate shorter term licenses agreements or agree to compensation in a form other than monetary royalties—such as equity shares or promotional initiatives.

Finally, some ASCAP publisher members expressed an interest in licensing their public performance rights together with other rights when appropriate. As discussed above, bundled licenses would improve the efficiency of existing licensing practices, but ASCAP is currently prohibited from offering them.

For these reasons, among others, certain members began to contemplate withdrawing from ASCAP altogether. Ultimately, ASCAP agreed to a compromise solution, whereby members would be permitted to modify their membership agreements (instead of terminating them completely) by withdrawing from ASCAP only the right to license new media services, and leaving with ASCAP the right to license traditional

music users (*i.e.*, television and radio stations, bars and restaurants), which ASCAP has long effectively licensed and which would be more difficult for music creators to license individually. Three major music publishers ultimately withdrew their new media rights from ASCAP—EMI Music Publishing, Sony/ATV Music Publishing, and Universal Music Publishing Group. Each then entered into fair market direct licenses with a number of new media users, including Pandora and Apple (for its recently launched iTunes Radio service). For the first time, the publishers were able to negotiate the rates in these licenses on equal footing with music users. As a result, these licenses provided ideal benchmarks for ASCAP to use in its own negotiations with similar users.

However, recent rulings by the ASCAP and BMI rate courts have created uncertainty concerning this new approach to licensing. Both courts concluded that their respective Consent Decrees did not allow for a partial grant of rights.<sup>55</sup> Because certain major music publishers would prefer to exercise full control over their catalogs in certain licensing situations, these decisions could lead to the publishers' complete resignation from the PROs. Despite the clear benefits and pro-competitive efficiencies of collective licensing for both music creators and users—and the complexities and expense that would inevitably arise in the absence of collective licensing—this outcome is a legitimate possibility.

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<sup>55</sup> On September 17, 2013, the ASCAP rate court granted a motion for summary judgment brought by Pandora, holding that the membership modifications did “not affect the scope of the ASCAP repertory” for the term of Pandora’s final license. Opinion & Order at 30, *In re Petition of Pandora Media, Inc.*, No. 12 Civ. 8035 (S.D.N.Y. Sept. 17, 2013), ECF No. 70. The court’s reasoning focused on Decree construction, with emphasis on provisions of AFJ2 that entitle applicants and licensees to perform “all of the works in the ASCAP repertory.” *Id.* at 17; *see also* AFJ2 §§ VI, IX(E). The BMI rate court later came to a similar—though not identical—conclusion, holding that “BMI [could] no longer license [withdrawn works] to Pandora or *any other applicant.*” Opinion & Order at 2, *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037 (S.D.N.Y. Dec. 19, 2013), ECF No. 74 (emphasis added).

This situation, however, can easily be avoided by permitting PROs to accept partial grants of rights. Allowing ASCAP and BMI to maintain the compromise already struck with their members would preserve the benefits of collective licensing in many situations, while allowing copyright holders to pursue direct non-compulsory licenses when they felt it was economically efficient and beneficial to do so. This approach would also afford greater latitude in structuring license arrangements, ultimately benefitting copyright owners and music users alike. Further, by encouraging the negotiation of direct licenses by truly willing buyers and willing sellers outside of the shadow of the rate court, this approach would result in fair-market transactions that would then provide informative benchmarks for the rate-setting tribunal. In contrast, maintaining the “all or nothing” approach adopted by the rate courts may force music publishers to choose “nothing,” threatening the viability of the PROs as well as undermining the pro-competitive efficiencies collective licensing has brought to the music licensing marketplace. The ultimate losers would be the thousands of songwriters, composers and publishers who depend on ASCAP’s collective licensing.

**D. An Alternative Solution Is the Elimination (or Sunset) of the Consent Decree, Which No Longer Serves Its Intended Purpose**

An alternative solution to these problems is to eliminate (or phase out) the Consent Decree, which no longer serves its intended purpose, and puts ASCAP and its members at a competitive disadvantage.

The ASCAP Consent Decree is the oldest and longest enforced consent decree in U.S. history. Since the original ASCAP Consent Decree was first entered, 73 years ago, new and robust competition for the licensing of musical works has made the Decree unnecessary. But the ASCAP Consent Decree contains no end date and no sunset

provision, and thus continues into perpetuity regardless of the increased competition in the marketplace for licensing the public performance of musical works. The Decree appears particularly punitive in nature when viewed in light of current DOJ policy. Today, the DOJ mandates the inclusion of sunset provisions in standard consent decrees, and does not currently enter into consent decrees with terms longer than ten years.

When the original ASCAP Consent Decree was entered in 1941, ASCAP operated with virtually no competition and controlled the vast majority of public performance rights. Seven decades later, ASCAP now faces vibrant competition, not only from BMI, but also from unregulated competitors such as SESAC, foreign PROs, and new market entrants, as well as from ASCAP's own publisher and writer members. Indeed, unregulated competitors openly cite the Consent Decrees as a competitive disadvantage in their bids to recruit ASCAP and BMI members. The landscape of music users has been dramatically transformed as well, with the old and new media markets now populated by an expanding field of large, sophisticated music users, such as Apple, Comcast, Disney, Google, Yahoo! and Pandora, each of which is capable of engaging in arm's length negotiations with ASCAP.

As a result, the market, rather than the government or rate court, can regulate ASCAP's behavior both with respect to the rates it charges music users and to the equal distribution of revenue to songwriter and publisher members. Neither compulsory licensing nor additional government involvement are needed to ensure access to ASCAP's repertory at market rates or to promote the development of alternative licensing models.<sup>56</sup> In fact, the development of increased competition in the market for public

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<sup>56</sup> The compulsory licensing scheme established by Sections 114 and Sections 115 of the Copyright Act, with rates set through litigation before the Copyright Royalty Board (the "CRB"), has proven to be as

performance rights has occurred without direct government intervention. SESAC, for example, has claimed an increasing share of the market operating as a for-profit PRO without either government input or oversight. New market entrants like Global Music Rights continue to emerge. Moreover, direct licensing of performance rights is becoming more prevalent, offering yet another alternative licensing model that has grown organically out of market competition.

ASCAP believes that eliminating or (or phasing out) the Consent Decree would reinforce and encourage these developments, while simultaneously allowing ASCAP to benefit from the increased competition they have fostered.<sup>57</sup>

## V. REVENUES AND INVESTMENT

### A. **Developments in the Music Marketplace and Interpretations of the Copyright Act Have Adversely Affected the Income of Songwriters**

Since the last modification of the Copyright Act in 1976, and the most recent amendments of the ASCAP and BMI Consent Decrees, technological developments have significantly increased the use of musical works, yet significantly decreased the income earned by songwriters. Thanks to the development of new media services, consumers now have a wider variety of options for listening to music and accessing audiovisual content than ever before. Many of these new services provide instant access, on a one-to-one basis and across a wide range of platforms, to practically every song ever recorded,

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problematic as the ASCAP rate court process. ASCAP believes that any transition from Consent Decree control to legislative or CRB control would only serve to perpetuate the problems discussed herein, rather than solve them.

<sup>57</sup> Indeed, even decades ago it was believed that all the provisions of the decree, save the limitation on exclusive rights, were unnecessary to insulate against antitrust violation. *See Buffalo Broadcasting Co., Inc. v. ASCAP*, 744 F.2d 917, 934 (2d Cir. 1984) (Winter, J., concurring) (“The result of this scrutiny [of the competitive impact of the blanket license] has been to demonstrate that so long as composers or [publishers] have no horizontal agreement among themselves to refrain from source or direct licensing and there is no other artificial barrier, such as a statute, to their use, a non-exclusive blanket license cannot restrain competition.”)

while others provide the same degree of access to massive libraries of film or television content, including, in some cases, original content that is only available through new media channels. Moreover, many digital music services—such as Pandora, Spotify and iTunes Radio—offer a high degree of customization, personalization or control over the music played, meaning that listeners only listen to music they like. The licensing marketplace, however, has not evolved to meet these changes.

While these changes are considered dramatic improvements for consumers, they have presented significant problems for songwriters, many of whom rely primarily on performance and mechanical royalties to earn a living. As discussed above, certain elements of the Copyright Act and the current PRO Consent Decrees prevent songwriters from receiving market-determined compensation for the increased use of their songs by new media services. At the current rates—constrained by both the consent decree rate court process and the Section 115 compulsory license—when a thriving digital music service plays a popular song millions of times, the songwriter earns only a few hundred dollars in royalties. Considering the increased number of music users and the dramatic amount of music typically performed by new media services, one would expect an increase in the overall fees being paid to songwriters and music publishers. This has not happened.

For example, Brett James, a successful songwriter who participated in the most recent ASCAP rate court proceeding, testified that the royalties he has earned have been steadily declining.<sup>58</sup> Other songwriters have made similar statements to Congress and the

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<sup>58</sup> Test. of Brett James, *In re Pandora Media, Inc.*, No. 12 Civ. 8035 (Nov. 17, 2013), ¶ 22.



media.<sup>59</sup> Even as ASCAP continues to provide its members with exceptional services—collecting over \$944 million in revenues in 2013—its ability to do so going forward is hampered by the below-market rates paid by many digital music services. As digital services shift from pure distribution models to streaming models, performance royalties will become that much more important, accounting for the majority—if not a great majority—of the income earned by songwriters and music publishers. For the thousands of creators who attempt to earn a living making music, ensuring that these digital music services pay market rates for the performances of their works is essential. Simply put, increased use of their music should lead to increased royalties.

This overall decline in music royalty compensation has also coincided with a number of recent legal developments that have allowed, if not encouraged, digital music services to shape their technology to exploit the language of the Copyright Act to the detriment of all content creators. For example, the Second Circuit’s decisions in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (“Cablevision”) and *WNET, Thirteen v. Aereo, Inc.* have ignored Congressional intent that the Copyright Act provide technology-neutral protection of a copyright-owner’s exclusive right of public performance.<sup>60</sup> They have

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<sup>59</sup> See, e.g., *Music Licensing Part One: Legislation in the 112th Congress, Hearing Before the Subcomm. On Intellectual Prop., Competition, and the Internet of the Comm. on the Judiciary*, 112th Cong. 76 (2012) (statement of Jimmy Jam, Chair Emeritus, The Recording Academy, Record Producer, Songwriter, Recording Artist) (arguing that “[it is unfair] for songwriters who provide the very DNA of the music industry to have to fight Pandora in court just to keep their already small payments”); Burt Bacharach, *What the Songwriting World Needs Now*, Wall St. J. (Jan. 22, 2014), <http://online.wsj.com/news/articles/SB10001424052702304603704579325053186123012> (arguing that songwriters are not fairly compensated in the digital world under the ASCAP and BMI Consent Decrees); Roger Walters, et al., *Pink Floyd: Pandora’s Internet radio royalty ripoff*, USA Today (June 25, 2013), <http://www.usatoday.com/story/opinion/2013/06/23/pink-floyd-royalties-pandora-column/2447445/> (arguing against a cut in royalties advocated by Pandora).

<sup>60</sup> See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (holding that DVR system’s playback of recordings were not public performances requiring a license under the Copyright Act); *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) (upholding denial of preliminary injunction against provider of unlicensed live Internet retransmissions of broadcast television because transmissions likely were not public performances under the Copyright Act).

allowed Cablevision, Aereo, and potentially many other services, to use wasteful, regressive or gimmicky technologies to exploit copyrighted works free of charge. While some of these issues stand before the Supreme Court, the Office should also evaluate whether the Copyright Act should be amended to ensure that arbitrary technical details and future technological developments do not provide immunity from infringement liability or permit services to exploit perceived legal loopholes in a manner that threatens the livelihoods and futures of a wide range of content creators and rights holders.

Similarly, the Second Circuit's distinction between downloading and streaming has proven unworkable in practice as new technologies continue to blur the line between the two delivery methods when transmitting music or audiovisual content to the public.<sup>61</sup> Current technologies enable the automatic and perceptively instantaneous performance of a work while the file is "downloading." However, because the file is completely "downloaded," and because the Second Circuit held that the act of downloading a musical work does not constitute a public performance of that work, music services may attempt to argue that no performance was made in the course of the transmission. Indeed, numerous services that provide "conditional" or "limited" downloads or that permit offline streaming of pre-set playlists have argued that such transmissions do not implicate the public performance right and do not require the payment of performance license fees, even though it is clear that such services are quite dissimilar from the traditional models for distributing music (which would not implicate the performance right).<sup>62</sup> ASCAP

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<sup>61</sup> See *United States v. Am. Soc'y of Composers, Authors, and Publishers (In re RealNetworks, Inc.)*, 627 F.3d 64, 74 (2d Cir. 2010) (holding that downloading a musical work does not constitute a public performance within the meaning of the Copyright Act because, unlike streaming, downloading "do[es] not immediately produce sound" that "is perceived simultaneously with the transmission").

<sup>62</sup> Analogizing this situation to the audiovisual world indicates the absurd results of these decisions. For example, a cable operator might choose to conditionally download a full day's worth of programming to a

believes that these irrelevant differences in technological access should not be permitted to vitiate creators' rights.

Further, the Second Circuit's interpretation of the Copyright Act in reaching these decisions is inconsistent with U.S. obligations under the WIPO Copyright Treaty and causes disharmony in global licensing practices. As digital performances reside in a borderless world, U.S. PROs increasingly compete with foreign PROs in global digital licensing. ASCAP, jointly with other musical works organizations, has recently filed comments with the Copyright Office arguing that these decisions have effectively weakened the public performance right and jeopardized U.S. obligations under various international copyright treaties to provide a "making available" right.<sup>63</sup> ASCAP believes that the Office should consider the inclusion of a specific making available right as part of the public performance right.<sup>64</sup> We refer the Office to those comments.

Finally, the definitions of "interactive" (and in turn "non-interactive") music services under Section 114 have been turned—by the music services and various rate-setting tribunals—into a broader industry standard with implications far beyond eligibility for statutory sound recording performance licenses. Although Congress did

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subscriber's DVR, rather than broadcasting the programming in real time, and allow a subscriber to view the programming on-demand for a limited period of time. The cable operator could argue that the programs were downloaded, not "performed" within the meaning of the Copyright Act, and that a performance license would not be necessary. Such a result would diminish the central stream of income relied upon by the many ASCAP composer members who write primarily for film or television.

<sup>63</sup> It is the practice in other countries for PROs to license all digital services without regard to whether the service provides downloads, streams or both, and apportion fees between performance and mechanical rights based upon the type of service. Thus ASCAP's members receive royalties for the downloads of their works outside of the U.S. in situations where they would not receive such royalties if the downloads occurred in the U.S. (for example, downloads of audiovisual works for which mechanical fees are not paid under the Copyright Act).

<sup>64</sup> See Joint Comments of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., The Songwriters Guild of America, SESAC, Inc., and The National Music Publishers' Association in Response to United States Copyright Office Request for Comments on Study on the Right of Making Available, Docket No. 2014-2 (Apr. 4, 2014).

not intend these definitions to apply to rights in musical works, music services have used their categorization as “non-interactive” for the purpose of licensing sound recording performance rights to limit the fees they will pay for musical work performance rights. In the process, they have exploited a disconnect between the binary interactive/non-interactive world established by Section 114 and the wide spectrum of user influence allowed by digital music services today. Customized Internet radio has approached interactivity in every sense of the word except under the outdated requirements of the statutory definition. The Office should clarify that the categorizations created for Section 114 are limited to the rights governed by Section 114.

**B. Revenues Attributable to the Performance of Music Are Not Fairly Divided Between the Creators and Distributors of Musical Works and the Creators and Distributors of Sound Recordings**

Under existing U.S. laws, the creators and distributors of sound recordings and the creators and distributors of musical works are treated quite unequally. In almost all instances, the owner of the sound recording copyright is compensated at a far higher rate than the owner of the underlying musical work copyright—often 12 to 14 times greater—even though a musical work is the foundation for every sound recording. There is no principled reason for this disparity.

For example, under the current structure for statutory sound recording performance licenses, digital music services like Pandora pay the artist and record company, collectively, either \$0.0012 or \$0.0022 every time a song is played, depending on whether the performance is made through Pandora’s free or subscription service. In other words, the sound recording performance license generates 1.2 or 2.2 cents per for every 10 times a song is played, and 12 or 22 cents for every 100 times a song is played.

In contrast, ASCAP is paid a fraction of this amount for the same performances. And, of course, this amount is split between all the writers and all the music publishers associated with a particular song. On average, Pandora pays only 8 cents in public performance royalties for every 1,000 streams of a song. As Mr. James testified before the ASCAP rate court, Pandora performed one of his most popular songs 24.98 million times in 2012. He was paid a grand total of \$376.63 for his share (16.67%) in those performances, or the equivalent of 1.5 cents for every 1,000 performances or 15 cents for every 10,000 performances.<sup>65</sup> The record company and artist were likely paid between \$29,000 and \$55,000 for the same performances. This situation is fundamentally unfair to songwriters and music publishers.

Moreover, this disparity distorts the true relative value of musical works in relation to sound recordings. Indeed, when both rights are licensed through competitive market transactions outside the influence of statutory licensing or judicial oversight, copyright owners in musical works are treated far more equally. For example, in the market for synch rights—in which music users must acquire the rights to both the sound recording and the underlying musical composition, but are required to do so through voluntary negotiation—copyright owners of musical compositions and copyright owners of sound recordings typically receive equivalent licensing fees. Through the use of “most favored nations” clauses in synchronization licenses granting rights to musical compositions on the one hand, and master use licenses granting rights to sound recordings on the other, music publishers (licensing on behalf of songwriters) and record companies (licensing on behalf of recording artists) each receive 50% of the content pool.

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<sup>65</sup> Test. of Brett James, *In re Pandora Media, Inc.*, No. 12 Civ. 8035 (Nov. 17, 2013), ¶ 24.

There is no reason why a musical work license is more valuable in relation to a sound recording license in the synch rights context; the only difference is that in the synch rights context, both licenses are negotiated outside the shadow of a rate court or statutory licensing scheme.

**C. Without the Promise of Fair and Adequate Compensation, Songwriters Are Discouraged from Creating New Music and Publishers Are Deterred from Investing in New Songwriting Talent**

Fundamentally, the American copyright system is meant to encourage creation and innovation by guaranteeing creators control over and compensation for the use of their works. Collective licensing through PROs attempts to further those objectives by managing the administrative side of music licensing, while freeing songwriters and music publishers to focus on the creation of music.

However, the ability of PROs to foster their members' creativity is limited by their ability to compensate them for their efforts. For the reasons described above, it has become increasingly difficult for PROs to provide such compensation in an efficient or cost-effective manner, which, in turn, has increased the difficulties their members and affiliates face in trying to make a living in the music industry. Many music users today, primarily in the new media sector, appear to feel that the music they use is a minor ingredient in a business driven primarily by their own innovation, and therefore deserving

of little compensation.<sup>66</sup> Others, through their use of particular technologies, attempt to avoid licenses and payments to content creators altogether.<sup>67</sup>

Although ASCAP recognizes the innovations offered by the services themselves, and encourages ever wider use of the ASCAP repertory, ASCAP's members should not be forced to subsidize—by means of compulsory licenses set at below-market royalty rates—new businesses built entirely on the backs of the songwriters, music publishers and recording artists who provide the content that makes such services possible, let alone attractive to consumers. ASCAP believes that the solutions suggested in these comments would help restore the Copyright Act's ability to incentivize and protect the creative efforts of its members and provide consumers with a wide variety of affordable choices.

## **VI. DATA STANDARDS**

Essential to the task of collective licensing is having current and comprehensive data and documentation regarding members, their works and the ownership and beneficiary interests to and in those works. PROs must provide this information to music users and the public in relation to their repertories so that the necessary licenses can be obtained. This data also ensures that PROs can properly collect and distribute royalties and bring enforcement or infringement actions on behalf of members. For these

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<sup>66</sup> See *In re Pandora Media, Inc.*, 12 Civ. 8035, 2014 WL 1088101 (S.D.N.Y. March 18, 2014) (“Pandora has shown that its considerable success in bringing radio to the internet is attributable not just to the music it plays (which is available as well to all of its competitors), but also to its creation of the MGP and its considerable investment in the development and maintenance of that innovation. These investments by Pandora, which make it less dependent on the purchase of any individual work of music than at least some of its competitors, do not entitle ASCAP to any increase in the rate it charges for the public performance of music.”)

<sup>67</sup> See, e.g., *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting), *cert. granted*, 134 S. Ct. 896 (2014) (“Aereo’s ‘technology platform’ is, however, a sham. The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.”).

purposes, all three major U.S. PROs maintain extensive, detailed databases of copyright ownership information. These databases have been developed, and can be maintained going forward, without government intervention or oversight. As a result, ASCAP believes that additional government involvement in the development of universal data standards is not needed to facilitate licensing at this time.

Although it is difficult to keep this information current when a PRO's membership and repertory changes daily as new works are registered, ASCAP and its competitor PROs have developed the necessary infrastructure and expertise to do so. Indeed, a sizeable portion of ASCAP's operating costs are dedicated to maintaining its databases. As a result, in ASCAP's experience, the complaints by music users seeking to obtain ownership or clearance information for other kinds of copyrighted works are relatively rare in the context of securing licenses for the use of musical works. In fact, the databases maintained by the PROs—which can be freely accessed online at any time and without charge, and which, collectively, maintain information on virtually all U.S. copyrighted musical works (with up-to-date contact information for the vast majority)—are frequently the first stop for rights and clearance information for all potential music users, regardless of the particular right they seek to license.

ASCAP has also long been involved in the efforts to implement common song identification standards with PROs around the world. Although ASCAP supports efforts by the Office to use such standards in providing public records of song authorship and ownership, ASCAP believes that the further development of uniform standards is best left to private entities.



If, however, the Office chooses to expand its role in this area, ASCAP recommends a focus on the creation of an efficient, inexpensive and accessible electronic records repository and retrieval system. None of the PROs in the U.S. currently maintain such a system, although it would facilitate efforts to bring copyright infringement suits or resolve title disputes between members. Even though additional government involvement is not needed to facilitate licensing, ASCAP fully supports the idea of creating incentives for document recordation and the building of a fuller public repository, if done in a carefully considered and measured manner.

## **VII. CONCLUSION**

ASCAP applauds the Office's efforts and initiative in the complex and challenging legal field of music licensing. Traditional music licensing practices may have adequately protected the interests of music users and creators for many decades, but must be updated to keep pace with a radically different music marketplace. Revolutionary changes in the means by which musical works are transmitted to consumers have transformed the competitive landscape for music licensing. These developments require parallel changes in the structure of music licensing in order to ensure that the interests of music users, creators and listeners are similarly protected in the digital age.

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