September 12, 2014

Library of Congress
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
Attn: Maria Pallante, Register of Copyrights
Jacqueline Charlesworth, General Counsel and Associate Register of Copyrights

RE: Music Licensing Study: Second Request for Comments

Thank you for this opportunity to submit my comments in response to the Music Licensing Study: Second Request for Comments.[1] I am submitting this paper to argue that, as we continue to discuss revising the laws surrounding music licensing practices, the Copyright Office and Congress must keep the goal of providing fair compensation for music creators—recording artists, songwriters, and music producers—at the forefront of their minds.

I. Introduction

My name is Dina LaPolt and I am a transactional music attorney in West Hollywood, California, with the law firm of LaPolt Law, P.C. For more than 16 years, I have represented creative professionals, including recording artists, songwriters, producers, musicians, authors, writers, photographers, actors, and other owners and controllers of intellectual property. In addition, I started in the entertainment industry as a musician and songwriter. Thus, I have built my practice from the music creator's perspective. I have also taught a course entitled "Legal and Practical Aspects of the Music Business" for the UCLA Extension Program since 2001, and I teach and lecture all over the United States, Canada, and Europe on issues that affect creators' rights. Protecting creators and representing their interests has always been my main focus and my passion. I frequently take part in legislative and advocacy efforts relating to issues that impact my clients and the broader music creator community. Further, I am well-qualified to discuss music licensing practices because my firm handles countless licensing-related agreements on behalf of our clients and we encounter these agreements in our practice on a daily basis.

I am submitting this paper to represent the music creator's perspective on licensing reform issues. While I quoted Register of Copyrights Maria A. Pallante in previous comment papers to

[1] 79 FR 42833.

the Department of Commerce Internet Policy Task Force[2] and the Copyright Office,[3] her words from "The Next Great Copyright Act" bear repeating:

> *"Congress has a duty to keep authors in its mind's eye, including songwriters, book authors, filmmakers, photographers, and visual artists. Indeed, '[a] rich culture demands contributions from authors and artists who devote thousands of hours to a work and a lifetime to their craft.' A law that does not provide for authors would be illogical — hardly a copyright law at all. And it would not deserve the respect of the public."*

The interests of creators, the lifeblood of the entertainment industry, must be at the forefront of our minds as we discuss potential changes to the Copyright Act.

II. Fair Compensation to Music Creators is the Most Important Consideration

As we continue to discuss potential changes to the music licensing system, I must again reiterate that our paramount goal should be ensuring fair compensation for all music creators. It is shameful that, in an industry dependent on creative material, the creators themselves are often the last consideration. We have to make sure that our laws represent their property interests and facilitate the creative process so that they are motivated to continue creating and disseminating their works.

This paper specifically addresses: (i) the potential publisher withdrawal from the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"); (ii) the consequences that would result from the modification or elimination of the Section 115 mechanical license; and (iii) the dangers of pursuing efficiency as our paramount goal at the expense of creators' property interests. The publisher withdrawal issue is an unfortunately realistic and imminent prospect of the current consent decree system governing the two performing rights organizations ("PROs"). Similarly, the elimination of Section 115 has been proposed by several parties as a solution to a problem that does not need to exist—the meager payments granted to songwriters under Section 115's statutory rate.

The Copyright Office and the Department of Commerce Task Force have stated that revisions to copyright law should facilitate an efficient and effective music licensing marketplace. On these two issues, we are at a crossroads where reaching this goal is dependent on revising the system to fairly compensate songwriters. If songwriters, and the publishers representing them, can obtain fair market value for their works through the current PRO system, then there would be no need for publishers to take the drastic step of withdrawal, and performance rights licensing would not

[2] Dina LaPolt and Steven Tyler, *Public Comments on the Green Paper*, Feb. 10, 2014, http://www.uspto.gov/ip/global/copyrights/lapolt_and_tyler_comment_paper_02-10-14.pdf.
[3] Dina LaPolt, *Music Licensing Study: Notice and Request for Public Comment*, May 23, 2014, http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Dina_LaPolt_MLS_2014.pdf.

become more fragmented and inconvenient for third parties. For mechanical licensing, an increased rate reflecting fair market value would reduce the need to push for Section 115's elimination, although I will argue that eliminating Section 115 would actually increase the licensing system's ability to operate efficiently and effectively. Regardless, the songwriters must come first.

III. The Consent Decrees Must Be Modified to Prevent the Necessity of Publisher Withdrawal from the PROs

I addressed consent decree-related issues in my recent submission to the Department of Justice, attached to this paper as ***Exhibit A.*** In this section, I will address the Copyright Office's question regarding marketplace developments affecting songwriters' income and elaborate on some of my arguments from the DOJ paper specifically relating to the issue of publisher withdrawal from the PROs.

A. Marketplace Developments Affecting Songwriter Income

The Copyright Office asks why songwriters continue to report declining income despite apparent growth in PRO revenues. The explanation lies not only in performance royalty income but the multitude of factors working against songwriters in the modern music industry. Mechanical royalty rates are far below fair market value, as discussed in depth below. And while synchronization licenses are more plentiful than ever, these licenses are paying lower and lower rates per individual agreement for the average songwriter.

The songwriters hurting most are the middle-class, working songwriters for whom songwriting as a career is becoming an increasingly impractical prospect. Songwriter witnesses at the recent House of Representatives Judiciary Committee hearings on music licensing have discussed this topic. Lee Miller, President of the Nashville Songwriters Association International testified that, since he started as a songwriter, nine out of ten of his songwriter colleagues are no longer able to write songs as a profession because royalty payments cannot support their families.[4] Rosanne Cash, on behalf of the Americana Music Association, spoke about how compulsory license rates benefit digital music services and satellite radio at the expense of songwriters.[5] Overall, while top songwriters are sometimes well paid, this is not to say that songwriters as a group are fairly compensated for their works. Focusing on the high income generated by a small percentage of songwriters ignores the bigger problem.

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[4] U.S. House, Committee on the Judiciary, *Testimony of Lee Thomas Miller: Music Licensing under Title 17 Part One*, Hearing, Jun. 10, 2014, http://judiciary.house.gov/_cache/files/a38e3eed-ab0c-4c2f-9ae8-09fb3466e1cf/miller-music-licensing-testimony.pdf.

[5] U.S. House, Committee on the Judiciary, *Testimony of Rosanne Cash: Music Licensing under Title 17 Part Two*, Hearing, Jun. 25, 2014, http://judiciary.house.gov/_cache/files/cec6453e-831f-4284-9ae8-d5d4b3c3f9c1/062514-music-license-pt-2-testimony-ama.pdf.

However, this question is irrelevant because if performance rights licenses pay less than their fair value, we must address this problem regardless. Whether a songwriter makes a million dollars a year or five hundred, songwriters deserve fair market value for their works. It is about fairness, plain and simple.

B. Publisher Withdrawal from the PROs is an Imminent Threat

Collective licensing by the two PROs subject to the consent decrees, ASCAP and BMI, is beneficial to all parties involved because it is a highly efficient and effective manner of managing songwriters' performance rights and distributing royalties. This is largely due to the fact that the PROs represent the majority of American songwriters, thus they operate on a massive scale with substantial resources. This keeps transaction costs low and, because the PROs are nonprofit organizations, results in higher royalty payments to their member songwriters.

However, the major music publishers have stated their intention to withdraw from the PROs if the consent decrees are not heavily modified or abolished to give rightsholders the flexibility to exploit their works in the manner they see fit in the free market. The major publishers believe they are well prepared to handle this transition, as illustrated by testimony by David Kokakis, head of Business and Legal Affairs and Business Development for Universal Music Publishing, at the June 17, 2014 Music Licensing Study Public Roundtable hosted by the Copyright Office.[6] In my opinion, this view is single-minded and does not consider the full effect this transition would have on songwriters. There would be many administrative hurdles and issues that would take years to work out.

Although some claim that publisher withdrawal could benefit the songwriters represented by these publishers, there are some potential negative effects that need analysis. While it is agreed that publishers would be able to obtain much more favorable rates through direct negotiation than through the constraints of the consent decree system, giving the publishers more power than they already have could have a long-term detrimental effect on songwriters.

C. Publisher Withdrawal Risks Giving Publishers Too Much Power and Harming Songwriters

Publisher withdrawal risks granting too much power to music publishers, who would control all aspects of musical composition licensing once they take on public performance licenses. This would implicate the same concerns of centralized power that motivated the consent decrees in

[6] U.S. Copyright Office, *Music Licensing Study Public Roundtable*, Jun. 17, 2014, http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-la-transcript06172014.pdf.

the first place. Although music publishers have an obligation to the songwriters they represent to obtain the full value of these licenses, enabling one group to control all licenses is just dangerous, while our current decentralized system offers many benefits.

Before the digital revolution, there were generally only two main types of companies that acquired copyrights in music: record companies and music publishers.[7] Historically, artists have had an inherent mistrust of their record companies and have been at least a little skeptical of their motives.[8] Publishers, on the other hand, were considered the proverbial "golden children" of the music industry when most of them were independent. Songwriters *loved* their music publishers and tended to have closer bonds with their designated representatives there.

However, recent years have incubated a lack of confidence between songwriters and their music publishers. Currently, while music publishers play a very important role in the music industry, they do not enjoy the best reputation amongst songwriters—largely due to mergers and acquisitions that push songwriters' best interests aside, layoffs of key creative executives within the music publishing community, a lack of information in connection with royalties (especially those from interactive streaming), and a host of other administrative issues.

1. Creative Issues with the Music Publishers

Between the expansion of the music industry beyond record companies and music publishers and into digital service providers, streaming technology, and direct-to-fan services, and the enactment of the Songwriter Capital Gains Tax Equity Act in 2006,[9] major publishers are

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[7] Movie and television producers also acquire copyrights in music created specifically for a film or television program.

[8] For example, Prince changed his name to an unpronounceable symbol more or less to spite his record company, calling it the first step "towards the ultimate goal of emancipation from the chains that bind [him] to Warner Bros." Rupert Till, *Pop Cult: Religion and Popular Music* 63 (1st ed. 2010). In another instance, EMI/Virgin Records sued the band 30 Seconds To Mars for $30 million for failure to deliver an album on time. In response, front man Jared Leto said:

> If you think the fact that we have sold in excess of 2 million records and have never been paid a penny is pretty unbelievable, well, so do we. And the fact that EMI informed us that not only aren't they going to pay us AT ALL but that we are still 1.4 million dollars in debt to them is even crazier. That the next record we make will be used to pay off that old supposed debt just makes you start wondering what is going on. Shouldn't a record company be able to turn a profit from selling that many records? Or, at the very least, break even? We think so.

Hamilton Nolan, *Jared Leto's Band Deserves More Money, Right?*, GAWKER, Aug. 18, 2008, http://gawker.com/5038359/jared-letos-band-deserves-more-money-right.

[9] The Capital Gains Equity Act provided that, not only could publishers continue to elect to treat the sale of copyrights as capital gains—taxed at a mere 15%—but the publisher could also amortize acquisition costs and expenses over a prolonged five year period. This made it much easier for publishers to buy and sell copyright assets and triggered an immense boom in catalog purchases. Denise Stevens, John Arao and John Beiter, *Songwriters Gain from Change in Tax Law*, LAW JOURNAL NEWSLETTERS - ENTERTAINMENT LAW & FINANCE, Jul. 2006, http://www.loeb.com/~/media/Files/Publications/2006/07/Songwriters%20Gain%20from%20Change%20in%20Tax

constantly merging with one another and selling off or acquiring songwriter catalogs. These mergers and acquisitions can greatly harm a songwriter's career, especially if his or her copyrights are sold to a company who is not in the music publishing business.

One of the biggest issues created by these mergers is that key publishing company staff are consolidated or laid off. Moreso than for massive advances, a songwriter chooses a particular publisher because of the personnel at the company whose creative visions align with the songwriter's. The connection between the songwriter and his or her designated representatives runs very deep, and is critical to the success of the writer at a company that may own millions of copyrights. How else can individual writers stand out from the crowd without some champions? These creative people will help develop a songwriter's career by, for example, arranging songwriting sessions and suggesting various collaborations that make sense from a creative standpoint. It is also essential that a songwriter has a good relationship with the executives whose job is to find synchronization opportunities for the songwriter's music.

Unfortunately, when companies merge—or worse yet, copyrights are sold to a company that is not even in the business of music publishing—and a songwriter's contacts are fired, the songwriter is left high and dry without a single person who cares about his or her development left at the company. Even worse, sometimes no one at the new company is even familiar with the songwriter's songs at all! We have several clients who have found themselves in this dismal situation over the past several years.

These songwriters are often stuck in lengthy contracts and their careers can easily stagnate. Even the hope of getting out of a publishing contract requires hundreds of thousands of dollars for a specialized litigator and prolonged litigation. Only a handful of songwriters in the entire music publishing industry could afford this. The remaining writers are, again, left to fend for themselves and end up, at best, floundering through the rest of their respective careers.

This has unfortunately become a common scenario in today's music publishing business and it is very harmful to songwriters. I hate having to tell my clients that their contacts at their publisher are gone, and so are the executives that attracted them to the company in the first place. It is heartbreaking because it is a huge blow—sometimes a death blow—to the songwriter's career. Lee Miller spoke to this fact in his oral testimony before the House Judiciary Committee. He stated that, prior to the consolidation of major music publishers, there were between three to four thousand full-time songwriters living in Nashville. Now, he estimates there are only three to four *hundred.*[10]

%20Law/Files/Songwriters%20Gain%20from%20Change%20in%20Tax%20Law/FileAttachment/Stevens%20Arao%20Beiter%20Entertainment%20Law%20and%20Financ__.pdf.

[10] U.S. House, Committee on the Judiciary, *Music Licensing under Title 17 Part One*, Hearing, Jun. 10, 2014, http://judiciary.house.gov/index.cfm/2014/6/hearing-music-licensing-under-title-17-part-one.

2. Administrative and Other Issues with the Music Publishers

There are other issues that exacerbate this mistrust. One such issue is the lack of transparency in accountings rendered by the music publishers. Because of the cycle of mergers, acquisitions, and layoffs, information and accounting is not as transparent or as available as it used to be, and even when such information is forthcoming, it is, at times, outdated and inaccurate. One issue in this regard is that publishers use different software programs to administer their catalogs. Publishers' databases are not compatible with one another, making it difficult for the acquiring party to properly account to its new songwriters. This software issue makes transitions between companies inefficient and risks losing important songwriter data in the process. If the publishers withdraw from the PROs, one could imagine there would be big problems with incompatibility between the PROs' public performance databases and the publishers' systems that would take years to work out.

The only way for songwriters to ascertain the accuracy of royalty statements is to conduct a cumbersome and often prohibitively expensive audit. Audits are tools only available to the rich and already successful. In a vast majority of cases, audits of music publishers reveal underpayment to the applicable songwriter of hundreds of thousands of dollars. This leaves the songwriters who do not have an extra $50,000 (or more) in the bank to spend on audit fees to their own devices, with no recourse against their publisher who is almost indubitably accounting to them inaccurately.

Another potential issue that I do not believe has been raised is who will administer the "writer's share" of public performance royalties: the publishers who have withdrawn from the PROs or the PROs themselves? Currently, the PROs take all of their licensing fees and divide them in half: one part goes to the publisher of the composition (the "publisher's share"), and the other goes to the writer (the "writer's share"). The PRO will <u>not</u> send the writer's share of these monies to the publisher of a musical composition; it will <u>only</u> send the royalties to the writer him- or herself. Even where a songwriter is unrecouped under his or her publishing deal, thus not receiving publishing royalties, he or she will continue to receive the writer's share of public performance monies from his PRO.

The writer's share is often the only direct revenue stream flowing to a songwriter. This guaranteed payout four times each year may be a songwriter's only means of paying rent or purchasing groceries until he or she begins receiving royalties from his publisher, if ever. If the publishers obtain control of public performance royalties, is not a question of if—but rather a question of when—the "writer's share" of these royalties are applied to recoupment of songwriter's publishing agreements. Losing that income could mean the difference between eating dinner and skipping a meal for a developing songwriter.

It is uncertain whether publishers who withdraw from the PROs would be able to obtain control of the writer's share of public performance royalties. It seems like they would not be able to force songwriters to withdraw their shares as well, although they would likely try. What is certain is that this issue is set to create a new host of administrative difficulties that would make public performance licensing much more difficult for third parties.

Finally, we must be wary of the tight-knit relationships between major record companies and their major publisher affiliates. Universal Music Group and Universal Music Publishing Group are under the same management. Warner/Chappell Music is a subsidiary of Warner Music Group. How much further can we solidify these monopolies before artists are left with absolutely no bargaining power whatsoever?

D. Preventing Publisher Withdrawal Would Benefit Both Songwriters and Third Parties

Companies who are not in the business of acquiring copyrights are generally more trusted by music creators. Largely because the PROs fall into this category, they do not have the same tendency as music publishers to protect their own interests and investments above the interests of songwriters. If music publishers withdraw from the PROs, we are in danger of granting too much power to companies who are not afraid to sell their songwriters to the highest bidder on a regular basis.

For third parties, publisher withdrawal would make performance rights licensing more fragmented and inconvenient, reducing efficiencies and increasing transactions costs of licensing these rights. This would be counterproductive to the Copyright Office's goal of streamlining licensing, rather making it more difficult. Instead of three organizations administering public performance rights (ASCAP, BMI, and SESAC, Inc.), third parties would have to negotiate with several publishers as well. Also, this would directly result in less money for self-administered songwriters and independent publishers, who do not have the resources to withdraw from the PROs.[11]

Accordingly, the ultimate goal should be to eliminate the need for publisher withdrawal by modifying or eliminating the consent decrees to allow the PROs to obtain fair market value for their licenses. This is the best way to maintain the benefits of the current PRO system while

[11] Independent parties are almost always disadvantaged in the music industry because of their lower bargaining power. This is shown by the recent debates between independent record labels and YouTube. YouTube has been accused of bullying and strong-arming independent labels in rights negotiations relating to YouTube's new paid subscription service. *See* Lars Brandle, *Indies Blast YouTube's 'Unnecessary and Indefensible' Tactics as Streaming Service Readies*, BILLBOARD, May 23, 2014, http://www.billboard.com/biz/articles/news/digital-and-mobile/6099114/indies-blast-youtubes-unnecessary-indefensible-tactics; Ben Sisario, *Indie Music's Digital Drag*, N.Y. TIMES, Jun. 24, 2014, http://www.nytimes.com/2014/06/25/business/media/small-music-labels-see-youtube-battle-as-part-of-war-for-revenue.html?_r=1.

addressing songwriters and publishers' valid concerns about the inadequate compensation they currently receive. I would urge the Copyright Office to lend its support to songwriters and publishers' call for substantial revision or elimination of the consent decrees for the benefit of songwriters, licensees, and consumers.

IV. The Section 115 License Needs Substantial Revision or Elimination

In the realm of the Section 115 mechanical license, we are potentially faced with a similar, although less imminent, scenario. Rightsholders are beginning to call for Section 115's elimination, for the most part because compulsory licensing is bad for music creators, but also because of the extremely low statutory royalty rate.[12]

The statutory mechanical royalty rate is clearly well below its fair market value. The current rate is 9.1 cents per reproduction for songs five minutes long or less. This is an unconscionably low rate considering that the statutory royalty rate was first set in 1909 at 2 cents—the equivalent of 51 cents today.[13] And because the Copyright Royalty Board (the "CRB") is not allowed to consider the fair market value of these licenses when setting the mechanical license rate, the current rate-setting system risks the possibility of an even lower royalty rate. Recording companies and online retailers have tried to exploit this in the past, such as in 2008 when Apple argued for a 4 cent rate for digital downloads.[14]

The Songwriter Equity Act would help address this concern. The bill seeks to require the CRB to set rates that reflect a willing buyer, willing seller standard. This could provide an invaluable safeguard to prevent a reduction of the mechanical royalty rate to the detriment of our artists, and hopefully provide them with the fair compensation they deserve. However, because this still maintains a compulsory rate-setting process under CRB review, this solution still falls short of the most desirable outcome of free negotiation to determine license rates.

Another concern with mechanical licensing in recent years has resulted from record labels' deals with digital streaming services. Record labels will sometimes purchase equity shares in the services in lieu of a portion of the royalties they would otherwise be due. The issue becomes, how does this equity share translate into mechanical royalty payment to songwriters? Do record labels count equity shares in their revenue that they pay out to songwriters? This is unclear and further confuses the current mechanical licensing system for songwriters, who have no way of knowing whether they are properly paid.

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[12] To be clear, some songwriters do disagree with the compulsory aspect of the license when it comes to cover versions of their works, and would prefer to have control over these uses as well.

[13] Inflation Calculator, *1909 Dollars in 2014 Dollars*, IN2013DOLLARS.COM, http://www.in2013dollars.com/1909-dollars-in-2014?amount=0.02.

[14] Mark Shafer, *Copyright Royalty Board Unveils New Royalty Rates*, THE MUSIC BUSINESS JOURNAL, Dec. 2008, http://www.thembj.org/2008/12/copyright-royalty-board-unveils-new-royalty-rates/.

As I will explain below, Section 115's elimination would greatly benefit songwriters while allowing the free market to develop its own methods of increasing efficiency for all parties' benefit.

A. The Elimination of Section 115 Would Best Serve the Interests of Songwriters and Promote Efficiency

Songwriters, and organizations representing their interests, should be able to freely negotiate all license rates so that they can obtain their works' true market value. As discussed above, the statutory royalty rate is laughable compared to its original rate, adjusted for inflation, and is far below the rates that rightsholders could obtain if they were allowed to negotiate.

One of the Section 115 royalty rate's main functions in the current marketplace is to inform private transactions. For example, recording contracts reference the royalty rate through "controlled composition" clauses, under which most songwriters are required to grant third parties the rights to their works for a reduced rate, usually 75% of the statutory rate with a so-called "song cap" of 10 or 11 songs per album.[15] If the statutory royalty rate were eliminated, nothing would substantially change in these negotiations except for a songwriter's ability to negotiate for a higher rate, and abolish the record company's unfair yet nearly unavoidable practice of reducing a mechanical royalty rate below its already embarrassingly low rate.

The Section 115 compulsory license, when utilized per the statute, may actually *hinder* efficiency rather than promoting it, in opposition to our present goals. Compliance with Section 115's provisions is nearly impossible in its current form. Its provisions, including the requirement of monthly accountings (in contrast to most contractual arrangements' requirement for semi- or quarter-annual accountings), impose more burden than benefit on third parties trying to utilize this license. This might be the reason that the Section 115 compulsory license as a means for licensing cover songs is rarely used. Everyone knows that direct licensing is preferable.

The Section 115 license presents a one-size-fits-all approach that is not effective in the digital age. Allowing negotiations to take place in the free market would allow the marketplace to develop its own methods of facilitating efficient transactions. Reducing transaction costs and increasing the speed of transactions is in rightsholders' best interest as well. The statutory license is only hindering these goals.

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[15] This means that the record company will pay songwriters 75% of the statutory rate, to a maximum of either 10 or 11 songs per album. If an artist has additional songs on his or her album, the excess mechanical royalty payments will come out of the artist's pocket.

If Section 115 is not eliminated, at an absolute minimum the scope of the Section 115 compulsory license cannot be further expanded, nor can we use Section 115 as justification for new compulsory license schemes. As I discussed extensively in my previous comment paper to the Department of Commerce Internet Policy Task Force, compulsory licensing severely harms music creators by taking away their power of approval, their most important and vital right.[16]

Further, absent its elimination, several of Section 115's provisions need substantial revision. There is no right to audit a third party utilizing a Section 115 compulsory license—this is the *only* compulsory license without this right. This is unexplained and unacceptable, especially since the "statements of account" rendered per Section 115's requirements are sometimes over a million pages long. Also, pass-through licensing, where record labels can license mechanical rights directly on publishers' behalf and without publishers' input, leaves songwriters with no clue as to whether or not they are properly paid. At the very least, these aspects of Section 115 must be changed purely out of fairness to songwriters.

B. How the Transition Would Work

When it comes to the Section 115 license as a manner of facilitating digital streaming services, no one can deny the benefits of collective licensing. But if Section 115 were eliminated, the vast majority of songwriters will continue to routinely grant mechanical licenses. To that end, most would enter into voluntary collective licensing arrangements allowing an intermediary to administer these rights on their behalf. Songwriters do not want to deal with the burden of licensing mechanical rights on a case-by-case basis.

In this regard, the legislation eliminating Section 115 could create an organization authorized by statute to administer mechanical licenses and negotiate royalty rates with an antitrust exemption. SoundExchange is a good example of how this could function. It is an organization that performing artists voluntarily join to help administer their rights and collect digital sound recording public performance royalties. A similar organization for mechanical licensing would address third parties' concerns that mechanical licensing would become too difficult and fragmented with Section 115's elimination.

Voluntary collective licensing systems would be highly preferable to the current system because these administrators would be able to negotiate for higher royalty rates reflecting these licenses' fair market value. It would not substantially increase third party costs to move from a compulsory system to a voluntary one because rights would, for the most part, still be administered by a select few entities, especially if the aforementioned organization is established by Congress. The fear that third parties would have to directly negotiate with thousands of

[16] LaPolt and Tyler, *supra* note 2.

rightsholders if the compulsory license were eliminated is unfounded. Because this would be highly burdensome for the righstholders as well, most would enter into voluntary arrangements.

Of course, the transition from a compulsory system to free negotiation should be gradual to ensure all parties are well-prepared for the transition. Third parties utilizing mechanical licenses would need adequate time to prepare and adjust their business models. Marketplace options such as voluntary collective licensing systems would need time to develop as well.

Also, it would only be fair to honor agreements in effect at the time of Section 115's elimination by allowing them to operate under the statutory system until their expiration or termination. Revisions to the Copyright Act have taken preexisting contractual arrangements into account in the past, so there is precedent for this type of transition.[17] For existing contracts based on the statutory rate, we could establish a floor that would last for the life of copyright for existing works at the time of elimination. This floor could serve in the place of the statutory rate as the minimum payment due for mechanical licenses. That way, existing contracts will not be affected by Section 115's elimination unless the parties voluntarily and mutually enter into new agreements. Meanwhile, all new transactions from the date of Section 115's elimination on will take place in the free market.

By creating an agency that songwriters could voluntarily engage to administer mechanical licenses and ensuring the transition out of Section 115 is gradual, we could approach the transition to free negotiation in a way that does not adversely affect anyone's reliance interest while ensuring that future practices more effectively address modern needs and adequately compensate rightsholders.

V. Creating an Efficient Licensing System

While efficiency is certainly a laudable goal of the ongoing debates surrounding music licensing reform, it cannot be our main focus. As I have continuously argued throughout this process, the needs of our music creators are of the utmost importance. The music itself is the backbone of our industry, and many interested parties show a disturbing lack of concern for music creators' welfare. The music industry is not only about those few high-grossing household names commanding six- or seven-figure incomes. We have to be careful that creators are not pushed aside to the point that creating their art is no longer viable and they quit the business altogether.

As this paper illustrates, the goals of adequately compensating songwriters and facilitating an efficient marketplace are aligned with one another. This section addresses my concerns regarding those who argue for efficiency at the expense of creators instead of working towards a viable solution that works in everyone's best interest.

[17] *See* 17 U.S.C. § 115(c)(3)(E)(ii)(I).

A. Efficiency Cannot Be the Only or Primary Focus

An emerging undertone in the continuing debates surrounding copyright reform is that the concerns of tech companies and consumers should trump the property rights of rightsholders. This is perhaps most egregious in discussions regarding the expansion of compulsory licensing, such as the proposal for a compulsory license for remixes, mash-ups and sampling. Besides the issue of control, compulsory licenses always under-compensate creators. Compulsory licenses basically say to third parties: it is acceptable, or even praiseworthy, to underpay creators...so long as you do so efficiently.

The same issue is at play for third parties who argue for maintaining the consent decrees in their current form. The positions taken by the comment papers submitted to the DOJ were easily predictable: media companies that utilize intellectual property want to pay as little as possible. Sadly, these companies care only about their own bottom line, with no regard for the creators who they owe their businesses to.

In a hypothetical free market, it would be the rightsholders' responsibility—and indeed, their goal—to achieve maximum efficiency for the benefit of everyone involved in music licensing transactions. Companies controlling intellectual property rights are certainly interested in cutting costs, and they are in a good position to do this by developing free market solutions. At this point, government-mandated attempts at increasing efficiency can only do so at the further expense of music creators, who are already suffering and need a drastic change to stay afloat.

B. The Recording Industry Association of America's Proposal is Unworkable

Music creators do not trust record companies, and with good reason. Record companies, especially the majors, have an unfortunate history of taking advantage of their recording artists. They have proved their willingness to go to extreme lengths to gain the upper hand in this relationship in the past, as shown by the time that the record labels attempted to drastically change the Copyright Act's work for hire provisions, to the detriment of recording artists, by surreptitiously inserting language into a last-minute amendment to a completely unrelated bill.[18] There is no doubt that recording companies are always looking for another opportunity to take a bigger portion of creators' income, especially now that their income streams for recorded music have all but dried up. The relationship has, for the most part, created a lot of resentment by music creators and the music community in general.

This is one reason why the proposal by the Recording Industry Association of America (the "RIAA") for a blanket license system bundling all rights into one, with record companies

[18] Eric Boehlert, *Four Little Words*, SALON, Aug. 28, 2000, http://www.salon.com/2000/08/28/work_for_hire/.

administering publishing rights, is a terrible idea. Frankly, creators cannot trust record labels to fulfill their current duties faithfully, especially accounting for artist royalties from record sales. I have advised my clients to audit their record labels on many times, and the audits have turned up substantial amounts of unpaid monies on *every single* occasion.

Unfortunately, as discussed above, the ability to audit is reserved for well-off creators who can afford the financial risk. Although substantial monies are always due, this amount may or may not cover the cost of the audit itself. Not to mention, record labels impose huge restrictions on the audit right, making it as inconvenient and expensive as possible for creators to exercise it. For example, the standard audit provision for one record label states that an artist can only conduct an audit within one year and three months of a royalty statement's delivery—meaning the artist would have to conduct separate audits at least that often to find all unpaid monies due. And most atrociously, a settlement where the record label pays the artist *half* of what the artist is due is considered a good settlement for the artist by customary industry standards. Because litigation would cost more money than the difference in monies, it is practically impossible for an artist to obtain the full amount discovered by an audit. Simply put, it benefits the record companies to underpay their artists, safe in the knowledge that even if they are caught red-handed, they will only have to pay out—at maximum—one-half of what the artist is actually due. How does this business model make any sense? And why would we want to perpetuate it?

If creators cannot trust recording companies to pay out sound recording royalties, why should they be given an expanded right to collect publishing monies as well? This would be especially harmful if record companies were to apply publishing revenues towards recoupment of recording advances. Creators might never see another dollar from their recording or songwriting careers again outside of recording advances. In this regard, maintaining separate administrators for different rights is ideal for creators as it gives them the most bargaining power and allows them to obtain the maximum possible value for their works.

A mandatory blanket license system would harm creators, regardless of who would administer such licenses. As I have stated before, creators should be able to grant their rights to anyone they like, whether this means one organization for every right or separate entities for each individual piece.[19] But such a system *cannot* be mandatory. It should be the creator's decision whether a single, coordinated means of license administration is the most effective solution to meet their individual needs.

VI. Conclusion

I must again reiterate that the free market is the ideal benchmark for music licensing transactions. All music creators, and the organizations representing their interests, deserve the ability to

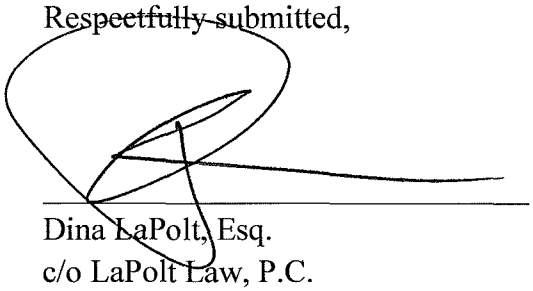
[19] LaPolt, *supra* note 3.

negotiate for the full value of their works. As this paper illustrates, the goal of an efficient and effective music licensing marketplace is dependent on ensuring fair compensation for music creators. Publisher withdrawal, which would disrupt the efficiencies of the PRO system and grant too much power to companies that do not represent songwriters' best interests, is an imminent threat to the restrictive and outdated consent decrees governing ASCAP and BMI. Meanwhile, the meager statutory royalty rate granted by Section 115 is becoming a bigger problem as songwriters' incomes are constantly in decline.

Finally, we must remember that, while efficiency is an important goal, we cannot emphasize this objective over the concerns of music creators. Music creators are the foundation of our industry, and music licensing reform will be a failure if it does not facilitate the ultimate goal of motivating creators to create and disseminate their works. We absolutely must keep the property interests of music creators as our first priority as the debates surrounding music licensing reform continue.

Thank you for your time and consideration.

Respectfully submitted,



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cc: Chairman Bob Goodlatte, House Judiciary Committee
Ranking Member John Conyers, Jr., House Judiciary Committee
Ranking Member Jerrold Nadler, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

August 6, 2014

Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 4000
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RE: Request for Public Comments on U.S. Department of Justice Consent Decree Review

Thank you for this opportunity to submit my comments regarding the United States Department of Justice's review of the consent decrees governing the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). I am submitting this paper to urge that, as the Department considers revising the consent decrees, it keeps the goal of providing fair compensation for songwriters at the forefront of their minds.

I. Introduction

My name is Dina LaPolt and I am a transactional music attorney in West Hollywood, California, with the law firm of LaPolt Law, P.C. For more than 16 years, I have represented recording artists, songwriters, producers, actors, and other owners and controllers of intellectual property. In addition, I started in the entertainment industry as a musician and songwriter. Thus, I have built my practice from the music creator's perspective. I have also taught a course entitled "Legal and Practical Aspects of the Music Business" for the UCLA Extension Program since 2001, and I teach and lecture all over the United States, Canada, and Europe on issues that affect creators' rights. Protecting creators and representing their interests has always been my main focus and my passion. I frequently take part in legislative and advocacy efforts relating to issues that impact my clients and the broader music creator community. Further, I am well-qualified to discuss this subject because a majority of our music clients utilize ASCAP or BMI's services, thus the consent decrees constantly impact them.

I am submitting this paper to represent the songwriter's perspective on this issue. The interests of music creators, the lifeblood of the entertainment industry, must be at the forefront of our minds as we discuss potential changes to laws that affect their interests. Previously, I submitted substantially similar comments on the consent decrees in response to the U.S. Copyright Office's Music Licensing Study: Notice and Request for Public Comment.[1] I applaud the Department for

[1] Dina LaPolt, *Comments in Response to the U.S. Copyright Office Music Licensing Study: Notice and Request for Public Comment*, May 23, 2014, http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Dina_LaPolt_MLS_2014.pdf.

opening up this topic for discussion, as the consent decrees are in severe need of revision or elimination in order to ensure fair compensation for songwriters.

II. The Consent Decrees Governing Performing Rights Organizations Must Be Abolished or Heavily Modified to Reflect the Modern Licensing Landscape

It is essential that we revise the consent decrees in order to fairly compensate songwriters and preserve the benefits of collective licensing for songwriters, licensees, and consumers. Collective licensing by the two performing rights organizations ("PROs"), ASCAP and BMI, is very beneficial to all parties involved because it is a highly efficient and effective manner of managing songwriters' performance rights and distributing royalties. This is largely due to the fact that the PROs represent the majority of American songwriters, thus they operate on a massive scale with substantial resources. This keeps transactions costs low and, because the PROs are nonprofit organizations, results in higher royalty payments to their member songwriters.

However, we are to the point where major publishers, representing a substantial portion of the works administered by the PROs, are considering withdrawing from the PROs altogether if the consent decrees are not revised to give rightsholders the flexibility to exploit their works in the manner they see fit in the free market. This would directly result in less money for self-administered songwriters and independent publishers, who do not have the resources to withdraw from the PROs.[2] Meanwhile, performance rights licensing would become more fragmented and inconvenient for third parties, reducing efficiencies and increasing transactions costs of licensing these rights.

Songwriters are severely prejudiced by the antiquated consent decrees governing the PROs, resulting in below fair market rates and potentially risking the loss of the benefits of collective licensing. Allowing negotiations to take place in the free market would result in fair license rates that adequately compensate songwriters. Further, permitting limited grants of rights to the PROs would more effectively allow songwriters to manage their rights by directly negotiating with licensees when beneficial to do so. We must revise the consent decrees in order to allow the PROs to operate effectively for the benefit of everyone involved in performance rights licensing.

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[2] Independent parties are almost always disadvantaged in the music industry because of their lower bargaining power. This is shown by the recent debates between independent record labels and YouTube. YouTube has been accused of bullying and strong-arming independent labels in rights negotiations relating to YouTube's new paid subscription service. *See* Lars Brandle, *Indies Blast YouTube's 'Unnecessary and Indefensible' Tactics as Streaming Service Readies*, BILLBOARD, May 23, 2014, http://www.billboard.com/biz/articles/news/digital-and-mobile/6099114/indies-blast-youtubes-unnecessary-indefensible-tactics; Ben Sisario, *Indie Music's Digital Drag*, N.Y. TIMES, Jun. 24, 2014, http://www.nytimes.com/2014/06/25/business/media/small-music-labels-see-youtube-battle-as-part-of-war-for-revenue.html?_r=1.

A. The Consent Decrees No Longer Serve Their Intended Purpose

The Department entered into consent decrees with the two PROs in 1941 due to antitrust concerns and to protect the songwriters whose rights were at stake. This made sense at the time, when performing rights licenses were required for a very limited range of media, most of the licenses granted by the PROs were for small, unsophisticated businesses, and ASCAP and BMI were the only two organizations administering these rights for popular music.

However, these rationales are no longer relevant. Nowadays, performing rights licenses are needed for a multitude of music consumption methods, from traditional broadcast to online streaming and other methods. Further, the PROs are dealing with a range of licensees from small businesses to huge, sophisticated, technologically-savvy organizations that certainly can negotiate for themselves. Meanwhile, competition has increased exponentially, from the independent, for-profit American PRO SESAC, Inc. to foreign PROs and many other administrators and organizations representing these types of licenses which are not governed by consent decrees.

Additionally, having separate rate courts for both ASCAP and BMI is creating even more confusion among songwriters and publishers. Nothing obligates the rate courts to reach similar results on rate-setting or other issues. This could lead to vastly different treatment of two songwriters of the exact same composition if those writers are affiliated with different PROs.

Most importantly, as explained by the following sections, it is clear that the consent decrees are harming the very songwriters they were designed to protect.

B. The Rate-Setting Process Must Be Modified

The compulsory rates set by the rate courts for licenses are severely lower than their true market value. For example, the compulsory royalty rates for streaming musical compositions are one twelfth of the royalty rates paid to record labels for the same exact uses.[3] The inadequacy of the consent decrees and rate court system is clearly illustrated by the recent rate court decision which ruled that Pandora must pay merely 1.85% of its annual revenue to ASCAP.[4] In 2013, the

[3] Ed Christman, *New Legislation Seeks to Modernize Copyright Act to Benefit Songwriters*, BILLBOARD, Feb. 25, 2014, http://www.billboard.com/biz/articles/news/publishing/5915717/new-legislation-seeks-to-modernize-copyright-act-to-benefit.

[4] Ed Christman, *Rate Court Judge Rules Pandora Will Pay ASCAP 1.85 Percent Annual Revenue*, THE HOLLYWOOD REPORTER, Mar. 17, 2014, http://www.hollywoodreporter.com/news/rate-court-judge-rules-pandora-689221.

service paid a total of 4.3% of its revenue to PROs[5] while paying 49% to record companies for the use of master recordings.[6]

It has become clear that rate courts are not the most effective way to set licensing rates. Rate courts are far too cumbersome, expensive, and antiquated, and cannot keep up with the pace set by the new digital marketplace.

For example, under their consent decrees, ASCAP and BMI must immediately grant a performance license to any person or organization who applies for one, even if the parties have not agreed on a rate and even if the user performs a substantial amount of music. If the parties cannot reach an agreement and must take the case to the rate court, proceedings often take more than a year, during which a PRO and its songwriters are not compensated for the licensee's use of the PRO's music. In fact, some licensees employ the rate court as a dilatory tactic to use performance licenses for a time without having to compensate the PROs.

As discussed below, the free negotiation would be much more effective at reaching fair rates for songwriters. If that is not feasible, an alternate solution would be to implement an expedited arbitration process in place of the rate courts. Arbitration would be significantly faster and less expensive than rate courts, benefitting both songwriters and consumers.

C. Free Negotiation Would Result in Fair Market Value Rates for Songwriters

When it comes to license fees, the most important consideration for songwriters is that we absolutely do not expand the reach of compulsory rate-setting. Compulsory rates gravely harm songwriters by taking away their power of approval, and are often grossly unfair and do not reflect the true market value of a use. The free marketplace is much more effective. It is quicker, more efficient, and more equitable. Simply allowing parties to freely negotiate, rather than tying them to a slow administrative process, reaches a more just result that reflects a licensed use's true market value.

This is shown by the licensing practices for synchronization licenses, the type of license needed to play music in a film, television show, or any other visual media. These uses customarily pay the same amount for the use of both the musical composition and the master recording. Without the hindrance of a compulsory rate-setting system, industry custom for these licenses recognizes that songwriters and recording artists are equally integral to music and deserve equal compensation.

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[5] Hannah Karp, *Showdown for Pandora*, THE WALL STREET JOURNAL, Jan. 20, 2014, http://online.wsj.com/news/articles/SB10001424052702304027204579332454120275882.

[6] Ben Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*, THE NEW YORK TIMES, Feb. 13, 2014, http://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html.

It is time that we turn performance rights over to the free market as well so that our songwriters can obtain just compensation for their work. While an expedited arbitration process would make great strides towards obtaining fair licensing rates for songwriters, this is only a partial fix—free negotiation is the only way to obtain the full value of a license.

D. Limited Grants of Rights Should Be Permitted

Another issue with the consent decrees is that publishers must grant PROs the right to administer either all or none of their performance rights. This is becoming a bigger problem as evidenced by the huge disparity between payments to songwriters and recording artists from digital streaming services. As mentioned above, major publishers have started considering withdrawing their catalogues from the PROs because they feel they can negotiate better rates independently, outside the rate court system.

To address this concern, ASCAP and BMI granted their members a limited withdrawal right allowing publishers to independently license their works for digital streaming services while keeping the rest of their rights with the PROs. However, the rate courts have held that their consent decree require the PROs to maintain all-or-nothing licensing systems. As a result, it is very possible that publishers might withdraw entirely from the organizations. This hurts the other songwriters represented by the PROs, because the PROs' revenues decrease while their operating costs do not. Because ASCAP and BMI are nonprofit organizations, less revenue directly results in less payout for their member songwriters and composers.

The PROs should be able to accept partial grants of rights from rightsholders so that copyright owners can effectively manage their assets in the way they choose while still taking advantage of the efficiencies and benefits of collective licensing. If a publisher believes that direct negotiation with licensees would help it obtain a better value in one instance, it should not be forced to withdraw all of its rights from a PRO to pursue this option. This does not have to be an all-or-nothing scenario, and imposing this restriction does not serve anyone's best interest.

It just does not make sense to maintain the consent decrees governing ASCAP and BMI's licensing practices. The consent decrees, both over 70 years old, cannot possibly adequately address licensing issues in the modern licensing landscape. As stated by Paul Williams in his June 25, 2014 testimony before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet, the ASCAP consent decree has not been updated since 2001, *before* the iPod hit stores, an event that dramatically changed the music marketplace.[7] There is no

[7] Paul Williams, Statement to the House, Committee on the Judiciary, *Music Licensing Under Title 17 Part Two*, Hearing, Jun. 25, 2014.

expiration date on the consent decrees and no system in place to regularly review their terms. Maybe the best solution would be to eliminate the consent decrees entirely.

III. Any Efforts to Streamline Licensing Must Maintain the Music Creator's Right of Approval

Only once we address the critical issue of fair compensation for songwriters is it appropriate to consider secondary concerns such as facilitating licensing for third parties. On this issue, music creators' biggest concern is that we do not expand compulsory licensing. I am categorically opposed to any change to the licensing system that reduces the creator's right of approval. Any new licensing system must maintain this right.

The Department has asked whether the consent decrees should be modified to permit rights holders to grant ASCAP and BMI additional rights in addition to the right of public performance. In general, I am in favor of allowing creators to grant any organization the rights to administer any or all of their rights, so long as creators have the choice whether or not to participate. The key consideration is that creators voluntarily enter these arrangements, and are not forced into a compulsory licensing scheme. And importantly, creators must be able to grant third parties these rights on a platform-by-platform basis. For example, if a songwriter wants to use ASCAP or BMI to collect his or her performance royalties from radio, but prefers to independently negotiate with digital streaming services, the songwriter should be free to do so.

A voluntary intermediary system would be fine, as long as creators can elect to participate by their own choice and are not forced into the system. So long as such a system is non-compulsory, then facilitating these transactions could benefit all parties. But we must be careful that, if we streamline the licensing process for musical compositions, we do not open the door to further compulsory licensing.

For example, allowing the PROs to administer a wide range of rights cannot snowball into a scenario where creators lose more control over their work by, for example, losing the right to approve derivative works. As I explained in depth in a previous comment paper to the Department of Commerce Internet Policy Task Force, creators are deeply concerned with any potential uses of their work that would compromise the moral integrity of their music.[8] Thus, any streamlined licensing system must be narrowly tailored to prevent further expansion of any compulsory license-granting and to maintain the creator's right to freely negotiate rates and uses of their works.

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[8] Dina LaPolt and Steven Tyler, *Public Comments on the Green Paper*, Feb. 10, 2014, http://www.uspto.gov/ip/global/copyrights/lapolt_and_tyler_comment_paper_02-10-14.pdf.

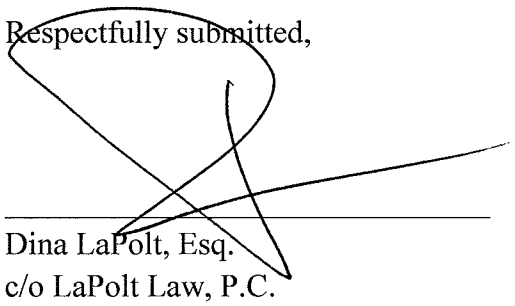
IV. Conclusion

While the consent decrees governing ASCAP and BMI were justified at their creation, it is clear that their provisions did not contemplate the new issues and challenges imposed by the digital age. It is time to substantially revise the decrees, or eliminate them entirely, to ensure that songwriters are fairly compensated for their works and can effectively manage their rights in the way they choose and to preserve the benefits of collective licensing for all parties.

Free negotiation is highly desirable over the current rate court system because it would ensure that songwriters can obtain the true value of their works when granting licenses. If this is not feasible, an expedited arbitration process could also be an effective second choice. Further, we should allow partial grants of rights to the PROs so that songwriters can directly negotiate with licensees when appropriate while still taking advantage of the benefits of PRO membership. Finally, PROs should be able to administer a wide range of rights in music so long as creators voluntarily opt-in to these arrangements, and we do not expand the scope of compulsory licensing.

Thank you for your time and consideration.

Respectfully submitted,



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