Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of **Music Licensing Study: Notice and Request for Public Comment**	**Docket No. 2014–03**

FURTHER COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB") appreciates the opportunity to provide further comments in response to the Copyright Office's Notice of Inquiry dated March 17, 2014 ("First Request for Comments") and to provide comments in response to the Notice of Inquiry dated July 23, 2014 ("Second Request for Comments").

THE PRO CONSENT DECREES SHOULD NOT BE ELIMINATED OR MODIFIED TO PERMIT PARTIAL WITHDRAWALS
Topic 14 (First Request for Comments) and
Topic 4 (Second Request for Comments)

For a detailed analysis of why the Consent Decrees should not be eliminated or modified to permit partial withdrawals, NAB respectfully refers the Copyright Office to the Comments of NAB, dated August 6, 2014 (the "NAB DOJ Comments"), which were recently submitted in connection with the review ("Consent Decree Review") undertaken by the U.S. Department of Justice ("DOJ") Antitrust Division with respect to the operation and effectiveness of the Final Judgments in *United States v. ASCAP*, Nos. 12 Civ. 8035, 41 Civ. 1395, 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014)(S.D.N.Y.), and *United States v. BMI*, No. 64 Civ. 3787, 2000 WL 280034 (S.D.N.Y. Mar. 15, 2000)(collectively, "Consent Decrees"). The Comments can be found at http://www.justice.gov/atr/cases/ascapbmi/comments/307974.pdf. The NAB DOJ Comments include the analysis of economist Steven Peterson, Ph.D., and address the following points:

- **The Consent Decrees remain essential to the functioning of the market for musical composition performance rights**. The Consent Decrees serve an essential purpose in today's music licensing marketplace by providing necessary protection against anti-competitive conduct and effects inherent in the collective licensing of musical composition performance rights. The aggregation of rights gives the PROs tremendous market power, which in the absence of the Consent Decrees would allow the PROs to extract supra-competitive pricing for their licenses. The inherent anti-competitive effects of collective, blanket licensing are clearly demonstrated by the conduct of the one (as of yet) unregulated PRO, SESAC. Moreover, the recent *Pandora* rate court decision demonstrates that even when major music publishers directly license their large catalogs,

aggregated from a large pool of songwriters, those publishers have and will abuse tremendous market power to extract supra-competitive rates from licensees. Rather than eliminate or lessen the regulatory oversight of the consent decrees, that oversight should be expanded.

- **Sunset provisions should not be added to the Consent Decrees**. DOJ's current policy generally favors the inclusion of sunset provisions in new consent decrees. It would be inappropriate, however, to apply that general policy to the PRO Consent Decrees, which are unique in several important ways. First, the Consent Decrees have been in place for almost the entire history of the market for blanket public performance licenses. Second, the rationale behind sunset provisions is that in the more typical situation a consent decree is fashioned in reaction to a particular set of market conditions, which may reasonably be expected to change after a certain period of time. With respect to the PROs, the problematic market power kept in check by the Consent Decrees is inherent in the PROs' collective licensing business model. Consequently, there is no reasonable expectation that the Consent Decrees will become unnecessary after any particular amount of time.
- **The Consent Decrees should not be amended to allow the PROs to discriminate against certain licensees by allowing music publishers to selectively withdraw their catalogs with respect to some licensees but not others**. One of the hallmarks of the Consent Decrees is nondiscrimination. Allowing the PROs to facilitate discrimination against licensees would undermine not only the nondiscrimination principle, but also the very purpose of the Consent Decrees: to prevent anti-competitive conduct.
- **If the Consent Decrees are amended at all, they should require greater transparency with respect to the PROs' repertories**. The Consent Decrees could be improved by requiring ASCAP and BMI to provide more accurate and comprehensive information to licensees about their repertories.
- **The due process, efficiency, and expertise afforded by the rate courts should not be sacrificed in favor of truncated, private mediation**. One of the most fundamental protections afforded licensees by the Consent Decrees is rate court supervision of license negotiations. The various changes to the Consent Decrees requested by the music publishers and their PROs are all motivated by their desire to eliminate or circumvent rate court supervision. Eliminating the rate courts in favor of truncated private arbitration risks weakening this protection, and should be rejected. The proposal to move to arbitration mistakenly assumes, in the first instance, that the rate courts are inadequate. There is no reason to believe that, without drastic elimination of appropriate and essential discovery and appellate review, private arbitration will be any more efficient, speedy, or cost-effective than the rate courts.

MUSIC PUBLISHERS' CLAIMS THAT LARGE NUMBERS OF PREVIOUSLY SUCCESSFUL SONGWRITERS ARE LEAVING THE INDUSTRY DUE TO PERFORMANCE LICENSE RATES ARE INCONSISTENT WITH THE PROS' CLAIMS OF INCREASED REVENUES, DISTRIBUTIONS, AND MEMBERSHIP
Topic 6 (Second Request for Comments)

In their written comments and testimony at the public roundtables, various music publishing entities and songwriters' representatives claimed that the supposedly "below market" rates set by

the PRO rate courts were driving large numbers of previously successful songwriters out of the business. As noted above, however, these claims are flatly inconsistent with the public claims of the PROs, each of which have reported increased collections, distributions, and membership in recent years. It is clear from these reports that any anecdotal stories relating to successful songwriters leaving the industry due to decreasing public performance royalties are not representative of the overall songwriting industry. It also bears noting that the rates paid to the PROs are not "below market" rates at all. Those rates are either negotiated in an environment where the PROs have substantial market power, as noted above, or are set by the rate courts pursuant to a fair market value standard.

CREATING A NEW SOUND RECORDING PERFORMANCE LICENSE REQUIREMENT FOR BROADCASTERS IS UNWARRANTED AND WOULD NOT LIKELY RESULT IN ANY INCREASE IN ROYALTY PAYMENTS FROM FOREIGN JURISDICTIONS

Topic 13 (First Request for Comments)

In its response to the First Request for Comments, NAB provided various legal, factual, and policy reasons why the law should not be changed to require broadcasters to pay new royalties for their terrestrial broadcast of sound recordings, and will not repeat those reasons here. Nonetheless, one of the arguments advanced by the record companies warrants an additional response. Proponents of a performance tax on broadcasters suggest that U.S. nationals can secure access to foreign revenue pools that sit overseas, just waiting for Americans to come claim them. As NAB noted in its response to the First Request for Comments, these proponents have failed to substantiate the actual amount of revenue at issue. More important, the idea that changing the law to require broadcasters to pay license fees for previously exempt performances will somehow release these pools of royalties is a mirage. Countries that currently choose to deny U.S. publishers and songwriters royalties on the grounds that the U.S. does not have a reciprocal full right of public performance will very likely continue to do so, even if broadcasters were compelled to pay royalties. Foreign nations that have a performance right in sound recordings have implemented a full performance right, which applies to all public performances of any kind, including those made by hotels, bars, restaurants, retail shops, gyms, and nightclubs.

Other countries are likely to demand a similarly comprehensive scheme before paying out any potential royalties. For example, when the U.S. adopted royalties to be paid for the sale of certain recording devices and blank CDs, France, which provided royalties for a more comprehensive list of recording equipment, refused any reciprocal payments to U.S. interests.

Those urging that adoption of a performance right in sound recordings for over the air broadcasts would generate additional royalties for U.S. interests also ignore the fact that many of these foreign regimes are distinctly less generous to sound recordings in other respects. If the U.S. is to adopt their regimes in one respect, presumably it should do so in others such as a much shorter term of protection, no protections against anti-circumvention devices, and cultural and other playlist quotas.

Another factor ignored by those suggesting a potential inflow of foreign royalties, is that many U.S. performers are, in fact, paid when their recordings are played abroad. For example, the

U.K. adheres to "simultaneous publication rules" which grant U.S. sound recordings the same rights as U.K. sound recordings when they are released in both countries simultaneously.

Expanding the current narrow U.S. sound recording performance right to include terrestrial radio broadcasts will significantly damage American broadcasters, but will not go far in achieving the full sound recording performance right that other countries are likely to demand before paying out any potential royalties.

THE REGULATORY FRAMEWORK OF SECTIONS 112 AND 114 SHOULD BE REFINED TO ACCOMMODATE SIGNIFICANT DIFFERENCES BETWEEN DIFFERENT TYPES OF LICENSEES SUCH AS BROADCASTERS
Topic 8 (First Request for Comments)

In the various comments relating to the Section 112 and 114 licenses submitted by recording industry parties, NAB notes a tendency to lump broadcasters in with all other digital performance licensees. Broadcasters are different in many ways, however, including differences that are impacted by the regulatory framework of the statutory licenses. Unfortunately, those differences have not been taken into account and a "one size fits all" approach has been employed by the Copyright Royalty Judges. In order to demonstrate some of these problems unique to broadcasters and NAB's proposed solutions to these problems, NAB respectfully refers the Copyright Office to the Joint Comments of the National Association of Broadcasters and the Radio Music License Committee Regarding the Copyright Royalty Judges' Notice and Recordkeeping Rulemaking, dated June 30, 2014 ("Joint Comments on Recordkeeping") along with its annexed exhibits, which may be found at: http://www.loc.gov/crb/proceedings/14-CRB-0005/NAB-RMLC.pdf.

In its Joint Comments on Recordkeeping, NAB proposed modifications to certain regulations relating to the Section 112 and 114 licenses. Compliance with the current regulations already imposes enormous burdens and challenges, without providing a material, offsetting benefit to copyright owners or artists. Indeed, many of the requirements are inconsistent with longstanding business realities. New burdens and penalties, as currently sought by SoundExchange, would be a further step in the wrong direction. Instead, the existing rules should be reformed so that compliance is commercially reasonable and possible, while still providing the data necessary for SoundExchange to collect and distribute royalties.

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Respectfully submitted,

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