March 31, 2015

The Honorable Mike Lee
Chairman
Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights
316 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Amy Klobuchar
Ranking Member
Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights
302 Hart Senate Office Building
Washington, DC 20510

Re: **Responses to Questions for the Record for Chris Harrison, Vice President of Business Affairs, Pandora Media, Inc.**

Dear Senator Lee and Senator Klobuchar:

Thank you again for the opportunity to testify before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Right at the hearing "How Much for a Song?: The Antitrust Decrees that Govern the Market for Music" held on March 10, 2015.

Pandora greatly appreciates the Subcommittee's inquiry into this important subject and its effort to ensure a properly functioning and competitive market for the licensing of musical works.

Below please find my responses to the questions for the record posed to me by Senators Lee and Leahy.

Sen. Lee's Question for the Record for Chris Harrison

The publishers have threatened to fully withdraw from the PROs if DOJ does not allow partial withdrawals. The PROs believe that such full withdrawals would seriously damage the blanket license system. Is the threat of full withdrawal sufficiently compelling to justify amending the consent decree?

The PROs are presenting a "lesser of two evils" argument to distract from the more germane issue of how services like Pandora can efficiently obtain all the rights they need at competitive market prices to play all the music consumers want to hear. Because partial withdrawals will *decrease* licensing efficiencies, partial withdrawals should be permitted only if they create real price competition among publishers and between publishers and PROs.

Pandora welcomes competition and we do not know, as I noted during my testimony, if the total amount of royalties that Pandora would pay to publishers would increase, decrease, or stay the same if the consent decrees permitted partial withdrawals. Given our recent experience in which publishers and PROs coordinated their behavior in an effort to artificially raise prices, what

Pandora fears are modifications of the consent decrees that give the publishers a risk-free opportunity to raise prices.

As currently proposed by the PROs, the partial withdrawal of musical works from a PRO's repertory would be at the discretion of each publisher. Large publishers with substantial market power who believe they can negotiate higher royalty rates by withdrawing (including by secreting the catalog being withdrawn) will likely opt out, while smaller publishers who believe they will not be able to negotiate higher rates will likely stay in. The PROs would then seek to use as benchmarks the rates negotiated by large withdrawing publishers to set the fees for the remaining PRO repertory, even though the repertory remaining in the PRO would be significantly diminished in value by the loss of the musical works controlled by the large withdrawing publishers. In other words, the PRO blanket license becomes a shield to protect smaller publishers from the effects of price competition, while enabling large publishers to target specific classes of licensees without risk to their remaining royalty revenue streams that continue to be licensed through the PROs.

Moreover, as discussed in my testimony and subsequent Q&A, Pandora's recent rate cases against ASCAP and BMI show that the publishers and PROs are not approaching publisher withdrawals and direct licensing as a means to inject competition into the licensing of musical compositions. Both the former CEO of ASCAP and the current CEO of BMI indicated they did not ever consider reducing the price of the blanket license in an effort to increase market share – and, potentially, total revenue – in order to compete with withdrawing publishers. If consent decrees are modified to permit partial withdrawals by publishers, then competition is only enhanced if the PROs and publishers *actually* compete on price to license their respective repertories to licensees. If the PROs and withdrawing publishers refuse to compete with one another, then there would be no pro-competitive benefit of permitting modification to the consent decrees.

Pandora believes that the consent decrees should not be modified simply to avoid the purported threat of publishers to withdraw fully from the PROs. Allowing publishers to threaten both the government and the licensee community – as well as their own songwriters – if they are not granted the right to withdraw in order to target a single segment of the music licensee community, would reward bad behavior and be harmful to a competitive marketplace for the use of musical works.

Sen. Leahy's Question for the Record for Chris Harrison

Please share your thoughts on what elements are critical to any efforts to improve the music marketplace.

Pandora believes that any reform of the Copyright Act as it pertains to music (both sound recordings and musical works) and the regimes that have grown up around them must take into consideration three overarching principles: transparency, technology neutrality, and efficient licensing mechanisms. By subjecting the corporate interests that control the licensing of music to competitive market forces, reforms undertaken in light of these principles would ultimately benefit all stakeholders in the industry, including music creators (e.g., songwriters, composers, and recording artists), broadcasters, services utilizing new distribution technologies, and, most importantly, consumers.

Transparency: During the oral testimony at the Subcommittee's hearing, all participants agreed that improved transparency is necessary for ensuring a more efficient music licensing marketplace. The importance of transparency will ensure that:

- Music distributors know exactly what works are associated with what recordings so they can obtain appropriate licenses for all of the rights in each work they use;
- Good actors can avoid infringing copyrights and the associated (potentially catastrophic) liability of statutory damages;
- Creators, including songwriters, composers, performing artists, and other royalty participants can be assured of proper attribution and payment for the use of their works;[1] and
- Copyright owners can monitor and appropriately license the works they own and/or control.

[1] Indeed, several songwriting groups recent published an open letter opposing partial withdrawal of publishers from the PROs and arguing that "any direct performance licenses negotiated by publishers require complete transparency concerning both the full terms of any direct licensing arrangement, and complete information necessary to determine the royalties each music creator is owed." *See* Rick Carnes, *et al.*, "Open Letter From Songwriters: Dear American Music Publishing Community, Let's Talk," Billboard, Mar. 26, 2015, *available at* https://www.billboard.com/articles/business/6516486/open-letter-from-songwriters-to-american-music-publishing-community.

Any modifications to music licensing procedures should therefore be designed to ensure transparency so that a licensee can bargain with copyright owner licensors or their agents with sufficient knowledge to allow it to decline a license if mutually acceptable terms cannot be agreed upon and be confident that it is not inadvertently using a copyrighted work in a manner that exposes the user to infringement liability. The market for the licensing of musical works is currently significantly distorted because of the lack of full and complete transparency.

Technology Neutrality: Creativity in music delivery is just as important to improving the music marketplace as creativity in music creation. The past 20 years have witnessed an explosion in the development of new technologies and distribution channels that have enhanced the public's access to music and the ability of creators to bypass traditional gatekeepers to reach audiences directly. These new means of lawfully accessing music improve listeners' experiences, make music available more broadly, increase exposure of new and emerging artists, and ultimately increase the value of copyrighted works through new streams of revenues. New *legal* digital music platforms, which are generating hundreds of millions of dollars in new royalty revenue each year, have also significantly reduced digital music piracy.

Modifications to the music licensing regime should therefore be technology neutral so that new market participants are not disadvantaged vis-a-vis established market participants. Innovation must be encouraged, not discriminated against, and any reforms to the copyright system should ensure that parties compete on the basis of the value of the goods and services brought to market as measured by consumers, not based upon when a particular participant entered the market. Free-market competition among all music distributors should be encouraged without the artificial distortions imposed by disparate licensing regimes.

Efficient Licensing Mechanisms: Everyone agrees that the authors of new works deserve to be compensated for their creations. Songwriters, performing artists, and other creative professionals keep the music industry vibrant and engaging. New technologies have given artists greater opportunities to reach consumers and consumers greater choice in music.

New technologies are being commercialized by a growing number of companies that operate in a highly competitive market. In many cases, these new technologies have only arisen where efficient licensing regimes exist, such as in the case of the statutory license for the public performance of sound recordings by means of digital audio transmissions, the statutory license for the mechanical reproduction of musical works, and the statutory license-like consent decrees that have resulted in the efficient licensing of millions of musical works authored by tens of thousands of songwriters and owned by thousands of individual music publishers.

Any reforms adopted by Congress – or the Department of Justice through modifications of the consent decrees governing ASCAP and BMI – should ensure that competition flourishes among

not only licensees competing for customers but also between licensors and licensees. Any changes to the music licensing system must be structured in a way that preserves the efficiency of "one stop" licensing but also prevents abuse of market power by middlemen—whether through holdup of licensees or withholding of revenues from artists, songwriters, and other creative professionals.

Implementing the Principles: Pandora has previously participated in providing comments to the United States Copyright Office and the United States Department of Justice on ways to implement the aforementioned principles and other measures to ensure a vibrant marketplace for the licensing of copyrighted musical works and sound recordings. Pandora respectfully requests that the following documents be incorporated with this letter and included in the official record of the Subcommittee:

- The comments submitted to the DOJ by CTIA-The Wireless Association, the Digital Media Association, and Pandora in connection with the DOJ's review of the ASCAP and BMI consent decrees, which are available at http://www.justice.gov/atr/cases/ascapbmi/index.html.

- The comments submitted to the Copyright Office by CTIA-The Wireless Association, the Computer and Communications Industry Association, and the Digital Music Association in connection with the Copyright office's Music Licensing Study, which are available at http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/index.html and http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/.

These documents are appended to this letter for ease of reference.

Pandora welcomes the opportunity to meet with you, other members of the Subcommittee, and your and their staffs, to provide any further assistance to the Subcommittee.

Thank you for your consideration of these important issues.

Sincerely,

Christopher S. Harrison

Enclosures

June 5, 2015

The Honorable Mike Lee
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316 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Amy Klobuchar
Ranking Member
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302 Hart Senate Office Building
Washington, DC 20510

Re: **Responses to Questions for the Record for Chris Harrison, Vice President of Business Affairs, Pandora Media, Inc.**

Dear Senator Lee and Senator Klobuchar:

Below please find my responses to the questions for the record posed to me by Senator Hatch.

Sen. Hatch's Question for the Record for Chris Harrison

With respect to transparency of license agreements negotiated directly by publishers, I am concerned about one situation in particular: a publisher striking a deal to license its works under which a licensee pays an upfront fee to the publisher—not disclosed to or shared with the songwriters affiliated with the publisher—in exchange for the licensee paying to the publisher directly a lower royalty rate.

How can we make certain that all payments by licensees for musical works pursuant to agreements negotiated directly by publishers are fully disclosed to songwriters and shared with them?

Additionally, how could such requirements be enforced?

Thank you for your question regarding the transparency that is provided to songwriters by their publishers, if any. You are correct to be concerned about the harm to songwriters and recording artists from the lack of transparency in the music industry. The industry's lack of transparency not only gives publishers and record labels substantial leverage over users (who do not have information to avoid infringing the rights-holders' portfolios); it also creates "black boxes" of revenue pools that inure to the benefit of the largest music publishers and record labels but may never be accounted for to songwriters and performers. In this way, the absence of transparency harms both music distributors and music makers. Pandora therefore strongly supports efforts to improve the transparency of the licensing process to songwriters as part of its broader support for increased transparency in the music industry.

Like many commercial contracts, license agreements between rights holders (e.g., music publishers and record labels) and licensees are ordinarily confidential. The reason for that is perfectly valid: most businesses do not want their competitors knowing the terms of their commercial relationships with their counter-parties. Pandora acknowledges, however, that confidentiality with respect to competitors is not a justification for a licensor to avoid transparency with respect to the very creators on whose behalf it is purportedly acting. Moreover, licensors often prohibit their licensees from disclosing the payments made for or the usage of a licensor's copyrighted works (sound recordings or musical works) in a manner that can cause real harm to a creator. This lack of transparency may prohibit a creator from determining whether she should commence a potentially time consuming and expensive audit of a record label or music publisher for royalties owed.

Unfortunately, the digital licensing marketplace has evolved to include many terms that permit abuse by licensors. These include licensor demands for contractual consideration that may not be easily attributable to uses of specific copyrighted works, thereby allowing a licensor to avoid accounting to creators for such consideration. For example, in addition to a per use royalty that a publisher or record label licensor may demand, the licensor may also charge a large "administrative fee" for licensing the licensee. A licensor may also charge a fee for data delivery. Publisher and label licensors also often demand up-front payments and minimum guarantees that are not conducive to easy allocation among an entire repertory of music licensed to a licensee.

Pandora also has been forced to enter into a covenant not to sue with a licensor that resulted in a substantial payment being made to that licensor. Under that covenant not to sue, Pandora was not required to provide information on its uses of copyrighted works, which likely permitted the licensor to keep that money without allocating it to creators. Similar allegations have been made against large record labels when they have entered into settlements with unauthorized file sharing services: what did they do with the millions of dollars they secured?

These various mechanisms create a system where licensees or defendants in litigation (or threatened litigation) are forced to pay enormous amounts of money for the right to play music without any confidence that such sums are shared with the very creators of the works used.

The PRO consent decrees are currently under review by the Department of Justice Antitrust Division ("**DOJ**"), and it is widely reported that DOJ is considering modifying the consent decrees to permit publishers to opt out of the blanket license process as to digital content distributors like Pandora without leaving the PROs completely.[1] Under this proposal, publishers would be allowed to partially withdraw from the PROs as to some users while continuing to rely on the PROs to license other users. This could require Pandora and other digital services to

[1] *See* Ed Christman, "Dept. of Justice Considering Major Overhauls on Consent Decrees, Sources Say," Billboard, Apr. 7, 2015, *available at* https://www.billboard.com/articles/business/6524359/dept-of-justice-consent-decrees-overhaul-publishing-ascap-bmi.

[2] *See* Andrew Flanagan, "Artist Managers Call Out Sony Following Spotify Contract Leak, Sony

secure licenses directly from each withdrawing publisher, which would in turn allow each withdrawing publisher to craft license terms like those described above that generate revenue and significant value for the publisher that may not necessarily be accounted for to the songwriters who created the works in the publisher's repertory.

Publisher direct licensing of digital services may lead to widespread abuse of songwriters. The closest analog is the way in which record labels license sound recordings and allegedly fail to account to their recording artists. Record labels license interactive streaming services directly, and it is widely reported that they use techniques like guaranteed advances, advertising credits, and other terms to monetize their portfolios in addition to straightforward royalty payments.[2] Further, it is unclear to what extent (if any) the labels share the added revenue with recording artists.[3]

Given this experience, it is understandable that songwriters have raised concerns about the impact of partial withdrawals on their ability to monitor payments flowing to publishers and obtain their fair share. For example, a number of organizations representing songwriters recently published an open letter expressing the concern that partial withdrawals would permit publishers to hide revenue from them.[4] And similar concerns have been expressed to DOJ in public comments on the ASCAP and BMI consent decree review process by the Songwriters Guild of America and the Music Managers Forum.[5]

Pandora believes transparency for all participants in the music market is an issue of critical importance, and it would be happy to engage in further dialogue with your office and other Senators to develop policy approaches that would make the market fairer and more transparent.

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[2] *See* Andrew Flanagan, "Artist Managers Call Out Sony Following Spotify Contract Leak, Sony Responds That It Pays," Billboard, May 21, 2015, *available at* http://www.billboard.com/articles/business/6575660/immf-sony-spotify-contract-response-breakage.

[3] *Id*.

[4] *See* "Open Letter From Songwriters: Dear American Music Publishing Community, Let's Talk," Billboard, Mar. 26, 2015, *available at* https://www.billboard.com/articles/business/6516486/open-letter-from-songwriters-toamerican-music-publishing-community.

[5] *See* Comments of Songwriters Guild of America, Inc. at 4-5, Aug. 6, 2014, *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307845.pdf; Comments of Music Managers Forum (UK) Ltd. at 9-11, Aug. 2014, *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307761.pdf.

Thank you for your interest in this issue and your consideration of Pandora's views.

Sincerely,

Christopher Harrison

Open Letter From Songwriters: Dear American Music Publishing Community, Let's Talk

March 26, 2015 2:50 PM EDT

The following is an open letter from numerous songwriter and composer guilds around the globe regarding the ongoing debate on publishing rights.

To the American Music Publishing Community,

We are an international alliance of songwriter and composer organizations representing tens of thousands of music creators throughout the world, many of whom have created musical works in which you claim rights. We recently reached out to your trade organization, the National Music Publishers Association (NMPA), hoping the Association would agree to have a discussion with us regarding unilateral withdrawal by publishers of rights and repertoire from the performing rights organizations ASCAP and BMI.

Related

- Swedish Songwriters Push for Fair Share of Streaming Music Revenues in Open Letter
- U.K. Songwriters Society Joins Chorus of Fair Digital Pay for Songwriters

While the discussion we requested was well within the bounds of applicable competition laws, the response we received from the NMPA was disappointing. In a letter from NMPA's General Counsel, we were told that the talks we were seeking would be "inappropriate" and would "prove fruitless." Because we believe there is still much to be gained from an open dialogue with publishers, we are reaching out to each of you directly seeking immediate discussion between our communities.

It is a matter of public record that some music publishers have announced they are considering withdrawing rights and repertoire from ASCAP and BMI, and licensing those rights directly to users.

These statements assume that publishers possess the legal authority to make such a unilateral withdrawal of works and rights on behalf of music creators and their families, without exception. We disagree.

While our organizations support the exploration of all opportunities that might increase royalty rates for music creators and publishers, we feel strongly that the songwriters, composers and others we represent maintain their right to decide who collects and administers performing rights royalties on their behalf.

Further, we feel that any direct performance licenses negotiated by publishers require complete transparency concerning both the full terms of any direct licensing arrangement, and complete information necessary to determine the royalties each music creator is owed.

Again, we are reaching out to discuss how we can work together for our mutual benefit. As an interim step, however, to preserve the rights of the songwriters, composers and heirs that we represent, this letter shall serve as formal notification on their behalf that each reserves the right to oppose any claims relating to alleged publisher authority to unilaterally withdraw rights and repertoire from the PROs, unless such reservations are specifically waived in writing by an individual creator. In no event should silence by any music creator represented by the members of this alliance be construed as acquiescence or waiver.

Signed,

Rick Carnes, Songwriters Guild of America (SGA)
International Council of Music Creators (CIAM)
Music Creators North America (MCNA)
European Composers and Songwriter Alliance (ECSA)
Society of Composers and Lyricists (SCL)
Songwriter's Association of Canada (SAC)
Screen Composers Guild of Canada (SCGC)
Latin American Composers and Authors Alliance (PACSA)
Société Professionelle des Auteurs et des Compositeurs du Québec (SPACQ)
Pan-African Composers and Songwriter Alliance (PACSA)

Before the
Library of Congress
U.S. Copyright Office
Washington, DC

In re Music Licensing Study: Second Request for Comments	Docket No. 2014-03

COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the notice of inquiry published by the Copyright Office in the Federal Register at 79 Fed. Reg. 42,833 (July 23, 2014), and extended at 79 Fed. Reg. 44,871 (Aug. 1, 2014), the Computer & Communications Industry Association (CCIA) submits the following comments on selected questions from the notice regarding the subject of music licensing.[1]

I. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.

One of the easiest ways to facilitate the assimilation and availability of data by private actors is to encourage the creation of such data through Copyright Office processes. The Commerce Department's 2012 Green Paper[2] and 2013 public meeting[3] addressed rights

[1] CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 600,000 workers and generate annual revenues in excess of $465 billion. A list of CCIA members is available at http://www.ccianet.org/members.

[2] Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity and Innovation in the Digital Economy* (July 2013), *available at* http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf (hereinafter "Green Paper"), at 97.

[3] Transcript of United States Patent & Trademark Office, Department of Commerce, *Public Meeting: Copyright Policy, Creativity and Innovation in the Digital Economy*, Dec. 12, 2013, *available at*

management information and elicited useful feedback on this issue. A diverse group of participants on the panel entitled "The Government's Role in a More Efficient Online Marketplace: Access to Rights Information" agreed with the value of standardizing codes. As CCIA explained, we already have international standards for datasets associated with certain classes of works, like ISBN and ISRC.[4] OneHouse pointed out that although Industry Standard Recording Codes (ISRCs) have existed for more than two decades, there is still not a recorded database of them.[5] SoundExchange's representative reiterated these concerns, and suggested that the government has the opportunity to incorporate ISRC standards into recordation or registration, and in statutory licensing for the Copyright Royalty Board.[6] Several comments filed in response to the Green Paper spoke favorably about standardizing codes as well,[7] indicating that there is substantial consensus on the benefits associated with standardized identifier codes, but that the lack of universally accessible data impedes greater adoption. Comments filed with the Office last year on technical upgrades[8] are also instructive, recommending that the Office implement standardized codes into its registration process, as Forms SR and PR do not presently require an ISRC or ISWC code.[9]

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http://www.uspto.gov/ip/global/copyrights/121213-USPTO-Green_Paper_Hearing-Transcript.pdf (hereinafter "Green Paper Transcript"), at 316-74.

[4] Green Paper Transcript at 342 ("ISBN and ISRC were actually associated with ISO standards… [W]e actually do have some international standards for datasets associated with certain classes of works.").

[5] Green Paper Transcript at 355-56 ("[F]or over two decades, the music industry has been giving out ISRC codes, Industry Standard Recording Codes. And we still don't have a database of them. Literally, we did not record a single code that we handed out.").

[6] Green Paper Transcript at 338-41 (noting filings to Copyright Office suggesting that ISRCs be part of copyright registration; "that that actually be a field, and so that you can actually have this way to connect copyright records seamlessly with record company and digital service records of what sound recordings are associated with ISRC").

[7] SoundExchange Green Paper Comments at 5-6; RIAA Green Paper Comments at 11 (suggesting USG collection of ISWC and ISRC numbers for sound recordings as part of copyright registrations to help build awareness and adoption; promoting awareness and use of standard identifiers); CEA Green Paper Comments at 8.

[8] Copyright Office, Technical Upgrades Comments, U.S. Copyright Office (Mar. 2013), *available at* http://www.copyright.gov/docs/technical_upgrades/.

[9] A2IM Technical Upgrades Comments at 1 ("We believe that the Copyright Office database should become a key searchable source for copyright information so that the creators' works are easily identifiable and do not become

Thus, the Office can lead by example on the issue of improving data reliability by incorporating standardized identifiers into registration and recordation forms on a pilot basis. Once the Office has established that it can routinely ingest such data, it may eventually choose to require the use of standard identifiers. Therefore, the Copyright Office should create optional fields for these codes or similar universal identifier systems on its own registration forms. Over time, the Office could phase in mandatory universal identifiers as a requirement for registration or recordation. In the long run, such efforts would help ensure that various standardized identifiers might achieve the widespread adoption associated with ISBNs, which would facilitate the development of comprehensive and authoritative public data related to the identity and ownership of various types of works.[10]

II. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

As discussed above, there are several widely embraced standards, including ISRC, ISBNs, and to a lesser degree, ISWCs, the likes of which the Office should endeavor to promote. While other stakeholders may furnish more specific information, a pilot effort should treat identifiers inclusively, without choosing one over the other. Naturally, identifiers that are based

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Orphan Works… The key date would include the album/track name, artist/author, owning label, data of release and UPC/ISRC code, with latter data the most important as the unique identifier."); SoundExchange Technical Upgrades Comments at 2 ("One of the most meaningful enhancements that the Copyright Office can make to its registration forms for sound recordings is to collect ISRCs."), 3 ("[I]t is critical that each recording be associated with a unique identifier that is used as a worldwide standard."); ISRC Agencies Technical Upgrades Comments at 4 ("The ISRC Agencies urge the Copyright Office to enable capture of explicitly named standardized identifiers as part of its updated electronic registration and recordation functions… Given the increasing importance of both digital distribution and electronic recordkeeping with respect to all manner of copyrighted works, we believe the Office would be remiss if it failed to position itself now to collect information that will be of increasing importance in the digital age.").

[10] AAP Technical Upgrades Comments at 8; Author Services Technical Upgrades Comments at 5; County Analytics, Inc. Technical Upgrades Comments at 7.

upon the work of consensus-based international standards bodies such as the ISO would be a logical starting point.

IV. Please provide your views on the logistics and consequences of potential publisher withdrawals from ASCAP and/or BMI, including how such withdrawals would be governed by the PROs; whether such withdrawals are compatible with existing publisher agreements with songwriters and composers; whether the PROs might still play a role in administering licenses issued directly by the publishers, and if so, how; the effect of any such withdrawals on PRO cost structures and commissions; licensees' access to definitive data concerning individual works subject to withdrawal; and related issues.

Publisher withdrawal from the PROs poses a significant threat to competition. Because the demands of the marketplace effectively compel many licensees to negotiate with all PROs, the consequences of licensee-specific withdrawal of rights may be tantamount to forbidding that licensee from operating in the marketplace. Insofar as PROs under Department of Justice consent decrees operate as a form of supervised cartel, a licensor that partially withdraws from a PRO with respect to some licensees, works, or uses, but not others receives the benefits of coordinated action in the marketplace without submitting to the obligations that DOJ has attached to the privilege of coordination. As described in Judge Cote's opinion in the *Pandora* case,[11] Sony's attempts to withdraw so-called "digital" rights[12] from ASCAP, while refusing to reveal which songs that withdrawal affected, meant that it could prevent ASCAP from licensing to one user – and use its "partial withdrawal" to drive an above-market fee – while still obtaining the transaction costs savings of coordination vis-à-vis other users. Accordingly, while a rights-holder should not be compelled to license through a PRO, it must also not be permitted to selectively benefit from coordinated action in the marketplace where it chooses. This "all-in or

[11] *In re Petition of Pandora Media, Inc.*, 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014), at *24.

[12] Notably, there is no so-called "digital" right under Section 106; Congress provided a public performance right. 17 U.S.C. § 106(4). That the public performance may occur via a digital medium does not change the fact that §106(4) is what is being licensed.

all-out" obligation should apply equally to uses (*i.e.*, 'digital') and works (*i.e.*, works in the publishers' portfolios).

IX. International licensing models for the reproduction, distribution, and public performance of musical works differ from the current regimes for licensing musical works in the United States. Are there international music licensing models the Office should look to as it continues to review the U.S. system?

The experience in Europe offers an instructive example of what happens when collecting societies are empowered with broader mandates and less oversight. A 2012 impact assessment issued in a European Commission review of collective rights management stated that "the ability of CS [collecting societies] to efficiently deliver their services is increasingly being questioned, leading to a loss of trust and confidence in their services. The issue is often raised by national parliaments, the European Parliament and national competition authorities. It is the subject of complaints from rightholders and users."[13] It also observed that European societies could sit on undistributed sums for years; as of "2010 major societies had accumulated €3.6 billions worth of liabilities to rightholders."[14] A survey of collective licensing organizations in more than 30 countries found that "many unfortunately share the characteristic of serving their own interests at the expense of artists and the public," and that there was "a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, CROs [collective rights organizations] have often

[13] Impact Assessment accompanying Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing, July 11, 2012, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0204&from=EN.

[14] *Id.* at 19-20 (Box 6; "Overall, between 5 and 10% of collections are not distributed to rightholders for as many as three years after they were collected – a delay which is significant"; delays in distribution may be to "giv[e] an impression of low operating expenses").

aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system."[15]

For these reasons, overseas models that rely heavily on collective licensing models should be regarded with an appropriate measure of skepticism.

September 12, 2014

Respectfully submitted,

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[15] Jonathan Band & Brandon Butler, *Some Cautionary Tales about Collective Licensing*, 21 MICH. ST. INT'L L. REV. 687, 689-90 (2013), *available at* http://msuilr.org/wp-content/uploads/2013/12/516973-Michigan-State-Jnl-of-Intl-Law-21.3_R2-2.pdf.

Before the
UNITED STATES 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**

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

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May 23, 2014

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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**

Comments of CTIA-The Wireless Association

CTIA-The Wireless Association® offers these comments as its initial response to the Copyright Office's March 17, 2014 Notice of Inquiry on music licensing issues. 79 Fed. Reg. 14,739 (Mar. 17, 2014) (the "NOI"). CTIA appreciates the opportunity to comment in this important inquiry.

Introduction and Summary

CTIA offers the following thoughts:

- Any analysis of music licensing issues must be conducted in light of the public interest purpose of copyright law, with an eye towards maximizing the benefit to the public;

- The market for music performance rights is not competitive, is adversely affected by competition-destroying collectives and major publishers that abuse their extensive market power, and, as a result, must effectively be regulated;

- Music publishers successfully sought a firewall insulating music performance rights fees from consideration of sound recording performance rights fees and successfully urged (through their affiliated record companies) that sound recording rights are worth multiples of music rights, and should not now be heard to seek removal of that firewall;

- The law should be amended and streamlined to eliminate double-dip rights claims by making clear that streamed performances do not require a reproduction or distribution license, downloads do not require a public performance license, and server copies used only to make licensed or exempt public performances are exempt from liability; and

- The Copyright Office should ensure that the public performance right is not expanded in a way that threatens cloud computing.

CTIA elaborates on these points below.

CTIA is an international organization representing all sectors of wireless communications – cellular, personal communication services, and enhanced specialized mobile radio. A nonprofit membership organization founded in 1984, CTIA represents providers of commercial mobile radio services ("wireless telecommunications carriers"), mobile virtual network operators, aggregators of content provided over wireless telecommunications systems, equipment suppliers, wireless data and Internet companies, and other contributors to the wireless universe. A list of CTIA's members appears at http://www.ctia.org/membership/ctia_members/.

CTIA frequently participates in administrative proceedings and coordinates efforts to educate government agencies and the public about wireless issues. CTIA also has presented its views in testimony before Congress and has filed numerous amicus briefs in the federal courts on behalf of the wireless industry on a variety of issues, including copyright issues. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

CTIA and its members have a substantial interest in the subject matter of the NOI. Wireless technology not only provides consumers with first-rate telecommunications service, but also provides a convenient and important means for wireless consumers to receive digital performances of music and to download a wide array of media products, including music, to their wireless devices. CTIA's members support the development of applications that enable users to discover new content. Among other things, CTIA's members have been instrumental in developing technologies and applications that enable their subscribers to store content in the "cloud" and access that content on a wide array of devices.

CTIA's members, either directly or through agreements with third-party service providers, offer interactive and non-interactive music streaming, access to satellite radio programming, permanent and limited music downloads, ringtone downloads, linear and on-demand video streaming, and access to games with full color graphics and embedded music. CTIA's members also transmit performances of recorded music to individuals placing calls to wireless customers in the form of "ringback tones"— sounds that replace the ringing that the caller hears when he or she calls a mobile telephone. Further, many of the media products and services that CTIA's members make available are available for preview using performances of short clip samples that are streamed over the Internet and wireless networks.

CTIA's members strive to provide their services to their customers at a reasonable cost. Thus, ready access to, and the cost of, music licenses are ongoing concerns. In light of these concerns, CTIA was an active participant in the Copyright Office's proceeding concerning whether streaming implicates the reproduction and distribution rights and may be subject to the section 115 compulsory license. Library of Congress, Copyright Office, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, Docket No. RM 2000-7, 73 Fed. Reg. 66,173 (Nov. 7, 2008). CTIA also participated as an amicus before the ASCAP Rate Court and

the Court of Appeals for the Second Circuit in the case deciding that music downloads did not implicate the public performance right. *United States v. ASCAP (Application Real Networks, Inc. & Yahoo! Inc.)*, 627 F.3d 64 (2d Cir. 2010) (hereinafter "*Yahoo!*").

Moreover, CTIA's members have been litigants before the ASCAP Rate Court, where they were instrumental in resisting ASCAP's efforts to demand public performance royalties for ringtone downloads. *See In re Cellco P'ship d/b/a Verizon Wireless*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (hereinafter "*Verizon Wireless*") (holding that downloading a ringtone to a cell phone is a reproduction but not a public performance).[1] They also resisted ASCAP's attempts to discriminate in its royalty fees against new wireless means of transmitting video. *See ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012) (rejecting ASCAP's discriminatory position and adopting rates consistent with past video licenses).[2]

CTIA members support protection of the legitimate rights of copyright owners. Indeed, CTIA members are among the leading legitimate performers and distributors of recorded music, and pay for the right to do both. Music publishers, and their songwriters, earn substantial performance royalties as compensation for CTIA members' public performance of musical compositions, and substantial mechanical royalties for CTIA members' offerings of downloadable music content, whether in the form of full track downloads or ringtones.

CTIA, however, strongly opposes duplicative compensation to music publishers (or to any copyright owner, for that matter) and redundant, burdensome rate-setting and administrative systems for the same economic transaction. Public performances are subject to the performance right; any copies that may be implicated in such performances should not also be subject to licensing under the reproduction or distribution rights (*e.g.*, mechanical licensing). Copyright Office DMCA Section 104 Report at 142-46 (Aug. 2001)**.** Similarly, downloads are digital phonorecord deliveries ("DPDs"), subject to the mechanical license; they should not also be subject to performance licensing. *Id.* at 146-48 ("It is our view that no liability should result under U.S. law from a technical 'performance' that takes place in the course of a download.") It makes no sense to make formalistic distinctions based on the technicalities of new transmission systems or to burden those wishing to provide legitimate, licensed music services with overlapping claims by different agents of the same copyright owner or multiple, expensive litigation processes in rate court and before the Copyright Royalty Board.

CTIA also supports the development of cloud-based computing services. CTIA members have invested heavily to provide such services, which offer the public

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[1] CTIA members Verizon Wireless and AT&T Mobility were parties in that case. CTIA filed an amicus brief.

[2] CTIA members Verizon Wireless and AT&T Mobility were parties in related cases that were set to be tried shortly after the MobiTV case. Those cases settled after the MobiTV decision. Verizon Wireless filed an amicus brief before the Second Circuit in ASCAP's unsuccessful appeal of the MobiTV decision.

convenient, efficient, and powerful computing and storage resources. Once an individual has lawfully acquired content, that content should be available to the individual on all of the user's devices and remotely. Moreover, individuals should be free to handle and manipulate their content as they see fit. The law should not place obstacles in the way of such uses or make the providers of cloud services the police or guarantors of user conduct.

In sum, CTIA has a direct interest in the issues raised by the NOI. Those issues will have significant ramifications for the public, the wireless industry, and CTIA's members.

I. Background: The Public Interest Purpose of Copyright

It is important for the Copyright Office to conduct its review of copyright law in light of the public interest purpose assigned to copyright law by the Constitution. The courts have made clear that copyright law does not exist to benefit authors and publishers. The law exists to benefit the public. Moreover, the Supreme Court has emphasized that dissemination of copyrighted works is as important as creation to fulfilling the constitutional goal. The interest of the public and the interest of fostering dissemination should be paramount in any report and recommendation made by the Register.

Article I, section 8, clause 8 of the Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* (emphasis added). Thus, the power to enact copyright laws exists for a specific purpose – "to promote the Progress of Science."

The Supreme Court consistently has emphasized that the ultimate goal of copyright is to serve the public interest, not the author's private interest: "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added); *accord Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) ("[T]he monopoly privileges that Congress has authorized ... must ultimately serve the public good."). "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *accord Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (observing that "[t]he primary objective of copyright is not to reward the labor of authors").

Copyright rights are granted to authors to induce them to create and to disseminate their creations. *See*, *e.g.*, *Paramount Pictures*, 334 U.S. at 158 ("[R]eward to the author or artist serves to induce release to the public of the products of his creative genius."); *Fogerty*, 510 U.S. at 526 (copyright is "intended to motivate the creative activity of authors"). "But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken,* 422

U.S. 151, 156 (1975). Moreover, "[e]vidence from the founding . . . suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science." *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) (emphasis in original).

Copyright rights are not absolute property rights but statutory creations subject to important limitations that further the constitutional goal. *E.g.*, 17 U.S.C. §§ 102(b), 107-122. "The limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature." *Aiken*, 422 U.S. at 156.

From the beginning, the Supreme Court consistently has held that copyright is not grounded in any theory of the author's natural right. It is solely a creature of statute, and the scope of the right is strictly limited by the statutory grant. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659-64, 667-68 (1834); *Sony Corp.*, 464 U.S. at 429 n.10 (observing that copyright law "is not based upon any natural right" of the author and describing the balance between the public benefit from "stimulat[ing] the producer" and the public detriment from "the evils of the temporary monopoly" (quoting H.R. Rep. No. 2222 (1909)). The Courts of Appeals have agreed, observing that "copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public." *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990)); *accord*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262-63 (11th Cir. 2001) ("The copyright is not a natural right inherent in authorship."). In other words, claims by copyright owners that "we created it, so it is ours" are inconsistent with law and the Constitution and should not be given weight.

Further, the goal of copyright law is not to maximize the revenues of copyright owners or the return to authors. Rather, the goal is to provide an appropriate level of incentive to induce the creation and dissemination of an amount of creative work that maximizes the overall welfare of society, taking into account other uses to which productive resources could be put. Among other things, the law should recognize that once a copyrighted work is created, maximizing consumption of the work maximizes society's welfare. Unlike tangible property, where consumption by one limits consumption by others, uses of copyrighted works do not deprive others of the ability to enjoy the work.[3]

In other words, broad use and dissemination of copyrighted works is central to the constitutional scheme. Promoting use and dissemination should lie at the core of the Copyright Office's recommendations.

[3] In economic terms, consumption is non-rivalrous.

II. Music Performance Rights: The Law Should Ensure that the PROs' Collective Market Power Is Constrained and Provide Protection Against the Comparable Market Power of the Major Publishers. [NOI Questions 5, 6, and 7]

Questions 5, 6 and 7 of the NOI ask about the effectiveness of the current process for licensing the public performance of music generally, and about the ASCAP and BMI consent decrees specifically. The NOI specifically notes that the ASCAP and BMI decrees "were last amended well before the proliferation of digital music," and asks if the consent decrees are still justified. *See* NOI at 14,741 & Question 7. The recent decisions of the ASCAP and BMI Rate Court judges, who have extensive experience with the PROs' behavior, and the recent experience of CTIA's members in their dealings with the PROs, confirm that the decrees remain essential to foster competitive market pricing for music performance rights.

Due to the nature of the markets, SESAC and the major publishers also exercise substantial supra-competitive market power. That market power should also be controlled.

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

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

First, ASCAP, BMI and SESAC aggregate enormous numbers of musical works, which would, in a competitive market, compete for use. Second, the large music publishers have been allowed to merge to the point that the publishing industry is now highly concentrated. Three major publishers control the vast majority of musical works.

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

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

Fourth, the PROs typically offer only licenses to their entire repertory. Thus, they effectively eliminate any competition that may exist among their members, among the

PROs, between the PROs and their members, or, for that matter, between the use of music and other programming matter.

Fifth, these problems are compounded by the near-impossibility of identifying the potential licensors of any particular performance right. Although the PROs offer on-line searches of their databases, they do not provide a reliable or effective means of identifying the content of each PRO's repertory. As the Magistrate Judge considering a preliminary injunction against SESAC found, SESAC's online search tool "does not provide a reliable means for determining what is SESAC's repertory." Report and Recommendation at 15, *Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5807 (E.D. Pa. Dec. 23, 2013). The court noted that the tool "expressly disclaims that it is accurate, advises stations that it could change on a daily basis, and limits the user to 100 searches per session." *Id.* at 15 n.13. ASCAP's search tool contains a similar disclaimer, stating that "ASCAP makes no representations as to its [search tool's] accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database." All of the search tools limit searches to one work at a time, making searches for numerous works impractical.

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

The judges that oversee the PROs' conduct have continued to recognize the PROs' market power and to curb their abuses, long after "the proliferation of digital music," which the NOI implied, without explanation, cast doubt upon the continued validity of the ASCAP and BMI consent decrees. NOI at 14,741. In 2005, the United States Court of Appeals for the Second Circuit, which oversees the rate courts that oversee the consent decrees, recognized that the "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." *United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005). As recently as 2012, that same court stated that "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012); *see Yahoo!*, 627 F.3d at 76.

Courts examining SESAC's market power also have concluded that SESAC functions as a monopolist and that there is evidence that SESAC has acted unlawfully. *See*, *e.g.*, *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(PAE), 2014 WL 812795 at *36 (S.D.N.Y. 2014) ("In sum, there is sufficient evidence upon which a jury could find that SESAC took action to maintain and fortify its monopoly over licensing of its affiliates' work, by adopting licensing practices that eliminated all realistic competition

with its blanket license."); *Radio Music License Committee v. SESAC Inc.*, Report and Recommendation at 31-33 (finding that Plaintiffs had made a prima facie case of a violation of Sherman Act sections 1 and 2, and noting that "SESAC has 100% of the market power over the unique collection of works in their repertory and there are no 'real' alternatives to SESAC's blanket license").

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

B. The Recent Experience of CTIA's Members Demonstrates that the Consent Decrees Continue to Provide an Essential Check on the PROs' Abuse of Their Collective Market Power.

CTIA members have experienced first-hand the abuses of market power that the PROs continue to perpetrate. In one case, the PROs asserted the right to collect fees for activities that did not implicate the performance right. In another, they sought to impose hugely discriminatory fees on wireless service providers for the music included in video programming. In both cases, the rate courts were essential in protecting the performing entities and the public.

1. The PROs' Over-Reaching Claims Relating to Music Downloads

The PROs asserted for years that downloads of music files, including ringtones, implicated the public performance right. In other words, according to ASCAP and BMI, downloads for which music publishers were fully compensated under the section 115 mechanical license, also required a further payment for a public performance license, due to various theories, including the PROs' construction of the "transmit clause" found in the definition of "to perform or display a work 'publicly.'" 17 U.S.C. § 101.

The PROs used their market power to parlay those claims into millions of dollars of ill-gotten gain. These claims for double-dip compensation were ultimately challenged in the ASCAP Rate Court by services that offered music and ringtone downloads. *See Yahoo!*, 627 F.3d 64 (full downloads); *Verizon Wireless*, 663 F. Supp. 2d 363 (ringtones).

The rate court, and then the Second Circuit, consistently held that downloads do not implicate the public performance right. See *Yahoo!*, 627 F.3d at 71 (downloads do not implicate the public performance right); *Verizon Wireless*, 663 F. Supp. 2d at 378 (ringtones do not implicate the public performance right). In other words, the rate court process established by the consent decrees served as an essential check on the PROs' abuse of their market power.

2. ASCAP's Efforts to Discriminate Against Mobile Video Services

CTIA's members also faced ASCAP's abuse of its monopoly power when they sought a reasonable license for their mobile video services. In response to the request, ASCAP sought a radical change to its longstanding, consistent paradigm for licensing music in video programming. ASCAP eschewed the fee structure that it had long applied in the cable and broadcast television industry, where license fees varied depending on music intensity of the programming between 0.9% and 0.1375% of the programming service's revenue (which does not include the revenue of the entity distributing the content to the public). Instead, ASCAP sought to nearly triple its rates.[4]

Moreover, ASCAP sought to apply those inflated rates to the revenue earned for both the programming and its public distribution. In other words, ASCAP attempted to use its monopoly power to leverage itself into a share of revenues that were earned for the wireless carriers' technical advances and huge capital expenditures in developing and maintaining their networks, revenues that were not reasonably attributable to the music in video programming.

The combined effect of the higher rate and inflated revenue base was that ASCAP sought fees from the wireless industry that were many multiples of the fees it obtains for the same audiovisual performances in other media. ASCAP's attempt to discriminate was particularly egregious given that its cable licenses (and at least one major network broadcast license) encompassed performances of identical content over identical wireless media.

Fortunately, the ASCAP Rate Court and Second Circuit rejected ASCAP's unprecedented attempt to discriminate among media. *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010), *aff'd sub nom. ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012). The district court found that ASCAP's witnesses were not credible, 712 F. Supp. 2d at 224 n.35, and that its case lacked an "explanation of guiding economic principles or any coherent theory," *id.* at 239.

ASCAP's efforts to discriminate against mobile video services shows the lengths to which the PROs will go to exercise their collective monopoly power and the continuing need for the consent decrees and rate courts to rein in that power.

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

The SESAC experience provides an example of what the world would look like without the ASCAP and BMI consent decrees – unconstrained price increases charging

[4] ASCAP sought to apply a rate of 2.5% to revenue that had been adjusted by a "music use adjustment factor," which was determined by the ratio of ASCAP's traditional cable TV rate for a type of programming to 0.9%. Thus, each applicable rate equaled the corresponding cable rate multiplied by 2.5/0.9 (2.78).

disproportionate amounts for the limited music that is performed. As a result of its behavior, SESAC has been sued for antitrust violations by both the Television and Radio Music License Committees. As discussed above, early decisions in both cases confirm that SESAC possesses collective market power, takes steps to eliminate competitive licensing by its affiliated publishers, and acts to ensure that it is able to extract supra-competitive license fees. These abuses should be curbed, and SESAC should be subjected to effective regulation comparable to that imposed on ASCAP and BMI.

D. While Direct Licensing Remains an Important Check on PRO Abuses, It Cannot Replace the Consent Decrees Due to the Lack of Competition Among Major Publishers. [NOI Question 14]

NOI question 14 asks about direct performance licensing by music publishers. As the rate courts found in the DMX cases, direct licensing, particularly by smaller independent publishers, provides an important check on the PROs' market power and offers some competition. Unfortunately, however, the major publishers have been allowed to merge under the cover of the ASCAP and BMI consent decrees to the point that the industry is highly concentrated. Moreover, due to this consolidation in the industry, the major publishers offer catalogs that every user must license, so they are no longer substitutes. Thus, the major publishers do not compete with each other. Rather, as the ASCAP Rate Court found in the recent Pandora case, the major publishers exercise extraordinary market power and are willing to abuse that market power to extract supra-competitive license fees.

In the recent Pandora case, the ASCAP Rate Court found in no uncertain terms that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices" in their negotiations with Pandora. *Pandora Media*, 2014 WL 1088101 at *35. The court found that the negotiations were conducted in a manner that left Pandora with no alternative: "it could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms." *Id*. According to the court, "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." *Id.* at *35-36.

As further evidence of the flaws in a direct-license only regime, when the major publishers tried to withdraw their digital rights from ASCAP and BMI and license them directly, they found it virtually impossible to administer their own rights. Instead, they turned back to ASCAP and BMI to administer the withdrawn rights for the vast majority of users. *See id.* at *17-18. This showed the withdrawal for what it was: an effort by the major publishers to exercise enormous market power free from the constraints of the consent decrees. Accordingly, while direct licensing is an important alternative to the PRO blanket licenses under the consent, direct licensing cannot be a substitute for the consent decrees.

E. The Proposed Change to the Section 114(i) "Firewall" Is Inappropriate and Should Be Rejected. [NOI Question 6]

NOI Question 6 asks specifically about the impact on rate setting under the ASCAP and BMI consent decrees of section 114(i), which prohibits the courts from taking into account the license fees payable for sound recordings under section 106(6). The NOI refers to this preclusion as "significant," NOI at 14,741 n.7, but fails to describe the reason this provision is in the law or to provide any evidence supporting its significance.

In fact, the provision was sought by the music industry, which was concerned that (i) that the new sound recording public performance rights fees would be seen by the rate court judges as reducing the pool of money available to pay publishers, and (ii) the sound recording fees might be less than existing musical works fees, thus leading to a reduction of musical works fees. Now that the publishing industry has seen how much the recording industry has been awarded by the Copyright Royalty Board, it is questioning its prior judgment.

Unfortunately, while the ASCAP and BMI Rate Court Judges recently have performed their function well and reined in the collective market power of ASCAP and BMI, the Copyright Royalty Judges have been less successful in controlling the market power of the major record companies, allowing the rates for sound recording licenses to reach supracompetitive levels. Moreover, the digital sound recording performance right for interactive streaming is not subject to any rate regulation. Rather, the record companies are entitled to charge whatever they can. As the FTC recently found in approving the merger of Universal and EMI, "Commission staff found considerable evidence that each leading interactive streaming service must carry the music of each Major to be competitive. Because each Major currently controls recorded music necessary for these streaming services, the music is more complementary than substitutable in this context, leading to limited direct competition between Universal and EMI." Statement of FTC Bureau of Competition Director Richard A. Feinstein, In the Matter of Vivendi, S.A. and EMI Recorded Music, September 21, 2012. In other words, the major record companies do not compete with each other to license interactive services. Accordingly, sound recording performance rights are not a reasonable proxy for competitive market rates.

The publishers' new-found concern about the disparity between musical work and sound recording rates is particularly ironic because the disparity exists only because of positions taken within the music industry. From the beginning, services subject to the new sound recording performance right argued that sound recording rights fees should be roughly equivalent to the fees set by the ASCAP and BMI Rate Courts for musical work rights.[5] The recording industry opposed this position vigorously, arguing that record

[5] *See* Library of Congress, Copyright Office, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule and Order, 67 Fed. Reg. 45,240, 45,242 (July 8, 2002) ("*Webcasting I*"); *See* Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Final Rule and

companies invested more resources at higher risk than music publishers and should reap performance rights fees that were many times musical works rights fees.[6] Virtually all of the record companies making these arguments had publisher affiliates, who are now the very entities objecting to the result upon which their own affiliates had insisted.

The publishers' objections to the existing rate disparity has led some in Congress to introduce a bill misleadingly named the "Songwriter Equity Act," H.R. 4079, 113th Cong. (2d Sess. 2014). That bill would eliminate the preclusion set forth in section 114(i), allowing publishers to argue that their fees should be related in some way to sound recording rights fees. The bill, however, would do so in a one-sided manner, expressing the "intent of Congress" that sound recording rights "not diminishing in any respect" the fees payable for musical works. H.R. 4079, § 2. The bill would go further, by prohibiting the Copyright Royalty Board, when setting sound recording rights fees, to construe the enactment of the bill as a Congressional recognition that the level of musical works fees should be taken into account in setting sound recording fees. *Id.*, § 3.

In other words, the publishers want it both ways – they want the higher sound recording fees to be relevant in setting their fees, but they want to protect their affiliate record companies and ensure that sound recording fees are not dragged down by much lower musical works fees. That makes no sense. If musical works fees and sound recording rights fees are to be related to each other, the relationship logically must flow both ways. Moreover, if sound recording rights fees are relevant in setting musical works fees, Congress should not pre-determine that the direction of relevance is to increase the fees.

CTIA submits that the rate setting process of the ASCAP and BMI Rate Courts has led to license fees that are far closer to the competitive market goal than the sound recording fees set in the past by the Copyright Royalty Board. If there is a relationship between sound recording fees and musical works fees, the law should be amended to ensure that the CRB takes musical works fees into account rather than to take the opposite approach sought by the publishing industry.

Order, 72 Fed. Reg. 24,084, 24,092 (May 1, 2007) ("*Webcasting II*").

[6] *See Webcasting I*, Proposed Findings of Fact and Conclusions of Law of the Recording Indus. Ass'n of Am., Inc., at 270-309 (Dec. 21, 2001); *Webcasting II*, 72 Fed. Reg. at 24,094.

III. The Law Should Be Amended to Simplify and Streamline Digital Rights. [Related to NOI Questions 4, 8, and 24]

The law relevant to music licensing is an incoherent mess, particularly as it applies to the digital environment. Music licensors claim that public performances implicate the reproduction and distribution rights. As CTIA's members discovered, agents of those same music licensors assert that distributions implicate the public performance right. A longstanding exemption that should allow reproductions to be made when they are used solely to effectuate permitted public performances is outmoded and riddled with limitations that create substantial risk.

The problems of duplicative license claims are compounded because different representatives of the same copyright owners typically license the reproduction and the public performance rights. Moreover, virtually all participants in the market have recognized that the licensing regime for the reproduction and distribution rights, which requires specific monthly reporting and payment, is complex and burdensome.

NOI question 4 asks "[f]or uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner?" That asks the wrong question and suggests the wrong answer.

Rather, the law should be revised to eliminate these complexities. Public performances should not require a mechanical license. Distributions should not require a public performance license and should be licensed under a blanket mechanical license that is priced in a way that fosters competitive market alternatives. The server copies used for both types of transmissions should be permitted without further need for a license. To the extent that these issues are not covered in questions raised in the NOI, they should be. *See* NOI Question 24.

A. Streamed Performances Do Not and Should Not Require a Reproduction or Distribution License. [NOI Questions 4, and 24]

When a service makes digital public performances over the Internet or over wireless networks, it is required to pay the copyright owner of the musical composition and of the sound recording for the exploitation of their respective works under the public performance right. The public performance of the musical work is typically licensed by the applicable PRO. The ASCAP and BMI Rate Courts recently have done an excellent job ensuring that the licenses are priced at a level that approximates the fees that would be charged in a competitive market, taking into account the economic value of the performance. As discussed above, the sound recording copyright owners are paid license fees that far exceed the rates that would exist in a competitive market.

In other words, the copyright owners are already paid fees at or above a level that accounts for the economic value of the performance. It makes no economic sense for a service making such performances to have to pay even more for reproductions that occur

simply as an artifact of the transmission technology that is used. Any such additional payment will create a disincentive for distribution that will necessarily result in fewer transmissions being made, to the detriment of the public.

The Copyright Office recognized this reality when it wrote its 2001 Report to Congress in response to section 104 of the Digital Millennium Copyright Act. The Office stated in clear and certain terms that "Temporary copies incidental to a licensed digital performance should result in no liability." DMCA Section 104 Report at 142. As the Office recognized:

> [t]he economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance. The same copyright owners appear to be seeking a second compensation for the same activity merely because of the happenstance that the transmission technology implicates the reproduction right, and the reproduction right of songwriters and music publishers is administered by a different collective than the public performance right. The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place – to the detriment of copyright owners, webcasters, and consumers alike – or to extract an additional payment that is not justified by the economic value of the copies at issue.

Id. at 143. The Section 104 Report was correct.[7]

Moreover, there is a strong argument under current law that buffers created as an artifact of a transmission technology used to make a performance are not cognizable reproductions within the meaning of the Copyright Act. *See*, *e.g.*, *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008) (buffers used to effectuate a performance are not fixed and do not implicate the reproduction right); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004) (RAM buffers used to effectuate a digital transmission are not fixed). To the extent that they may be considered copies under current law, Congress should clarify the law to make clear that buffers are not cognizable copies or are exempt from copyright liability, not to find a means to double charge for an activity whose economic value is in the performance.

Unfortunately, the NOI neglects the reasoning and finding of the Section 104 Report and instead misleadingly asserts that "[t]he Copyright Office has thus interpreted

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[7] Indeed, the recommendation of the Section 104 Report in this regard did not go far enough. The same reasoning applies to performances that are exempt from liability under specific exemptions adopted by Congress. Where the primary economic activity at issue is a public performance, and Congress determined that there should be no liability for that performance, it makes no sense to undermine Congress' determination by requiring the user to obtain a license under one of the other rights that may be incidental to the technology used to make the performance.

the Section 115 [mechanical] license to cover . . . the server and other reproductions necessary to engage in streaming activities." NOI at 5. Actually, the Office declined to find that a stream was, in fact, a DPD subject to the reproduction and distribution rights. Library of Congress, Copyright Office, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries (Docket No. RM 2000–7), Interim rule, 73 Fed. Reg. 66,173, 66,174 (Nov. 7, 2008) ("The Office is not currently prepared to issue a regulation that definitively addresses whether such copies are within the scope of the compulsory license. . . . As such, the interim regulation takes no position on whether . . . and when it is necessary to obtain a license to cover the reproduction or distribution of a musical work in order to engage in activities such as streaming."). Rather, the Office held only that, if a stream resulted in a DPD, the mechanical license would cover the server and other reproductions necessary to engage in the activity.

CTIA understands that the Office was considering adopting a rule that streaming results in DPDs in order to fill a hole in the law – there is no clear exemption or means to license the server copies used by streaming services to make their performances. The Copyright Office was constrained in 2008 by the terms of existing law. Unfortunately, the solution being considered by the Copyright Office, if adopted, would have destroyed the longstanding distinction in the law among distributions, reproductions, and public performances and would have created major inconsistencies in other contexts. For example, section 114 includes a statutory license for certain non-interactive digital sound recording performances. Section 112(e) includes a statutory license for server copies used to make those licensed performances as long as no copies are made from those copies. There is, however, no license for buffer or other downstream "phonorecords" that might be created in the course of the performance, and any such copies could vitiate the section 112(e) statutory license. In other words, if the Office had decided that streaming results in the distribution of copies of musical works, it would necessarily also result in the distribution of phonorecords of sound recordings, effectively converting Congress's two sound recording statutory licenses into an absolute right to license the downstream incidental phonorecords. That would have made no sense and would have destroyed the statutory license system Congress created.

Fortunately, the NOI seeks recommendations to improve the law and is not constrained by the limitations and ambiguities of the law as it now exists. There is a better way to fix the music server copy hole, which CTIA discusses below in Part III.C.

For the reasons set forth in the Section 104 Report, the Office was right when it refused to establish the principle that streaming implicates the reproduction and distribution rights. It should recommend that Congress clarify the law to ensure that reproductions that are incidental to a licensed or exempt public performance (and that serve no other purpose) do not create liability under the Copyright Act.

B. Downloads Do Not and Should Not Require a Public Performance License.

As discussed above, it was only when challenged in the rate courts that the music PROs were forced to drop their claims for double-dip compensation for downloads under

the guise of the public performance right. These claims resulted from the arguable lack of clarity in the drafting of the transmit clause defining when a performance was public.

The inappropriateness of these claims, like the inappropriate claims relating to buffers discussed above, was addressed by the Copyright Office in its DMCA Section 104 Report. As the Copyright Office clearly stated in its heading on page 146 "[p]ublic performances incidental to licensed music downloads should result in no liability." The Office recognized that this was "symmetrical" to the difficulty of the double-dip claims relating to buffers:

> We view this issue as the mirror image of the question regarding buffer copies. We recognize that the proposition that a digital download constitutes a public performance even when no contemporaneous performance takes place is an unsettled point of law that is subject to debate. However, to the extent that such a download can be considered a public performance, the performance is merely a technical by-product of the transmission process that has no value separate from the value of the download. If it is a public performance, then, we believe that arguments concerning fair use and the making of buffer copies apply to that performance. In any case, for the reasons articulated above, it is our view that no liability should result under U.S. law from a technical "performance" that takes place in the course of a download.

DMCA Section 104 Report at 147-48.

Here, too, the Office got it right in 2001. Any revision to the definition of public performances should make clear that downloads do not implicate the public performance right to prevent abusive double-dip claims in the future.

C. Server Copies Used to Make Licensed or Exempt Performances Should Be Exempt, and Archaic Conditions on the Relevant Exemptions Should Be Removed.

Source copies that are used for no purpose other than to make a licensed or exempt performance have, traditionally, been exempt from copyright liability under a provision called the "ephemeral recording" exemption. It is contained in section 112(a) of the Copyright Act and applies both to sound recordings and the musical works contained in the sound recordings. Unfortunately, the exemption is subject to limitations that do not reflect modern realities.[8] Thus, entities making permitted public performances remain at risk for claims of copyright infringement. Both the recording industry and music publishing industry have used claims of violations of the terms of the

[8] The exemption was created during the 1976 revision of the Copyright Act and was crafted to reflect the technology of the time – namely, the use of program tapes by radio and television stations to facilitate their performances. *See* H.R. Rep. No. 94-1476, at 101 (1976) (noting that "the need for a limited exemption [for ephemeral recordings] because of the practical exigencies of broadcasting has been generally recognized.").

exemption and statutory license in litigation and legislative efforts to obtain inappropriate leverage. *See*, *e.g.*, *Atlantic Recording Corp. v. XM Satellite Radio*, Complaint Count IV (S.D.N.Y. May 16, 2006) (asserting willful infringement based on ephemeral recordings used for licensed performances as leverage for complaint against receiver with recording function)**;** RIAA Demand Letter to Webcasters, June 1998 (asserting liability for reproductions used for nonsubscription webcasting, leading in part to DMCA expansion of sound recording performance right).[9]

The existing exemption fails in a number of important respects:

- First, the section 112(a) exemption is limited to a single copy. Digital services often require multiple copies. Notably, the section 112(e) statutory license permits multiple copies of sound recordings (but does not apply to musical works).

- Second, the 112(a) exemption (and the 112(e) statutory license) prohibit the making of copies from the exempt copy. Modern transmission technologies often require the making of buffers or caches, which may or may not be cognizable "copies" under existing law.

- Third, section 112 limits the performances for which the exempt ephemeral recordings are used to performances made "within the local service area" of the transmitter. It has been argued that this limitation excludes Internet streaming. Notably, the section 112(e) statutory license removes this condition with respect to ephemeral phonorecords of sound recordings, but there arguably is no similar exemption or license for musical works.

- Fourth, both the exemption in section 112(a) and the statutory license in section 112(e) require the server copy to be destroyed within six months of the first performance. That condition makes no sense in a world of digital music servers and likely is being honored in the breach, creating a substantial risk of claims of copyright infringement.

- Fifth, section 112(a) applies to "transmission programs," a confusing term that may or may not apply to digital servers storing individual sound recordings. Again, that limitation makes no sense in today's world and is not part of section 112(e).

When the recording industry and the Digital Media Association (DiMA) negotiated the expansion of the sound recording performance right in 1998, they also created a statutory license for source/server copies of sound recordings used in licensed performances in section 112(e). The Copyright Office opposed this statutory license in

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[9] Available at https://web.archive.org/web/19980703045450/ http://www.mp3.com/news/058.html.

1998 and restated its opposition and its belief that an exemption should be enacted in the DMCA Section 104 Report. In that report, the Copyright Office commented that the Section 112(e) ephemeral recording license "can best be viewed as an aberration." *See* DMCA Section 104 Report at 144 n.434. The Office went on to say that it did not "see any justification for the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license. Our views have not changed in the interim, and we would favor repeal of section 112(e) and the adoption of an appropriately-crafted ephemeral recording exemption." There is no reason that a service making a licensed (or exempt) performance should have to pay additional compensation for server copies that have no purpose other than to facilitate the performance. In other words, an exemption makes sense; a statutory license does not.

Moreover, even on its own terms, the section 112(e) statutory license fails in several respects:

- First, although the statutory license is broader than the exemption, it is still subject to some of the unreasonable limitations of the section 112(a) exemption, including the prohibition on copies from copies and the six month destruction requirement; and

- Second, Congress did not create a statutory license applicable to musical works or expand the exemption to cover server copies of musical works, leaving a gap that publishers have exploited.

Copies or phonorecords that are used solely to facilitate a licensed or exempt performance should not bear copyright liability. The copyright owner either is paid for the performance, or Congress has decided it should not be paid for the performance. Thus, the ephemeral recording exemption in section 112(a) should be broadened for both musical works and sound recordings, and the statutory license in section 112(e) should be eliminated.

The ephemeral recording exemption is designed to ensure that transmitting entities that are providing performances to the public can operate efficiently and without uncertainty and risk. These performances are already fully compensated or have been deemed exempt from copyright liability. There should be no further payment needed to make copies used only to facilitate the permitted performance.

IV. The Office Should Ensure that Unreasonable Expansions of the Public Performance Right Do Not Threaten Cloud Computing. [NOI Question 24]

CTIA members have invested heavily in cloud computing. Cloud computing refers to the practice of accessing a network of remote computers on the Internet or wireless networks to store, manage, and process data. Cloud computing unlocks enormous new value for businesses, consumers, and the economy as a whole, by making computing and storage resources available in an efficient, flexible, and secure manner. It

also gives people the ability to access their own documents, email, music collections, and other data across multiple wired and wireless devices, remotely and seamlessly.

Cloud computing depends on the proper limitation of copyright rights, most notably the public performance right. Constructions of the law that discriminate against remote activities threaten cloud computing services with potentially massive liability and would chill investment in this exciting new sector of the economy.

Cloud computing, by its nature, allows users to store content remotely and then transmit it back to themselves on demand. Under a proper construction of the law, such transmissions should be considered private performances that do not implicate the public performance right. If such transmissions do implicate the public performance right, cloud computing would be subject to the whim of an unknowable and uncountable array of copyright owners.

The following principles relating to the performance right are essential to protect the continued growth and vitality of cloud computing.

- When a user directs a computer to store a personal copy of a work, a subsequent transmission of that copy back to the same user is a private performance, not a public performance;

- In assessing whether a performance is public or private, the physical location of the devices involved is irrelevant;

- The fact that multiple users may store or transmit the same work does not transform a number of otherwise individual private performances into a single public one;

- Volitional conduct is a necessary element of direct liability.

CTIA is aware that the Supreme Court is considering the scope of the performance right in the *Aereo* case. The amicus brief in which CTIA participated in that case expands on these principles. Brief Amici Curiae of Center for Democracy and Technology, CTIA-The Wireless Association at 9-20, *ABC v. Aereo, Inc.*, No. 13-461, (U.S. Mar. 3, 2014).

The Copyright Office should be vigilant to ensure that the public performance right is not expanded in a way that threatens cloud computing. If needed, the Copyright Office should recommend to Congress that the right be clarified to protect and encourage the use of cloud computing technology. If, the right continues to be construed in a way that does not threaten cloud computing, the Copyright Office should resist calls to expand the right in ways that do.

CTIA appreciates the Copyright Office's consideration of its comments and looks forward to working with the Copyright Office on these important issues.

Respectfully submitted,

May 23, 2014

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

In the Matter of: **ASCAP and BMI Consent Decree Review**

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

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Introduction and Summary

CTIA-The Wireless Association® offers this initial submission in response to the Department of Justice's June 4, 2014, request for comments concerning the ASCAP and BMI consent decrees (the "Consent Decrees"). CTIA appreciates the opportunity to comment in connection with this important review.

CTIA respectfully submits that:

- The market for music performance rights is not competitive and the Consent Decrees continue today to serve important pro-competitive purposes;
- The recent experience of CTIA's members demonstrates how the Consent Decrees provide an important check on ASCAP's and BMI's Abuse of their Collective Market Power;
- SESAC possesses significant collective market power that should be subjected to effective regulation under a consent decree comparable to the Consent Decrees
- Direct licensing is an important check on performance rights organization ("PRO") market power under the Consent Decrees, but it cannot replace the Consent Decrees due to the high market concentration of the major music publishers and the lack of competition among them.

CTIA elaborates on these points below.

CTIA is an international organization representing all sectors of wireless communications – cellular, personal communication services, and enhanced specialized mobile radio. A nonprofit membership organization founded in 1984, CTIA represents providers of commercial mobile radio services ("wireless telecommunications carriers"), mobile virtual network operators, aggregators of content provided over wireless telecommunications systems, equipment suppliers, wireless data and Internet companies, and other contributors to the wireless universe. A list of CTIA's members appears at http://www.ctia.org/membership/ctia_members/.

CTIA frequently participates in administrative proceedings and coordinates efforts to educate government agencies and the public about wireless issues. For example, CTIA recently submitted comments in response to the Copyright Office's Music Licensing Study, Docket No. 2014-03, which, among other things, raised questions similar to those being evaluated as part of the Justice Department's Consent Decree review. CTIA also has presented its views in testimony before Congress and has filed numerous amicus briefs in the federal courts on behalf of the wireless industry on a variety of issues, including copyright issues. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

CTIA and its members have a substantial interest in the continued effectiveness of the Consent Decrees. Wireless technology not only provides consumers with first-rate telecommunications service, but also provides a convenient and important means for wireless consumers to receive digital performances of music in connection with their wireless devices. CTIA's members, either directly or through agreements with third-party service providers, offer interactive and non-interactive music streaming, access to satellite radio programming, permanent and limited music downloads, ringtone downloads, linear and on-demand video streaming, and access to games with full color graphics and embedded music. CTIA's members also transmit performances of recorded music to individuals placing calls to wireless customers in the form of "ringback tones"— sounds that replace the ringing that the caller hears when he or she calls a mobile telephone. Further, many of the media products and services that CTIA's members make available are available for preview using performances of short clip samples that are streamed over the Internet and wireless networks.

CTIA's members strive to provide their services to their customers at a reasonable cost. Thus, ready access to, and the cost of, music licenses are ongoing concerns. In light of these concerns, CTIA participated as an amicus before the ASCAP Rate Court and the Court of Appeals for the Second Circuit in the case deciding that music downloads did not implicate the public performance right. *United States v. ASCAP (Application Real Networks, Inc. & Yahoo! Inc.)*, 627 F.3d 64 (2d Cir. 2010) (hereinafter "*Yahoo!*").

Moreover, CTIA's members have been litigants before the ASCAP Rate Court, where they were instrumental in resisting ASCAP's efforts to demand public performance royalties for ringtone downloads. *See In re Cellco P'ship d/b/a Verizon Wireless*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (hereinafter "*Verizon Wireless*") (holding that downloading a ringtone to a cell phone is a reproduction but not a public performance).[1] CTIA's members also resisted ASCAP's attempts to discriminate in its royalty fees against new wireless means of performing video. *See ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012) (rejecting ASCAP's discriminatory position and adopting rates consistent with past video licenses).[2]

CTIA members support protection of the legitimate rights of copyright owners. Indeed, CTIA members are among the leading legitimate performers and distributors of recorded music, and pay for the right to do both. Music publishers, and their songwriters, earn substantial performance royalties as compensation for CTIA members' public performances of musical compositions. CTIA, however, believes that the market for music licenses is far from competitive, that the PROs abuse market power derived from

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[1] CTIA members Verizon Wireless and AT&T Mobility were parties in that case. CTIA filed an amicus brief.

[2] CTIA members Verizon Wireless and AT&T Mobility were parties in related cases that were set to be tried shortly after the MobiTV case. Those cases settled after the MobiTV decision. Verizon Wireless filed an amicus brief before the Second Circuit in ASCAP's unsuccessful appeal of the MobiTV decision.

their aggregation of copyrights and their blanket licensing practices, and that the Consent Decrees remain an essential means of mitigating that market power.

In sum, CTIA has a direct interest in the issues raised by the DOJ's Consent Decree review. Those issues will have significant ramifications for the public, the wireless industry, and CTIA's members.

I. The Justice Department Should Ensure that the PROs' Collective Market Power Is Constrained and Provide Protection Against the Comparable Market Power of the Major Publishers.

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

The recent decisions of the ASCAP and BMI Rate Court judges, who have extensive experience with the PROs' behavior, and the recent experience of CTIA's members in their dealings with the PROs, confirm that the decrees remain essential to foster competitive market pricing for music performance rights. Due to the nature of the markets, SESAC and the major publishers also exercise substantial supra-competitive market power. That market power also should be controlled.

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

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

First, ASCAP, BMI and SESAC aggregate huge numbers of musical works that would, in a competitive market, compete for use. Second, the large music publishers have been allowed to merge to the point that the publishing industry is now highly concentrated. Three major publishers control the rights to vast majority of musical works.

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

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

program or ad, unconstrained by the actual value contributed to that program or ad by the licensor's music.

Fourth, the PROs typically offer only licenses to their entire repertory. Thus, they effectively eliminate any competition that may exist among their members, among the PROs, between the PROs and their members, or, for that matter, between the use of music and other programming matter.

Fifth, these problems are compounded by the near-impossibility of identifying the potential licensors of any particular performance right. Although the PROs offer on-line searches of their databases, they do not provide a reliable or effective means of identifying the content of each PRO's repertory. As the Magistrate Judge considering a preliminary injunction against SESAC found, SESAC's online search tool "does not provide a reliable means for determining what is SESAC's repertory." Report and Recommendation at 15, *Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5807 (E.D. Pa. Dec. 23, 2013). The court noted that the tool "expressly disclaims that it is accurate, advises stations that it could change on a daily basis, and limits the user to 100 searches per session." *Id.* at 15 n.13. ASCAP's search tool contains a similar disclaimer, stating that "ASCAP makes no representations as to its [search tool's] accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database." All of the search tools limit searches to one work at a time, making searches for numerous works impractical.

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

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

Courts examining SESAC's market power also have concluded that SESAC functions as a monopolist and that there is evidence that SESAC has acted unlawfully. *See, e.g., Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(PAE), 2014 WL 812795 at

*36 (S.D.N.Y. 2014) ("In sum, there is sufficient evidence upon which a jury could find that SESAC took action to maintain and fortify its monopoly over licensing of its affiliates' work, by adopting licensing practices that eliminated all realistic competition with its blanket license."); *Radio Music License Committee v. SESAC Inc.*, Report and Recommendation at 31-33 (finding that Plaintiffs had made a prima facie case of a violation of Sherman Act sections 1 and 2, and noting that "SESAC has 100% of the market power over the unique collection of works in their repertory and there are no 'real' alternatives to SESAC's blanket license").

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

B. The Recent Experience of CTIA's Members Demonstrates that the Consent Decrees Continue to Provide an Essential Check on the PROs' Abuse of Their Collective Market Power.

CTIA members have experienced first-hand the abuses of market power that the PROs continue to perpetrate. In one case, the PROs asserted the right to collect fees for activities that did not even implicate the performance right. In another, they sought to impose hugely discriminatory fees on wireless service providers for the music included in video programming. In both cases, the rate courts acting under the Consent Decrees were essential in protecting the performing entities and the public.

1. The PROs' Over-Reaching Claims Relating to Music Downloads

The PROs asserted for years that downloads of music files, including ringtones, implicated the public performance right. In other words, according to ASCAP and BMI, downloads for which music publishers were fully compensated under the section 115 mechanical license, also required a further payment for a public performance license, due to various theories, including the PROs' construction of the "transmit clause" found in the definition of "to perform or display a work 'publicly.'" 17 U.S.C. § 101.

The PROs used their market power to parlay those claims into millions of dollars of ill-gotten gain. The enormous risk of liability created by copyright law's statutory damages regime precluded users from challenging the PROs' position directly by refusing to take a license. Absent the Consent Decrees, the choice would have been to capitulate or risk enterprise-threatening liability.

The PROs' claims for double-dip compensation were ultimately challenged in the ASCAP Rate Court by services that offered music and ringtone downloads. *See Yahoo!*, 627 F.3d 64 (full downloads); *Verizon Wireless*, 663 F. Supp. 2d 363 (ringtones). The rate court, and then the Second Circuit, consistently held that downloads do not implicate the public performance right. See *Yahoo!*, 627 F.3d at 71 (downloads do not implicate the public performance right); *Verizon Wireless*, 663 F. Supp. 2d at 378 (ringtones do not implicate the public performance right). In other words, the rate court process

established by the Consent Decrees served as an essential check on the PROs' abuse of their market power.

2. ASCAP's Efforts to Discriminate Against Mobile Video Services

CTIA's members also faced ASCAP's abuse of its monopoly power when they sought a reasonable license for their mobile video services. In response to the license request, ASCAP sought a radical change to its longstanding, consistent paradigm for licensing music in video programming. ASCAP eschewed the fee structure that it had long applied in the cable and broadcast television industry, where license fees varied depending on music intensity of the programming between 0.9% and 0.1375% of the programming service's revenue (which does not include the revenue of the entity distributing the content to the public). Instead, ASCAP sought to nearly triple its rates.[3]

Moreover, ASCAP sought to apply those inflated rates to the revenue earned for both the programming and its public distribution. In other words, ASCAP attempted to use its monopoly power to leverage itself into a share of revenues that were earned for the wireless carriers' technical advances and huge capital expenditures in developing and maintaining their networks, revenues that were not reasonably attributable to the music in video programming.

The combined effect of the higher rate and inflated revenue base was that ASCAP sought fees from the wireless industry that were many multiples of the fees it obtains for the same audiovisual performances in other media. ASCAP's attempt to discriminate was particularly egregious given that its cable licenses (and at least one major network broadcast license) encompassed performances of identical content over identical wireless media.

Fortunately, the ASCAP Rate Court and Second Circuit rejected ASCAP's unprecedented attempt to discriminate among media. *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010), *aff'd sub nom. ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012). The district court found that ASCAP's witnesses were not credible, 712 F. Supp. 2d at 224 n.35, and that its case lacked an "explanation of guiding economic principles or any coherent theory," *id.* at 239.

ASCAP's efforts to discriminate against mobile video services shows the lengths to which the PROs will go to exercise their collective monopoly power and the continuing need for the Consent Decrees and rate courts to rein in that power.

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[3] ASCAP sought to apply a rate of 2.5% to revenue that had been adjusted by a "music use adjustment factor," which was determined by the ratio of ASCAP's traditional cable TV rate for a type of programming to 0.9%. Thus, each applicable rate equaled the corresponding cable rate multiplied by 2.5/0.9 (2.78).

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

The SESAC experience provides an example of what the world would look like without the ASCAP and BMI Consent Decrees – unconstrained price increases charging disproportionate amounts for the limited music that is performed. As a result of its behavior, SESAC has been sued for antitrust violations by both the Television and Radio Music License Committees. As discussed above, early decisions in both cases confirm that SESAC possesses collective market power, takes steps to eliminate competitive licensing by its affiliated publishers, and acts to ensure that it is able to extract supra-competitive license fees.

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

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

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

As the rate courts found in the DMX cases, direct licensing, particularly by smaller independent publishers, provides an important check on the PROs' market power and offers both some competition and an indication of the prices that would prevail in a competitive market. Unfortunately, however, the major publishers have been allowed to merge under the cover of the ASCAP and BMI Consent Decrees to the point that the industry is highly concentrated. Moreover, due to this consolidation in the industry, the major publishers offer catalogs that every user must license, so they are no longer substitutes. Thus, the major publishers do not compete with each other. Rather, as the ASCAP Rate Court found in the recent Pandora case, the major publishers exercise extraordinary market power and are willing to abuse that market power to extract supra-competitive license fees.

In the recent Pandora case, the ASCAP Rate Court found in no uncertain terms that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices" in their negotiations with Pandora. Pandora Media, 2014 WL 1088101 at *35. The court found that the negotiations were conducted in a manner that left Pandora with no alternative: "it could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms." Id. According to the court, "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their

negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." Id. at *35-36.

As further evidence of the flaws in a direct-license only regime, when the major publishers tried to withdraw their digital rights from ASCAP and BMI and license them directly, they found it virtually impossible to administer their own rights. Instead, they turned back to ASCAP and BMI to administer the withdrawn rights for the vast majority of users. See id. at *17-18. This showed the withdrawal for what it was: an effort by the major publishers to exercise enormous market power free from the constraints of the Consent Decrees. Accordingly, while direct licensing is an important alternative to the PRO blanket licenses under the Consent Decrees, direct licensing cannot be a substitute for the Consent Decrees.

Conclusion

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

Respectfully submitted,

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Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of:	
Music Licensing Study	Docket No. 2014-03

Comments of the Digital Media Association ("DiMA")

The Digital Media Association ("DiMA") respectfully submits the following comments in response to the above-referenced Notice of Inquiry (the "Notice of Inquiry"). DiMA commends the Copyright Office for initiating this inquiry, and appreciates the opportunity to participate.

DiMA is the leading national trade organization dedicated to representing the interests of licensed digital media services, including many of the leading players in the digital music marketplace today. DiMA's members include Amazon.com, Apple, Google/YouTube, Microsoft, Pandora, RealNetworks and Slacker, and a complete list of its membership may be found at http://www.digmedia.org/about-dima/members. Although DiMA is submitting a single response to the Notice of Inquiry, DiMA's members operate a broad array of different digital music service types and consumer offerings with different music licensing needs. However, as distributors of copyrighted sound recordings and musical works through legitimate music services, DiMA's members share many common interests, and are directly affected by existing methods of licensing music, as well as the mechanisms for obtaining music licenses that are shaped by U.S. copyright law. DiMA has been actively involved in many of the recent studies, analyses, public inquiries and roundtables conducted by the Copyright Office on various aspects of copyright law. Through the Copyright Office's efforts, we believe that Congress has already been provided with much important background on music licensing issues.

The interests of DiMA and its members are aligned with those of the rights owners in several significant respects. First, DiMA members share the belief that rights owners should be appropriately compensated for the use of copyrighted works. Second, DiMA members also share the belief that the long-term survival of the music business depends on the ability to develop profitable, sustainable digital music services that will delight consumers for generations to come. The legitimate music services represented by DiMA's members have collectively paid billions of dollars in royalties to content owners, recording artists and songwriters in a marketplace where the sale of physical products – long the content owners' primary source of revenue – has continued to decline year-over-year. In the face of this decline, digital music services, including many of the streaming services operated by DiMA's members, are generally viewed by the music business as its salvation.[1] Significantly, the delivery of engaging,

[1] IFPI Digital Music Report 2014, at 6 (2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.; *see also* Ben Sisario, *Spotify Hits 10 Million Subscribers, a Milestone*, N.Y. Times, May 21, 2014, *available at* http://www.nytimes.com/2014/05/22/business/media/spotify-hits-milestone-with-10-million-paid-subscribers.html?_r=1.

innovative music services by DiMA members is critical to the central public policy underlying our copyright system: affording the widest range of consumers access to the widest range of creative works.[2]

However, the complex process for music licensing in the digital landscape that exists today in the United States – the framework of which is based on U.S. copyright law – threatens to chill investment in legitimate music services, and the continued development and expansion of innovative services that are essential to the survival of the recorded music industry. Accordingly, we are pleased that the Copyright Office is continuing its examination of the effectiveness of existing methods of licensing music. We remain hopeful that, after evaluating the issues, Congress will consider ways to modernize U.S. copyright law in a manner that assures consumers continued access to a vibrant marketplace for music products and services in the digital era.

[2] *See, e.g., Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."); *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 558 (1985) ("the immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate the creation of useful works for the general public good." (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975))); *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[to] promote the Progress of Science and useful Arts.'").

EXECUTIVE SUMMARY

- Fragmentation of copyright rights and rights ownership. The mechanisms for obtaining music licenses in the United States are rooted in various distinct rights recognized under U.S. copyright law, where sound recordings, and the musical works embodied within them, are routinely owned by different copyright holders. In fact, the rights within the musical work rights bundle itself are routinely owned by more than one copyright holder. This fragmentation did not severely disrupt the historical business model for the sale of recorded music products because the distributors and retailers that sold and resold physical products (and promoted them) did not need to license any copyrights, and third parties (i.e., terrestrial radio broadcasters) licensed musical work public performance rights to promote the sale of these recorded music products through radio airplay.

- Shifting of licensing responsibility. In the digital environment, music services are functionally equivalent to the distributors and retailers that sold music under the historical business model, but licensing responsibility has shifted to them – a first in the history of the music industry.

- The impact of rights fragmentation and the shifting of licensing responsibility on digital music services. The above-referenced rights fragmentation and shifting of licensing responsibility to service providers under the current legal and regulatory framework established by U.S. copyright law has created formidable challenges for digital music services for various reasons unique to music licensing in the digital environment, including the following:

    - The need for licensing ubiquity, and the new legal uncertainties. As a result of the convergence of rights in the digital era, digital music services are subjected to legal uncertainties around the precise rights implicated for particular activities, overlapping claims for royalty payments, and significant potential legal exposure. Concurrently, as the music business has shifted from ownership models to access models, digital music services are confronted with the need to secure licenses from tens of thousands of rights holders, covering tens of millions of tracks, in order to offer consumers commercially viable services. Failing to secure the necessary licenses is not an option.

    - The unprecedented market power of rights owners, and the "tug-of-war" over royalties. Rights owners enjoy unprecedented market power, and because each negotiation and ratesetting proceeding occurs in parallel (at different times, in different places and before different ratesetting tribunals operating under different ratesetting standards), each rights owner seeks to increase its own royalty, generally without regard to the royalties that services have to pay the various other rights owners. As discussed further below, an example of this phenomenon was seen in recent proceedings involving musical composition public performance licensing for Internet radio services. Effectively, this dynamic has resulted in a ratcheting effect whereby digital music service providers have been thrust into the middle of a "tug-of-war" among rights owners over royalties. The net result of this "tug-of-war" is royalty rates that are (i) not presented to copyright users in a unified way such that digital music services can evaluate, forecast and understand their aggregate royalty expense for all of the copyright rights needed, and (ii) in the aggregate, are unjustifiably high and, ultimately, unsustainable.

    - Interdependence of interests. Because of the interdependence of interests among rights owners, creative talent and digital music services, the conduct of any one party in the music licensing marketplace can have adverse consequences for the others, and the public interest. There is no centralized body with general oversight to effectively balance these

competing interests and minimize the collateral consequences that one "hold out" rights owner can have on all others parties in the ecosystem.

- The current music licensing mechanisms do not work well in the digital environment. The existing music licensing structures are not well-suited for the digital era, as they (i) lack necessary transparency, (ii) are not efficient, and (iii) do not provide a "level playing field" for competitors in terms of ratesetting standards, royalty rates or functionality rules because of platform distinctions or historical anomalies. Nor do these structures often provide a suitable counter-balance to the market power of rights owners.

- Six essential pillars for modernization of copyright laws for the digital environment. U.S. copyright law is in need of modernization for the digital environment, and, as noted above, a holistic view of the entire music licensing ecosystem should be taken. For modernization to be effective, the framework for the new digital era should be based on the following six essential pillars:

    - **Continued Government Oversight and Regulation of Music Licensing Activities:** A music licensing framework that appropriately counter-balances the unique market power and negotiating leverage of copyright owners, and takes digital music services out of the middle of the rights owner "tug-of-war" over royalty rates that has driven up royalty costs to levels that are unsustainable, would facilitate a healthy and sustainable digital music marketplace.

    - **Transparency and a centralized database:** The digital marketplace needs a publicly available, centralized database that contains information about rights ownership of musical works and sound recordings on a work-by-work level and on which digital music services can rely. For such a database to be truly effective, it needs to be accurate, comprehensive and reliable, as well as use standard industry identifiers such as International Standard Recording Code ("ISRC") and International Standard Musical Work Code ("ISWC") numbers that show the relationship between the musical works and sound recordings that embody them, and vice versa. However, as experience with the development of the Global Repertoire Database ("GRD") in Europe has shown, if left entirely to private industry without government oversight, these universal standards (and the centralized database itself) are unlikely to get implemented.

    - **Licensing Efficiencies and Reduced Transaction Costs:** The music licensing marketplace would benefit from a framework that promotes licensing efficiencies and reduced transaction costs for music licensing activities, implemented through vehicles such as compulsory blanket licenses and common agents.

    - **Clarification of Rights**: A music licensing framework where rights owners are not able to drive up royalty rates based on legal uncertainties arising out of the convergence of reproduction, distribution and public performance rights in the digital environment would foster growth and promote new entry into the digital music marketplace.

    - **Reduction of Legal Risks Around Licensing Activities:** Immunity from infringement liability (including statutory damages) for copyright users that have acted diligently and in good faith based on the information contained in the centralized database would reduce risk and encourage further innovation. Further, any entitlement to statutory damages in other contexts should be conditioned on the registration of accurate rights ownership information in the centralized database, utilizing universal standards.

- **“Level Playing Field”:** A music licensing framework that creates a “level playing field” where one music service is not advantaged over another in terms of ratesetting standards, royalty rates or functionality rules because of platform distinctions or historical anomalies would increase competition on the merits, thereby incentivizing innovation.

I. INTRODUCTION AND OVERVIEW

1. The current legal and regulatory framework was designed for a historical business model (the sale of physical products) and is ill-suited for the digital environment.

A. Licensing responsibility under the historical business model.

As the Copyright Office has noted in the Background section for this Notice of Inquiry, many of the sound and enduring principles in U.S. copyright law are challenged when applied to the music business in the digital environment. The historical business model for recorded music products was relatively simple and straight-forward. Record companies sold physical products embodying sound recordings, musical works and other copyrighted materials (including artwork) to distributors and retailers, who in turn, resold those finished goods to consumers. Significantly, these distributors and retailers did not need to obtain copyright licenses from content owners in order to *resell the finished goods* because record companies delivered them with "all rights cleared."[3] Moreover, copyright law did not require retailers to seek licenses from content owners in order to engage in activities intended to *promote these sales*, such as in-store public performances of records.[4]

Under the pre-digital model, licensing activity for the promotion of physical product sales was generally the responsibility of parties other than the retailers – such as terrestrial radio broadcasters. These parties, not the retailers, licensed the necessary rights to promote the sale of records, such as by means of terrestrial FM and AM radio airplay. Moreover, the only rights broadcasters needed to secure were public performance rights in the underlying musical works, as Congress has long refrained from recognizing an exclusive right for the public performance of sound recordings by means of terrestrial radio airplay.

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[3] This included the right to reproduce and distribute the musical works embodied in the physical products. It is worth noting that the migration from selling physical products to permanent digital downloads has done little to change this basic construct, at least in the United States. Whether sold or resold on wholesale or agency models, record labels generally still bear responsibility for acquiring and administering mechanical licenses for the musical works embodied in the sound recordings, and paying the required mechanical royalties to musical work rights owners.

[4] Congress has long exempted retailers from the requirement to license musical work public performance rights for such promotional activities under Section 110(7). In the digital environment, there is no equivalent of Section 110(7). Accordingly, for the use of sound clips to promote the sale of permanent digital downloads within the digital download store environment, digital music services are responsible for acquiring and administering musical work public performance rights, and paying the required pubic performance royalties. Congress created the exemption for the promotion of physical sales in response to *Chappell & Co. v. Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3d Cir. 1964), a case brought under the 1909 Act, which "held that the public performance of phonorecords in an establishment selling such phonorecords to be an infringing public performance for profit, notwithstanding defendant's argument that it was merely engaged in advertising the phonorecords and not in a 'public performance for profit.'" Melville B. Nimmer & David Nimmer, 2 *Nimmer on Copyright* § 5.18[F] (2013) (internal citations omitted). In the Fairness In Music Licensing Act of 1998, Congress extended this exemption beyond "copies or phonorecords of the work" to include "the audiovisual or other devices utilized in such performance." Fairness In Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998); *see* 17 U.S.C. § 110(7) (2012). Although the exemption set forth in Section 110(7) has not been extended to digital, and the Southern District of New York recently ruled that the public performance of sound clips in equivalent digital contexts does not constitute a fair use of the musical works, we believe that uses that do not substitute for sales, but instead, promote them, should be encouraged and not discouraged, regardless of whether they are digital or analog in nature. *See United States v. Am. Soc'y of Composers, Authors, and Publishers*, No. 41-cv-1395, 2009 WL 484449 (S.D.N.Y. Apr. 3, 2009).

B. The evolution of the music business from the historical physical business model to the digital environment.

Over the past ten to fifteen years, the music business has been transformed by the digital landscape. Consumers – who are intended to be the primary beneficiaries of our copyright system – have largely benefited from this transformation.[5] We have seen paradigm shifts in the following areas:

- The *way* that sound recordings and musical works are delivered to the consumer (as new digital product configurations and services replace traditional physical products);
- The *technology platforms* used to deliver sound recordings and musical works (as the Internet, mobile carrier networks, cable television networks, satellite television networks and satellite radio networks replace traditional brick-and-mortar retailers and terrestrial broadcasters);
- The *consumer electronics devices* used by consumers to enjoy sound recordings and musical works (as connected, highly portable devices such as smart phones, tablets and lightweight computers replace conventional CD players, turntables and cassette players);
- The *business models* used to create revenue-generating opportunities (as subscription, freemium, bundled and ad supported digital business models replace simple a la carte physical sales);
- Consumer expectations about *how* music can be consumed (as an array of product types, such as permanent downloads, limited downloads and streams – which often enable consumers to be in control of the media they consume by "personalizing" their experiences in a multifaceted, immersive way – replace traditional physical product types);
- Consumer expectations about *when* music can be consumed (as digital music services provide consumers with instant access to music without having to drive to brick-and-mortar stores or wait for mail order shipments to arrive);
- Consumer expectations about the *quantity of titles available* (as consumers migrate to access model services, legitimate digital music services must offer and make available a "critical mass" of licensed works to remain commercially viable, unlike the historical business model where it was acceptable for some titles to be out of stock); and
- A culture that expects licensed digital music services to provide ubiquitous access to all content at *low cost or no cost at all* (as free-to-the-user illegal alternatives are plentiful, unlike the marketplace for traditional physical products).

With respect to these paradigm shifts, DiMA's members have risen to the occasion and are responsible for much of the innovation and substantial financial investment that has transformed the music industry for the better (such as the development of the download, streaming, subscription, locker and other digital business models that represent the future of recorded music delivery). The digital music services offered by DiMA's members provide a variety of compelling, immersive consumer experiences that satisfy the needs of a highly segmented array of consumers.

C. Licensing responsibility has shifted in the digital environment.

In most industries, the manufacturers of products are responsible for sourcing the various components and rights necessary to deliver goods to their network of wholesalers and distributors, so they

[5] Mark Cooper, *Copyright Policy, Creativity And Innovation In The Digital Economy: Comments of the Consumer Federation of America*, (November 13, 2013), *available at* http://www.ntia.doc.gov/files/ntia/consumer_federation_of_america_comments.pdf.

may be resold to other businesses or directly to end user customers without the need to acquire additional components or rights. Under the historical business model, record companies performed the role of the manufacturer, and, as such, they delivered physical record products to their network of distributors and retailers with "all rights cleared." In the digital environment, these roles have been reversed, and digital music services (i.e., the retailers) must source many of the component parts of the product – individual copyright based rights – and bear all of the burdens and responsibilities for (i) acquiring and administering those rights and (ii) paying the required royalties out of their own share of the revenues generated.

These incremental responsibilities and burdens have vastly complicated the licensing landscape, and diminished the operating margins for digital music services that now perform these converged roles. For example, unlike the physical distributors of yesteryear, today's digital distributors must identify and locate licensors of rights associated with sound recordings, musical works and other copyrighted materials (such as artwork); negotiate and administer licenses; and navigate the complex web of rights ownership in the U.S. and global licensing paradigms.[6] Under the current licensing framework and industry structure, digital music service providers are forced to bear the entire burden of reconciling any conflicting demands from rights owners, who often assert overlapping royalty claims for the same uses of the same works.[7] This change represents a seismic shift in the distribution of recorded music product – and one with far-reaching repercussions, as detailed below.

2. The effects of the current legal and regulatory framework in the digital environment.

A. <u>The current legal and regulatory framework enhances the negotiating leverage of rights owners</u>.

The challenges faced by digital music services are formidable and fundamentally different from the challenges faced by retailers and distributors under the historical music business model. The shift in licensing responsibility from record companies to digital music services, compounded by the unique and byzantine nature of music licensing in the digital environment under the current legal and regulatory framework established by U.S. copyright law, has significantly *enhanced the negotiating leverage of right owners* (and diminished the leverage of licensees). This framework has proven detrimental to digital music service providers and actually has served to undermine the shared belief that rights owners should be appropriately compensated for the use of copyrighted works. The following attributes of today's music licensing model, as supported by the current legal and regulatory framework, are among the most problematic:

- <u>Fragmented rights ownership</u>. Based on anachronistic distinctions in U.S. copyright law, sound recording and musical work rights are markedly fragmented[8] and controlled by numerous rights owners. Adding further complication, rights within the musical work

[6] Although it is beyond the scope of this Notice of Inquiry, it is worth mentioning that many digital music service providers that operate legitimate music services in the U.S. also operate services in other countries. These services must navigate similarly complex copyright regimes on a country-by-country basis, adding further complexity to the burden of the digital music service providers.

[7] These overlapping claims stem from the convergence of various Section 106 rights in the digital era, which is discussed in more detail elsewhere in this response.

[8] Examples of this fragmentation include the separation of sound recording and musical work rights, the separate licensing structures for copyright rights within the musical work rights bundle, and the separate international licensing structures for musical work rights and certain sound recording rights.

rights bundle itself may be further fragmented across numerous rights owners.[9] Accordingly, in order to comply with their licensing responsibilities, digital music services must acquire, retain and administer licenses under copyright from a *multitude* of rights owners. The effects of this fragmentation on licensees in the music licensing marketplace are discussed in greater detail in our response to Question 4 below.[10]

- Access services, and the need for licensing ubiquity. While it might be possible to launch a digital music service with only the sound recordings owned and controlled by the three major labels and a few independent labels and aggregators, doing so would limit the service's commercial viability in light of consumer expectations that "everything" should be available. Moreover, few services can be commercially viable without musical work licenses from *all* music publishing rights owners, because musical work rights generally cut across the lines of sound recording copyright ownership (e.g., musical works in sound recordings owned or controlled by Warner Music Group are controlled by tens of thousands of music publishers and not exclusively by Warner/Chappell, its affiliated music publishing company). The need for licensing ubiquity requires services to secure licenses from tens of thousands of rights holders, covering tens of millions of tracks, in order to meet consumer expectations in the digital environment.

- New legal uncertainties arising out of rights convergence. Reproduction, distribution and public performance rights have converged in various ways, and the lines between them are often unclear. Accordingly, the multitude of rights owners with whom digital music services must secure licenses often assert overlapping claims for the same or analogous rights, which can increase a digital music service provider's overall royalty expense by requiring redundant payments for a single use of a copyrighted work (i.e., "double dipping" by rights owners). For example, the performance rights organizations (PROs) long asserted that digital downloads and ringtones implicated public performance rights in addition to "mechanical" reproduction rights; while this position was ultimately rejected by multiple legal decisions,[11] it cast a shadow of uncertainty for digital music services and led to the unnecessary payment of millions of dollars in duplicative royalties for many years. In addition, this convergence of rights increases transaction costs as digital music services must often clear, for example, both public performance and reproduction/distribution rights in a musical work for a use whose historical analog would have only required one or the other such clearance.

- Unprecedented market power of rights owners. After decades of industry consolidation, rights owners now have unprecedented market power (and significantly more market

[9] For example, the musical work "We Are Young" as recorded by the recording artist "fun." splits musical work copyright ownership among four different songwriters and seven different publishers. As a further example, the musical work "Get Lucky," as performed by Daft Punk, which won this year's GRAMMY Award for Best Pop Duo/Group, has four separate songwriters and four separate music publishers

[10] Fragmentation, in the context of musical works, also harms songwriters in that their intended royalty payments are often redirected to cover arguably duplicative administrative expenses. *See Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. of the Judiciary*, at 110th Cong. 14 (2007) (statement of Marybeth Peters, Register of Copyrights) ("The system would also offer substantial advantages to rights holders. Under a blanket license system, there are economies of scale that reduce the administrative costs associated with the collection and distribution of the royalties.").

[11] *See, e.g., In re Cellco Partnership*, No. 09-cv-7074, 2009 WL 3294861 (S.D.N.Y. Oct. 14, 2009); *United States v. Am. Soc'y of Composers, Artists, and Performers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

power than any of the individual services that require particular licenses from all of them).[12]

- Lack of a "level playing field." The complex patchwork of *laws*,[13] *regulations*,[14] *private voluntary licensing arrangements*, *collective licensing arrangements*,[15] and *court rulings*[16] that comprise the current legal and regulatory framework for music licensing have created an unlevel playing field, that unfairly tilts competition, typically in favor of legacy technologies, at the expense of innovating technologies. For example, ratesetting standards, royalty rates and functionality rules provide an advantage to some service types over others. These issues are discussed in greater detail in our responses to Questions 8 and 9 and our consolidated response to Questions 12 and 13 below.

- Lack of transparency. The lack of a publicly available, centralized database for musical works and sound recordings makes it difficult, if not impossible, for digital music services to determine what rights they do and do not have at any given time.[17] This creates a host of problems and inefficiencies which are discussed in greater detail in our responses to Questions 1, 3, 5 and 22 below.

- Statutory damages. The current risk of statutory damages under U.S. copyright law enhances the leverage and bargaining power of rights owners, because the law imposes severe economic consequences for any mistakes on the part of licensees, however technical and regardless of "fault."[18] U.S. copyright law lacks a "safe harbor" from statutory damages that would shield copyright users from infringement liability if they have acted diligently and in good faith based on the best information available, which is often limited because of the lack of a centralized database, as noted above.

B. The rights owner "tug-of-war" over royalty rates, and its effect on the aggregate royalty expense of digital music services.

In the licensing marketplace, the fragmented rights ownership structure creates an environment in which each individual licensor negotiates for a greater share of services' revenue in separate, but parallel,

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[12] See e.g., Flavia T. Fortes, *Music Industry Consolidation: The Likely Anticompetitive Effects of the Universal / EMI Merger*, American Antitrust Institute 7 (Aug. 30, 2012), *available at* http://www.antitrustinstitute.org/sites/default/files/White%20paperEMI%20Universal.pdf. ("A hypothetical merged Universal/EMI would have had nearly 40% of the market in 2011, leaving only Sony with nearly 30% and Warner with less than 20% among rival 'majors.' This 4-3 reduction would take the market from 'moderately concentrated' to 'highly concentrated'…"); *see also* notes 36 and 37 *infra* and accompanying text.

[13] Such laws include the statutory licenses codified in Sections 112, 114 and 115 of the Copyright Act.

[14] Such regulations include the rates and terms for various statutory licenses codified in the CFR and the Federal Register.

[15] Such collective licensing arrangements include the collective licensing of musical work public performance rights under antitrust consent decrees.

[16] Such court rulings include interpretations of the laws codified in Sections 112, 114 and 115, the scope and meaning of the antitrust consent decrees, and the boundaries between rights under state laws and federal copyright

[17] It is worth noting that this information is rarely provided by rights owners to licensees in practice, even in direct deals where the information is readily available. Moreover, some of the private databases utilized by the rights owners themselves reflect conflicting ownership information. For example, the database used by a PRO may show that a musical work is owned or controlled by a music publisher, but that music publisher's own database may not include any reference to the musical work at all.

[18] *See* 17 U.S.C. § 504 (2012).

negotiations with digital music services. Understandably, each licensor focuses on its own individual self-interests – namely, how to maximize its own share of the total revenue pie. As a result of this fractured approach, these individual licensors generally have no interest in considering (i) the aggregate amount of royalties paid by distributors to all licensors, (ii) the value the service itself provides, such as the substantial investment, creativity and innovation, including patents and other intellectual property, that enhance the overall user experience, and, accordingly, the value of the music for the consumer,[19] and (iii) the costs of other inputs and participants in the value chain. Unlike the relative simplicity of the historical business model, distribution in the digital environment requires digital music services to share revenues with a wide array of other value chain participants, such as mobile network operators, Internet service providers and consumer electronics vendors, who bring much needed scale and relationships with consumers. Further, digital music service providers are often required to bear considerable infrastructure, technical and operational costs by utilizing third party vendors to provide necessary services and functions.

With all of these costs and expenses, the percentage of revenue that any digital music service can make available to all rights owners (and still turn a profit) is relatively fixed. However, when an individual rights owner successfully negotiates with a service for a greater share of the service's revenue, the resulting incremental royalty expense reduces the digital music service's share of revenues rather than reallocating a fixed pool of "wholesale costs" among the different rights owners. As a result, the digital music service provider frequently finds itself in the middle of a "tug-of-war" among the rights owners over royalties. The situation may be exacerbated in circumstances where individual rights owners enhance their negotiating leverage even further by withholding their licenses until other licensors have concluded their deals with the service.

Perhaps nowhere has this "tug-of-war" been more publicly recognized than in the recent ASCAP ratesetting proceeding involving Pandora Media. As noted by Judge Cote in a decision handed down in that proceeding in March 2014, the underlying premise for Sony/ATV's purported withdrawal of its catalog from the ASCAP repertory for certain digital uses was not that they felt the long-standing, well-established range of royalty rates for *musical work* public performance rights was unreasonable in *absolute terms*, but rather, when compared to the extraordinarily high royalty rates being paid by webcasters for *sound recording* rights under the Section 112 and 114 statutory licenses, they were not reasonable in *relative terms.*[20]

This all leads to upward pressure on royalty rates, which is entirely borne by the digital music services. Thus, much of the current debate over rates stems from disagreement among the labels, publishers and PROs about how to allocate the *content owners' fixed share of the pie*, rather than from a notion that service providers are not paying enough, in the aggregate, for content.[21] The net result of this "tug-of-war" over royalties among rights owners is aggregate royalty rates that are unjustifiable and, ultimately, unsustainable.

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[19] The value of the digital music services' contribution is discussed in greater detail in Section I.2.D below.

[20] *In re Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 2014 WL 1088101, at *25 (S.D.N.Y. Mar. 18, 2014) ("*Pandora II*") ("In his interview with Billboard.biz, reported on January 18, Bandier explained that the rates 'are quite reasonable. When you compare it to the rate record companies are getting, it was really miniscule.'").

[21] It is not novel for the content user to pay an all-in royalty for multiple rights in the copyright bundle. For example, music services pay a total fee for the combined right to the public performance of sound recordings under 17 U.S.C. § 114 and for any ephemeral reproductions that result from such a public performance under § 112(e). 37 C.F.R. § 380.3(c) (2013) ("The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by the Licensee solely to facilitate transmissions for which it pays royalties shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.").

C. **Interdependence of interests**.

On a *macro level*, each of the stakeholders in the music licensing marketplace shares a common interest in, and would benefit from, a functional licensing structure that enables and facilitates long term, sustainable and profitable digital music businesses. On a *micro level*, however, the licensing structure that exists today enables each of the fragmented rights owners to "jockey for position" in the manner noted in Section I.2.B above, without regard for the *collective effect* that these individualized negotiations have on the potential profitability of digital music services (or the shared goal of building long-term, sustainable and profitable digital music businesses for the future).

Because of the symbiotic relationship between rights owners, creative talent and digital music services, the conduct of any one actor in its individualized negotiations can have unintended collateral consequences for the other unrelated parties. For example, a musical work that is held back from a digital music service over licensing issues would not only affect the publisher and the songwriter, but the record label and featured performer in the sound recording as well, and vice-versa. Because these individualized negotiations take place at different times, in different places, with different rights owners, and under different standards, the interdependence of interests often gets "lost in the shuffle." The "common good" – as well as the long term public interest in ensuring the continued existence of a vibrant music ecosystem where digital music services can operate long-term, sustainable businesses that can delight consumers for generations to come – would be served by copyright modernization and continued government oversight over certain key aspects of music licensing activity.

D. **In the rights owner "tug-of-war" over royalties, the value added by digital music service providers is often overlooked**.

While DiMA's members recognize the value of music as one of the critical inputs for their innovative services, content owners have tended to ignore, or undervalue, the massive investment by digital music service providers for many of the other critical inputs that allow services to delight consumers. In fact, the innovative services that are the result of the substantial investments made by DiMA members fulfill the primary goal of the Copyright Act: consumer access to creative works. The transformation of the music business to the digital environment could not have occurred without the substantial investment, creativity and innovation of legitimate digital music providers in developing and deploying these services, but the value added is often overlooked in ratesetting proceedings under statutory licenses and in individual negotiations with rights owners. This significant inequity was pointed out by Judge Cote in an ASCAP ratesetting decision handed down in March 2014:

> A rights holder is, of course, entitled to a fee that reflects the fair value of its contribution to a commercial enterprise. It is not entitled, however, to an increased fee simply because an enterprise has found success through its adoption of an innovative business model, its investment in technology, or its creative use of other resources. It appears that Sony, UMPG, and ASCAP (largely because of the pressure exerted on ASCAP by Sony and UMPG) have targeted Pandora at least in part because its commercial success has made it an appealing target. 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 [Music Genome Project] 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.[22]

3. The need for continued regulatory oversight in the area of music licensing.

A. <u>The purpose of U.S. copyright law, and the required balancing of interests</u>.

The fundamental purpose of U.S. copyright law is to serve the public interest by striking the optimal balance between (i) encouraging the creativity of authors by granting exclusive property rights in works of authorship, and (ii) fostering an efficient and competitive marketplace that ensures access to those works of authorship.[23] Because the public interest is at the core of copyright protection, the rights of authors are limited in various ways (as opposed to being absolute). These limitations – which range from the finite duration of copyright protection (as specified by the Constitution) to the myriad exceptions, exclusions and limitations established under U.S. copyright laws and the corresponding federal regulations, as well as the court rulings that have interpreted those laws and regulations – serve as a critical counter-balance to the market power of rights owners in the music licensing marketplace.

B. <u>Congress and the Department of Justice have long recognized that a music licensing marketplace cannot properly function without regulatory oversight</u>.

Both Congress and the Department of Justice have long recognized that the marketplace for copyrights creates ample opportunities for rights owners to frustrate, rather than enhance, an efficient competitive environment for the licensing of copyrighted works. These opportunities stem from the market power of rights owners, and the lack of available substitutes for the copyright rights needed. As a result, for over a century, the various rights conferred by U.S. copyright law have been subject to a regime of regulatory oversight that supplements, and operates in parallel with, the general principles of antitrust laws that apply to every industry. Each of these mechanisms and procedures was enacted to counter-balance the unique market power of copyright owners, and to ensure that copyright users can bring innovative technologies, products and services to consumers at fair prices, without being held up by the status of rate negotiations and/or ratesetting proceedings.

(a) <u>The compulsory "mechanical" licenses for the reproduction and distribution of musical works embodied in phonorecords</u>.

Since 1909, Congress has implemented a system that has allowed record labels to obtain compulsory "mechanical" licenses for the reproduction and distribution of musical works embodied in phonorecords, in order to ensure that there was a vibrant marketplace for the sale of recorded music.[24] As noted above, under the historical business model, retailers were also exempt from the need to secure musical work public performance licenses under Section 110(7) in furtherance of the same goal. As a

[22] *Pandora II*, 2014 WL 1088101, at *46.
[23] *See* Nimmer, *supra* note 4, § 1.03[A] ("[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities." (internal footnote omitted)).
[24] *See* Nimmer, *supra* note 4, § 8.04[A] (2013) ("The Congress that enacted the 1909 Act was concerned with the possible emergence of 'a great music monopoly'. To forestall this threat, Section 1(e) of the 1909 Act enacted a compulsory license provision.").

result of this combination of regulations, retailers and record companies were free to sell recorded music without being encumbered (or potentially held back) by music licensing issues.[25]

(b) The public interest in "radio" in all of its forms, and the Section 112 and 114 statutory licenses.

In 1995 (and as further amended in 1998), Congress granted a compulsory license for the performance of sound recordings by means of non-exempt digital audio transmissions under Section 114 (and a corresponding compulsory license for the making of ephemeral recordings used to facilitate non-exempt digital audio transmissions under Section 112).[26] These compulsory licenses are particularly significant because they represent Congressional recognition that without them, market failures would have deprived the public of the benefits of new digital music services, including Internet radio services, satellite radio services, and radio services delivered through cable television and satellite television systems.[27]

(c) Exceptions and exclusions under U.S. copyright law.

In addition to the compulsory licenses noted above, Congress has also counter-balanced the unique market power of musical work and sound recording copyright owners through a long history of exceptions and exemptions to the exclusive rights otherwise conferred by Section 106.[28]

C. Antitrust considerations.

[25] Since 1909, Congress has established various other statutory licenses to counter-balance the unique market power of copyright owners, including the following: compulsory license for secondary transmissions by cable systems (§ 111(d)); compulsory license for public performance of musical works in jukeboxes (§ 116); compulsory license for the public performance of musical works and display of pictorial, graphic and sculptural works by public broadcasting entities (§ 118); compulsory license for secondary transmissions by satellite carriers (§ 119); compulsory license for the reproduction and distribution of musical works in digital phonorecords (§ 115); compulsory license for the performance of sound recordings by means of non-exempt digital audio transmissions (§ 114); compulsory license for the making of ephemeral recordings used to facilitate non-exempt digital audio transmissions (§ 112); and sui generis right for the importation and distribution of digital audio recording devices (§ 1004).

[26] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified at 17 U.S.C. §§ 112, 114); Digital Millenium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in relevant part at 117 U.S.C. §§ 112, 114).

[27] S. Comm. on the Judiciary, Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 128, 104th Cong., 1st Sess. 25 (1995), reprinted in 1995 U.S.C.C.A.N. 356 ("The Committee is aware of concerns that the copyright owners of sound recordings might become 'gatekeepers' and limit opportunities for public performances of the musical works embodied in the sound recordings.").

[28] Examples of these exceptions and exemptions include the following: exemptions from the reproduction right for ephemeral recordings (§ 112(a)), computer programs (§ 117(a)(1)) and computer maintenance (§ 117(c)); an exemption from the distribution right under the first sale doctrine (§ 109(a)); exemptions from both the reproduction and distribution rights for libraries and archives (§ 108) and for public broadcasting of sound recordings as part of educational programs (§ 114(b)); an exemption from both the reproduction and adaptation rights for computer program archives (§ 117(a)(2)); and exemptions for public performances for classrooms (§ 110(1)), instructional broadcasting (§§ 110(2), 111(a)(2)), religious services (§ 110(3)), fraternal organizations (§ 110(10)), non-profit performances (§ 110(4)), vending establishments (§ 110(7)), transmissions to handicapped persons (§ 110 (8)), secondary transmissions in hotels (the *Jewell-LaSalle* exemption) ((§ 111(a)(1)); display transmissions of television and radio in small commercial establishments (the *Aiken* exemption) (§ 110(5)), non-profit secondary transmitters (§ 111(a)(5)), nonsubscription broadcast transmissions (§ 114(d)(1)(A)), and retransmission of an exempt nonsubscription broadcast transmission (§ 114(d)(1)(B)).

Antitrust laws provide another critical counter-balance to the market power of rights owners in the music licensing marketplace. The exclusive rights conferred by copyright law are often in tension with both the public interest and the interests of intellectual property rights users. In the early part of the twentieth century, the prevailing antitrust view held that the inherent monopoly rights conferred by the granting of exclusive rights under our intellectual property laws were *incompatible* with the fundamental purpose of our antitrust laws (which were designed to protect against the abuses of monopoly power).[29] The more modern view, as recently set forth by the U.S. Department of Justice and the Federal Trade Commission, is that our intellectual property laws (including copyright) and antitrust laws share the same fundamental goals (i.e., enhancing consumer welfare and promoting innovation), and "work in tandem to bring new and better technologies, products, and services to consumers *at lower prices*."[30]

Under the modern view, the purpose of our antitrust laws as they relate to intellectual property rights is to "ensure that new proprietary technologies, products and services are bought, sold, traded and licensed in a *competitive environment*."[31] However, even under the modern view, it is well recognized that a competitive environment with robust competition in the marketplace cannot exist in markets where intellectual property rights are held by rights owners with significant *market power*, and there are no *good substitutes* reasonably available to the users of those intellectual property rights in the marketplace.

(a) The ASCAP and BMI antitrust consent decrees.

The unique market power of rights owners in the context of licensing musical work public performance rights under the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") collective licensing regimes has long been counter-balanced by the antitrust consent decrees that the Department of Justice has put in place to govern the conduct of ASCAP (since March 1941) and BMI (since January 1941).[32] The processes and protections assured by these consent decrees serve several important roles that are critical to an efficient, properly functioning marketplace for these rights, and are discussed in greater detail in our responses to Questions 5, 6 and 7 below.

(b) The looming specter of publisher withdrawals from ASCAP and BMI.

In 2011 and 2012, various music publishers attempted to withdraw their catalogs from the ASCAP and BMI repertory for certain digital uses.[33] In two separate legal decisions handed down in 2013 by the federal courts with jurisdiction over ASCAP and BMI ratesetting proceedings, these courts

[29] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 1 (2007).
[30] *Id.* (emphasis added).
[31] *Id.* (emphasis added).
[32] *See* Christopher Harrison, *You Gotta Fight for the Right to Publicly Perform*, 21 Texas Entm't and Sports L.J. 5 (2012).
[33] In May 2011, EMI Music Publishing purported to withdraw its catalogs from ASCAP's repertory for certain digital uses, effective as of January 1, 2012. Several other music publishers, including Warner/Chappell, Universal Music Publishing Group and BMG, followed with similar "partial" withdrawals. *See In re Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 2013 WL 5211927, at *3 (S.D.N.Y. Sept. 17, 2013) ("*Pandora I*"). In September 2012, EMI Music Publishing and Sony/ATV Music Publishing purported to withdraw their catalogs from BMI's repertory for certain digital uses, effective as of January 1, 2013. Several other publishers – BMG Rights Management, Kobalt Music Group, Universal Music Publishing Group, Wixen Music Publishing and George Johnson Music – followed with similar withdrawals, effective as of January 1, 2014. *See Broadcast Music, Inc. v. Pandora Media, Inc.*, Nos. 13-cv-4037, 64-cv-3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013) ("*Pandora III*").

ruled that partial withdrawals are not permitted under the antitrust consent decrees.[34] However, both of these decisions left open the possibility that music publishers could withdraw their respective catalogs from ASCAP's or BMI's repertory for *all purposes*. It is rumored that the music publishers and the PROs are seeking modifications to the consent decrees to allow for partial withdrawals, which would give them the ability to withdraw their musical catalogs from the ASCAP and BMI repertories for only certain limited digital uses. As noted in these decisions and publicly reported articles,[35] the publishers attempted to withdraw certain digital rights for one simple reason – to further enhance their individual negotiating leverage to extract higher royalties (and other terms) from digital music services that have no reasonable substitutes for the rights they need (musical work public performance rights). The possibility of future withdrawals (in full or, if the consent decrees were to be modified, in part) threatens to undermine the key processes and protections assured by the antitrust consent decrees. The potential effects of such withdrawals are discussed in greater detail in our response to Question 5 below.

D. <u>The unprecedented market power of rights owners</u>.

It bears repeating that the market power of musical work and sound recording rights owners is greater now than any other time in our history. A little over fifteen years ago, there were six major record labels. Today, with the recent acquisition by Universal Music Group (the largest of the major record labels) of EMI (the smallest), there remain only three. On the musical work side, a little over fifteen years ago, there were six major music publishers. Today, with the recent acquisition of EMI Publishing (the largest of the major music publishers) by Sony/ATV, there remain only three. The increased concentration of market power of the major labels and the major publishers *greatly enhances* the leverage of right owners (and further diminishes the leverage of digital music services) when negotiating licenses for sound recordings and musical works.

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[34] In a legal decision that was handed down by the federal court with jurisdiction over ASCAP ratesetting proceedings in September 2013, Judge Cote ruled that under the antitrust consent decree that governs ASCAP's conduct, if a music publisher has made its catalog available for licensing by ASCAP to the public *in any respect* (*i.e.*, partially or fully), that catalog is therefore a part of ASCAP's "repertory" for *all* purposes (thereby rendering the purported partial withdrawals for certain digital uses *ineffective* for any purpose, with the result that the publishers involved remained *"all-in"* as a result of any purported partial withdrawal of rights). *Pandora I*, 2013 WL 5211927, at *6-*8. In a separate legal decision that was handed down by the federal court with jurisdiction over BMI ratesetting proceedings in December 2013, Judge Stanton similarly ruled that that under the antitrust consent decree that governs BMI's conduct, publishers cannot effectuate withdrawals for some uses (such as certain digital uses) without withdrawing their catalogs for all uses, and therefore, a purported partial withdrawal of a publisher's catalog from BMI's repertory for certain digital uses is effectively a withdrawal of that catalog from BMI's repertory for all purposes (thereby rendering the purported partial withdrawals for certain digital uses an *effective withdrawal for all purposes and service types*, including broadcast radio stations, television networks, bars and restaurants, with the result that the publishers involved remained "all-out" as a result of any purported partial withdrawal of rights). *Pandora III*, 2013 WL 6697788, at *4

[35] *Pandora II*, 2014 WL 1088101, at *14, *35 ("[The publishers] believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publically perform a composition."); Bill Donahue, *Judge In ASCAP-Pandora Royalty Row Spells Out Rate Ruling*, Law 360, Mar. 19, 2014, *available at* http://www.law360.com/articles/519905/judge-in-ascap-pandora-royalty-row-spells-out-rate-ruling; Ed Christman, *Why Publishers Lost Big Against Pandora*, Billboard, Mar. 20, 2014, *available at* http://www.billboard.com/biz/articles/news/publishing/5944618/why-publishers-lost-big-against-pandora-analysis ("Both of those rates [negotiated by Sony and Universal directly with Pandora after the publishers' attempted partial withdrawals from ASCAP] are substantially higher than the 1.85% royalty rate that ASCAP was being paid by Pandora and neither qualify as market rates according to the Judge, because negotiating circumstances compelled Pandora to accept such rates.").

E. The relationship between market power and music licensing issues.

The relationship between market power and negotiating leverage is well known to the rights owners themselves. For example, in its opposition to the merger of Universal Music Group and EMI, Warner Music Group submitted testimony to the United States Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights illustrating how a major label with market power can use its leverage in negotiations with digital distributors to extract economic concessions and other favorable contract terms.[36] Warner's testimony went on to explain how a combined Universal Music Group/EMI would have such unprecedented market power that it would "be able to exercise its blocking position to coerce exclusionary deals and extract higher royalties, advances and other favorable terms by virtue of its market power alone."[37]

Further, in their capacity as the *licensees* of musical work rights (for the records they create, manufacture and distribute under the historical business model), the major labels have supported the existence of the compulsory license for the reproduction and distribution of musical works on a continuous basis since 1909, and have participated in each proceeding to adjust royalty rates and terms under Section 115 ever since, including the industry-wide settlements in 2008 and 2012, respectively.[38]

4. Copyright modernization is needed to ensure a legal and regulatory framework that will work in the digital environment.

A. Copyright modernization should take a holistic, rather than a "piecemeal" approach in the area of music licensing.

As the Register of Copyrights has previously noted, Congress generally moves slowly in the copyright space for a variety of reasons, including the complexity of the subject matter, the intensity of interested parties on particular issues, general public indifference on copyright matters, and finite time

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[36] *The Universal Music Group/EMI Merger and the Future of Online Music: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Edgar Bronfman, Jr., Director, Warner Music Group), *available at* http://www.judiciary.senate.gov/imo/media/doc/12-6-21BronfmanTestimony.pdf.

[37] *Id.*

[38] *See, e.g., Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords*, Docket No. 2011-3 CRB Phonorecords II (Feb. 1. 2011) (RIAA Petition to Participate), *available at* http://www.loc.gov/crb/proceedings/2011-3/ (stating that "RIAA participated in all previous proceedings to adjust royalty rates under Section 115 [and] has a significant interest in the royalty rates and terms that are the subject of this proceeding"); *Discussion Draft of the Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong., 2d Sess. (2006) (statement of Cary H. Sherman, President, Recording Industry Association of America, Inc.) (arguing that proposed expansions of the 115 compulsory mechanical license to new forms of digital delivery were not broad enough, and advocating further expansion by "extend[ing] the blanket license to ALL products and services covered by the mechanical compulsory license…" (emphasis in original)); *Comm. on the Judiciary, Copyright Law Revision*, H.R. Rep. No. 83, at 66 (1st Sess. 1967) ("[T]he record producers argued vigorously that the compulsory license system must be retained. They asserted that the record industry is a half-billion-dollar business of great economic importance in the United States and throughout the world; records today are the principal means of disseminating music, and this creates special problems, since performers need unhampered access to musical material on nondiscriminatory terms. Historically, the record producers pointed out, there were no recording rights before 1909 and the 1909 statute adopted the compulsory license as a deliberate anti-monopoly condition on the grant of these rights. They argue that the result has been an outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice.").

given other domestic and international priorities.[39] Consequently, the current legal and regulatory framework for music licensing developed in a piecemeal manner, and is the product of accommodating the needs, goals and desires of special interest groups who "jockey for position" in their lobbying efforts to effectuate specific and narrow changes at any given time based on historical legal distinctions and rights recognized under U.S. copyright law.

However, the various issues and problems with the current music licensing framework have created a "perfect storm" that has led to systemic failure in the music licensing marketplace. The only way to fix this broken system and to address these issues, problems and inefficiencies is to view the music marketplace in a holistic way. Such a holistic approach should cut across the lines of traditionally recognized rights under U.S. copyright laws, and across the interests of particular groups that developed licensing practices in the pre-digital era.

Further, any solution must take into account the public interest in creating a licensing environment that allows digital music service providers to operate long-term, sustainable businesses that can delight consumers for generations to come. We could not agree more with the sentiments of the Register of Copyrights who, quoting former Register of Copyrights Thorvald Solberg, stated that "there comes a time when 'the subject matter ought to be dealt with as a whole, and not by further merely partial or temporizing amendments.'"[40]

B. <u>The "Six Pillars" of U.S. copyright law modernization for the digital environment</u>.

As the Copyright Office considers making its recommendations to Congress regarding potential areas for the modernization of U.S. copyright law, DiMA urges the Copyright Office to take a holistic view of the entire music licensing ecosystem, and provide a framework for the new digital era that is based on the six essential pillars discussed more fully in the Executive Summary section above:

- *Continued Government Oversight and Regulation of Music Licensing Activities*
- *Transparency and a Centralized Database*
- *Licensing Efficiencies and Reduced Transaction Costs*
- *Clarification of Rights*
- *Reduction of Legal Risks Around Licensing Activities*
- *"Level Playing Field"*

[39] Maria A. Pallante, *The Next Great Copyright Act*, 36(3) Colum. J.L. & Arts 315, 319 (2013).
[40] *Id.* (quoting Thorvald Solberg, *Copyright Law Reform*, 35 Yale L.J. 48, 62 (1926)).

II. RESPONSES TO THE SPECIFIC QUESTIONS POSED BY THIS NOTICE OF INQUIRY

MUSICAL WORKS

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

A. The Section 115 statutory license for the reproduction and distribution of musical works is vital.

First, the Section 115 statutory license provides an *essential counter-balance to the unique market power of copyright rights owners*. It does this by providing a mechanism for immediate license coverage, thereby negating the rights owner's prerogative to withhold the grant of a license. Importantly, this immediate license coverage is not dependent on the status of rate negotiations and/or ratesetting proceedings. Without the ability to obtain this immediate obligatory coverage, some of the innovative digital music services in the marketplace today may not have been able to attain a significant enough number of musical work licenses to be considered attractive by consumers, while others would have been unable to launch at all, and thus would have been kept out of the marketplace entirely.

Second, the Section 115 statutory license provides a *useful benchmark for direct deals*. The royalty rates established by Section 115 ratesetting proceedings are often used as benchmarks for direct licenses of musical work rights, especially in cases where particular consumer offerings do not squarely fit into one of the statutory license categories available under Section 115 or its rate structure.

Third, the Section 115 statutory license provides a *framework for negotiating statutory rates by industry consensus*. By providing antitrust immunity for collective licensing discussions to settle ratesetting proceedings under Section 115, this essential framework enables stakeholders to negotiate rates and terms for a variety of digital music service types, consumer offerings and business models. This process was used successfully in 2008 and 2012, when rates and terms for a wide variety of physical and digital product types were negotiated by the relevant stakeholders, and implemented into the Code of Federal Regulations.[41]

Fourth, the Section 115 statutory license provides *necessary procedures for self-auditing and certification*. The self-auditing requirements provide rights owners with appropriate financial assurances regarding accountings.[42] At the same time, these requirements provide digital music services with appropriate protections against the possibility of direct audits by potentially tens of thousands of individual rights owners, which would be virtually impossible to administer and settle, and would significantly interfere with the day-to-day operations of digital music services.

Finally, the Section 115 statutory license provides *necessary procedures for notice and cure based on inaccurate accountings*. The Section 115 statutory license provides rights owners with appropriate opportunities to question accountings and provides digital music services with appropriate

[41] *See* Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 Fed. Reg. 67938 (Nov. 13, 2013) (final rule) (codified at 37 C.F.R. § 385) ("setting the rates and terms for the section 115 statutory license for the use of musical works in physical phonorecord deliveries, permanent digital downloads, ringtones, interactive streaming, limited downloads, limited offerings, mixed service bundles, music bundles, paid locker services, and purchased content locker services"); Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510 (Jan. 26, 2009) (final rule) (codified at 37 C.F.R. § 385) (same).
[42] *See* 17 U.S.C. § 115(c)(5) (2012).

opportunities to rectify, clarify and/or address the concerns of rights owners without jeopardizing license coverage. This mechanism for assuring *continuous license coverage* during periods of discussion (or dispute) provides another counter-balance to the unique market power of copyright owners that is as essential as the *initial* immediate license coverage provided by the Section 115 statutory license upon service of an NOI.

B. A number of significant problems with the Section 115 statutory licensing process limit the effectiveness of the Section 115 statutory license.

Although the continued existence of the Section 115 statutory license for the reproduction and distribution of musical works *is vital*, there are a number of *significant problems* with the licensing *process* that currently *limit its effectiveness*:

- Song-by-song licensing is inefficient and expensive. The current process of song-by-song licensing has not worked well under the historical business model for a variety of reasons,[43] and is particularly ill-suited for the digital environment. While the Section 115 statutory license provides an important tool for securing licensing ubiquity, the process of securing that ubiquity is highly inefficient and costly because millions of works must be licensed individually from the tens of thousands of different rights owners who own and control the required rights. Moreover, to the extent that a service chooses to file statutory license notices with the Copyright Office for the many musical works for which the relevant rights owners cannot be identified, the costs can be overwhelming given the volume of works at issue.[44]

- The licensing process under Section 115 lacks necessary transparency. The lack of a publicly available, centralized database for musical works limits the effectiveness of the licensing process in several significant respects:
    - First, it requires each of the dozens of digital music services to dedicate separate internal systems and personnel to developing rights owner information on a song-by-song basis, or to engage third-party service providers such as The Harry Fox Agency ("HFA") or Music Reports, Inc. to do so on its behalf. In either case, the undertaking is incredibly costly, and because the same information is developed by multiple parties (including the record labels) in parallel, there is much duplication of effort.
    - Second, in cases where statutory licenses under Section 115 are supplemented with direct licenses with music publishers, it is difficult to determine what is (and is not) covered by any given direct license, since this information is seldom provided by the music publishers to their own licensees. Accordingly, it is almost impossible to ascribe an

[43] For example, Section 115 requires services to clear the underlying publishing rights for newly released sound recordings before distributing them, but such a task is nearly impossible in many cases, where there are co-writers of a musical work and those co-writers do not determine their individual relative percentages of ownership (if any) until *after* the phonorecords which embody them are commercially released. This is a challenge that the major labels themselves have faced under Section 115 when securing mechanical licenses for physical products under the historical business model.

[44] The filing fee for "[r]ecordation of a notice of intention to make and distribute phonorecords" under 17 U.S.C. § 115 is $75 for the first title and $20 for each additional title for each group of ten titles. Circular SL 4L, *Copyright Office Licensing Division Service Fees*, *available at* http://www.copyright.gov/fls/sl04l.pdf (last visited May 14, 2014). Thus, the Copyright Office filing fee amounts to $255 for every ten musical works with unknown authors. For example, ten thousand (10,000) unknown authors would cost a service more than two-hundred fifty thousand dollars ($250,000) in filing fees alone to protect the service from potential statutory damages for infringement of the reproduction and distribution rights in musical works whose authors are nowhere to be found.

appropriate value to a direct license agreement, and to determine which musical works must be separately licensed through statutory licenses under the licensing process in Section 115.

- Third, despite the best intentions of a digital music service provider to identify accurately every musical work rights owner for every musical work, there are inevitably musical works whose owner(s) cannot be identified at all, or that are misidentified as a result of inaccurate information contained in the incomplete privately available databases relied upon today by digital music services.
- Fourth, the statutory licenses under Section 115 are only available if the copyright owner has already made or authorized a recording of the composition that has been distributed to the public in the U.S.[45] It is quite challenging to ascertain whether this first use has, in fact, occurred, as most of the privately available databases relied upon by digital music services (including the musical work information independently developed by the record labels themselves) lack this critical information. This problem is especially acute in circumstances where co-writers of musical works disagree about the relative percentages of their individual contributions to the work as a whole, and do not resolve these intra-songwriter and intra-publisher disputes over "splits" until long after the initial commercial release.

The risk of any resulting "rights gaps" exposes digital music service providers to the possibility of statutory damages, even in instances where the digital music service provider has acted diligently and in good faith based on the best information available to them, with limited (if any) control over how to mitigate this legal risk. This significantly limits the effectiveness of the licensing process, and exposes digital music services to levels of risk that are not equitable under the circumstances.

- The risk of statutory damages for "timing" issues inherent in the Section 115 licensing process. Given the difficulties noted above in determining whether a first use has occurred, the specter of statutory damages for failing to timely send NOIs under the Section 115 licensing process exposes digital music service providers to levels of risk that are not equitable under the circumstances.
- The lack of financial certainty caused by "timing" issues inherent in the Section 115 licensing process. For digital music services that rely on licenses under Section 115 as well as separate licenses for the public performance of musical works, it is often impossible to determine the appropriate deduction for musical work public performance royalties at the time that accountings under the Section 115 licenses are due. This is because the calculation of "mechanical" royalty rates under Section 115 requires that public performance royalties be deducted; and public performance rates are often not determined – whether by "interim agreement," "final agreement" or ratesetting proceeding – until long after the close of the month during which Section 115 royalties are due. As a result, digital music service providers must often make assumptions about how much to accrue, and then hold the accrued amounts for substantial periods of time (which is not beneficial for music publishers or songwriters who desire to get paid more quickly). Further, once the actual rates become known, digital music services must recalculate their royalties, restate their earnings for prior periods (which investors do not like), and send restated Section 115 royalty statements (which is costly and administratively burdensome).

[45] 17 U.S.C. § 115(a)(1). Section 115(b)(1) provides in relevant part as follows: "Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner."

- Monthly accountings. In direct license agreements for rights otherwise covered by the Section 115 statutory licenses, it is customary for digital music services to pay rights owners on a *quarterly basis*. Similarly, in recording agreements with recording artists it is customary for record labels to pay mechanical royalties to artists who are also songwriters on a quarterly basis, even in circumstances where the record royalties payable for the uses and exploitations of the sound recordings that embody these musical works are paid on a less frequent basis.[46] However, royalties under the Section 115 statutory licenses are required on a *monthly basis*. Because of the vast number of rights owners and musical works licensed under the Section 115 statutory licenses, each set of accountings requires administrative resources and out-of-pocket costs. The more frequently accountings are required, the less efficient and more burdensome it is for the digital music services that pay these royalties.

- "Hard-coded minima." The royalty rate structures for some (but not all) rate categories under the Section 115 statutory licenses set minima that reflect reproduction and distribution rights only,[47] rather than an "all-in" minimum that also includes the cost of royalties for public performance rights.[48] If musical work public performance rights are not available at "reasonable rates" through the processes and protections under the ASCAP and BMI antitrust consent decrees for any reason,[49] the "hard-coded minima" in Section 115 could cause the "all-in" rates to be exceeded, which was never intended by the stakeholders that negotiated the voluntary settlement of the rates and terms under the Section 115 statutory licenses in 2008 and 2012. Such a phenomenon would undermine the Section 115 ratesetting process as a whole.

2. Please assess the effectiveness of the royalty ratesetting process and standards under Section 115.

A. The royalty ratesetting process under Section 115 has generally been effective.

As noted in our response to Question 1, the royalty ratesetting process under Section 115 provides an essential *framework* for negotiating statutory rates by industry consensus, which is only possible because of the antitrust immunity for collective licensing discussions to settle rate setting proceedings under Section 115. Through this framework, stakeholders are able to negotiate rates and terms for a variety of digital music service types, consumer offerings and business models and bring them to market for the benefit of consumers.

B. The royalty ratesetting process under Section 115 could be made more effective.

[46] *See, e.g.*, Matthew Bender, 8-159 Entertainment Industry Contracts FORM 159-1 (Exclusive Recording Artist Agreement [Long Form] with Commentary), at ¶¶ 8.01, 11.01(d) (2014).

[47] The royalty minima for the following rate categories covers the reproduction and distribution rights only, and do not cover public performance rights: "standalone non-portable subscription—streaming only," "standalone non-portable subscription—mixed," "standalone portable subscription service," and "bundled subscription services." *See* 37 C.F.R. § 385.13 (2013).

[48] The royalty minima for the following rate categories are truly "all-in," meaning that the PRO fees for the public performance rights are included in (and can be deducted from) the minimum amount owed for the mechanical rights: "free nonsubscription/ad-supported services," "mixed service bundle," "music bundle," "limited offering," "paid locker service," and "purchased content locker service." *See* 37 C.F.R. §§ 385.13, 385.23.

[49] For example, in the event that music publishers withdraw entirely from ASCAP and BMI, or, alternatively, just for certain digital uses in the event that the antitrust consent decrees were to be modified by the Department of Justice to allow for partial withdrawals.

Although the royalty ratesetting process under Section 115 has generally been effective, the fast-moving digital landscape sometimes outpaces the five year cycle for ratesetting proceedings under Section 115. The royalty ratesetting process under Section 115 would be *more effective* if it provided a mechanism for *interim ratesetting proceedings* on an as-needed basis for *new* service types, consumer offerings and business models that develop in between the regular ratesetting proceedings. As the music business continues its evolution from the historical business model to the digital environment, it is essential that digital music services meet consumer expectations, and a process under Section 115 that recognizes the pace of change could be incredibly valuable.

C. <u>The royalty ratesetting standards under Section 115 have generally been effective</u>.

Since 1976, royalty ratesetting proceedings under Section 115 have been governed by the standard set forth in Section 801(b),[50] which provides in relevant part as follows:

> (1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:
>
> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[51]

The Section 801(b) standard for ratesetting proceedings under Section 115 was adopted as part of the copyright revisions implemented in 1976.[52] As previously noted, in their capacity as the *licensees* of musical work rights under the historical business model, the record labels have long argued that this standard correctly balances the relevant factors required to yield a fair and equitable royalty for the exercise of musical work reproduction and distribution rights under the Section 115 statutory licenses. The Section 801(b) standard has been time-tested to provide fair rates (i.e., "reasonable fees") that have been accepted for more than half a century in many different contexts, including ratesetting proceedings under Sections 114(f)(1)(B), 115, and 116.

3. Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities,

[50] *See* H.R. Rep. No. 94-1476, at 111 (1976) ("This [Section 115] rate will be subject to review by the [CRT], as provided in section 801, in 1980 and at 10-year intervals thereafter.").
[51] 17 U.S.C. § 801(b) (2012).
[52] *See* H.R. Rep. No. 94-1476, at 173-74.

rather than on a song-by-song basis? If so, what would be the key elements of any such system?

A. <u>The music marketplace would benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis</u>.

As previously noted in our response to Question 1, the current process for acquiring licenses under Section 115 on a song-by-song basis has many significant drawbacks including inefficiencies, expenses, lack of transparency, inequitable exposure to legal risk, lack of financial certainty and the possibility that all-in rates may not, in fact, be all inclusive. As discussed more fully in the next section, the music marketplace would greatly benefit from blanket licenses under Section 115.

B. <u>The Section 115 statutory license could be made more effective</u>.

The effectiveness of the Section 115 statutory license would be *significantly enhanced* by implementing a licensing regime that incorporated the following *key elements*:[53]

- <u>Blanket licenses</u>. For the reasons noted elsewhere, the music marketplace would benefit greatly from replacing the current process of licensing music on a song-by-song basis with a blanket license system (without the ability of rights owners to "opt-out"). Under this system, one license application would be served under a collective administration mechanism covering all musical works. For such a system to be effective, copyright users must nonetheless continue to have (i) payment options designed to ensure that they only pay for the rights they need (and the actual level of use and consumption), as per the current framework of Section 115, (ii) the ability to enter into direct licenses with rights owners in addition to (or in lieu of) these blanket licenses, and (iii) the ability to appropriately offset amounts paid under direct licenses from the minima prescribed by the blanket licenses.[54]

- <u>Transparency and a centralized database</u>. The problems and issues noted in Section II.1.B, above, could be greatly mitigated by the recommended centralized database of musical works and sound recordings.

- <u>Collective administration</u>. A mechanism should be established that enables the collective administration of musical work rights, in a manner similar (but not necessary identical) to the mechanism proposed in the context of the Section 115 Reform Act of 2006 ("SIRA").[55] Collective administration of musical work copyrights has worked in the context of public

[53] Several of these key elements were incorporated in the proposed Section 115 Reform Act of 2006 ("SIRA"), which was fully negotiated by interested stakeholders in 2006 but failed to be enacted into the copyright law for unrelated reasons.

[54] At a minimum, if song-by-song licensing is still required, there should be a system that facilitates an automated, electronic process for serving NOIs (in lieu of the current requirement under the implementing regulations that these NOIs be served in paper formats, which is inefficient, costly and more difficult to track and administer). *See* 37 C.F.R. § 201.18 (2013). Alternatively, if a SIRA-like structure for blanket licenses and collective administration is not implemented, there should be a safe harbor that shields copyright users from infringement liability if they have acted diligently and in good faith based on the information contained in the centralized database, to avoid inequitable outcomes.

[55] For clarity, we are not suggesting an implementation of SIRA exactly as was proposed in 2006. However, we believe that there are many elements and components from SIRA that would serve the music licensing marketplace well today.

performance rights in musical works (ASCAP, BMI and SESAC), and reproduction/public performance rights in sound recordings (SoundExchange, Inc.), but no similar mechanism exists for reproduction and distribution rights for Section 115 licenses. Difficult logistical issues – particularly the many reporting, payment and other operational issues – should be left to implementing regulations, and not addressed in Section 115 directly. However, it is critical that any collective administration mechanism be in addition to, and not in lieu of, the recommended centralized database for musical works, as digital music services should, at all times, retain the right to pay the required royalties directly to the applicable rights owners instead of through one or more common agents.

- Legal certainty. The copyright laws should be clarified to provide that the blanket license covers all intermediate copies (e.g., server, cache and buffer copies) necessary to facilitate the digital delivery of music, and intermediate copies for non-interactive streaming should be royalty free, or exempt (to avoid "double dipping" by rights owners based on claims arising out of overlapping copyright rights).

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

A. For uses under the Section 115 statutory license that also require a public performance license, the licensing process would be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner.

As previously noted, the fragmentation of rights ownership and the convergence of rights increase the number of transactions that must be undertaken for the license of musical works, and each additional transaction diminishes licensing efficiencies, and increases transaction costs for both licensors and licensees.

B. How a unified process for the licensing of performance rights along with reproduction and distribution rights might be effectuated.

A process for licensing performance rights along with reproduction and distribution rights in a unified manner could be effectuated by a system that incorporated the following key elements:

- Collective administration. A mechanism should be put in place that enables the collective administration of an "all-in," combined mechanical and performance royalty. The rights owners would be responsible for allocating the aggregate "all-in" royalty among themselves (i.e., between the "mechanical" and public performance interests) based on factors that they deem to be reasonable and appropriate under the circumstances. By allowing the rights owners to make this allocation as between themselves, the digital music service providers would be taken out of the rights owner "tug-of-war" over royalty payments.

- Process for determining reasonable rates. In an ideal world, services that require a combination of musical work public performance rights, as well as reproduction and distribution rights under Section 115, would be able to acquire such rights from a single licensing source under a single statutory license and pay a single royalty to a common agent, similar to the way that SoundExchange administers the Section 112 (reproduction) and 114 (public performance) statutory licenses. However, DiMA recognizes that such a structure would require a fundamental

alteration of the existing framework for musical work licensing. To the extent that the existing framework is retained, the collective licensing agent(s) DiMA is proposing for the collection of royalties under Section 115 would be authorized to collect the "all-in" royalty payable under Section 115, and then apportion an appropriate percentage of that royalty to the PROs, thereby removing the digital music service providers from the middle of the rights owner "tug-of-war" over publishing royalty payments.[56] Digital music services that require only public performance licenses would continue to operate under the current licensing framework that governs the PROs.

- No ability to opt-out. As a further counter-balance to the already significant market power of rights owners, to ensure the essential protections of the ASCAP and BMI antitrust consent decrees it is essential that rights owners not have the ability to "opt-out" of this licensing process.

- Transparency and a centralized database. For the reasons noted elsewhere, the licensing process would be greatly facilitated by the recommended centralized database for musical works, including information about the sound recordings in which such musical works are embodied.

C. A unified licensing process for licensing otherwise fragmented rights is not new.

The use of a collective administration mechanism to manage rights that are fragmented across different rights owners under U.S. copyright laws is not new, and has already been in place for some time with respect to the collection and administration of royalties under the Section 112 and 114 statutory licenses for sound recordings. In this context, SoundExchange, Inc. ("SoundExchange"), as the collective administration mechanism for statutory royalties under the Section 112 and 114 statutory licenses, collects a single "all-in" royalty that covers both the Section 112 and Section 114 rights. The recipients of these royalties, which include the sound recording rights owners, featured recording artists, and the relevant talent unions, determined among themselves the value of the Section 112 reproduction rights relative to the value of the Section 114 public performance rights, and the digital music services that pay these royalties were not placed in the middle of this determination.

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

A. The current process for licensing the public performances of musical works has generally been effective.

As previously noted, the blanket licenses (among other forms of licenses) offered by ASCAP, BMI and SESAC provide a framework that promotes licensing efficiencies and reduced transaction costs for both licensors and licensees alike. With regard to songwriters in particular, the process offers greater transparency in the context of performance royalty payments, as the general custom and practice in the music publishing industry is that songwriters, even if subject to arrangements with music publishers for the administration of musical work copyrights and related royalties, receive the "songwriter's share" of public performance royalties directly from ASCAP, BMI and SESAC, respectively.

The processes and protections assured by these consent decrees serve several important roles that are critical to an efficient, properly functioning marketplace for these rights:

[56] Difficult issues regarding how the licensing process would work under this structure need to be worked out, and should probably be addressed through the implementing regulations under Section 115.

- Immediate, blanket licensing. The process allows for immediate license coverage of a vast body of musical works on a "blanket" basis upon the service of a consent decree license request (and is not dependent on the status of rate negotiations and/or ratesetting proceedings). This is an essential counter-balance to the unique market power of rights owners, as it negates the prerogative of a rights owner of an exclusive right from withholding the license and enables digital music services to bring new offerings to market quickly and efficiently for the benefit of consumers.

- Non-discrimination on royalty rates. The "rate parity" concept in each of the antitrust consent decrees requires each of ASCAP and BMI to license all similarly-situated services on comparable terms. This provides another essential counter-balance to the unique market power of rights owners, and ensures that the rates set under the antitrust consent decrees are fair on a relative basis compared to comparable service types, which is essential to the "level playing field" required for services to compete with one another fairly in the marketplace.

- Reasonable rates. As a further counter-balance to the unique market power of rights owners, the process provides a mechanism that allows copyright users to resort to the federal courts with jurisdiction over ASCAP and BMI ratesetting proceedings to set "reasonable fees." This ensures that rights owners cannot use their combined market power to extract unreasonable royalty rates. The interpretation and implementation of the ratesetting standard in ASCAP and BMI ratesetting proceedings have generally been effective because the federal courts appropriately take into account several important factors when attempting to determine appropriate benchmark rates in the music licensing marketplace, such as whether the parties have equal access to information and whether both parties are compelled to act.[57] These critical factors, by contrast, are not recognized under the "willing buyer, willing seller" standard used in some ratesetting proceedings under the Section 112 and 114 statutory licenses. As discussed at greater length in our response to Question 8 below, this difference in interpretation and implementation yields vastly different economic results for copyright users.

B. Withdrawals of musical works from the repertories of ASCAP and BMI threaten to undermine the effectiveness of the current process for licensing the public performances of musical works.

As noted in Section I.3.C., recent decisions by the federal courts in rate setting proceedings under the ASCAP and BMI consent decrees have clarified that as a matter of antitrust law, music publishers cannot withdraw their musical catalogs from the ASCAP and BMI repertory for only certain limited digital uses. However, both of these decisions left open the possibility that music publishers could withdraw their respective catalogs from ASCAP's or BMI's repertory for *all purposes*. Alternatively, it is

[57] These critical factors were noted by Judge Cote in an ASCAP ratesetting decision handed down in March 2014, which cited a textbook definition of "fair market value": "A widely used description of fair market value is the cash equivalent value at which a willing and unrelated buyer would agree to buy and a willing and unrelated seller would agree to sell . . . *when neither party is compelled to act, and when both parties have reasonable knowledge of the relevant available information*. . . . Neither party being compelled to act suggests a time-frame context – that is, the time frame for the parties to identify and negotiate with each other is such that, whatever it happens to be, it does not affect the price at which a transaction would take place. . . . The definition also indicates the importance of the availability of information – that is, the value is based on an information set that is assumed to contain all relevant and available information." *Pandora II*, 2014 WL 1088101, at *32 (emphasis added) (quoting Robert W. Holthausen & Mark E. Zmijewski, *Corporate Valuation* 4–5 (2014)).

rumored that the music publishers and the PROs are seeking modifications to the consent decrees to allow for partial withdrawals, which would give them the ability to withdraw their musical catalogs from the ASCAP and BMI repertories for only certain limited digital uses. If either complete or partial withdrawals were to occur, the processes and protections assured by the antitrust consent decrees – in particular, the assurance of "reasonable fees" for copyright users – would be undermined.[58] In this event, if digital music services and music publishers are unable to agree on licensing terms, certain musical works would not be available, and the commercial viability of the services that require these licenses would be threatened, as consumer expectations of licensing ubiquity could not be achieved. As previously noted, the music publishers sought to withdraw their catalogs for one simple reason – to further enhance their individual negotiating leverage to extract higher royalties (and other terms) from digital music services.

In fact, such withdrawals would be contrary to the very policies that underlie the statutory licenses under Sections 112, 114 and 115, which were designed to ensure that services subject to such licenses could efficiently attain licensing ubiquity, and lawfully operate without having to negotiate individually with tens of thousands of rights holders. When these statutory licenses were created, it was not contemplated that musical works might be removed from the digital licensing purview of ASCAP and BMI. In fact, such withdrawals would open up a "back door" for musical work rights owners to undermine the objectives of the Section 112, 114 and 115 statutory licenses, and the public interest in ensuring that "radio" in all of its forms would not be kept out of the marketplace entirely because of music licensing issues, as noted Section I.3.B(b) above.

Finally, because of the interdependence of interests among sound recording and musical work rights owners, the result of a decision made by any one rights owner *not* to grant a requested license to a digital music service has *collateral consequences* for the other rights owners that have made a decision to *grant* a requested license. Empowering a "hold out" to effectively make a decision (with economic consequences) for other third parties, such as other record labels, music publishers, songwriters, featured recording artists, non-featured recording artists and non-featured vocal performers, turns the principal of recognizing exclusive rights under copyright on its head, and should be avoided.

C. <u>The current process for licensing the public performances of musical works could be made more effective</u>.

The effectiveness of the current process for licensing the public performances of musical works would be *significantly enhanced* by implementing a licensing regime that incorporated the following key elements:

- <u>Transparency and a centralized database</u>. The problems and issues noted in Section II.1.B, above, could be greatly mitigated by the recommended centralized database of musical works and sound recordings.[59] As Judge Cote determined in an ASCAP ratesetting decision handed down in March 2014, the music publishers acted in concert with ASCAP to modify ASCAP's internal rule set (known as the ASCAP Compendium) to allow music publishers to withdraw their catalogs from ASCAP's repertory for certain digital uses, for the sole and limited purpose of "closing the

[58] Partial withdrawals would also undermine the principle of platform parity in the consent decrees, which holds that similarly situated services must be treated the same by ASCAP and BMI. *See Am. Soc'y of Composers, Authors, and Publishers v. MobiTV, Inc.*, 681 F.3d 76 (2d. Cir. 2012) ("*MobiTV*"); *Pandora III*, 2013 WL 6697788, at *5 ("BMI cannot combine with [the publishers] by holding in its repertory compositions that come with an invitation to a boycott attached.").

[59] *See Meredith Corp. v. SESAC LLC*, No. 09-cv-9177, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014) ("*Meredith Corp.*"); *Radio Music License Committee, Inc. v. SESAC Inc*., No. 12-cv-5807 (E.D. Pa. Dec. 20, 2013) ("*RMLC*").

gap between the composition rates and the sound recording rates" through direct licenses outside the framework and protections of the ASCAP antitrust consent decree, which they believed "stood in the way."[60] Judge Cote also found that the lack of transparency regarding rights ownership was used as negotiating leverage, because the withholding of a list of the works in question, which was "readily at hand," denied Pandora the ability to (i) remove the ASCAP repertory controlled by those music publishers from the service if the parties could not reach agreement on economic terms, (ii) apportion any payments between the catalogs of two different music publishers, and (iii) evaluate whether a substantial advance payment paid by Pandora was likely to be recouped.[61] As a result, without this critical information, a digital music service provider is unable to assess its potential legal exposure for the use of unlicensed works (and mitigate any potential exposure by refraining from using those musical works, or taking them down, as the case may be), and determine the value of the blanket licenses and direct licenses offered by rights owners for the public performance of musical works.

- Immunity from statutory damages. To avoid inequitable outcomes, there should be a "safe harbor" that shields copyright users from infringement liability if they have acted diligently and in good faith based on the information contained in the recommended centralized database. Further, any entitlement to statutory damages in other contexts should be conditioned on the registration of accurate rights ownership information in the centralized database, utilizing universal standards.

- No ability to opt out. For the public policy reasons noted above, as a further counter-balance to the already significant market power of rights owners, it is essential that music publishers not have the ability to opt out of the blanket licenses.[62]

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

A. The royalty ratesetting process and standards applicable under the consent decrees governing ASCAP and BMI have generally been effective.

[60] *Pandora II*, 2014 WL 1088101, at *13-*14.

[61] *Id.* At *24 ("Sony understood that it would lose an advantage in its negotiations with Pandora if it provided the list of works and deliberately chose not to do so.").

[62] By opting out, the ability of a rights owner to extract an unreasonable royalty from a digital music service is greatly enhanced, as Judges Cote and Stanton recognized in the recent ASCAP and BMI rate setting proceedings with Pandora Media. These unreasonable royalty rates, in turn, would then be bootstrapped by rights owners as the new market rate to be used in future ratesetting proceedings. As such, very few music publishers (and perhaps as few as one) could effectively control the overall market rate for musical works, and the resulting bootstrapped rate would then have collateral consequences for other publishers and the performing rights organizations, to the detriment of all similarly-situated digital music services and, ultimately, the consumers of digital music services. Further, opt outs create other unintended consequences, such as the possibility that unreasonable rates extracted for the public performance of musical works would cause the all-in rates in 37 C.F.R. § 385 "Subpart B" – which were intended to be inclusive of the aggregate royalties paid for both musical work public performance rights, as well as reproduction and distribution rights – to be exceeded, which was never intended by the stakeholders that negotiated the industry-wide settlements for rates and terms under the Section 115 statutory licenses in 2008 and 2012, respectively.

As noted in our response to Question 5, the royalty ratesetting *processes* under the ASCAP and BMI consent decrees are critical to an efficient, properly functioning marketplace for the public performance of musical works. In addition to the reasons noted above, the oversight of the federal courts to set "reasonable fees" in ratesetting proceedings has been essential. The proceedings are in front of seasoned, tenured, federal judges who are regularly assigned these cases and are able to apply the terms of the consent decrees in a consistent manner. The trials are thorough and the resulting decisions tend to be thoughtful and well-reasoned. Furthermore, the proceedings themselves are conducted utilizing the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which enable litigants to fairly and predictably obtain discovery, present evidence and rely on precedents.

The royalty ratesetting *standards* under the ASCAP and BMI consent decrees similarly provide an essential counter-balance to the unique market power of rights owners, and are equally critical. Under the consent decrees, the federal courts are required to set "reasonable fees" in ratesetting proceedings.[63] In practice, this ratesetting standard has been time-tested in numerous rate setting proceedings for more than half a century to determine rates that have been entirely consistent with this standard, and has consistently established royalty rates that appropriately approximate the "fair market value" of particular licenses in different contexts.[64]

For the reasons already noted in the context of Question 5 and elsewhere in this Notice of Inquiry response, full (or even partial) withdrawals of musical works from the repertories of ASCAP and BMI threaten to undermine the effectiveness of the current royalty ratesetting process and standards applicable under the consent decrees.

B. The impact of 17 U.S.C. § 114(i).

With respect to the impact, if any, of 17 U.S.C. § 114(i), on the effectiveness of the royalty ratesetting process and standards applicable under the ASCAP and BMI consent decrees, it is worth mentioning that this provision is a good example of the type of legislation that results when special interest groups "jockey for position" in their lobbying efforts to seek specific and narrow changes to U.S. copyright law. The result is piecemeal modifications that benefit only those special interest groups, at the expense of other stakeholders and the public interest.

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[63] *See United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-cv-1395, 2001 WL 1589999, at *6-7 (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree") ("[T]he burden of proof shall be on ASCAP to establish the reasonableness of the fee it seeks … Should ASCAP not establish that the fee it requested is reasonable, then the Court shall determine a reasonable fee based upon all the evidence."); *United States v. Broadcast Music, Inc.*, No. 64-cv-3787, 1994 WL 901652, at *1 (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree") ("If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when [BMI] advises the [service] of the fee which it deems reasonable, the [service] may forthwith apply to [the Southern District of New York] for the determination of a reasonable fee … If the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when [BMI] advises the [service] of the fee which it deems reasonable and no such filing by applicant for the determination of a reasonable fee for the license requested is pending, then [BMI] may forthwith apply to [the Southern District of New York] for the determination of a reasonable fee.").

[64] *MobiTV*, 681 F.3d at 82 ("When setting an appropriate rate, the District Court must attempt to approximate the "fair market value" of a license—what a license applicant would pay in an arm's length transaction. … In so doing, the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music.") (citing *United States v. BMI (Application of Music Choice)*, 316 F.3d 189, 194 (2d Cir. 2003)); *Pandora II*, 2014 WL 1088101, at *31 (noting that Section IX of the ASCAP Consent Decree "requires the rate court to set a 'reasonable' fee for a requested license, but that [the] term is not defined in [the ASCAP Consent Decree]" and citing *MobiTV* as "[g]overning precedent" dictating that courts must approximate the fair market value in determining such a "reasonable fee").

This provision was implemented into U.S. copyright law in 1995 based on lobbying efforts by the music publishers and the PROs,[65] who were concerned that the rate for musical work public performance rights might be *reduced* if the rates for the newly created sound recording public performance rights were taken into account in musical work public performance ratesetting proceedings.[66] Remarkably, with the benefit of hindsight, the music publishers and performing rights organizations have now observed that the royalties established by the Copyright Royalty Board for the statutory licenses under Sections 112 and 114 are in certain cases incredibly high (and, as noted below, so high in some cases that they are unsustainable). Not surprisingly, music publishers are now seeking to use those rates as relevant benchmarks to *increase* the rates for musical work public performance rights. *In theory*, taking a holistic view of the total royalty expense that a digital music service provider should pay would be a positive development for the licensee, because the pool of revenue that any digital music service can make available to all rights owners as "fair compensation" (and still turn a profit) is fixed. However, the repeal of Section 114(i) would only further enhance the ability of musical work rights owners to exploit the fractured nature of rights ownership to their own advantage. Under this construct (i.e., using the sound recording public performance royalty rates as a *benchmark* for musical work public performance royalty rates), the royalty rate for musical work public performance rights would be *increased* without regard to the overall, aggregate royalty expense of the digital music service provider, since the federal courts that oversee PRO ratesetting proceedings do not have the jurisdiction to commensurately *reduce* the royalty payable for the corresponding sound recording rights.

Accordingly, *in practice*, the repeal of Section 114(i) would not result in a holistic determination of the total royalty expense that a digital music service provider should pay. Instead, it is, in a sense, a microcosm of how the current legal framework based on piecemeal changes to U.S. copyright law can serve as a vehicle for one group to take advantage of the fragmented nature of rights ownership to promote its own interests at the expense of the interests of others and, more importantly, of the whole digital music ecosystem.

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

A. <u>The consent decrees are serving their intended purpose</u>.

As already noted in our responses to Questions 5 and 6, the ASCAP and BMI consent decrees provide an essential counter-balance to the unique market power of rights owners and are critical to an efficient, properly functioning marketplace for the public performance of musical works.[67]

B. <u>The need for the consent decrees is greater now than ever</u>.

[65] *See Pandora II*, 2014 WL 1088101, at *12 n.30 ("Publishers lobbied for this provision in Congress because they were concerned that the sound recording rates would be set below the public performance rates for compositions and drag down the latter. ASCAP also supported the enactment of the provision, for the same reason.").

[66] *See* Nimmer, *supra* note 4, § 8.22[A][3][a] ("[The] drafters [of the Digital Performance Right in Sound Recordings Act of 1995 (DPRA)] also wished to 'dispel the fear that license fees for sound recording performance may adversely affect music performance royalties.'") (quoting H.R. Rep. No. 104–274, 104th Cong., 1st Sess. 24 (1995)).

[67] If the threat of publishers withdrawing entirely from the PROs were to become a reality, it would upset the delicate balance of the licensing ecosystem, making it necessary to revisit the question of whether the consent decrees are serving their intended purpose.

The concerns that motivated the entry of these consent decrees are still present given modern market conditions and legal developments. In fact, as previously noted in the context of our responses to Questions 5 and 6, the unprecedented concentration of rights in the hands of an increasingly smaller pool of major music publishers makes the processes and protections assured by these consent decrees more important now than ever before. While music publishers have always been free to withdraw their catalogs from ASCAP's or BMI's repertory for all purposes, a right which has been confirmed by the recent decisions in the ASCAP and BMI ratesetting proceedings involving Pandora Media,[68] the practical impossibility of licensing performances nationwide for all purposes, including thousands of radio stations, television stations, bars, restaurants and other public venues, has effectively prevented publishers from exercising its right to do so.[69]

However, if the antitrust consent decrees were to be modified by the Department of Justice to accommodate "limited" withdrawals (such as for certain digital uses, but not for all purposes), the key processes and protections assured by the antitrust consent decrees would be undermined, and the marketplace for musical work public performance rights would be significantly compromised.[70]

The continued need for the processes and protection assured by the consent decrees was well articulated in the March 2014 ASCAP ratesetting decision involving Pandora Media.[71] Specifically, Judge Cote found evidence of closely coordinated conduct by the major music publishers and ASCAP, which was designed to undermine the core processes and protections accorded by these consent decrees that are critical to an efficient, properly functioning marketplace:

- "The publishers believed that [the ASCAP Consent Decree] stood in the way of their closing this gap. They believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publically perform a composition."[72]

- "The press coverage focused on Sony's leverage in negotiations due to its outsize market power: 'Look a little closer, and this is ultimately a very lopsided negotiation .... Pandora absolutely needs Sony's catalog to run an effective radio service. And if they don't pay what Sony/ATV wants, they can't use it, by law.'"[73]

- "What is important is that ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified."[74]

C. <u>The process for acquiring and administering musical work public performance rights under the consent decrees could be made more effective</u>.

[68] *Pandora II*, 2014 WL 1088101; *Pandora III*, 2013 WL 6697788.
[69] *See* note 62, *supra*.
[70] If the antitrust consent decrees were to be modified in this way, the basic premise for allowing music publishers to withdraw should be revisited, with a view to creating a new statutory license for musical work public performance rights.
[71] The need for the protections of the antitrust consent decrees was also acknowledged by the Southern District of New York in *Meredith Corp.*, No. 09-cv-9177, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014), and by the Eastern District of Pennsylvania in *RMLC*, No. 12-cv-5807 (E.D. Pa. Dec. 20, 2013).
[72] *Pandora II*, 2014 WL 1088101, at *14.
[73] *Id.*, at *25.
[74] *Id.*, at *35; *see also* note 59 *supra* for additional context regarding SESAC.

While the consent decrees have served their intended purpose and the need for them now is greater than ever before, for the reasons noted in our responses to Questions 1 and 5, the process for acquiring and administering musical work public performance rights would be *greatly enhanced* through the recommended centralized database.

SOUND RECORDINGS

8. Please assess the current need for and effectiveness of the Section 112 and Section 114 statutory licensing process.

A. <u>There is currently a need for the Section 112 and Section 114 statutory licensing process</u>.

In contrast to the inefficient and expensive work-by-work licensing process for musical work reproduction and distribution rights under Section 115 (which is discussed in our response to Question 1 above), the statutory licensing process under Sections 112 and 114 provides for a *blanket license* for uses of sound recordings which satisfy the eligibility criteria set forth in Sections 112 and 114. As noted in the context of musical work rights, blanket licenses promote efficiency and reduce transaction costs by making a vast body of sound recordings subject to license coverage immediately upon the service of a single notice.[75]

B. <u>There are a number of problems with the Section 112 and Section 114 statutory licensing process that limit its effectiveness</u>.

As noted in Section I.3.B, the statutory license for the performance of sound recordings by means of non-exempt digital audio transmissions under Section 114 (and the corresponding compulsory license for the making of ephemeral recordings used to facilitate non-exempt digital audio transmissions under Section 112) is particularly significant because it reflects a recognition by Congress that a compulsory license is necessary to avoid music licensing complexities that might otherwise deprive the public of the benefits of culturally important digital radio services.[76] However, as noted in our response to Question 2, and as we will discuss further in the context of our answer to Question 9, the intent of Congress has not been fully realized because the "willing buyer, willing seller" standard, which governs the royalty *ratesetting process and standards* applicable to these statutory licenses, has resulted in royalty rates that have been so high and unsustainable that (i) numerous services have exited the business since Congress first established the sound recording public performance right in 1995,[77] and (ii) Congress has had to step

[75] *See* 17 U.S.C. § 114(f)(4)(A) (2012) ("The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings."); 17 U.S.C. § 114(f)(4)(B) ("Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection…").

[76] Prior to implementation of the Digital Performance Right in Sound Recording Act of 1995, digital radio services would not have required sound recording licenses at all

[77] Both AOL and Yahoo! concluded that the resulting high royalty costs were unsustainable for their Internet radio services. In April 2008, AOL reduced its exposure to these fees by entering into an arrangement with CBS Radio to power its Internet radio service (AOL Radio). In February 2009, Yahoo! followed suit by entering into a similar arrangement with CBS Radio to power its Internet radio service (LAUNCHcast). Additional services that have exited the business since Congress established the sound recording public performance right in 1995 include, without limitation, East Village Radio, Turntable.fm, Loudcity, RadioParadise and 3Wk. *See also* Ben Sisario, *East*

in twice to mitigate the substantial economic hardships that the resulting rates imposed on digital music services.[78]

In addition to the applicability of the "willing buyer, willing seller" standard, there are a number of problems with the Section 112 and Section 114 statutory licensing process that *limit its effectiveness*, including the following:

- Expense of participating in ratesetting proceedings before the Copyright Royalty Board. Ratesetting proceedings to establish rates and terms under the Section 112 and Section 114 statutory licenses are long and complex, and the cost for any service to actively participate in this process is very high. This high cost poses a barrier to participation for many smaller digital music services, and, in some cases, larger digital music services as well.

- Evidentiary limitations. The evidentiary rules that govern ratesetting proceedings under the Section 112 and Section 114 statutory licenses prohibit the Copyright Royalty Judges from considering all relevant market data when setting royalty rates. Specifically, Section 114(f)(5)(C) expressly prohibits voluntary agreements between statutory licensees and the receiving agent for the Section 112 and 114 royalties, SoundExchange, from being considered as evidence in ratesetting proceedings, including the royalty rates, rate structure, definition, terms, conditions, or notice and recordkeeping requirements.[79] These voluntary agreements cover the rights actually being granted in the proceeding (non-interactive Internet radio services), unlike the agreements for interactive rights that Copyright Royalty Judges use as proxies to impute non-interactive rates.[80] Copyright Royalty Judges should not be required to consider rates for a *hypothetical marketplace* instead of rates for an *actual marketplace* in this way.

- No pro-ration or apportionment of annual minimum fees based on duration of operation during the applicable calendar year. The rates and terms for many of the service types operating under the Section 112 and Section 114 statutory licenses include an annual minimum fee that is due by

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Village Radio to Close, Citing Licensing Costs, N.Y. Times, May 14, 2014, *available at* http://artsbeat.blogs.nytimes.com/2014/05/14/east-village-radio-to-close-citing-licensing-costs.

[78] *Music Licensing Part I: Legislation in the 112th Congress: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 56 (2012) (statement of Joseph J. Kennedy, Chairman and Chief Executive Officer, Pandora Media, Inc.) ("Two major rate setting decisions and two congressional interventions to undo those decisions - clearly we are dealing with a broken system that needs to be fixed.").

[79] *See* 17 U.S.C. § 114(f)(5)(C). ("Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, *shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings*, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). *It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller*, or otherwise meet the objectives set forth in section 801(b). This subparagraph shall not apply to the extent that *the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection*." (Emphasis added.))

[80] *See* Section II.9.A *infra*.

January 31 of the year covered by the particular Section 112 and Section 114 statutory license.[81] However, not every digital music service has commenced its operations as of January 1 of the year covered by the license. For example, a commercial webcaster that is relying on the "default" rates and terms set forth in 37 C.F.R. § 380.3 and expects to have 100 or more channels would be required to pay an annual minimum fee of $50,000 for that calendar year, even if that commercial webcaster commences making digital audio transmissions and ephemeral recordings on December 1 of that year. The statute (or the implementing regulations promulgated under the statute) should be amended to provide an appropriate pro-ration mechanism for the minimum annual fees.

- No mechanism for recouping royalties under direct licenses from annual minimum fee. For some digital music service providers that rely on the statutory licenses under Sections 112 and 114, it is common practice to concurrently have direct licenses in place with some sound recording rights owners. However, there is no mechanism for reducing or recouping royalties (or pre-payments of royalties) paid directly to sound recording copyright owners under direct licenses from the annual minimum fee. Accordingly, the royalty framework set by the Section 112 and 114 statutory licenses should be amended to allow for recoupment or offset in these circumstances.

- Purging server copies every 6 months. As a condition of eligibility for the Section 112 statutory license, Section 112(e)(1)(C) provides that "unless preserved exclusively for archival purposes, the copy or phonorecord [must be] destroyed within six months from the date the transmission program was first transmitted to the public."[82] In light of technological developments and current practices, this requirement imposes an unnecessary burden on digital music services without any corresponding benefit to rights owners or the public interest. Accordingly, 112(e)(1)(C) should be amended to abolish this requirement.

- Limitations on the number of server copies. Another condition of eligibility for the Section 112 statutory license is that digital music services must make "no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more)."[83] The intent of this provision is to leave the question of whether more than one phonorecord is permissible to the implementing regulations promulgated under Section 112. In light of technological developments, a limitation of no more than one phonorecord imposes an unnecessary burden on digital music services without any corresponding benefit to rights owners or the public interest. Moreover, there is no benefit for leaving this determination to implementing regulations. Accordingly, Section 112(e) should be amended to allow for the creation of as many phonorecords as are reasonably necessary to facilitate digital audio transmissions under the Section 114 statutory license.

9. Please assess the effectiveness of the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

A. <u>The royalty ratesetting standards applicable to the various types of services subject to statutory licensing under Section 114 have been generally ineffective</u>.

[81] 37 C.F.R. §§ 380.4(d), 380.13(d), 380.23(c), 383.3(b), 384.4(d) (2013).
[82] 17 U.S.C. § 112(e)(1)(C).
[83] 17 U.S.C. § 112(e).

The "willing buyer, willing seller" standard – which only applies to a single class of services (non-interactive Internet radio services) – is codified in Sections 112(e) and 114(f), and provides in relevant part as follows:

> The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—
>
> > (A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and
> >
> > (B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.
>
> In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms under voluntary license agreements described in paragraphs (2) and (3). The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.[84]

This standard – which has consistently resulted in royalty rates that are disproportionately higher than in contexts that rely on the 801(b) standard – requires judges to set a rate based solely on *marketplace benchmarks*, but there is very little record evidence of market rates for directly licensed Internet radio services that are not tied to a separate rights grant for additional service types and functionalities (such as direct licenses for interactive services). In recognition of this fact, the standard requires the Copyright Royalty Judges to assume a *hypothetical marketplace* for the rights actually being granted, and *impute* the appropriate rate for the rights actually granted (non-interactive Internet radio services) from the royalty rates paid by digital music services for interactive rights that are not eligible for the statutory licenses under Sections 112 and 114. Once secured, the alleged precedents set by these direct licenses are then bootstrapped as the relevant benchmarks for determining the *hypothetical marketplace* assumed by the "willing buyer, willing seller" standard. Moreover, unlike the 801(b) standard, the "willing buyer, willing seller" standard fails to account for the disruptive impact that high royalty rates may have on digital music service providers, and the public interest in maximizing the availability of creative works to the public.

Another problem with the "willing buyer, willing seller" standard has been that a component of the royalty is usually calculated and determined on the basis of the number of performances, even in circumstances where the higher usage does not equate to higher revenues for the digital music service provider. The Internet Radio Fairness Act (which was not enacted) sought to mitigate this fundamental problem by eliminating the ability to use the rates paid by interactive services, or any rates agreed to by

[84] 17 U.S.C. §§ 112(e)(4), 114(f)(2)(B).

major labels, in Section 112 and 114 ratesetting proceedings.[85] As noted previously, the resulting royalty rates have been so high and unsustainable that Congress has had to step in twice to mitigate the substantial economic hardship that the resulting rates imposed on digital music services.[86] By contrast, the 801(b) standard has never required Congressional intervention in the almost half century since it was introduced.

Finally, under the "willing buyer, willing seller" standard, many Internet radio services have had to pay in excess of 50% of their revenue to SoundExchange under the Section 112 and 114 statutory licenses (of course, such royalties are in addition to those that the services must pay to publishers for the use and exploitation of the underlying musical works). By contrast, broadcast radio pays nothing to the labels for their use of sound recordings, and Sirius XM pays less than 10% of its revenue for the same rights for its satellite digital audio radio service (which rate was established under the 801(b) standard). There is no justifiable reason that performance royalties for Internet radio are determined under an inequitable ratesetting standard.

B. The royalty ratesetting standards applicable to the various types of services subject to statutory licensing under Section 114 could be made more effective.

As previously discussed, the 801(b) standard has been time-tested to provide fair rates in many contexts, including the ratesetting proceedings set forth in Sections 114(f)(1)(B), 115, and 116. It bears repeating here that the record labels have participated as *licensees* in every proceeding to adjust royalty rates and terms under Section 115,[87] and as a result have benefited from the 801(b) standard that was adopted for such proceedings under the 1976 Act.[88] It is disingenuous for the labels to suggest that a different standard should apply for Internet webcasters.

C. Additional problems with the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

In addition to the application of the "willing buyer, willing seller" standard, there are a number of problems with the royalty ratesetting process and standards that *limit their effectiveness*, including the following:

- Reversed adjudication process. Under the current procedural rules that apply to ratesetting proceedings under the Section 112 and 114 statutory licenses, parties are required to submit a statement of the case prior to the commencement of discovery.[89] Moreover, the scope of discovery that is permissible is limited to non-privileged material that is the subject matter

[85] H.R. 6480 § 3(a)(2)(D)(v), 112th Cong. (2012).
[86] Congress stepped in first with the Small Webcaster Settlement Act of 2002 and then again with the Webcaster Settlement Acts of 2008 and 2009. *See also* note 78, *supra*.
[87] *See* note 38 *supra*.
[88] *See* note 52 *supra* and accompanying text.
[89] 37 C.F.R. §§ 351.4, 351.5(a) (2013); 17 U.S.C. §§ 801(b)(6)(C)(i)-(ii). Although 37 C.F.R 351.4(c) permits a participant to amend this statement based on new information received during the discovery process, up to 15 days after the close of discovery, the process is nevertheless not efficient and moreover, proves a tactical advantage to rights owners as they are aware of the direct licenses in the market place to a far greater degree than the digital music services, especially the ones who only operate music services under the Section 112 and 114 statutory licenses.

presented in the statement of the case.[90] Accordingly, in preparing a statement of the case, parties are required to *assume* what they will develop during discovery and hope that relevant information will be voluntarily revealed by their opponent in the opponent's written case, which is a significant reversal of the traditional adjudication procedures followed by state and federal courts and prejudicial to the interests of the litigants. The Section 112 and 114 statutory licenses, and the related implementing regulations governing the rate-setting procedures, should be amended to correct this procedural anomaly.

- Compressed time frame for discovery. Litigants have only 60 days in which to complete all discovery – among ALL litigants.[91] Even in the event that the Copyright Royalty Judges see fit to extend the discovery period, they have very little time to do so, after factoring in the time required for mandatory settlement periods,[92] the submission of written statements,[93] settlement conferences,[94] hearings, rebuttal, and proposed findings of fact and conclusions of law. In typical ratesetting proceedings, the schedules issued by the Copyright Royalty Judges mandate that all discovery – among all parties - must be completed in 60 days. This does not provide digital music services enough time to undertake a full discovery process, and advantages labels, who possess the lion's share of the relevant discoverable information.

- Discovery vehicles and limitations. Under the discovery vehicle limitations set forth in 17 U.S.C. § 801(b)(6)(C)(iv) and 17 C.F.R. § 351.5(2), the participants on each side are *collectively* entitled to up to 25 interrogatories and 10 depositions.[95] Because SoundExchange is the sole participant on behalf of sound recording copyright owners, it is entitled to 25 interrogatories and 10 depositions. However, all interested digital music services, collectively, must *share* 25 interrogatories and 10 depositions. In the currently pending proceeding, there are 28 such

[90] 17 U.S.C. § 801(b)(6)(C)(v) ("Any participant under paragraph (2) in a proceeding under this chapter to determine royalty rates may request of an opposing participant *nonprivileged documents directly related to the written direct statement or written rebuttal statement* of that participant." (Emphasis added.)).
[91] 17 U.S.C. § 801(b)(6)(C)(iv) ("Discovery in connection with written direct statements shall be permitted for a period of 60 days, except for discovery ordered by the Copyright Royalty Judges in connection with the resolution of motions, orders, and disputes pending at the end of such period.").
[92] 17 CFR 351.2 (2013) ("After the date for filing petitions to participate in a proceeding, the Copyright Royalty Judges will announce the beginning of a voluntary negotiation period and will make a list of the participants available to the participants in the particular proceeding. *The voluntary negotiation period shall last three months, after which the parties shall notify the Copyright Royalty Judges in writing as to whether a settlement has been reached.*" (Emphasis added.)).
[93] 17 CFR 351.4 (2013) ("All parties who have filed a petition to participate in the hearing must file a written direct statement. The deadline for the filing of the written direct statement will be specified by the Copyright Royalty Judges, *not earlier than 4 months, nor later than 5 months, after the end of the voluntary negotiation period* set forth in §351.2." (Emphasis added.)).
[94] 17 CFR 351.7 (2013) ("A post-discovery settlement conference will be held among the participants, within 21 days after the close of discovery, outside of the presence of the Copyright Royalty Judges. Immediately after this conference the participants shall file with the Copyright Royalty Judges a written Joint Settlement Conference Report indicating the extent to which the participants have reached a settlement.").
[95] 17 U.S.C. § 801(b)(6)(C)(iv); 17 CFR 351.5 (2013) ("In a proceeding to determine royalty rates, the participants entitled to receive royalties shall collectively be permitted to take no more than 10 depositions and secure responses to no more than 25 interrogatories. Similarly, the participants obligated to pay royalties shall collectively be permitted to take no more than 10 depositions and secure responses to no more than 25 interrogatories. Parties may obtain such discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. Relevant information need not be admissible at hearing if the discovery by means of depositions and interrogatories appears reasonably calculated to lead to the discovery of admissible evidence.").

participating digital music services. This gives a decided tactical and procedural advantage to SoundExchange in discovery matters.

10. Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

A. DiMA takes no view on whether the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings.

We take *no view* on (i) whether the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings, (ii) whether there are reasons to continue to withhold such protection, or (iii) whether pre-1972 sound recordings should be included within the Section 112 and 114 statutory licenses.

B. Any approach taken with respect to the copyright status of pre-1972 sound recordings should be holistic: Pre-1972 sound recordings should either be "all-in" or "all-out" for all purposes, with no exceptions or exclusions.

Although we take no view on whether the music marketplace might benefit from extending federal copyright protection to pre-1972 sound recordings, we strongly believe that pre-1972 sound recordings should either:

> [1] Be covered by federal copyright protection for *all purposes* (including the statutory licenses under Sections 112 and 114, the "safe harbors" under Section 512 and each of the myriad other statutory licenses, exceptions and exemptions set forth elsewhere in U.S. copyright law), *or*
>
> [2] Not be covered by federal copyright protection for *any purposes at all*.

As noted in other places throughout this response, the current legal and regulatory framework for music licensing developed in a piecemeal manner, and is the product of accommodating the needs, goals and desires of special interest groups. We feel that this tradition should not be continued in the area of pre-1972 sound recordings; rather, this issue should be addressed holistically. Recognizing pre-1972 sound recordings for federal copyright protection for select purposes would be confusing, short-sighted, and against the public interest.

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

The distinction between interactive and noninteractive services *is adequately defined* for purposes of eligibility for the Section 114 license. The definition of an "interactive service" set forth in Section 114(j)(7), as clarified by the Second Circuit in *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009), provides an adequate degree of clarity regarding what constitutes an "interactive service" and a "noninteractive service" for purposes of eligibility for the Section 114 statutory license.

PLATFORM PARITY

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

Because of the close relationship between Questions 12 and 13, we are consolidating our response to Question 12 under Question 13, below, so that the issues raised can be addressed collectively.

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

A. <u>The varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms, unfairly tilts competition in favor of some digital music service providers, to the disadvantage of others</u>.

The "playing field" regarding ratesetting standards is not level, and the result is fundamental inequity. The differences between the "willing buyer, willing seller" and 801(b) standards, and their resulting impact on the royalty rates that are established under them, have been discussed in our responses to Questions 2, 8 and 9.

Beyond the inherent inequities associated with the differing ratesetting standards, lawmakers[96] and the recording industry itself[97] have recently cited the absence of a sound recording public performance right for terrestrial AM, FM and HD Radio broadcasts as additional evidence that the current system lacks balance and further tilts the competitive landscape in favor of some music service providers, to the disadvantage of others. In his testimony before the United States Senate Committee on Commerce, Science, and Transportation in support of the merger of the satellite radio services Sirius and XM, the then-CEO of Sirius assured government regulators that a merged Sirius and XM would not create a "monopoly" that could harm competition or new market entrants, because the two satellite radio services do not just compete with each other; they compete head-to-head with a wide variety of other entertainment services and products for the attention of the consumer, including AM and FM terrestrial radio, HD Radio, Internet radio, permanent digital downloads that are sold to consumers and enjoyed on

[96] Jennifer Martinez, *Nadler Circulates Draft Legislation on Music Royalties*, The Hill, Aug. 20, 2012, *available at* http://thehill.com/policy/technology/244413-nadler-circulates-draft-legislation-on-music-royalties (quoting Nadler as saying, "[t]he lack of a performance royalty for terrestrial radio airplay is a significant inequity and grossly unfair."); *Blackburn, Eshoo Introduce Legislation to Protect Musicians' Creative Content*, official website of Rep. Marsha Blackburn (press release), May 7, 2014, *available at* http://blackburn.house.gov/news/documentsingle.aspx?DocumentID=379223 (last visited May 21, 2014) ("'This is a basic issue of modernizing the law to get rid of a dated loophole that only applies to AM/FM radio,' Blackburn said. … 'When Kenny Rogers "The Gambler" is played on Internet radio or satellite radio, Kenny gets paid, but when it is played on AM/FM radio, he doesn't get anything.'").

[97] *Performance Rights Act (H.R. 848): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association Of America); Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, 21 Intell. Prop. & Tech. L.J. 10 (Aug. 2009); *see also* Bruce A. Lehman, *Intellectual Property and the Nat'l Information Infrastructure: the Report of the Working Group On Intellectual Property Rights* 221-225, Information Infrastructure Task Force of the Commerce Dep't (Sep. 1995), *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf.

portable devices and mobile phones that provide access to various types of audio entertainment.[98] The merger was subsequently approved by the Department of Justice and Federal Communications Commission on this basis.[99]

The different ratesetting standards, royalty rates and functionality rules based on platform distinctions do not make sense in the digital environment where the very same consumer electronics devices – such as automobile in-dash receivers – are capable of receiving digital and/or analog transmissions of the same sound recording, yet the sound recording will bear a different royalty rate (or will not be royalty-bearing at all) depending on whether the service that delivered it is considered AM terrestrial radio, FM terrestrial radio, HD Radio, satellite radio or Internet radio under U.S. copyright laws.

B. <u>Fair competition among digital music service providers can be restored by applying the balanced standard under Section 801(b) to all services operating under the Section 112, 114 and 115 statutory licenses</u>.

As previously noted, the royalty standard that applies to Internet radio services (i.e., "willing buyer, willing seller") often results in a royalty rate that is demonstrably higher than the services that operate under the Section 801(b) standard. In lieu of the "willing buyer, willing seller" standard, the balanced standard under Section 801(b) should be adopted to apply to *all services* operating under the Section 112, 114 and 115 statutory licenses. And, as noted above, various lawmakers and the recording industry believe that the lack of a sound recording public performance right for terrestrial AM, FM and HD Radio broadcasts has further tilted the competitive balance in favor of some music service providers, to the disadvantage of others.

CHANGES IN MUSIC LICENSING PRACTICES

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

A. <u>Direct licensing by musical work owners in lieu of licensing through a common agent or PRO *is quite prevalent* for musical work *reproduction and distribution rights*, but not for musical work *public performance rights*</u>.

Direct licensing by musical work owners in lieu of licensing through a common agent or PRO is quite prevalent for musical work reproduction and distribution rights covered by the major music publishers, the larger independent music publishers and HFA's publisher-principals. Some digital music services have entered into direct license agreements with smaller independent music publishers, but this practice is the exception rather than the rule. Because there are a vast number of musical works that are not controlled by the major music publishers, the larger independent music publishers or the remainder of

[98] *XM-Sirius Merger and the Public Interest: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. (2007) (statement of Melvin Alan Karmazin, CEO, Sirius Satellite Radio).
[99] DOJ, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc.* (press release) (March 24, 2008), *available at* http://www.justice.gov/opa/pr/2008/March/08_at_226.html; *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket 07-57, 23 F.C.C.R. 12348, 12408, 12410-11, 12434-35, ¶¶ 1, 131, 135 & App. B (July 25, 2008) (Memorandum Opinion and Order and Report and Order).

HFA's publisher-principals, direct licenses are usually supplemented with NOIs under the Section 115 statutory license process, which (as previously discussed) involves substantial administrative costs.

To perform this function, many digital music services engage the Harry Fox Agency or Music Reports, Inc. (the only private businesses that offer musical work mechanical and reproduction rights research, administration and management services in the U.S.) to undertake this NOI process on their behalf for a fee, as the services do not have the in-house resources and infrastructure necessary to undertake this process themselves. Many of the digital music services that enter into direct licenses also use these companies to administer the payment of royalties under their direct licenses, because the administration (not just the acquisition) of publishing licenses requires personnel and infrastructure that many services do not have.

However, direct licensing by musical work owners in lieu of licensing through a common agent or PRO *is not prevalent* for musical work *public performance rights*. The potential withdrawal of repertoires from the PROs would make direct licensing of musical work public performance rights much more prevalent. However, as previous noted,[100] these withdrawals would disrupt the musical work licensing marketplace and cause an array of adverse effects for digital music services and the public interest, including the extraction of unreasonable royalty rates based on a combination of market power and lack of transparency into the catalogs that were the subject of the contemplated withdrawals.[101]

For the reasons noted in the next section, it vitally important that the licensing regime maintain the right of parties to enter into direct license arrangements.

B. <u>How direct licensing impacts the music marketplace</u>.

Direct licensing impacts the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees, by *facilitating the introduction of new business models* that do not fit squarely into any of the categories covered by the Section 115 licenses. This gives digital music services and rights owners the flexibility to *vary statutory requirements* and the flexibility to agree on *new and innovative license types and royalty rate models*, which ensures the ability of digital music services to license the rights they require to fit the unique needs of their businesses.

While direct licenses offer cost efficiencies and reduced transaction costs, they also pose a number of significant challenges:

- As previously noted, direct licensing results in high transaction costs to secure and administer licenses. The number of licensors is vast because of the fragmentation of rights, and it is often not cost effective to acquire rights under direct licenses from the "long tail" of independent labels and music publishers.

- Most individually negotiated agreements are long and complex. Rights owners do not share the same concerns in each individual negotiation, which protracts the negotiation period and can lead to impasses.

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[100] *See* Sections I.3.C(b), II.5.B, and II.7.B *supra*.

[101] For example, in the ASCAP ratesetting proceeding with Pandora Media, Judge Cote found that a pattern of conduct, including lack of transparency about the musical works involved, was designed by the music publishers to drive up the royalty rate for musical works by 250%. Accordingly, Judge Cote disregarded Sony ATV's direct license with Pandora Media as a relevant benchmark rate for musical work public performance rights. *Pandora II*, 2014 WL 1088101, at *36-*38.

- Direct license negotiations can take a long time, and can delay the time-to-market for innovative products and services.

- Disparate approaches taken by rights owners on key economic terms put upward pressure on royalty rates, and often include unreasonable demands on key economic terms, such as advances and minimum revenue guarantees.

- Many rights owners are concerned with parity vis-à-vis other rights owners, which results in the imposition of so-called "most favored nations" (or "MFN") clauses for the benefit of rights owners. Because there is no counter-balance to the market power of rights owners in the music licensing marketplace, these MFN clauses are usually asymmetrical in their application, and solely benefit the rights owners.

- The negotiation of direct licenses can increase overhead costs and divert key personnel away from other critical operational, marketing or management functions on behalf of the digital music service.

- Since there is no uniform standard for royalty accountings, each rights owner often imposes its own royalty reporting requirements on digital music services, frequently using proprietary reporting specifications unique to that rights owner. This reduces efficiencies, and adds to the administrative burden and expense undertaken by digital music services.

- As the music publishing industry consolidates and reduces its staffing and overhead, rights owners do not have enough personnel and other resources necessary to fully explore and assess licensing opportunities.

- The existence of the statutory rates under Section 115 sometimes serves to inhibit, rather than facilitate, the willingness of rights owners to experiment with innovative approaches on economic terms in order to avoid the possibility of setting "precedents" that would be adverse to their interests in future ratesetting proceedings.

Nevertheless, direct licenses provide a critical function for music licensing in the digital environment, and the legal and regulatory framework provided by U.S. copyright law must preserve the ability of digital music services to enter into direct licenses.

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

DiMA takes *no view* on whether the government could play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms.

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

The innovations to address the complexity of music licensing have generally been undertaken by digital music services, at their expense. In order to secure, administer and retain music licenses, digital music service providers must devote extraordinary time and resources to develop the following:

(i) Information about rights ownership (including building, or funding the building of, redundant, private databases that, for reasons already noted, are often not comprehensive, reliable or accurate);

(ii) Systems to track massive amounts of data related to the usage of content; and

(iii) The complex systems necessary to account to rights owners in a variety of different (and often conflicting) formats and specifications.

In addition to these costs and functions, digital music services must develop content hosting and infrastructure in a way that enables the terms and conditions of myriad music licenses to be satisfied, along with data analytics, management reporting, chart reporting, and enforcement of content access rules (including digital rights management systems for some service types).

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

Other than as discussed in our responses to other questions in this Notice of Inquiry, DiMA takes *no view* on whether the music marketplace would benefit from modifying the scope of the existing statutory licenses,.

REVENUES AND INVESTMENT

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

The development and deployment of legitimate music services has resulted in *significant royalty payments* by digital music service providers to rights owners for the benefit of songwriters, composers, and recording artists. The legitimate music services represented by DiMA's membership collectively have paid billions of dollars in royalties to content owners in a marketplace where the sale of physical products – long the content owners' primary source of revenue – has continued to decline year-over-year.[102] The various forms of music streaming and so-called "subscription" services are now recognized by rights owners as a "mainstream model."[103] According to IFPI, the recorded music industry's global trade organization, the biggest growth area in recorded music has been in music subscription services, with revenues up 51.3% globally in 2013, while the sale of permanent downloads remains the largest revenue segment from digital music services, at 67% of global revenues.[104] The New York Times recently reported that while the trend for the historical business model is one of decline, streaming services around the world are expected to continue showing substantial growth in the income they generate for songwriters, composers, and recording artists: "The music business has started to see streaming as its salvation. … In 2013, streaming services around the world yielded $1.1 billion in income for the music industry, a number that has been growing fast."[105]

[102] While the decline in physical music sales was inevitable, legitimate digital music services have created new royalty streams for the benefit of rights holders by monetizing digital music consumption and sharing the revenues with licensors.
[103] Francis Moore, *Introduction*, IFPI Digital Music Report 2014, at 5 (2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.
[104] IFPI Digital Music Report 2014, at 17 (2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.
[105] Sisario, *supra* note 1.

With respect to recording artists, SoundExchange recently reported a 312% increase in the total sum of royalties it paid to recording artists and labels in 2012 versus 2008.[106] Digital radio alone paid out $590.4 million in royalties to artists and rightsholders last year.[107] And according to a report recently released by the Recording Industry Association of America ("RIAA"), the recorded music industry's trade organization in the United States, payments to rights owners in connection with on-demand streaming services have also substantially risen, totaling $220 million in 2013.[108] The substantial royalties generated by the combination of statutory and direct licenses for the use of sound recordings has brought stability to the recording industry, which until recently had witnessed a constant decline in revenues.[109] With respect to songwriter income, royalties paid by digital music services for musical work public performance rights provide the lifeblood for most songwriters. Both ASCAP and BMI reported record high royalty payments of $851.2 million and $814 million, respectively, to their songwriter, composer and publisher members on revenues of $944 million each.[110] SESAC's revenues have grown from just $9 million in 1994 to $167 million in 2013.[111]

The substantial royalties paid by digital music services constitute new revenue streams that were unimagined just a few decades ago. The legitimate music services represented by DiMA's membership make significant royalty payments to content owners. These royalty payments are, in turn, shared with songwriters, composers, and recording artists in accordance with the terms of their respective agreements music publishers, record companies and other rights administrators. Although licensed digital music services have no control over, or insight into, the manner in which content owners share proceeds with songwriters, composers, and recording artists, it is worth noting that the current system, which is based on overlapping copyright rights recognized under U.S. copyright law – sometimes for the same uses of the same works – causes licensing inefficiencies and operational redundancies which add to the expense of administering rights on behalf of rights owners, and correspondingly diminishes the income of songwriters, composers and recording artists.[112]

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[106] *2012 Annual Review* 1, SoundExchange, http://www.soundexchange.com/wp-content/uploads/2014/01/2012-Annual-Review.pdf. Between 2012 and 2013, SoundExchange reported a 19% increase in payments to artists; *Year End Recap 2013*, SoundExchange, http://www.soundexchange.com/wp-content/uploads/2014/02/year-end-recap-2013.pdf.

[107] *Music Industry Leader SoundExchange Celebrates Year of Milestones with 2013 Total Distributions Reaching $590 Million*, SoundExchange (press release), Feb. 4, 2014, http://www.soundexchange.com/pr/music-industry-leader-soundexchange-celebrates-year-of-milestones-with-2013-total-distributions-reaching-590-million/; *see also* Alex Pham, *Streaming Made Up One-Fifth of U.S. Recorded Music Revenue in 2013*, Billboard, Mar. 18, 2014, *available at* http://www.billboard.com/biz/articles/news/digital-and-mobile/5937634/streaming-made-up-one-fifth-of-us-recorded-music (last viewed May 9, 2014).

[108] Joshua P. Friedlander, *News and Notes on 2013 RIAA Music Industry Shipment and Revenue Statistics*, RIAA, *available at* http://76.74.24.142/2463566A-FF96-E0CA-2766-72779A364D01.pdf.

[109] According to the RIAA, total music industry revenues have been stable at about $7 billion for the past four years, but had been on a steady decline before that, dropping from $8.8 billion in 2008 to $7.8 billion in 2009 to the current level of $7 billion in 2010. *Id.*

[110] *ASCAP Reports Strong Revenues in 2013*, Am. Soc'y of Composers, Authors, and Publishers (press release), Feb. 12, 2014, http://www.ascap.com/press/2014/0213-2013-financials.aspx; *Broadcast Music Inc. Reports Record-Breaking Revenues of $944 Million*, Broadcast Music Inc. (press release), Sept. 23, 2013, http://www.bmi.com/press/entry/563077.

[111] Ed Christman, *SESAC Refinances Debt to Cut Interest Payments*, Billboard, Apr. 8, 2014, *available at* http://www.billboard.com/biz/articles/news/legal-and-management/6042238/sesac-refinances-debt-to-cut-interest-payments (last viewed May 9, 2014).

[112] For example, in the context of ASCAP and BMI, each PRO retains administration fees of approximately 12% of the gross royalties paid by digital music services. Based on the 2013 royalties noted above, DiMA estimates that approximately $200 million of the royalties paid by digital music services in 2013 was redirected from songwriters

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

Revenues attributable to the performance and sale of music are *not* fairly divided between creators and distributors of musical works and sound recordings. Distributors bear a *disproportionate percentage* of the costs, expenses and related risks for the investment in and operation of digital music services, relative to the share of revenues they generally retain (after making royalty payments for the use of musical works and sound recordings). In addition to the cost of royalty payments, digital music services must bear the costs of acquiring and administering the licenses for musical works and sound recordings, as well as many other operational costs, such as those related to engineering; content hosting, delivery, and billing infrastructure; financial clearing; bandwidth; reporting; marketing; and technology, software, services, and backend infrastructure. As was made plain by the testimony of the record labels' expert witness in the last ratesetting proceeding for the satellite radio and preexisting subscription services under the Section 112 and 114 statutory licenses, digital music services pay the lion's share of their revenues over to rights owners at roughly the following rates:[113]

Digital Product Type	**% of Gross Revenues Rate** ***Sound Recording Rights Only***	**% of Gross Revenues Rate** ***Inclusive of Sound Recording and Musical Work Rights***
Permanent Audio Download	N/A	70%
Interactive Subscription (Non-Portable)	50% - 60%	60% - 72%
Interactive Subscription (Portable)	60% - 65%	70% - 78%

Unfortunately, the public discourse around the compensation of creators is quite misleading. For example, much publicity was recently generated about a tweet from Bette Midler, where she observed that after more than four million plays on Pandora's Internet radio service, she only received $144.21 in royalties.[114] What this publicity failed to take into account is that four million plays on Pandora's service represents the equivalent number of "impressions" (public performances) as just twenty spins on a terrestrial FM radio station that averages 200,000 simultaneous listeners. Even more significantly, this publicity ignores the fact that terrestrial FM broadcasters do not pay *any* royalties to creators for the public performance of sound recordings. Of course, there is little transparency about what happens to the significant royalties generated from digital music services *after they are paid* to record labels, music

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and retained to cover administrative expenses. *See ASCAP CEO John LoFrumento's Remarks from the 2014 ASCAP General Annual Membership Meeting*, Official Website of Am. Soc'y of Composers, Authors, and Publishers, Apr. 24, 2014, *available at* http://www.ascap.com/playback/2014/04/action/john-lofrumento-membership-meeting-remarks.aspx ("2013's operating ratio stood at 12.4%."); *FAQs*, official website of Broadcast Music, Inc., *available at* http://www.bmi.com/faq/entry/what_happens_to_the_fees_that_businesses_pay_and_how_much_profit_does_bmi_m (last visited May 21, 2014) ("Currently, more than eighty-seven cents of every dollar of your licensing fee goes to our affiliated copyright owners.").

[113] *See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, SoundExchange Witness Direct Statements, Docket No. 2011-1 CRB PSS/Satellite II, at 15 (Nov. 29, 2011) (expert witness statement of George S. Ford, President, Applied Economic Studies).

[114] *See, e.g.*, Paul Resnikoff, *After 4,175,149 Plays, Pandora Pays Bette Midler $144.21*, Digital Music News, Apr. 6, 2014, http://www.digitalmusicnews.com/permalink/2014/04/06/bettemidler.

publishers and PROs, and processed under the financial terms of recording artists' and songwriters' own private arrangements with rights owners. As might be imagined, a significant portion of the royalties received are retained by these rights owners for their own account, or applied toward the recoupment of advances paid to recording artists and songwriters.

While the public is led to believe through the aforementioned sorts of publicity that digital music services do not pay significant royalties, nothing could be further from the truth. In fact, digital music services are paying more in royalties and wholesale proceeds, as a percentage of their gross revenue, than any music distributors under the historical business model.

20. In what ways are investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, impacted by music licensing issues?

DiMA takes *no view* on what ways investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, are impacted by music licensing issues. Although DiMA's members have significant intellectual property portfolios of their own and have great respect for the investments made by content creators, DiMA's members do not generally perform the functions of music creators, record labels or music publishers.

21. How do licensing concerns impact the ability to invest in new distribution models?

As we have noted elsewhere in our responses to the other specific questions posed in this Notice of Inquiry, the current legal and regulatory framework provided by U.S. copyright law for music licensing has created a "perfect storm" of issues and areas of concern that have led many potential investors *to refrain from investing* in new distribution models. Such issues and areas of concern include: the complexity of music licensing caused by the fragmented nature of rights ownership; unsustainable royalty rates; the cost of acquiring and administering licenses; lack of transparency regarding rights ownership; and substantial legal risks, such as the potential liability for statutory damages for "mistakes," however innocent or unavoidable they may be.

In testimony before the U.S. House of Representatives Subcommittee on Intellectual Property, Competition and the Internet of the Committee on the Judiciary in 2012, one investor noted the following about the chilling effect that music licensing issues have had on entrepreneurship and investment in new business models:

> As venture capitalists we evaluate new companies largely based on three criteria: The abilities of the team, the size and conditions of the market the company aims to enter, and the quality of the product. Although we've met many great entrepreneurs with great product ideas, we have resisted investing in digital music largely for one reason: The complications and conditions of the state of music licensing. The digital music business is one of the most perilous of all Internet businesses. We are skeptical under the current licensing regime that profitable standalone digital music companies can be built. In fact, hundreds of millions of dollars of venture capital have been lost in failed attempts to launch sustainable companies in this market. While our industry is used to failure, the failure rate of digital music companies is among the highest of any industry we have evaluated. This is solely due to the overburdensome royalty requirements imposed upon digital-music licensees by record companies under both voluntary and compulsory rate structures. The compulsory royalty rates imposed upon

> Internet radio companies render them noninvestible businesses from the perspective of many VCs.[115]

Addressing these concerns and problems through a comprehensive modernization of U.S. copyright law for the digital environment will go a long way toward stimulating a new wave of investment in new distribution models.

DATA STANDARDS

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

As noted in our responses to Questions 1, 3, 5 and 8, the lack of transparency around rights ownership information for musical works and sound recordings makes it difficult if not impossible for digital music services to determine what rights they do and do not possess at any given time, which presents many adverse consequences. A publicly available, centralized database for musical works and sound recordings would go a long way toward resolving many of the problems identified in our response to this Notice of Inquiry.

The federal government *could encourage* the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process by establishing a set of best practices, database standards, and a regime for enforcing participation and compliance. At a minimum, this regime could encourage adoption by incorporating the following key elements:

- Statutory damages. Without limiting the concept of a "safe harbor" from statutory damages previously suggested (i.e., one that shields copyright users from infringement liability if they have acted diligently and in good faith based on the best information available, such as the centralized database), eligibility to seek statutory damages in general should be conditioned on participation in the centralized database, utilizing the universal standards.

- Attorneys' fees. As a further incentive for participation, like the registration of copyrighted works with the Copyright Office,[116] eligibility to seek attorneys' fees in infringement cases in general should be conditioned on the registration of accurate rights ownership information in the centralized database, utilizing the universal standards.

- Economic incentives. The federal government should also encourage the adoption of universal standards by creating other economic incentives for rights owners to participate.

The federal government should develop these standards, practices and compliance regulations in conjunction with interested parties from the private sector, as much of the information required is already controlled by private parties in disparate private databases, and there are many different data standards utilized by digital music service providers and rights owners today that would need to be harmonized. However, as the experience with the development of the GRD has shown (and as previously noted), if left

[115] *Music Licensing Part I: Legislation in the 112th Congress: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 71 (2012) (statement of David B. Pakman, Partner, Venrock).
[116] 17 U.S.C. § 412 (2012).

entirely to private industry without oversight from the federal government, these universal standards – and the centralized database itself – are unlikely to get implemented.

OTHER ISSUES

23. Please supply or identify data or economic studies that measure or quantify the effect of technological or other developments on the music licensing marketplace, including the revenues attributable to the consumption of music in different formats and through different distribution channels, and the income earned by copyright owners.

DiMA believes that the following data and economic studies measure or quantify the effect of technological or other developments on the music licensing marketplace:

- Michael Masnick and Michael Ho, *The Sky is Rising*, Computer and Communications Industry Ass'n, Engine Advocacy and Floor 64, Jan. 2012, *available at* http://www.techdirt.com/skyisrising/.

- Brett Danaher, Samita Dhanasobhon, Michael D. Smith and Rahul Telang, *Understanding Media Markets in the Digital Age: Economics and Methodology* (Apr. 2014), *available at* http://www.nber.org/chapters/c12999.pdf.

- *Adventures in the Netherlands: Spotify, Piracy and the New Dutch Experience*, Spotify, Jul. 17, 2013, *available at* https://spotify.box.com/shared/static/nbktls3leeb0rcyh41sr.pdf.

- *IFPI Digital Music Report 2014*, IFPI, *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.

- Joshua P. Friedlander, *News and Notes on 2013 RIAA Music Industry Shipment and Revenue Statistics*, RIAA, *available at* http://76.74.24.142/2463566A-FF96-E0CA-2766-72779A364D01.pdf.

- Jean-Manuel Izaret, John Rose, Neal Zuckerman and Paul Zwillenberg, *Follow the Surplus: How U.S. Consumers Value Online Media*, Boston Consulting Group (Feb. 2013), *available at* http://www.bcgtelaviv.com/documents/file127046.pdf.

- Thomas Künstner, Matthew Le Merle, Hannes Gmelin and Christian Dietsche, *The Digital Future of Creative Europe: The Economic Impact of Digitization and the Internet on the Creative Sector in Europe*, Booz & Co. (Mar. 24, 2013), *available at* http://www.strategyand.pwc.com/global/home/what-we-think/reports-white-papers/article-display/digital-future-creative-europe.

24. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

As noted in our response to Questions 12 and 13, the digital music services that operate under the Section 112 and 114 statutory licenses not only compete against each other without regard to these platform distinctions, they also compete with a wide variety of other entertainment services and products for the attention of the consumer, including AM and FM terrestrial radio, HD Radio and permanent digital downloads. Just as there is no rational basis for different ratesetting standards applicable to each of these competing services, there is no rational basis for there to be discriminatory standards for applying *the programming rules and restrictions* to these services that compete for the same users, time spent

listening, advertising dollars and subscription dollars. Yet, the standards under Section 114(d)(2), are applied in such a way as to advantage some competitors (e.g., satellite radio and digital radio that is bundled with cable and satellite television services) over others (e.g., Internet radio). For example, the following five rules apply to Internet radio services, but not any of the other service types operating under the Section 112 and 114 statutory licenses:[117]

- The service cannot "knowingly perform the sound recording…in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity…"[118]

- The service must cooperate in order to prevent technology from "automatically scanning… transmissions…in order to [allow the user to] select a particular sound recording;"[119]

- The service must not take "affirmative steps to cause or induce the making of a phonorecord by the transmission recipient" and must enable its own technology to the fullest extent possible "to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format;"[120]

- The service must accommodate technical anti-circumvention measures for the identification and protection of copyrighted works;[121] and

- The service must ensure that the title of the sound recording, the album, and the artist "can easily be seen by the transmission recipient in visual form" during the performance.[122]

Fair competition among digital music service providers can be restored by applying the same programming rules and restrictions under Section 114(d)(2) to all services operating under the Section 112 and 114 statutory licenses. The programming rules and restrictions under Section 114(d)(2) should apply to *all service types* that rely on Section 114 statutory licenses, such that the law creates a "level playing field" for all parties.

III. CONCLUSION

In making its recommendations to Congress regarding potential areas for the modernization of U.S. copyright law in the area of music licensing, DiMA urges the Copyright Office to take a holistic view of the entire music licensing ecosystem, and provide a framework for the new digital era that is based on the six essential pillars outlined in Section I of this Notice of Inquiry response. Because of the importance and technical complexity of the various issue involved, we respectfully suggest that the Copyright Office conduct further analysis into the current landscape with a view to [1] achieving a better understanding of the "perfect storm" of music licensing issues and problems that has created systemic failure in the music licensing marketplace, and [2] determining how the issues, problems and inefficiencies discussed in this Notice of Inquiry response may be addressed through appropriate legislative changes.

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[117] 17 U.S.C. § 114(d)(2)(C); *see* Nimmer, *supra* note 4, § 8.22[D][1][c] (2013).
[118] 17 U.S.C. § 114(d)(2)(C)(iv).
[119] 17 U.S.C. § 114(d)(2)(C)(v).
[120] 17 U.S.C. § 114(d)(2)(C)(vi).
[121] 17 U.S.C. § 114(d)(2)(C)(viii).
[122] Nimmer, *supra* note 4, § 8.22[D][1][c] (2013) (describing the requirements of 17 U.S.C. § 114(d)(2)(C)(ix)).

Dated: May 23, 2014

By: _____

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Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of:	
Music Licensing Study	Docket No. 2014-03

Reply Comments of the Digital Media Association ("DiMA")

The Digital Media Association ("DiMA") respectfully submits the following reply comments in response to the Copyright Office's second Notice of Inquiry, seeking additional written comments to the above-referenced Notice of Inquiry (the "Notice of Inquiry").

First, DiMA commends the Copyright Office for initiating this inquiry and for continuing the study. DiMA appreciates the opportunity to participate and is willing to continue to participate in the study going forward and to assist the Copyright Office in any way we can. As set forth in our first set of comments in response to the initial Notice of Inquiry, DiMA is the leading national trade organization dedicated to representing the interests of licensed digital media services, including many of the leading players in the digital music marketplace today. DiMA's members include Amazon.com, Apple, Google/YouTube, Microsoft, Pandora, Rhapsody, Slacker and others.

DiMA's members operate a broad array of different digital music service types and consumer offerings that span across the spectrum of music licensing concerns, from so-called "statutory, non-interactive internet radio" which utilizes the Section 114 license, to on-demand streaming services which have had to forge independent licenses in a free market, to digital download services which employ the Section 115 compulsory reproduction license (or some variation thereof). Many of DiMA's members provide a multitude of these services, for which they must seek a broad array of music licenses. As the premiere providers of copyrighted sound recordings and musical works through virtually every form of legitimate online music service, DiMA's members are directly affected by existing methods of licensing music, as well as the mechanisms for obtaining music licenses that are shaped by U.S. copyright law. DiMA has been actively involved in many of the legislative efforts, recent hearings, studies, analyses, public inquiries and roundtables conducted by the Copyright Office on various aspects of copyright law.

It is important to note that the interests of DiMA and its members are aligned with those of the rights owners in several significant respects. First, DiMA members share the belief that rights owners should be appropriately compensated for the use of copyrighted works. Second, DiMA members also share the desire to ensure the long-term survival of the music business, going forward. The legitimate music services represented by DiMA's members have collectively paid billions of dollars in ever-increasing royalty payments to content owners, recording artists and songwriters, even as the sale of physical products – long the content owners' primary source of revenue – has continued to decline year-over-year. The delivery of engaging, innovative music services offered by DiMA members is critical to the central public policy underlying our copyright system: affording the widest range of consumers' access to the widest range of creative works.

The complex process for music licensing in the digital landscape that exists today in the United States is unnecessarily fragmented and outdated and as a result, chills investment in legitimate music services and the continued development and expansion of innovative services that are essential to the

survival of the recorded music industry. We are pleased that the Copyright Office is continuing its examination of the music licensing landscape. We remain hopeful that, after evaluating the issues, the Copyright Office can formulate at least some basic recommendations that Congress will consider to modernize U.S. copyright law so that it assures consumers continued access to a vibrant marketplace for music products and services in the digital era.

As we made clear in our initial submission in this study, the process for music licensing in the United States, as it has been applied in the current digital landscape, threatens to chill investment in, and the continued development and expansion of innovative, legitimate music services that are essential to the survival of the recorded music industry. The most significant problems with the system are:

- Fragmentation of copyright rights and rights ownership. The rights in and to musical works under U.S. copyright law include multiple varied and distinct rights. Sound recordings, and the musical works embodied within them, are separate rights that are routinely owned by different copyright holders and indeed, often multiple copyright holders for just the musical compostion. This fragmentation with multiple "stacked" rights, which all must be cleared in order to exploit a final sound recording of a musical composition, was not disruptive to the historical business model for the making, distribution, promotion and sale of physical records, but it is a significant problem in the digital age, where retailers have effectively become the licensees.

- Shifted licensing responsibility. In contrast to the historical physical model, in the digital environment, music services are functionally equivalent to the distributors and retailers that sold music under the "brick and mortar" business model. Licensing responsibility has shifted to the digital services as the retailers – a first in the history of the music industry.

- The impact of rights fragmentation and the shifting of licensing responsibility onto digital music retailers. The rights fragmentation and shifting of licensing responsibility to service providers has created formidable challenges for digital music services for various reasons unique to music licensing in the digital environment, including:

    - New legal uncertainties. As a result of the shift in licensing responsibility and the development of new music delivery technologies of the digital era, digital music services are subjected to legal uncertainties around the precise rights implicated for particular activities, overlapping claims for royalty payments, and significant potential legal exposure.

    - The need for licensing ubiquity. As the music business has shifted from physical sales of individual records to the digital services – and as it seems to be moving from ownership models to access models - digital music services need to secure licenses from tens of thousands of rights holders, covering tens of millions of tracks, in order to offer consumers commercially viable services. Failing to secure the necessary licenses is not an option.

    - The "tug-of-war" over royalties. Because each negotiation and rate setting proceeding occurs individually, at different times, in different places and before different rate setting tribunals operating under different rate setting standards, each individual rights owner/administrating body seeks to increase its own royalty, generally without regard to the aggregate royalties that services have to pay to the totality of various rights owners. This dynamic has resulted in an upward spiral of costs to digital music service providers who have been thrust into the middle of this "tug-of-war" among multiple rights owners over multiple, individual royalties. The net result of this "tug-of-war" is royalty rates that

are (i) not presented to copyright users in a unified way such that digital music services can evaluate, forecast and understand their aggregate royalty expense for all of the copyright rights needed, and (ii) in the aggregate, are unjustifiably high and, ultimately, unsustainable.

The current music licensing mechanisms do not work well in the digital environment. The existing music licensing structures are not well-suited for the digital era, as they (i) lack necessary transparency, (ii) are not efficient, and (iii) do not provide a "level playing field" for competitors in terms of rate setting standards, royalty rates or functionality rules because of platform distinctions or historical anomalies. Nor do these structures often provide a suitable counter-balance to the market power of rights owners.

U.S. copyright law is in need of modernization for the digital environment, and, as noted above, a holistic view of the entire music licensing ecosystem should be taken. For modernization to be effective, the framework for the new digital era should be based on the following six essential pillars:

- **Continued Government Oversight and Regulation of Music Licensing Activities:** A music licensing framework that appropriately counter-balances the unique market power and negotiating leverage of copyright owners is necessary to a healthy and sustainable digital music marketplace.

- **Transparency and a centralized database:** The digital marketplace needs a publicly available, centralized and reliable database that contains information about rights ownership of musical works and sound recordings on a work-by-work level. Development of data standards, such as International Standard Recording Code ("ISRC") and International Standard Musical Work Code ("ISWC") need to be developed and employed with consistency. Experience with the stalled development of the Global Repertoire Database ("GRD") in Europe has shown, if left entirely to private industry without government oversight, these universal standards (and the centralized database itself) are unlikely to get implemented. The establishment of data standards and a database must be stimulated and maintained by governmental action.

- **Licensing Efficiencies and Reduced Transaction Costs:** The music licensing marketplace would benefit from a framework that promotes licensing efficiencies and reduced transaction costs for music licensing activities, implemented through vehicles such as the development of an accurate, comprehensive and reliable database of all musical works, compulsory blanket licenses and regulated common agents.

- **Clarification of Rights**: The music licensing framework should be established so that discrete rights owners are not able to drive up royalty rates based on legal uncertainties arising out of the convergence of reproduction, distribution and public performance rights in the digital environment. Certainty would foster growth and promote new entry into the digital music marketplace.

- **Reduction of Legal Risks Around Licensing Activities:** Immunity from infringement liability (including statutory damages and attorney's fees) for copyright users that have acted diligently and in good faith to negotiate licenses, would reduce risk and encourage further innovation.

- **"Level Playing Field":** A music licensing framework should include a truly "level playing field" where particular music services are not advantaged over others, in terms of royalty obligations, rate setting standards, royalty rates or functionality rules, based on technological platform distinctions or historical anomalies. Clear and unbiased rights and obligations, for all parties, would increase competition on the merits, thereby incentivizing innovation.

RESPONSES TO THE SPECIFIC QUESTIONS SET FORTH IN THE COPYRIGHT OFFICE'S SECOND REQUEST FOR COMMENTS

Data and Transparency:

1. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.

As DiMA has long advocated, and as recently as in our initial comments in response to the Copyright Office's commencement of this study, a comprehensive and authoritative database of musical works and sound recordings - a central registry of all current rights holder, sound recording and musical work metadata necessary to adequately identify, refer to, license and pay for the use of sound recordings and the musical works they embody - must be established and maintained in order for the continued existence and growth of a commercial music ecosystem in the digital age. Establishing such a database would not only facilitate direct licensing, lend transparency and hopefully reduce overall licensing costs, but the existence of such a reliable database would also alleviate many of the other problems that we currently see in the music copyright landscape (some of which are the subject of other discrete policy studies undertaken by the Copyright Office); concerns about compulsory licenses, lack of blanket coverage and certainty, orphan works and many other issues plaguing the music licensing marketplace today.

Accurate, timely and transparent data on what works are available, from whom and for what uses, would afford rights holders greater flexibility in licensing and greater information about the uses of their works and the revenue those uses generate. It would also provide music providers with the ability to engage in large-scale licensing much more efficiently. A reliable database would also help solve other concerns regarding musical works and copyright. It would allow the identification of the totality of works known and available for licensing, thereby moving us towards truly blanket coverage, certainty about licensed rights and concurrent reduction of concerns about liability, and it would also necessarily help reduce and potentially solve the orphan works problem, as it relates to musical works.

Ideally, such a database would include all information about all musical works - both compositions and sound recordings - available for any type of licensing, including not only all forms of public performance, reproduction and distribution, but also availability for licensing of uses that are currently non-statutory. A database which contains accurate and timely information about all works available for compulsory mechanical licensing, or for blanket performance licensing, or for statutory streaming, would not end its usefulness with that one statutory purpose. Properly established and populated, such a database would be useful to facilitate other, voluntary licenses for additional types of uses not covered by compulsory or blanket licenses that it may serve, initially.

The database should be in a flexible, scalable, machine-readable format and should be open to public review, to facilitate continuous licensing and the innovation and launch of licensed services. While the database should not be open to public editing, rules regarding the entry of data in the database should be crafted with ample latitude to allow the data to be updated and corrected by any legitimate party with up-to-date information on the contents of the database. The actual oversight of the musical works and sound recordings database - within the Copyright Office or other Government office, perhaps with assistance from the private sector – should likely follow the structure of a private non-profit body, operating within a charter that should include a Board or other governing division comprised of representatives from rights holders; including individual creators and aggregators from the music publishing, sound recording industries, and from music service provider constituencies.

The actual form of the database could take any number of contours, whether it be centrally located, co-located, distributed or some combination thereof. The most important aspect of a musical works and sound recordings database is that it be comprehensive, accurate and reliable. Ideally, the Copyright Office could be the central location for the database and for the input and maintenance of the data. That structure would afford the certainty of a single official database, maintained by a single, reliable entity, with clear authority over the contents and intended use of the database.

If the Copyright Office is unable or unwilling to take on the burden of establishing and maintaining a musical works database, for financial or other reasons, the Copyright Office could join with private sector providers to establish a database that is operated privately, with Copyright Office input and approval. The Copyright Office could even go so far as to simply establish a set of "best practices" that potential database operators would be obliged to adhere to, in order to be authorized to handle the database, or a portion of it.

Whether a musical works and sound recordings database is to be established and maintained by the Copyright Office or by a private entity or group of private entities, Congress and/or the Copyright Office could incentivize potential partners by allowing some measure of commercial benefit for participating in the database, such as designating a small portion of license fees/royalties generated to cover administrative costs of those private entities that participate in developing and maintaining the database.

The Copyright Office and/or Congress can best incentivize private actors to gather, assimilate and share reliable data within a musical works and sound recordings database a number of ways. In the first instance, the Copyright Office should first identify (with input from stakeholders) and publicize the data standard to be utilized. Placing the accepted data standard on copyright registration forms, the Copyright Office website, and any other public materials that the copyright office distributes would go a long way to informing creators in particular, and the public, in general, of the data points and standards necessary to maintain an effective licensing database.

Going further, the Copyright Office should make the submission of that data a pre-requisite for copyright registrations accepted by the Copyright Office, under the present Chapter 4. The properly identified data points and format should be enumerated and specifically made part of the requirements under Sections 402, and Sections 407 through 412, to secure copyright registration, to make claims thereunder and to seek remedies for infringement. Finally, the Copyright Office could further incentivize private actors to participate in developing and sharing reliable data by providing economic incentives, such as limited liability exposure, unrestricted access to the database, or perhaps reduced registration costs, to those who provide accurate and timely data and participate in the development and maintenance of the database.

2. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

While the most widely embraced identifiers are the International Standard Recording Code ("ISRC") and/or International Standard Musical Work Code ("ISWC"), these identifiers are hardly uniform or reliable in either their presence or their application. To be clear, the basic information necessary to be able to identify musical works and sound recordings for the purposes of licensing and payment include a few simple fields of information:

1) Song Title
2) Artist(s) (Featured Artist and Contributing Artist, if any)
3) Composer(s)
4) Album Title
5) Releasing Record Label
6) Musical Works Publisher(s)
7) PRO Affiliation

These data points, while few and relatively simple to organize and track, are only partially issued and managed by a myriad of uniquely interested parties, none of which have any interest in collecting, organizing or making available all of the identifying information necessary, for all uses. Neither ISRC Codes nor ISWC Codes are applied to all works, nor are they applied uniformly or correctly, even when they are attached to work. What is more, many services note that currently, not only ISRC, but also UPC - in addition to the information listed in items 1-4 above, are usually required in order to properly identify a work for commercial exploitation. In effect, services cannot rely solely on ISRC, but are required to use other criteria, in addition to ISRC, in order to properly identify a work, in today's marketplace.

Many parties with access to some or all of this data keep it in proprietary format (often to satisfy long-outdated legacy systems), and within proprietary databases that are not open for public review. Many parties not only collect limited information they specifically need as may bes necessary only to administer the particular right they might be concerned with, but they do it in unique formats, without regard to being able to distribute or allow others to use the data in any other context.

For instance, performing rights organizations ASCAP, BMI and SESAC collect and maintain only the information they need to administer public performance licenses for their members. ISWC codes are only applied by each of them, respectively, only to the songs within their respective repertories. Their databases are only searchable manually, on an individual song-by-song basis and are explicitly disclaimed as incomplete and unreliable, with prohibitions on using the data for any other purpose other than licensing works within their repertory, for public performance uses.[1]

[1] BMI Terms of Use: *"The information contained in the database has been provided to BMI from a variety of sources, and BMI makes no warranties or representations whatsoever with respect to its accuracy. In some cases, the writer or publisher information shown may not reflect actual copyright ownership of a work as registered with the U.S. Copyright Office. In addition, writers or publishers for whom BMI does not license a work are not listed. Any use of this information for purposes other than to determine what musical compositions are contained in the BMI Repertoire through the last update is solely at the risk of the user. …BMI specifically disclaims any and all liability for any loss or damages which may be incurred, directly or indirectly, as a result of the use of the information in this database, or for any omissions or errors contained in the database."*

ASCAP Terms of Use: *"The information contained in the ACE Database is updated weekly. The information contained has been supplied to ASCAP by various sources and ASCAP makes no representations as to its accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database."*

The inefficiency of these databases was explicitly observed in the most recent rate-setting proceeding between Pandora and ASCAP. Despite the fact that ASCAP's Consent Decree mandates that ASCAP make its repertory available, specifically to "enable users to make more informed licensing decisions and can facilitate substitution of music from one PRO for music from another or direct licensing from rights holders,"[2] the structure and form of ASCAP's current database does not and cannot fulfill that purpose. As Judge Cote noted in her ruling: "Although ASCAP attempted at trial to show that Pandora could have used public sources of information to identify the Sony catalog, it failed to show that such an effort would have produced a reliable, comprehensive list, even if Pandora had made the extraordinary commitment necessary to try to compile such a list from public data."[3]

The government can incentivize more universal availability and adoption of data and data standards by again, identifying the requisite data points that all stakeholders require and codifying how those points should be reported, and further making those data points a requirement for Federal Registration in Chapter 4, a part of all Federal Records, and an absolute requirement for bringing an action for copyright infringement.

In addition, the Government could further incentivize private actors to participate in developing and sharing reliable data by also including an obligation for authors and copyright owners to identify all entities to which those authors have authorized to license works on their behalf, as a pre-requisite to any claims for remedies for infringement. While it would seem that authors and other rights holders should be incentivized by the potential commerce alone to identify any agencies, aggregators or other collectives whom they have empowered to license their works, sometimes they unfortunately fail to recognize the advantage. Obligating authors and rights holders to identify those who they empower as their agents would go further to eliciting that important information, and making it known.

As an adjunct to requiring authors and rights holders to identify the agencies that they authorize to license their works, the Government could also require the inverse; that all collectives or aggregators of copyrights, such as music publishing companies, record companies, performing rights organizations, mechanical licensing agencies, royalty collection and/or processing agencies and the like, must make publicly available the proper data, in the proper format, in order to be authorized to represent any third-party author/artists' interests, or to make claims for infringement on behalf of any author or artist.

SESAC Terms of Use*: "The SESAC repertory database contains works in the SESAC repertory for which SESAC, Inc. has compiled information from various sources. The database lists songs or compositions, titles, composers, authors and publisher information on musical compositions, including copyrighted arrangements of public domain works. The information is updated regularly and may change on a daily basis.*

SESAC, Inc. makes no representations and/or warranties with respect to the accuracy or completeness of the information. There are no representations and warranties contained herein and SESAC, Inc. specifically disclaims any direct or indirect liability for any losses or risks of any kind, including but not limited to incidental, special, exemplary, punitive or consequential damages, arising or which may arise out of the use, application or omission of any of the information in the database.

The following information provided by SESAC in response to specific requests may not be copied, sold or distributed by any method including electronic, magnetic or print without prior written consent from SESAC.

This is proprietary material and your cooperation is expected."

[2] United States of America v. American Society of Composers Authors and Publishers, Second Amended Final Judgment "AFJ2," Sec X; Department of Justice Memorandum in Support of AFJ2, at page 37.

[3] In Re Petition of Pandora Media, Inc. , __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) at page 68-69.

Finally, as we suggested above, the Government could further incentivize private actors to participate in developing and sharing reliable data by providing economic incentives, such as limited liability exposure, unrestricted access to the database, or perhaps reduced registration costs, to those who provide accurate and timely data and participate in the development and maintenance of the database.

3. Please address possible methods for enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of non-usage-based forms of compensation (*e.g.*, advances against future royalty payments and equity shares).

Again, the most effective method of enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities would be to require all rights-owners and licensing agents – record labels, music publishers, performing rights organizations, mechanical licensing agents and individual rights holders, as well – to establish and maintain timely, accurate, public machine-readable databases of all works that they own, control or excercise licensing rights for.

The Government could establish a requirement that any entity seeking to operate as a collective or aggregator of music copyright licensing rights, such as music publishing companies, record companies, performing rights organizations, mechanical licensing agencies and royalty collection and/or processing agencies, must make publicly available a comprehensive, machine-readable database of all works they claim to represent, in order to be recognized as authorized to represent third-party authors and artists' interests, and specifically to make claims for infringement or claims on behalf of any author or artist.

It is a necessary component of the business of any collective or aggregator of these rights for exploitation, as part of a business endeavor, to identify and catalog the rights they have accumulated to represent, and the parties from whom (and the terms on which) those acquisitions have been made. It is a simple task for these businesses to make that information, which they must maintain in order to run and value their businesses, available to the general public. It should be a requirement that such collectives and aggregators adequately identify the catalogs they claim to represent.

Transparency in the reporting of usage of and payment for works can be accomplished by requiring those agencies and collectives to report timely and accurate data of all uses of works that have been reported to them, along with accurate and timely accountings of all forms of payment received for such uses. In the first instance, direct payment for discrete usage should always be reported to the author or rights holder with the least amount of obfuscation. Any entity that seeks the authority to operate as an agent on behalf of individual authors or copyright holders should be required to make available, to each and every author or other rights holder they represent, an accurate, comprehensive, machine-readable database of all uses and payments made therefore that have been made to the agent, in order for the agent to be authorized to represent third-party authors and artists' interests, and specifically to make claims for infringement or claims on behalf of any author or artist.

Any entity that purports to operate as an agent on behalf of individual authors or copyright holders which does not make available, to each and every author or other rights holder they represent, an accurate, machine-readable database of all uses and payments made therefore that have been reported to the agent, should, at the least, be prohibited from making any claims for infringement or other claims on behalf of any authors, artists or other rights holders.

We understand the concerns regarding the disclosure of non-usage-based forms of compensation, such as pre-paid advances and equity ownership. There has been a good deal of public discussion regarding these transactions and how they affect overall artist compensation. While concerns over these issues may be legitimate, these transactions are often extremely complex and subject to (and therefore tailored to) a myriad of accounting, finance, tax and other concerns. As a result, it may be likely that any attempt to require disclosure of these types of remuneration in a broad policy directive will actually result in very little being reported back to authors or rights holders, as "compensation" or other recognizable benefit, in practice. In light of the complex nature of this topic, DiMA does not have a specific recommendation with respect to a requirement to disclose particular transactions or business arrangements.

Musical Works

4. Please provide your views on the logistics and consequences of potential publisher withdrawals from ASCAP and/or BMI, including how such withdrawals would be governed by the PROs; whether such withdrawals are compatible with existing publisher agreements with songwriters and composers; whether the PROs might still play a role in administering licenses issued directly by the publishers, and if so, how; the effect of any such withdrawals on PRO cost structures and commissions; licensees' access to definitive data concerning individual works subject to withdrawal; and related issues.

Potential publisher withdrawals from ASCAP and/or BMI, should not be allowed on a selective, "partial" basis. Music Publishers wishing to have their works licensed outside of the collectives of ASCAP or BMI, for any uses, should not be able to reap the benefits that are only available as a result of participating in collective licensing. Benefits of collective licensing, such as lower administrative costs, sharing of enforcement costs, etc., should not be available to parties who seek to circumvent the very controls which have proven necessary to keep such collective oligopolies in check. Music publishers should have to decide to either work within a collective, which is necessarily subject to some oversight, or to engage in entirely self-administered licensing. As DiMA made clear in our filing with the Department of Justice in response to their inquiry on this issue, to afford music publishers all or most of the benefits of these collectives, while allowing them to selectively circumvent only the clearly-necessary controls the collectives must adhere to, is antithetical to both basic notions of anti-competitive behavior and to the specific purpose of the Consent Decrees, themselves.

In the event of complete withdrawal of all rights, licensees must have access to definitive data concerning the repertory administered by the performing rights organization in question and any individual works subject to withdrawal as the Pandora and ASCAP case made painfully clear. The "blanket licensing" system that exists currently between the three main PROs; ASCAP, BMI and SESAC, establishes a marketplace that operates on the premise that, as long as a music service has licenses from all three PROs, the extent of any specific repertory or catalog (or change thereto) is inconsequential. If licensed by all three PROs that cover the marketplace, the net effect is that licensee music services have "blanket coverage" and need not worry about specifics of which works are affiliated with any particular PRO. Obviously, this approach is only effective when the licensing landscape is so-covered by a complete "blanket."

If the blanket nature of the license market is compromised in any way, then it becomes imperative for licensees to know precisely which works are licensed through the collectives and which works are subject to direct licensing, through individual music publishers. Anything short of complete disclosure of accurate information regarding the repertory gives rise to potential infringement.

The need for clear data on what repertory is available through the PROs versus which repertory is available directly from music publishers, in the event of publisher withdrawals, is absolutely critical to public performance licensees. This is something that ASCAP apparently counted on quite effectively, as a bargaining chip in their negotiations with Pandora. As Judge Cote noted in her decision in Pandora vs. ASCAP: "That same day, Pandora also asked ASCAP for the list of Sony works in ASCAP's repertoire. It would have taken ASCAP about a day to respond to Pandora's request with an accurate list of the Sony works. But, ASCAP, like Sony, stonewalled Pandora and refused to provide the list" … "By withholding the list [of its repertory], Sony deprived Pandora of significant leverage in their negotiations. Pandora was faced with three options: shut down its business, face crippling copyright infringement liability. …Sony's determined refusal to provide the list despite repeated requests over the license negotiation period is testament to the importance Sony itself placed on this bargaining chip."[4]

It is clear that even now, with the public disclosure requirements which are part of the current ASCAP Consent Decree, the information regarding PRO repertory and how any publisher withdrawals would affect the repertory fall far short of the explicitly-stated goal of "enabling users to make more informed licensing decisions and facilitating substitution of music from one PRO for music from another or direct licensing from rights holders." The need for timely, accurate and easily-accessible data regarding PROs' repertory is essential to maintaining a truly competitive licensing marketplace for the performances of musical works. This is true even when that marketplace is effectively covered by a "blanket," resulting from PRO licenses. That information becomes absolutely necessary, in the event of publisher withdrawals from those PROs.

Publisher withdrawals from the PROs are likely incompatible with existing publisher agreements with songwriters and composers, as well, and would require, at the least, significant modification of each of those agreements, or the performance licensing business, at large. The musical work publishing business literally relies on the historical and continuing assumption that music publishers will have the performance rights for the works in their catalogs administered by a PRO, who in turn, have direct relationships and outstanding fiduciary duties to their songwriter affiliates.

The overwhelming majority of publishing and administration agreements that songwriters have entered into over the last 70 years are premised on the presumption that the music publisher, with whom the songwriter enters into the agreement, will coordinate with that songwriter's Performing Rights Organization with respect to the administration of the public performance rights to those compositions the songwriter delivers under the agreement. Songwriters - and their publishing and administration agreements, by their very terms - assume the publisher and songwriter's continued affiliation with the Performing Rights Organizations as a basic element of the contractual bargain and relationship. Songwriters would be immeasurably damaged by the ability of their music publishers to claim that certain compositions, or certain rights and uses of certain compositions, were not subject to the administration of the PRO, an assumption that underlies virtually every songwriter's music publishing and/or administration agreement entered into over the last 70 years.

[4] *In Re Petition of Pandora Media, Inc. , __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) at page 101; fn 68*

If music publishers simply withdraw an artist's works from administration by the artist's chosen PRO, doing so would effectively change the very terms of those agreements, to the detriment of the songwriters.[5] Indeed, PROs that even allow such withdrawals may be subject to claims by individual songwriters of a breach of the PRO's fiduciary duty to the songwriter members.

The economics of virtually every publishing, co-publishing and administration agreement entered into over the last 70 years were negotiated with full and complete reliance on the "splits" between songwriters and publishers being administered by the PROs. A typical publishing agreement that refers to a 75/25% split between the songwriter and publisher on "publisher income" necessarily assumes a greater payout the songwriter on the overall income, since, by virtue of the PRO's administration of the public performance income, the "publisher income" includes only half of the total income generated by public performances, with the other half of the income generated by those public performances being paid directly to the songwriter, and never counted among the "publisher income" subject to the subsequent split.

Songwriters would no longer be able to rely on their PROs and the statements they receive from them, to determine uses of their compositions. Songwriters would be left only to look to their music publishers for that information.

5. Are there ways in which the current PRO distribution methodologies could or should be improved?

The current PRO distribution methodologies can and should be improved. Artists have virtually no information regarding how the PRO income is allocated, how plays are reported or how payments are calculated. Even major music publishers are unhappy with the way ASCAP and BMI account to artist and publishers, and are seeking more detail in their payments to writers and accountings to publishers, the ability to monitor payments and conduct audits.

As Sony/ATV said in their comments in response to the pending Department of Justice inquiry into the Consent Decrees that govern ASCAP and BMI:

"…in reality, the methods used by ASCAP and BMI to allocate payments to the various music publishers and writers are complicated and often opaque. The "transparency" of which some writers and writer associations speak is typically the division of royalties between publisher members and songwriter members; however, this division is only a small piece of the transparency equation."[6]

ASCAP's payment calculation system is laid out in no less than a 20 page document that includes an acknowledgement that they rely on sample reporting, apply "song credits" through a "weighting formula" and then apply those through separate formulas for writer and publisher payments, and two and a half pages of "defined terms" that must be referred to, to even try to figure out the formula.[7] Similarly, BMI also weighs performances based on a number of loosely defined factors. Additionally, BMI builds in

[5] Songwriter's Guild Comments Submitted to the Department of Justice in Connection with its Review of the ASCAP and BMI Consent Decrees http://www.justice.gov/atr/cases/ascapbmi/comments/307845.pdf

[6] Sony/ATV, LLC Comments Submitted to the Department of Justice in Connection with its Review of the ASCAP and BMI Consent Decrees, at page 18. http://www.justice.gov/atr/cases/ascapbmi/comments/307983.pdf

[7] http://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf

several different "bonuses" to their payout structure, including a "Hit Song Bonus," a "Standards Bonus," a "Super Usage Payment" which is tied to television uses and a "Music Payment Bonus."[8]

These sampling, calculation and payout schemes are not easily understandable, result in varied payouts that have little relationship to actual performances, are virtually impossible to audit and clearly favor bigger, established artists and their music publishers over smaller artists.

6. In recent years, PROs have announced record-high revenues and distributions. At the same time, many songwriters report significant declines in income. What marketplace developments have led to this result, and what implications does it have for the music licensing system?

The PROs have announced record-high revenues and distributions over the last 10 years, during a time period in which the overall recorded music industry has seen declines. Both ASCAP and BMI have seen their membership double between 2003 and 2013[9] and their respective revenues and royalty distributions increased similarly.[10] SESAC's annual revenue has averaged 30 % yearly growth, growing by a factor of 19 times over a 20 year period, from $9 million per year in 1992 to an estimated $167 million in 2013.[11]

Neither DiMA nor any of its individual members are in a position to assess whether - despite the proudly-reported clear increases in both revenues AND royalty payments to songwriter members by each of the PROs - any individual or class of songwriters have actually suffered any declines in income, whether "significant" or not. We are not aware of any songwriters providing verified income statements, tax returns or other proof to support claims that they have suffered declines in income from their PROs.

Nevertheless, even assuming - only for the sake of argument - that some songwriters have experienced declines in their payments from their PROs, there are likely many possible factors that could explain that occurrence. In the first place, individual songwriters, like all other artists and performers, eventually fall out of fashion and their works become less commercially popular, over time. It is to be expected that, like the income generated by any product or service that has passed its peak of commercial demand, particular songs will receive less airplay and therefore generate less income. This natural decline in revenues for particular songwriters is something that has always occurred, should be expected and is not a result of any development in the music licensing system.

Beyond the obvious acknowledgment that composers and their musical works are timely and necessarily subject to declining popularity and revenue over time, the lack of transparency in the way that the PROs' distribute royalties to their affiliates and high administrative costs within ASCAP and BMI certainly contribute to the limited payments that some songwriters receive. Songwriters who know their songs have been played complain that they receive no payment, at all, for those plays, while more popular artist receive "bonus" payments, beyond what plays they had were actually reported.

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[8] http://www.makingitinmusic.net/publishing-2/performing-rights-organizations-2-how-does-bmi-and-ascap-calculate-payouts.html

[9] 2003 ASCAP Membership = 150,000 v. 2013 = 500,000, 2003 BMI Membership = 300,000 v. 2103 = 600,000 – ASCAP and BMI Press Releases, 2003 and 2013.

[10] http://www.billboard.com/biz/articles/news/1445452/ascap-revenues-hit-record-high-in-2003
http://www.billboard.com/biz/articles/news/publishing/5901249/ascaps-2013-revenues-distributions-rise-in-2013
http://www.bmi.com/news/entry/20031021_bmi_reports_revenue_increase
http://www.bmi.com/press/entry/563077

[11] http://www.billboard.com/biz/articles/news/legal-and-management/6203855/sesac-gets-new-leadership-plans-to-greatly-expand

Marketplace developments that may have contributed to the alleged reduction in songwriter income necessarily include first and foremost the advent of the internet and services such as those of DiMA members, which provide consumers access to a much wider selection of music, produced by a broader array of artists, than what was traditionally exposed by the limited terrestrial radio and major record company system of marketing music. DiMA's services allow consumers to be exposed to, and then go on to delve deeply into, independent and non-mainstream areas of music that were historically largely, if not completely, unavailable through traditional, mainstream media outlets.

Self-produced and marketed artists, special-interest "niche" artists and others that would never have found an audience through the limited exposure provided by major record companies and terrestrial radio can now participate in a virtually unlimited marketplace for music. These developments have clearly led to a "democratization" of the music business, in which many participants can find a specific audience, as opposed to the traditional system, in which only a few, select, big stars are selected to be mass-marketed to a passive public. Accordingly, more artists are making some income form the performance of their works, while a select few artists that managed to dominate the narrower avenues previously available might be making less.

This democratization of the music business demands further efficiencies in music licensing, as more and more individual artists eschew the traditional major record company route and instead run their entire careers individually. Those millions and millions of smaller, self-promoting artists need an efficient licensing system that affords all artists – not just major artists that have the advantage of major music publisher and record company backing – the same ability to enter the marketplace and claim their part of it.

7. If the Section 115 license were to be eliminated, how would the transition work? In the absence of a statutory regime, how would digital service providers obtain licenses for the millions of songs they seem to believe are required to meet consumer expectations? What percentage of these works could be directly licensed without undue transaction costs and would some type of collective licensing remain necessary to facilitate licensing of the remainder? If so, would such collective(s) require government oversight? How might uses now outside of Section 115, such as music videos and lyric displays, be accommodated?

DiMA takes exception to the characterization, set forth in the Second Request for Comments that "many stakeholders appear to be of the view that the Section 115 statutory license for the reproduction and distribution of musical works should either be eliminated or significantly modified to reflect the realities of the digital marketplace"[12] and to the implicit assumption in this inquiry, that the inquiry should be focused only on the potential elimination of the compulsory license, specifically. In the first place, it is not clear that "many stakeholders" appear to be of the view that Section 115 should be eliminated or significantly modified. Of the 85 comments received and published by the Copyright Office, it appears that a small minority specifically seek elimination or significant modification of the Section 115 statutory license. The vast majority of comments do not even address the question, at all. Of the remaining comments that do address efficacy of the Section 115 compulsory license, a significant number of those remaining comments either support the retention of the Section 115 compulsory license and/or seek to expand and enhance the license.

Significantly, A2IM, which represents a broad coalition of over 325 independently owned U.S. music labels, which collectively, represent the largest music label industry segment (according to

[12] Federal Register, Vol. 79, No. 141,Wednesday, July 23, 2014, at page 42833

Billboard Magazine and Neilsen-Soundscan, 34.6% of the U.S. recorded music sales market in 2013 and approximately 40% of digital recorded music revenues) submitted comments which explicitly stated:

"The Section 115 Compulsory mechanical license is part of a music licensing framework that appropriately counter-balances the unique market power and negotiating leverage of copyright owners with certain controls on the marketplace."[13] This position was also publicly re-iterated at the New York Round Table discussion that the Copyright Office conducted.

Similarly, Brigham Young University's submission said, unequivocally:

"Section 115 is working wonderfully for our needs at the University. We love the predictable, statutory rate and the compulsory provision. It's the only part of the law (outside Section 107) where the user has some refreshing leverage in the music licensing world."[14] Again, that position that was also explicitly re-stated, in person, at the Nashville roundtable session conducted by the Copyright Office.

The Future of Music Coalition ("FMC"), a non-profit collaboration between members of the music, technology, public policy and intellectual property law communities, which described themselves as being "comprised of performing artists, composers, independent label owners, music publishers and advocates that have paid close attention over the past 14 years to developments in the technology space and their impact on music creators," filed comments that included the following, regarding the Section 115 compulsory license, in their submission:

"The 115 statutory license aids a functional music marketplace in numerous ways. Without an efficient means for sound recording owners to obtain permission to reproduce and distribute songs to which they do not retain underlying composition rights, the delivery of catalog to services and consumers would be impeded.

Current debates about the efficacy of the compulsory mechanical license tend to obscure its benefits. While it isn't hard to understand why the major publishers would want the licensing of musical compositions to be subject to direct negotiation — as is the case with sound copyright owners and services — consolidation in the publishing sector means that under such a scenario, a small handful of publishers would be able to leverage their valuable and vast catalogs to the potential detriment of competition. Besides limiting opportunity for independents, this would also frustrate the ability for sound recording owners to bring their products to the marketplace, exacerbating tensions between labels, recording artists, and publishers. It could even lead to a lowering of rates as some publishers cut bargain - basement deals to remain competitive."

The FMC submission went on to actually consider the additional benefits that would come from expanding Section 115, converting it to a full blanket license.[15]

Beyond the considered, explicit support for the Section 115 compulsory license in many of the comments, of those few comments that did call for an elimination of the Section 115 compulsory license (which, not surprisingly, includes comments of the NMPA and also several of its members and other music publishers, who also filed individually) most did so without citing any "realities of the digital marketplace." The NMPA comments, and several of the others, such as those of GEAR Music

[13] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/American_Association_of_Independent_Music_MLS_2014.pdf

[14] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Brigham_Young_University_Copyright_Licensing_Office_MLS_2014.pdf

[15] http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Future_of_Music_Coalition_MLS_2014.pdf

Publishing, plainly seek a repeal of the Section 115 compulsory license with a request for a free market, entirely, with respect to ALL mechanical reproduction licenses, whether for more traditional physical goods or digital uses. Comments seeking the abolishment of the Section 115 compulsory license based on the assertion that the 115 compulsory is and always has been an improper burden on songwriters and their collectives are not made any more urgent or current by suggesting that the request is made now, only in response to the alleged "realities of the digital marketplace."

DiMA does not support the elimination of the Section 115 compulsory license. As we made clear in our initial comments, DIMA member companies occupy an uncomfortable middle ground in a multi-rights owner "tug-of-war" over royalty rates between several, independent right holders, which has driven up overall royalty costs to levels that are virtually unsustainable, under the present system. Any relaxation of the existing controls on that marketplace would effectively decimate any hope for a healthy and sustainable digital music marketplace, going forward.

As imperfect as it is - with no obligation for musical work copyright holders to identify themselves, on one hand, yet the requirement on the part of potential licensees to locate and notify those unknown rights holders of an intent to make mechanical reproductions, on the other - the music licensing marketplace still benefits from the Section 115 compulsory license framework that promotes licensing efficiencies and reduces transaction costs. The Section 115 mechanical license should remain, and should be made more effective and efficient, by establishing a comprehensive and authoritative public database of the identity and ownership of musical works (and sound recordings), as discussed more fully, above.

When considering even the possibility of eliminating the Section 115 compulsory license today, it is important to note that the massive consolidation that has occurred in the recording and music publishing businesses over the last 25 years (much of it occurring in just the last 5 – 10 years), which has resulted in the establishment of significant market-dominating corporations, was approved largely because the existence of the Section 115 compulsory license. As these marketplace consolidations were proposed and subsequently reviewed for regulatory approval, the review occurred entirely within the context that the Section 115 compulsory license was, and would continue to be, in effect as a significant check on the resulting consolidated market power. Accordingly, any consideration of eliminating or curtailing the compulsory license going forward would necessarily require re-examining the entire marketplace, which has only been permitted to develop into the present state - of only a handful of participants, each of which wields market-shaping power - as a result of the compulsory license being in place.

The current Section 115 compulsory license is really only effective as a means of guaranteeing music users - that is, record companies and digital music services - access to a large number of musical works, in return for defined payments and terms. While it is a statutory license, it is not a fully functional blanket license. The Section 115 license does not guarantee complete licensing of all compositions that may be in existence and otherwise capable of reproduction and distribution, nor does it provide for licensing of potential new or alternate uses that might not fit within an interpretation of a "phonorecord." As such, the current Section 115 compulsory license falls short of a full blanket license, which would afford complete coverage for all mechanical reproductions and distributions.

If the Section 115 statutory compulsory license is to be eliminated, it should be replaced by a blanket licensing system, similar to the performing rights market, where all musical works are available for licensing, from a limited number of licensors, which licensors are subject to governmental oversight and controlled rate-setting, and in which timely, accurate and easily-accessible data regarding the licensed work, and the terms upon which it can be licensed, is readily available to potential licensees. The ability to identify and license all works, comprehensively, and to make accurate payment for the use

of those works is absolutely essential to maintaining a truly competitive licensing marketplace for musical works. The efficiencies afforded by the establishment of such a concentrated marketplace, must naturally also be accompanied by significant governmental oversight of the licensing entity(ies) empowered with that unique collective licensing authority. Statutorily-created monopolies beg for concomitant supervision of their significant pricing and other market-shaping behavior.

In addition to the continued need for some type of regulated, blanket license system for licensing of musical works for reproduction and distribution of musical works, any transition from the compulsory license market to a more uniform, blanket license market for musical works that might even be considered must be carried out in a very deliberate, controlled set of phases, all of which would necessarily be subject to oversight of a disinterested mediating entity. Simply abolishing the long-standing compulsory license is quite literally not an option. Any potential change in the system should be carefully monitored, with an explicit understanding that any change that produces a significant upset of the existing marketplace would be considered evidence that the change being undertaken is ill-advised and likely should be abandoned.

Digital service providers and record companies do, in fact, need to obtain licenses for millions of songs in order to meet consumer expectations and be commercially viable. While it is possible for digital music distribution services to be successful without an absolute complete catalog of all works, the allowable margin of unlicensed works is clearly quite thin. The unfortunate results within the market over the last 5 to 10 years have proven that without a significant majority of the works available, services cannot effectively compete. The historical landscape is littered with digital music delivery companies that were unable to sustain themselves without licenses for the majority of musical works. At present, there are no digital distribution services operating in the United States without at least every major music publisher licensed. Those that could not acquire licenses from all majors either closed or did not enter the U.S. market, at all.

While it would seem that a significant percentage of those millions of works which are necessary to launch and maintain a viable music delivery service works could be directly licensed without undue transaction costs, some type of collective licensing remains necessary to facilitate licensing of the remainder. The licensing costs for large catalogs are essentially fixed. A single license, for the entire catalog of millions and millions of songs takes only incrementally increased time, energy and cost to execute over a single license for a single composition. Pursuing individual licenses for each of hundreds of thousands or even millions of individual musical works that are not a part of larger catalogs is not a viable proposition. This is true for both digital music service providers on the licensee side and also for independent artists who are not part of a significant catalog, on the songwriter/licensor side.

Digital music delivery services, who need to offer as many titles as possible to remain competitive and require business certainty about the availability and the cost of those millions of titles, would require some type of centralized licensing system, in order to ensure that they have properly licensed as many musical works as possible. On the other side of the equation, small independent artists would need a licensing scheme that would ensure that they could easily get their works placed on these services at a competitive rate, so that they could effectively participate in the wider market now presented by digital services, a market that previously afforded independent artists little or no exposure.

As discussed above and elsewhere, such collectives require government oversight. As has been historically recognized by Congress and the Department of Justice - and as the federal judges retaining jurisdiction over certain Consent Decrees have, as recently as this year, found to be the case - the natural behavior for collectives and monopolies is to instinctively leverage their position and attempt to extract supra-competitive rates and terms. We should not need to point to the recent evidence of this behavior, specifically in the context of music licensing (as convenient as it may be), to make the point. It is a plain

economic fact which requires no supporting citation that left unchecked, monopolies and oligopolies will unfailingly exploit the market power they accrue. Accordingly, the efficiencies that inure from a concentrated marketplace require significant governmental oversight of the few licensing entity(ies) authorized to operate without natural marketplace competition.

Potential uses now outside of Section 115, such as music videos and lyric displays, could easily be accommodated on a voluntary basis, by licensors. One of the additional significant ancillary benefits to establishing an efficient licensing regime that would be built around a comprehensive and authoritative public database of musical works and sound recordings, beyond going great lengths in resolving issues such as realizing a truly blanket licensing result, affording certainty about licensed rights and reducing liability, and helping accurately identify orphaned works, is that once the database is established and a licensing system utilizing it is in place, for even a single type of use, that database can easily be extended to support licensing for any number of other uses. A database initially constructed specifically to support compulsory licensing of Section 115 mechanical rights could easily be extended by rights holders to facilitate licensing of the works represented in the database for any number of additional uses. The availability of voluntary licenses for any type of use could be made available through the database. Similarly, rights users, such as record labels, digital music services and audio visual producers could solicit licenses for those additional uses directly to the rights holders identified in the database.

Much discussion at the round table meetings surrounded the so-called "RIAA Proposal," which was also specifically mentioned by the Copyright Office in your solicitation for these Reply Comments.[16] Briefly, the proposal would apparently allow music publishers and sound recording owners to collectively negotiate, among themselves, an industrywide revenue-sharing arrangement as between them, with a fixed percentage of licensing fees for use of a recorded song allocated to the musical work and the remainder to the sound recording owner. Record labels would thereafter be permitted to bundle musical work licenses with their sound recording licenses, with the third-party licensees making payments for the musical work, in accordance with the previously established ratio, directly to music publishers and the balance to the record companies owning the sound recordings, according to the agreed industry percentages. We further understand that the end result of the "RIAA Proposal" assumes that the Section 115 compulsory license would be eliminated and free market rates would apply, and further that such an arrangement would extend to certain audiovisual uses not currently covered by the Section 115 license, such as music videos and lyric display.

The proposal was rather forcefully and consistently rejected by many of the music publisher participants at the round table discussions, and certainly by all of the representatives of major music publishing concerns. Accordingly, we are not convinced that the proposal warrants detailed consideration. A proposal that is predicated upon coordination between record labels and music publishers, which has been rejected out-of-hand by the music publishers, may not be very viable, regardless of its potential merits.

For what it is worth, some of the basic elements of the RIAA Proposal at least address some issues that would necessarily lead to a much more efficient music licensing marketplace. The proposal includes the concept of bundling two distinct rights necessary to effectively license a sound recording; the rights to a) the sound recording, and also b) the underlying musical composition, into a single transaction, which transaction would supposedly be ultimately negotiated on economically reasonable and viable terms. The concepts of establishing "one-stop-shopping" to acquire both of those two important rights, as well as the concept resulting in a single transaction for the total "content costs" should be considered more closely.

[16] Federal Register, Vol. 79, No. 141,Wednesday, July 23, 2014, at page 42835

Reducing the number of licensors that need to be dealt with by providing a single licensor entity that passes through other included rights would reduce the number of transactions necessary and the transaction costs, greatly. Additionally, combining both of the rights necessary to engage in music distribution into one transaction, as opposed to having them addressed in multiple discrete transactions, none of which incorporate or take into account other rights licensing costs or terms, would help alleviate a significant facet of the "tug-of-war" over rights and royalties music distributors face, and presumably result in total transaction costs that would come within economically sustainable levels. These are admirable goals that should be pursued, in whatever context rights holders can find comfortable accommodating.

Sound Recordings

8. Are there ways in which Section 112 and 114 (or other) CRB rate setting proceedings could be streamlined or otherwise improved from a procedural standpoint?

There are several ways in which Section 112 and 114 and or other CRB rate setting proceedings could be streamlined. In the first instance, the Section 112 "ephemeral" license should be, at the least, updated to reflect the realities of the transmission of performances of sound recordings in today's day and age. Requirements such as that the ephemeral recordings, necessary to engage in transmissions, must be "destroyed within six months from the date the transmission program was first transmitted," or that the transmitting entity "make no more than 1 phonorecord of the sound recording" are archaic and serve no real purpose in modern broadcasting. Similarly, the need to have a distinct rate-setting process, that results in a separate rate specifically attributable to the 112 ephemeral license (as distinct from the Section 114 license rate) is a procedural redundancy that serves no actual purpose. The basic concerns addressed by the 112 license can and should be incorporated into the 114 license, as a component of the process of making transmissions under section 114.

Moving on, several improvements could and should be made to the statutory rate setting procedures. For example, all rate setting could occur under dedicated federal judges and under standard Federal litigation rules. As the 70 year history of ASCAP and BMI Consent Decrees indicates, such rate setting procedures conducted in that context are not unduly burdensome, and they do not produce significantly unforeseen results. Moreover, by making such a change policymakers would eliminate questions that some have raised regarding the constitutionality of the Copyright Royalty Board and guarantee that complex music licensing disputes would be resolved by judges with increased experienced and tenure. Properly appointed, sitting federal judges, with years of practice before them, have proven astute at grasping the nuances of music licensing and particularly adept at applying standards and arriving at fair rates under those standards.

The rate setting process itself could be significantly streamlined by allowing for discovery before presentation of the parties' direct cases, and combining the direct and rebuttal phases of the ratesetting hearings into a single integrated trial, in ordinary civil litigation. In addition, more should and could be done to encourage settlements. Adoption of settlements is currently painfully slow and labored. The Copyright Royalty Judges seem overly concerned with details of settlements, particularly as the adoption of those settlements may impact the awkward division (and overlap) of jurisdiction between the Copyright Royalty Board and the Copyright Office. Encouraging swift adoption of settlements, allowing settlements to be treated as non-precedential, and perhaps allowing non-precedential interim settlements (i.e. in between the 5 year rate setting intervals) are just some of the ways that the current process could be modified to engender more settlements.

International Music Licensing Models

9. International licensing models for the reproduction, distribution, and public performance of musical works differ from the current regimes for licensing musical works in the United States. Are there international music licensing models the Office should look to as it continues to review the U.S. system?

While it may seem initially as though international licensing models for the reproduction, distribution, and public performance of musical works might offer viable alternatives to consider, contemplation of adopting these regimes should be considered carefully, and in full context. There may be certain aspects of foreign licensing systems that we can learn from and perhaps even incorporate. For instance, a closer harmonization of U.S. licensing systems with international systems would facilitate the inevitable move towards a global marketplace.

It is important to take note however, that several of the models developed in earnest throughout Europe, Asia and Latin America recently have failed in actual practice. In addition, these regions often have entirely different copyright schemes, such as "author's rights" being superlative to so-called "neighboring rights" (which vary widely in scope between different countries and collections of states) and "broadcast mechanical rights" which make the adoption of certain standards very difficult, if not impossible under the U.S. system.

Other Issues

10. Please identify any other pertinent issues that the Copyright Office may wish to consider in evaluating the music licensing landscape.

During the course of the public round table discussions the Copyright Office seemed to embrace the perspective, perhaps fostered by some commenters, that the 801 (b) rate-setting standard is somehow inherently geared to result in "below market rates" which rates are only intended to provide a "subsidy" to assist fledgling start-up businesses. With a further assumption that "mature" businesses should be able to "age out of" the 801(b) standard[17] and into the willing buyer-willing seller rate-setting standard, which people think are "rates that are closer to what would come about in the free market."[18]

As we tried to make clear in our comments at the round table, it does not seem that many of the commenters believe that 801(b) is somehow a less-preferred rate-setting standard that should only be applied temporarily. There were at least 6 participants at the New York Public Round Table, where the issue was discussed, that took the opportunity to explicitly announce support for the 801(b) standard over willing buyer-willing seller.[19]

Beyond the fact that there does not appear to be any agreement - or even majority - on the issue, there is an absence of historical or factual support for the assertion on the part of commenters, or an assumption on the part of the Copyright Office, that 801(b) is somehow inappropriate or has only been adopted as an interim standard that companies or industries should "mature out of." The 801(b) standard

[17] Music Licensing Public Roundtable, Monday, June 23, 2014, transcript, at pages 327-329.

[18] Id at 334.

[19] Myself, Willard Hoyt of the Television Music License Committee, LLC, at page 45; Paul Fakler, representing the National Association of Broadcasters and Music Choice, at page 309-311; Cynthia Greer of Sirius XM Radio Inc., at 326; William Malone, of the Intercollegiate Broadcasting System, Inc. at 349; and Jodie Griffin, of Public Knowledge, at 318.

has been in effect and employed to set a variety of music licensing rates, both for mechanical licenses and for public performances of sound recordings, since 1976. It has been applied to numerous rate-setting proceedings, none of which resulted in so much as a request for Congressional intervention, much less actual intervention occurring. Many of the rate-setting proceedings conducted under the 801(b) standard did not even result in an appeal of the rate set, in the initial proceeding.

In sharp contrast, the willing buyer-willing seller standard for rate setting is only employed with respect to setting the rate for statutory uses of sound recordings in non-interactive digital radio, and only since 1998. Congress only applied a similar "fair market value" standard to a non-existent market once prior, in the context of the satellite television industry. As some may recall, the rate determination under that statute resulted in rates and terms that were seen as so unfair and problematic that it set off years of debate in Congress, ultimately resulting in Congress not only reversing the result, but additionally going out of its way to discourage any further use of the standard for the satellite television industry, with the Satellite Home Viewer Act of 1999.[20] Not surprisingly, almost every application of the willing buyer-willing seller standard to non-interactive internet radio has also resulted in Congressional intervention, and virtually all applications of the standard have resulted in lengthy appeals.

A fundamental flaw with "constructed fair market value" standards such as the willing buyer-willing seller standard, is that the "market" the standard seeks to construct or emulate does not exist and often has never existed. There is no market, nor has there even been a historical model, to inform the judges what the fictional "willing buyer" would ask for, or more importantly, be able to actually get, or what the fictional "willing buyer" might be truly willing to pay, in a marketplace that would not incorporate the terms of the statutory license environment.

The 801(b) standard, as opposed to trying to emulate a market that, by its very terms does not and cannot exist, simply announces four objectives to be sought, when setting rates under the standard:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The wisdom behind § 801(b) rests in these four extremely important, flexible objectives. The first objective essentially re-states the Constitutional purpose of copyright law. The second objective is to assure that, under existing conditions, royalty payments will foster the continued existence and growth of

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[20] "Applying the new marketplace value standard as it was required to do, the CARP not surprisingly raised the rates considerably. The satellite industry, with less than 10 million subscribers, was required to pay more in statutory royalty fees than the cable industry, which had nine times the number of subscribers. The satellite industry and its customers were irate."

"In reaction to complaints about the outcome of the 1997 CARP proceeding that raised the section 119 royalty rates, Congress abandoned the concept of marketplace value royalty rates and reduced the CARP-established royalty fee for network stations by 45 percent and the royalty fee for superstations by 30 percent." Statement of David O. Carson, General Counsel, United States Copyright Office, before the Committee on the Judiciary United States Senate,108th Congress, 2nd Session, May 12, 2004.

the market, by equitably compensating creators and also providing fair income to those services that utilize the works. The third objective is to assess the relative value of contributions of both the copyright owner and the copyright user, in the market. The fourth objective is focused on minimizing disruption, for each industry involved in the overall bargain, and the need for rates that do not upset those industries or their prevailing practices.

The application of these objectives comprising the 801(b) standard does not result in inherently "below market rates." Indeed, in one of the most consistent applications of the standard – the statutory rate for mechanical licenses under Section 115 – the 801(b) standard has virtually uniformly resulted in what are unequivocally ABOVE market rates. The vast majority of recording agreements over at least the last 40 years, all of which are entered into in a completely unregulated, free market, include provisions under which recording artists and songwriters freely agree to a marketplace rate for the reproduction of the musical works to be reproduced under the agreement, at a rate which is typically a full 25% below the statutory rate, which has been set pursuant to the 801(b) standard, since 1976.

The willing buyer-willing seller standard is not only clearly NOT the preferred rate setting-standard of a majority of the commenters who have submitted thoughts on it to the Copyright Office, it is in fact a relatively novel approach to the important task of statutory rate setting, and one that has proved both far more problematic and far less predictable than the 801(b) standard, in the short tenure of its tumultuous application. Discussions regarding the standard that should be applied to important rate-setting proceedings resulting in rates that will effectively determine the survival of significant participants in the music ecosystem should consider these facts, seriously.

CONCLUSION

In making its recommendations to Congress regarding potential areas for the modernization of U.S. copyright law in the area of music licensing, DiMA continues to urge the Copyright Office to take a holistic view of the entire music licensing landscape, beginning with consideration of the true intent and purpose of Copyright. Copyright is not intended to benefit authors and artists first and the public second, as some have erroneously proposed. It is, explicitly, intended to promote the public good that comes from a wide dissemination of creative works, and to ensure that primary public benefit is promoted, through the means of securing exclusive rights to authors for limited times. As the Constitutional framers, Congress and the United States Supreme Court have all observed, the goal should be to strike the proper balance between the principal concerns of the public at large, with the appropriate incentives to stimulate individual creators.[21]

In addition, in policy debates regarding copyrights, we must maintain an appreciation of the unique nature and monopoly that is inherent in each copyrighted work. Individual copyright owners enjoy a limited set of rights, for a limited period of time, specifically in recognition of the unique, intrinsically monopolistic charachter of copyrights. Copyrighted works are not commodities that compete directly with each other. Just as a novel will not serve as a suitable replacement for a textbook, any particular song is a unique "good," for which no other market replacement readily exists. As such, while copyright owners are given great flexibility in the rights to exploit the works they create, the collective licensing of musical works is inherently anticompetitive, as the license for any particular musical work cannot be a substitution for another specific musical work.

[21] "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served. . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . ." H.R. Rep. No. 60-2222, at 7 (1909); "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' Art. I, 8, cl. 8." Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340 (1991).

Accordingly, we urge the Copyright Office to consider the six essential pillars outlined in our initial response to the Copyright Office's original Notice of Inquiry on this topic, as you continue to study the state of music licensing in the United States. In respect of both the importance and the technical complexity of the various issue involved, we respectfully suggest that the Copyright Office continue to conduct further analysis of music licensing issues and the significant problems that have plagued the marketplace which have been discussed in this and other responses and replies, the round table discussions and elsewhere, as part of the Copyright Office's ongoing assessment of the music licensing aspects of the Copyright law, which may ultimately be included in recommendations for appropriate legislative changes.

Dated: September 12, 2014

By: _____

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In the Matter of Review of ASCAP and BMI Consent Decrees	)	In Re: Final Judgments in United States v. ASCAP, 41 Civ. 1395 (S.D.N.Y.), and United States v. BMI, 64 Civ. 3787 (S.D.N.Y.) ("Consent Decrees")

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I. Introduction

The Digital Media Association (DiMA) is an established trade association whose membership has helped revolutionize the music marketplace and to democratize creative opportunity. DiMA members include Amazon.com, Apple, Live365, Microsoft, Pandora, Rhapsody, Slacker and YouTube. The innovative products and services that DiMA-member companies bring to market have changed – and will continue to change – how consumers obtain and enjoy music, entertainment and other media. As many DiMA-member services include the performance of music, DiMA-member companies regularly license performance rights for musical compositions from performing rights organizations ASCAP and BMI.[1]

DiMA members appreciate the Department of Justice's oversight and enforcement of the Final Judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) ("Consent Decrees"). DiMA Members specifically appreciate that, since the entry of the Consent Decrees in 1941, the Department of Justice has periodically reviewed the operation and effectiveness of the Consent Decrees and those reviews have led to both Consent Decrees having been amended several times since their entry. The ASCAP Consent Decree was last amended in 2001 and the BMI Consent Decree was last amended in 1994.

DiMA understands that the Antitrust Division is currently undertaking this review to examine the operation and effectiveness of the Consent Decrees and to explore whether the Consent Decrees should be modified and, if so, what modifications would be appropriate, in light of the fact that "ASCAP, BMI and some other firms in the music industry believe that the Consent Decrees need to be modified to account for changes in how music is delivered to and experienced by listeners." While unsure of which "other firms in the music industry" have

[1] As detailed herein, DiMA-member companies that publicly perform music often must also secure the right to perform the sound recordings that embodying the underlying musical compositions licensed by ASCAP and BMI. These rights to publicly perform sound recordings may be obtained by DiMA-member companies under certain circumstances pursuant to a statutory license under § 114 of the Copyright Act.

requested this review – and further unsure as to what specific changes have occurred in how music is delivered and experienced by listeners that would necessitate any substantial changes in the Consent Decrees - DiMA members nonetheless support the Department in the quest to examine the Consent Decrees to determine their effectiveness and to explore possible modification of them.

Before answering the Department's specific questions below, it is important to address a few issues regarding ASCAP, BMI, the Consent Decrees and how they operate, and the environment that has led to this most recent call for the Department to review the Consent Decrees. The Department of Justice should consider the request for substantive changes to the ASCAP and BMI Consent Decrees very carefully, noting many consolidations in the music industry that have occurred not only in the shadow of, but quite literally only because of, the existence of the Consent Decrees.

Both ASCAP & BMI's Revenues, Distributions and Membership Have Grown Substantially While They Have Both Operated Under The Current Consent Decrees

In the last decade, ASCAP & BMI's revenues and membership have grown substantially. For example, both ASCAP and BMI have seen their membership double between 2003 and 2013[2] and their respective revenues and royalty distributions increased similarly.[3] This fantastic growth occurred entirely while both organizations were operating under the current Consent Decrees. These growth numbers are especially enviable as they occurred in large part over the last 6 or 7 years, a period of economic decline for many American businesses, including, in particular, the recorded music industry.

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[2] 2003 ASCAP Membership = 150,000 v. 2013 = 500,000, 2003 BMI Membership = 300,000 v. 2103 = 600,000 – ASCAP and BMI Press Releases, 2003 and 2013.

[3] http://www.billboard.com/biz/articles/news/1445452/ascap-revenues-hit-record-high-in-2003
http://www.billboard.com/biz/articles/news/publishing/5901249/ascaps-2013-revenues-distributions-rise-in-2013
http://www.bmi.com/news/entry/20031021_bmi_reports_revenue_increase
http://www.bmi.com/press/entry/563077

This incredible growth and success not only occurred "despite" the existence, operation and enforcement of the Consent Decrees but, quite clearly precisely *because* of the existence of the Consent Decrees. The marked increase in both the number of affiliated songwriters and publishers and in revenue is attributable to the Court's application of the Consent Decrees and the fair market value standard.

Without the presence of the Consent Decrees, ASCAP and BMI would not have been able to retain and trade on their significant market power, in turn, citing their dominance as a lure for potential music publisher and songwriter affiliates. Absent the Consent Decrees, in a more truly-competitive market for music work performance rights (i.e. a market consisting of multiple competitors of relatively equal bargaining power), ASCAP and BMI would likely not have been able to achieve the prolific increase in revenues that they managed under the Consent Decrees. It is worth noting that, during this same period of astounding growth for ASCAP and BMI and their affiliates, the recorded music industry – the industry which ASCAP and BMI's Music Publisher affiliates have openly acknowledged they desperately want their royalty rates to mirror, now - saw marked declines.[4]

Clearly, the existence and application of the Consent Decrees has done absolutely nothing to harm ASCAP or BMI as regards their ability to sustain and grow their businesses. This is true, whether considered either objectively – in the context of general economic growth (especially during a period of severe economic recession), or more specifically - in the context of the music business, in particular.

[4] RIAA – 2003 Revenues = $14 Billion v. 2013 = $7 Billion – RIAA Annual Report, USA Recording Industry in Numbers; IFPI Digital-Music-Report-2014, page 6; http://www.ifpi.org/facts-and-stats.php

Digital Music Streaming Services are the Only Entities That Perform Musical Works That Are Obliged to Pay BOTH Composition Performance Fees AND Sound Recording Performance Fees

It is also important to note that digital music streaming services – uniquely – are the ONLY services that pay performance rights for the performance of BOTH a) sound recordings, AND b) musical compositions. Terrestrial radio, television, bars, restaurants and other business establishments – and all other services and locations that perform musical works – only pay ASCAP, BMI and SESAC for the right to perform the inherent composition. None of these entities have any obligation to pay record labels for the performance of the sound recordings which embody the compositions. It is only digital services - such as DiMA members – that are obligated to make payments for both.

It is this unique, double-royalty obligation, that only digital services are saddled with, that has driven the recent attempts by ASCAP and BMI members to withdraw their rights - ONLY for performances via digital services – and further prompted their request of the Justice Department to engage in the instant review of the Consent Decrees, specifically to allow for these types of punitive, partial withdrawals, which have been determined to be disallowed, under the Consent Decrees, by the Judges with jurisdiction over them.

In his testimony in the recent rate-setting trial between ASCAP and Pandora, conducted pursuant to the ASCAP Consent Decree, John LoFrumento, ASCAP's CEO, testified that his members never complained about the revenues collected from, for example, terrestrial radio broadcasters, which pay sound recording owners no royalties.[5] Indeed, both ASCAP and BMI

[5] In Re Petition of Pandora Media, Inc. , __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014)Trial Tr. pp. 289-90 (Jan. 23, 2014): "Q. My question is whether the frustration with the disparity was limited to a disparity in new media performance rights as opposed to other areas of ASCAP licenses? A. It had to do with new media performance rights. Q. It's true, is it not, that you never heard similar dissatisfaction from ASCAP members concerning the revenues collected for terrestrial -- A. No, I did not hear complaints. ; Trial Tr. pp. 291 (Jan. 23, 2013) "Q. Even beyond terrestrial radio, it is true, is it not, you have not heard any dissatisfaction with any disparity between what ASCAP collection performance royalties and what sound recording owners collect in performance

continue to enter into bargains with representatives of other broadcast media – media sources that do NOT labor under a sound recording performance royalty – to license their considerable catalogs at ever-more attractive rates and terms.

It is important to note that, just before the rate litigation between ASCAP and Pandora unfolded, both ASCAP and BMI voluntarily agreed, with many terrestrial radio broadcasters represented by the Radio Music Licensing Committee[6] to new licenses[7] that cover those terrestrial radio stations for broadcasts between January1, 2010 through December 31, 2016. These agreements, which both ASCAP and BMI entered into voluntarily and submitted to the respective courts for approval in 2012, included such provisions as:

- A 75 Million Dollar "industry fee credit" against 2010-2011 terrestrial broadcaster "industry" payments (in addition to the terrestrial broadcast industry's retention of 40 Million Dollars in fee reductions that had been ordered by the Court at the interim fee stage of the litigation);

- A performance royalty rate of 1.7% of gross revenue fee structure for blanket/music format license-reporting stations, minus a "standard deduction" of 12% for commissions and costs of collection;

- What amounted to a 25% standard deduction for those broadcasters of revenue attributable to "new media uses" (as those uses were now included in the same 1.7% overall rate); and

- Expanded rights grants accommodating the terrestrial radio industry's developing "new media" platforms, such as Internet websites, smart phones, and other wireless devices.

Plainly, ASCAP and BMI are not requesting to have the Consent Decrees modified because the existence of the Consent Decrees makes it impossible for them to negotiate fair rates in the current market. Under these very Consent Decrees, both ASCAP and BMI have explicitly

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royalties or other royalties in connection with any other media that ASCAP licenses? A. That is true."
[6] Radio Music Licensing Committee - http://www.radiomlc.org/Homepage/4779186
[7] http://www.radiomlc.org/pages/4795848.php
http://www.radiomlc.org/pages/6282052.php
http://www.ascap.com/~/media/files/pdf/licensing/radio/2010%20radio%20station%20license%20agreement.pdf
http://www.bmi.com/licensing/entry/radio
http://www.bmi.com/forms/licensing/radio/2012_RMLC_blanket_per_program.pdf

acknowledged that they have no problem with the fees that are paid by terrestrial broadcasters (even for their digital broadcasts). Both ASCAP and BMI have voluntarily submitted to the controlling courts freely-negotiated agreements with terrestrial broadcasters which include massive credits, reductions in rates, significant deductions - and even lower rates for "new media" and digital uses by those broadcasters.

It is clear that the aim of this request is to ultimately allow ASCAP and BMI to uniquely target digital-only broadcasters – the only entities that have both a royalty obligation for the performance of a) musical works, AND also b) sound recordings - for focused, selective, attack, aimed at increasing the performance royalty rates that only digital-only broadcasters must pay. Again, in his testimony in the recent rate-setting trial between ASCAP and Pandora, ASCAP's CEO John LoFrumento testified that ASCAP board members believed that the affiliated publishers who withdrew their "new media rights" would be able to get higher rates from Pandora and that ASCAP would then be able to use those higher rates in any future negotiations or rate setting proceeding to secure higher rates for publishers that remained in ASCAP.[8] This plan of attack was presented to reluctant board members, as an inducement to have them agree to the partial withdrawals.[9]

Permitting the type of partial withdrawals that ASCAP and BMI seek permission to engage in would undoubtedly harm competition among music service licensees. The type of selective, partial, targeted withdrawals that ASCAP and BMI members have attempted are, by their own

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[8] Petition of Pandora Media, Inc. Trial Tr. p. 300 "Q. The answer to my question was yes, the expectation was the 2 withdrawing publishers would be able to secure higher rates than ASCAP was getting, right? A. That was their belief, yes. Q. It was also the expressed intention of the publishers who were considering withdrawal that these higher rates could then be used as benchmarks in order to help ASCAP raise its own rate. Isn't that right? A. Yes."

[9] Id., page 301 "Q. It's true, is it not, that one of the factors that was used to try to gain the support of those that had expressed concern about the partial withdrawals was the possibility that the expected higher rates that the publishers would receive would be used by ASCAP to raise the rates for everyone within ASCAP. Isn't that right? A. There was a linkage between the two, publishers said if we get a higher rate, then ASCAP could try to negotiate a higher rate. Q. And that was one of the things, one of the arguments that was used within the board discussions about the partial withdrawals, to try to gain the support of those that initially expressed concern, correct? A. Yes."

admission, designed to allow the PROs and their affiliates to unilaterally pick formats and mediums for punitive (or preferential) rates and licensing terms, in a coordinated attempt to thwart the very purpose of the Consent Decrees and obtain supra-competitive rates.

ASCAP and BMI Allege that the Consent Decrees Are Not Suitable For the Digital Age, Yet Fail To Provide Any Specific Element of this Supposed Incompatibility

As a justification for the request to have the Consent Decrees modified, both ASCAP and BMI have alleged generic complaints that the Consent Decrees are "decades old" and "not suitable for the digital age," yet neither of them has articulated any particular element of either the Consent Decrees themselves, or the way that musical works are performed by digital services in the "internet era," that requires modification of the basic terms of the Consent Decrees. The essence of how music is performed publicly via digital services is no different than the way it is performed by analog transmissions. While the format of the transmission is technically distinct, with one being digital and the other analog, there is nothing about the process of engaging in the public performance of musical works through a digital delivery that is any different than the performance of those musical works through an analog transmission. Similarly, the way musical works are licensed for performance for digital performance is in no way different than the process for licensing for analog performances.

We are well into the age of digital performances of musical works. The Copyright Act was amended almost 20 years ago specifically to acknowledge the digital performances of musical works and sound recordings that was a reality, at that time. Both the ASCAP and BMI Consent Decrees have undergone review and modification within that time, and the very text of each Consent Decree contemplates broadcasters employing various technological means – beyond analog terrestrial broadcast means - of transmitting performances of ASCAP and BMI's repertory. Indeed, the most recent modification of the ASCAP Consent Decree, which occurred

in 2001, was accompanied by the Department explicitly taking into account digital services. The very text of the Amended Consent Decree states, as the Department itself noted publicly, that the modification was undertaken (in part) to "expand and clarify ASCAP's obligation to offer certain types of music users, including background music providers and Internet companies, a genuine alternative to a blanket license."[10]

Additional indications that the Consent Decrees in no way fail to accommodate the licensing of music performances through modern means include the plain fact that both ASCAP and BMI have, over recent years, entered into numerous voluntary agreements to license terms and fees for digital performances of their repertory, as well as participating several proceedings before the rate courts that retain jurisdiction over the Consent Decrees, specifically to determine appropriate rates and terms for digital performances. Both ASCAP and BMI have managed these events, all without any problems applying the terms of the Consent Decrees to these digital uses.

There is no merit to the argument that now, in 2014, after at least a decade of operating within the bounds of the Consent Decrees, as they have been applied to many various digital services, that the Consent Decrees are "outdated" and are "not suitable for the digital age." As Judge Cote observed in the recently-concluded ASCAP v. Pandora rate case: "It is true that the digital delivery of music has permitted the creation of customized radio stations that are unique to individual listeners. But, despite that development, customized radio retains the essential characteristics of radio."[11] The amorphous claims that the terms of the Consent Decrees are somehow an outdated hindrance, which are being put forth as vague support of the clear ultimate goal - which is to be able to single out digital music services for unique rate increases, the likes of which the Consent Decrees were specifically designed to prohibit - should not carry any weight.

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[10] Dep't of Justice Announcement, issued Monday, September 5, 2000.
[11] In Re Petition of Pandora Media, Inc., page 132

Musical Works Are Not Commodities That Can Be Interchanged and Compete Directly with Each Other in the Market for Licenses

Any policy debate over the continuing role of Performing Rights Organizations and the Consent Decrees under which ASCAP and BMI operate must be conducted with an appreciation of both copyright law and antitrust law being considered. Individual copyright owners enjoy a limited set of rights, for a limited period of time, specifically in recognition of the unique nature of copyrights. Both the Constitution, and Congress in crafting laws pursuant thereto, considered the unique nature and potential monopoly that is inherent in each copyrighted work. It is understood that copyrighted works are not commodities that compete directly with each other. Just as a novel will not serve as a suitable replacement for a textbook, a particular song is a unique "good," for which no other market replacement readily exists. While copyright owners are given great flexibility in the rights to exploit the works they create, the music industry has repeatedly demonstrated the anticompetitive reality of arrangements under which multiple copyrighted works are aggregated and licensed collectively, as the Performing Rights Organizations in the United States are specifically designed to do.

The collective licensing of the performance right for musical works is inherently anticompetitive, as the right to license a particular musical composition cannot be a substitution for another specific musical work. As such, the simple aggregation of certain musical works for licensing by the Performing Rights Organization is, in-and-of-itself, a somewhat anti-competitive behavior. The need to closely monitor the market behavior of such collectives is even more pronounced when the total market of participating licensees is reduced to the lowest single numbers, each with sufficient market share to dictate the entire market.

The existing ASCAP and BMI consent decrees do not eliminate this market power entirely, they merely serve to limit some of the negative effects of the monopolistic position.[12] However imperfectly, the ASCAP and BMI consent decrees attempt to preserve the potential benefits of such aggregation while recognizing this anticompetitive potential. In light of this reality, as long as ASCAP and BMI exist with the market concentrations that they have amassed, they must be subject to oversight in their dealings with licensees, as they currently are, under the present Consent Decrees.

II. Responses to Specific Questions:

1) Do the Consent Decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Are there provisions that are ineffective in protecting competition?

a) The Consent Decrees Continue to Serve Important Competitive Purposes Today

The Consent Decrees obviously continue to serve a very important function. Recent cases indicate that the very type of behavior that initially gave rise to the Department's cases against ASCAP and BMI – the precise type of anti-competitive behavior which the Consent Decrees were and are intended to regulate – continue today. As Judge Cote's decision in the recent ASCAP v. Pandora rate case noted: "In addition, the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying AFJ2 and casts doubt on the proposition that the 'market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned.'[citation omitted]."[13] ASCAP and its affiliated publishers engineered a plan to circumvent the ASCAP Consent Decree and to specifically use the market power that each of them had acquired while

[12] ASCAP v. MobiTV, Inc ., 681 F.3d 76, 82 (2d Cir. 2012) "the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."; United States v. BMI (In re: Application of Music Choice), 426 F.3d 91, 96 (2d Cir. 2005) "As we held with respect to ASCAP, rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights.".

[13] In Re Petition of Pandora Media, Inc., __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014), at page 97.

under the Consent Decree, to frustrate the fundamental goal of that Consent Decree.[14] ASCAP and its affiliate music publishers Sony and UMPG did not act as competitors in the marketplace at all, and as a result of this unfair coordination, their already very significant individual market power was substantially enhanced, for each of them.[15]

It is an unfortunate reality that, despite the fact that the Consent Decrees have been in place since the early 1940s, the anti-competitive behavior that they were specifically intended to address and curtail is still very-much present. The anti-competitive practices of ASCAP, BMI and their affiliated music publishers (as well as, apparently, SESAC, the only other Performing Rights Organization in the U.S., which is not presently subject to a Consent Decree[16]) is apparent and this anti-competitive behavior was applied immediately, following certain music publishers attempted withdrawal of their substantial catalogs from ASCAP and BMI. The ASCAP and BMI consent decrees are a necessary attempt to preserve the potential benefits of such aggregation, while recognizing the anti-competitive propensities of any such collective.

b) There Are Few, if Any, Provisions of the Consent Decrees That Are No Longer Necessary to Protect Competition or That Are Ineffective in Protecting Competition

In addition to the clear, still-present need for the Consent Decrees, in order to keep in check what is the obviously, inherently anti-competitive nature of ASCAP, BMI and their affiliated music publishers, the terms and text of the Consent Decrees themselves have been modified at

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[14] Id., at Page 96 "ASCAP has not shown that either the Pandora-Sony or the Pandora-UMPG licenses are good benchmarks for its license with Pandora. Sony and UMPG each exercised their considerable market power to extract supra-competitive prices."

[15] Id., at page 97; "What is important is that ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified."

[16] SESAC is currently a defendant in two pending antitrust lawsuits, brought by the Radio Music Licensing Committee and the Television Music Licensing Committee in 2012. A 2013 evidentiary hearing in the RMLC case on a preliminary injunction motion resulted in a conclusion that the RMLC had a likelihood of success on the merits of its antitrust claims. Radio Music License Committee, Inc. v. SESAC Inc., No. 12-cv-5087, Report and Recommendation, 29 (E.D. Pa. Dec. 20, 2013).

several points over the years, to ensure that the Consent Decrees do, in fact, continue to remain relevant and applicable and to serve important competitive purposes. The BMI Consent Decree was modified in 1996 and the ASCAP Consent Decree was modified as recently as 2001, with the Department noting, at the time, that the modification specifically provided "increased competition in music licensing, update the procedures for settling license fee disputes, and eliminate[d] certain costly and outdated provisions of the original decree." While there may be some areas where the Consent Decrees could be clarified, homogenized and otherwise updated, as discussed more fully below, the Consent Decrees continue to serve important competitive purposes today and should not be modified in any way that undermines their basic purpose.

There are some provisions of the Consent Decrees and the form, format and implementation of each of them that prevent competition or that may be ineffective in protecting competition. One such area is the ineffectiveness of, and the disparity between, the public disclosure obligations in the ASCAP Consent Decree vs. the BMI Consent Decree, which is discussed in more detail in response to the Department's fourth question, below. The current public disclosure requirement in the ASCAP Consent Decree is, in itself ineffective. That issue is exacerbated by the distinction with the BMI Consent Decree, which has no such disclosure requirement. This lack of uniformity in the Consent Decrees applicable to the two largest, direct competitors in the music performance licensing market make the current Consent Decrees ineffective in protecting competition.

2) What, if any, modifications to the Consent Decrees Would Enhance Competition and Efficiency?

The substantive response to question 2 follows the response to question 3, below, as the response regarding specific suggested modifications to enhance competition is contained in the response and observation that the differences between the Consent Decrees adversely affects competition.

3) Do Differences Between the Two Consent Decrees Adversely Affect Competition?

Certain Modifications, Including Eliminating Substantive Differences, Would Enhance Competition and Efficiency

Differences between the Consent Decrees adversely affect competition because those terms and conditions that vary between each of the Consent Decrees ultimately result in the market in which licensees cannot make adequate comparisons between the respective repertory of each ASCAP and BMI, cannot make informed assessments of the value of each and cannot directly compare all of the elements of the cost, effectiveness and operation of licenses acquired under the distinct Consent Decrees. As discussed below, the differences between the way the two distinct Consent Decrees are drafted and organized frustrates the over-arching goal of enhancing competition in the music work performance marketplace. Both logic and actual demonstrated market conditions dictate that, given an opportunity to amend the Consent Decrees, the Department of Justice ought to standardize both of the Consent Decrees, making them uniform and following the same form and format. Modifications aimed at making the Consent Decrees more uniform and current would enhance competition and efficiency.

There are several areas where modifications, aimed at enhancing competition, should be made to the Consent Decrees. The Consent Decrees would be much more conducive to efficient licensing, as well as enabling both ASCAP and BMI, and their licensees and potential licensees,

to adequately assess the marketplace and properly value the respective repertories, if the Consent Decrees were uniform in form and format.

With respect to the public disclosure requirement, which is discussed at length in response the Department's fourth question, below, the differences between the way the two distinct Consent Decrees are drafted and organized significantly frustrates the over-arching goal of enhancing competition in the music work performance license marketplace. In addition, the definitions should be consistent across both the ASCAP and BMI Consent Decrees. Definitions of important, fundamental terms such as those that define the repertory in question should be consistent across both Consent Decrees.

For instance, the ASCAP Consent Decree defines "ASCAP's Repertory" as: "those works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time,"[17] while the BMI Consent Decree defines "Defendant's repertory" as "those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense."[18] These definitions should be updated and made consistent, to clearly indicate that a) the repertory subject to both Consent Decrees is "those compositions, the right of public performance of *which defendant has or hereafter shall have* the right to license or sublicense," and b) to make it clear that so-called "split works" (i.e. a musical work which is co-written by two or more writers, with at least two of those writers having affiliations with separate Performing Rights Societies) may be licensed by either of the affiliated Performing Rights Societies, without requiring a license from both Performing Rights Organizations, with respect to that work.

Other definitions (which are generally more comprehensive as they are found in the more-recently amended ASCAP Consent Decree), should be applied to both Consent Decrees.

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[17] ASCAP Consent Decree, Sec. II (C).
[18] BMI Consent Decree, Sec. II (C).

Defined terms and their definitions should be made more comprehensive and be applied in both the ASCAP and the BMI Consent Decrees, simultaneously. Terms such as "Background/foreground music service," "Per program license," "Per-segment license," "Programming Period" (versus "Program" found in the BMI Consent Decree) "Similarly Situated" and the definition of the "Through to the Audience" license, which are found in the more current ASCAP Consent Decree,[19] should be incorporated into the BMI Consent Decree, as part of a general move towards making the two Consent Decrees uniform and therefore more conducive to true competition. In addition, defined terms such as such as the current distinction between "Music user" and "On-line music user" found in the current ASCAP Consent Decree,[20] do not seem relevant and should be dispensed with.

The Department should also consider addressing and updating and/or adding other important, terms. The term "Licenses in Effect" should be a defined term, with the definition including not only current licenses which have been finalized, but also any pending "application for a license that has been made." Other terms, which may be subject to continued interpretation, such as the concept of an "interactive service" should likely be addressed by incorporating flexibility into the Consent Decrees with respect to that term. Both the ASCAP and BMI Consent Decrees should address the issue of what constitutes an "interactive service" by referring to the Copyright law as may be interpreted by case law, much as the terms "Right of public performance" and the general reference to "Performance" are addressed throughout both the ASCAP and BMI Consent Decrees, presently. Incorporating such flexibility will avoid a potential situation of a particular service possibly being deemed "non-interactive" following adjudication of those issues in separate proceedings, which service might fall under a static definition of (or unprincipled application of the term) "interactive," in the continued application of the Consent Decrees.

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[19] ACAP Consent Decree, Sec II *et. seq.*
[20] ACAP Consent Decree, Sec II (F), (G), (H).

In addition to ensuring that terms and definitions are consistent across the two Consent Decrees, elements of the form of the individual Consent Decrees should be homologated, as well. The specific delineation of what is "Prohibited Conduct"[21] vs. behavior the "Defendant is enjoined and restrained from"[22] should be made consistent, in both form and language, across both the ASCAP and BMI Consent decrees. Similarly, the Per-Program and Per-Segment License structure of the ASCAP Consent Decree[23] should be incorporated into both Consent Decrees. And the explicit availability of an Adjustable Fee, Blanket License, as is described in the BMI Consent Decree[24] should be incorporated into both the ASCAP and BMI Consent Decrees, as well. Each of these respective provisions, as have been applied, serve to make the licensing process flexible, efficient and available to a wide array of potential licensees, ensuring that many different licensees can avail themselves of public performance licenses, regardless of the size or situation of the particular licensee.

4) **How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?**

a) It is Extremely Difficult to Acquire the Contents of ASCAP's or BMI's Repertory in a Useful Format and That Lack of Transparency Severely Impacts Competition

As briefly addressed above, a major distinction between the ASCAP Consent Decree and the BMI Consent Decree is that the ASCAP Consent Decree includes a comprehensive section, Section X, which enumerates several requirements for ASCAP to make available to the public information about the compositions contained in its repertory, ostensibly so that music users can more easily determine which PRO administers the rights to particular compositions and the

[21] ASCAP Consent Decree, Sec IV.
[22] BMI Consent Decree, Sec. IV
[23] ASCAP Consent Decree, Sec VII.
[24] BMI Consent Decree, Sec. VIII.

identity of the ultimate rights holder for such compositions. Those provisions, as well-intentioned as they may be, have proven to be less-than effective, as ASCAP has interpreted them to mean that ASCAP is only obligated to provide a partial online database, which is only searchable by song title. Even more troubling, the BMI Consent Decree contains no public disclosure requirement, at all. We understand that BMI representatives have publicly stated, as a result, that BMI is under no obligation to provide data on BMI's repertory.

The ineffectiveness of the current public disclosure requirement in the ASCAP Consent Decree, and the complete absence of any disclosure requirement in the BMI Consent Decree, makes it virtually impossible to acquire the contents of ASCAP's or BMI's repertory in any useful format. This state of affairs has an immense negative impact on competition. Without knowing the contents of the repertory to be licensed, a potential licensee is essentially blind to the particulars of what is being licensed, and must take it on pure faith that the repertory is as significant as ASCAP or BMI represents it is. Licensees cannot adequately value the license for the repertory, and significantly, cannot ascribe value to potential direct licenses of works that may be within that repertory. Modifications of the transparency requirements in both Consent Decrees are not only warranted, but in fact, absolutely necessary, in order to effectively promote competition in market for music performance licenses.

Section X of the ASCAP Consent Decree was imposed as part of the 2001 Amendment to the Consent Decree.[25] Section X is comprised of several detailed instructions governing how inquiries regarding specific compositions must be responded to by ASCAP, how and where a list of works in ASCAP's repertory is to be maintained and the specifics of how the repertory list

[25]United States of America v. American Society of Composers Authors and Publishers, Second Amended Final Judgment "AFJ2," Sec X; Department of Justice Memorandum in Support of AFJ2, at page 37.

must be made available. Finally, Section X prohibits ASCAP from initiating infringement actions for works that were not identified on the electronic public list.[26]

As this Department's Memorandum in Support of the adoption of Section X as part of the most recent amendments to ASCAP Consent Decree in 2001 itself noted, the information required under Section X was intended to "enable users to make more informed licensing decisions and can facilitate substitution of music from one PRO for music from another or direct licensing from rights holders."[27] Unfortunately however, as the most recent rate case with ASCAP painfully indicates, these public information requirements do not go far enough in enabling music users to make licensing decisions, as is the provision's stated intent. ASCAP has very narrowly interpreted the provisions of Section X of the current Consent Decree to be satisfied by its limited, "searchable database," which can only be searched manually, on a song-by-song basis. Applying this interpretation of its public disclosure obligations, ASCAP was able to successfully obscure the extent of its repertory, and that of its affiliated music publishers, to successfully stymie efforts of Pandora to make precisely the type of "more informed licensing decisions to facilitate substitution of music from one PRO for music from another or direct licensing from rights holders" that the Consent Decree is intended to facilitate.

As Judge Cote noted in her decision: "That same day, Pandora also asked ASCAP for the list of Sony works in ASCAP's repertoire. It would have taken ASCAP about a day to respond to Pandora's request with an accurate list of the Sony works. But, ASCAP, like Sony, stonewalled Pandora and refused to provide the list."[28] And "Although ASCAP attempted at trial to show that Pandora could have used public sources of information to identify the Sony catalog, it failed to

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[26] AFJ2, Sec X.
[27] Dep't of Justice Memo in Support of AFJ2, at page 37.
[28] In Re Petition of Pandora Media, Inc., at page 67.

show that such an effort would have produced a reliable, comprehensive list, even if Pandora had made the extraordinary commitment necessary to try to compile such a list from public data."[29]

It is clear that the public disclosure requirements which are part of the current ASCAP Consent Decree, while intended to provide public access to data regarding ASCAP's repertory, fall far short of the explicitly-stated goal of "enabling users to make more informed licensing decisions and facilitating substitution of music from one PRO for music from another or direct licensing from rights holders." The need for timely, accurate and easily-accessible data regarding both ASCAP's and BMI's repertory is absolutely essential to maintaining a truly competitive licensing marketplace for the performances of musical works.

In addition to the fact that the lack of available data from ASCAP as noted previously, the BMI Consent Decree presently has no explicit provisions requiring public disclosure of BMI's repertory, at all. Following the observations made initially by the Department of Justice, and much more recently by Judge Cote in the context of amendment of and the recent rate case conducted pursuant to the ASCAP Consent Decree, both of which emphasize the incredible importance of the public disclosure of accurate and timely information about repertory – and beg for enhancement and enforcement of those provisions - it is clear that the BMI Consent Decree should also include parallel, enhanced public disclosure requirements, as well.

b) Modifications to the Transparency Requirements in the Consent Decrees Are Not Only Warranted, But Necessary

Both the ASCAP and BMI Consent Decrees should be modified, to make it absolutely clear that both ASCAP and BMI are both obliged to maintain accurate, timely databases, which should be machine-searchable, by catalog, publisher/administrator and writer, as well as by song, of all works within their respective repertories, which lists should be publicly available, at all times, to any and all licensees and prospective licensees. Further, both the ASCAP and BMI Consent

[29] Id.,at page 69.

Decrees should be amended to include appreciable consequences for failure to maintain such public disclosures, such as potential penalties in the form of fines or, at the very least, being absolutely enjoined from bringing actions, whether it be infringement, petitions to the rate court, or any other action, against any party, regarding any composition which is not accurately depicted in a publicly-available list of repertory.

5) Should The Consent Decrees Be Modified to Allow Rights Holders to Permit ASCAP Or BMI to License Their Performance Rights To Some Music Users But Not Others? If Such Partial or Limited Grants Of Licensing Rights to ASCAP And BMI Are Allowed, Should There Be Limits On How Such Grants Are Structured?

a) The Consent Decrees Should Not Be Modified to Allow Rights Holders to Permit ASCAP or BMI to License Their Performance Rights to Some Music Users But Not Others

The Consent Decrees should not be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others. Doing so would run counter to the very essence of the Consent Decrees, which is to ensure that ASCAP and BMI provide their entire repertory for licensing to all licensees, at rates that are uniform among all licensees that are similarly situated. Any modification that would allow ASCAP or BMI to permit their affiliated music publishers to limit ASCAP or BMI's authority to license their performance rights to some music users but not others would empower ASCAP and BMI to selectively license certain entities but not others, at various rates, subject only to their unique discretion. ASCAP and BMI and their affiliated music publishers could simply allege some "distinction" (however minor or inconsequential) between otherwise similarly situated services. What is more, allowing individual music publisher affiliates to withdraw portions of their catalogs from ASCAP or BMI would wreak havoc on the literally millions of agreements with songwriters, who's publishing agreements are founded on the assumption that public performance licenses would occur as part of ASCAP and BMI.

We understand that the instant inquiry itself was prompted by both ASCAP and BMI specifically seeking modification of the Consent Decrees to, among other things, allow their affiliated rights holders to withdraw some of their rights to license their performance rights through ASCAP and/or BMI, as those rights holders may see fit. There is no reason for the Department to consider modifying the Consent Decrees to allow rights holders to withdraw some of their rights from ASCAP and/or BMI. Under both of the Consent Decrees currently, there is no prohibition against rights holders withdrawing the works that they control, or for rights holders to license those works to music users, directly. Accordingly, there would likely be little or no competitive benefit to allowing rights holders to withdraw only portions of their rights or their catalogs from ASCAP and/or BMI, only for certain uses.

Indeed, allowing *selective, partial* withdrawal of particular rights, which rights are needed only by certain services, would be highly anti-competitive and would eviscerate the very essence of the Consent Decrees: The requirement that ASCAP and BMI license their entire catalog, at competitive rates, to all potential licensees seeking licenses.

Works that are licensed through ASCAP and/or BMI are, and should be, licensed subject to the terms of the Consent Decrees, which have been correctly interpreted to include the obligation to license all works in their respective repertory,[30] to all licensees requesting a license, at fair rates and for the same rate among similarly-situated licensees. The decision for a rights holder to remove their catalog or certain works from ASCAP or BMI for the purposes of licensing and administration should necessarily be a considered undertaking, with rights holders having to weigh the benefits that are derived from collective licensing through ASCAP or BMI – benefits that include lower transaction costs, efficient licensing, collective funding of rate negotiations and rate-setting proceedings, enforcement of performance rights and other administrative

[30] BMI vs. Pandora, 13 Civ. 4037 (LLS) (Dec. 18, 2013) Opinion and Order; and In re: Pandora Media, Inc., 2013 WL 5211927 (Sept. 17, 2013) Opinion and Order.

functions - all of which are subject to the oversight applied by the Consent Decrees, against the potential benefits of individual, direct licensing – which include potentially higher individual fees, the ability to seek preferred placement of the rights holder's works and freedom from sharing collective cost and licensing burdens that benefit other rights holders – all of which are subject to the vagaries of running an individual, stand-alone, competitive business.

There is likely nothing more anti-competitive than to allow rights holders to elect to have all of the benefits of collective licensing – the centralized administration, streamlined licensing and payments, collective enforcement, etc. - that are only available through collectives such as ASCAP and BMI, without being subject to any of the oversight that has proven to be necessary for the equitable operation of those collectives.

In addition, the history of the musical work publishing business literally relies on the continued assumption that music publishers will have the performance rights for the works in their catalogs administered by ASCAP and/or BMI, who in turn, have direct relationships and outstanding fiduciary duties to their songwriter affiliates. The overwhelming majority of publishing and administration agreements that songwriters have entered into over the last 70 years are premised on the presumption that the music publisher with whom the songwriter enters into the agreement, will look to that songwriter's Performing Rights Organization - ASCAP or BMI – for administration of the public performance rights to those compositions the songwriter delivers under the agreement. Songwriters – and their publishing and administration agreements, by their very terms - assume the continued affiliation with the Performing Rights Organizations as a basic element of the contractual bargain and relationship. Songwriters would be immeasurably damaged by the ability of their music publishers to claim that certain compositions, or certain rights and uses of certain compositions, were not subject to the

administration of ASCAP and/or BMI, an assumption that underlies virtually every songwriter's music publishing and/or administration agreement entered into over the last 70 years.

b) If Such Partial or Limited Grants Of Licensing Rights To ASCAP And BMI Are Allowed, They Should Only be Allowed Subject to Strict Controls

If the Department of Justice and the presiding courts of the Southern District of New York do believe that allowing partial withdrawals of rights holders' catalogs would encourage competition, it is imperative that any such relaxation of the existing provisions in the Consent Decrees, requiring rights holders to license their entire catalogs through ASCAP and BMI be premised on and governed by significant controls. Just some of the points that must be considered in order to make any scheme of partial withdrawals even remotely workable and conducive to competition include:

- No direct license with respect to any partially withdrawn rights which are entered into by any a music publisher with a market share of greater than 10% (of either total works or market revenue) can be used as evidence of the reasonable value of a Performing Rights Organization's blanket license in any rate trial.

- The Performing Rights Organization and rights holder seeking to withdraw some of their rights must give 12 months' notice of the impending withdrawal, which notice must include not only a specific description of which license rights are being withdrawn, but also must include a complete, detailed and accurate list of the works for which partial rights are intended to be withdrawn;

- Songwriters must be able to keep their rights within the Performing Rights Organization and payments for the "writer's share" for all exploitations, including any exploitations subject to a partial withdrawal made to and administered by their Performing Rights Organization, regardless of a music publisher withdrawing partial rights to that songwriter's works;

- The Board – with any prospective withdrawing rights holder abstaining – of ASCAP and BMI should vote on whether and how to implement any proposed withdrawal of partial rights.

- No rights holder who engages in any partial withdrawal of certain licensing rights can sit on the Board of ASCAP or BMI; and

- No rights holder who engages in any partial withdrawal of certain licensing rights can re-submit the withdrawn licensing rights for at least 3 years;

These requirements would constitute the minimum level of restrictions that should be attendant to any consideration of allowing partial withdrawals by rights holders of certain rights from ASCAP and BMI. Not having these controls and allowing certain large music publishers – some of whom now approach individual market share that is on par with ASCAP and BMI, themselves – to withdraw and hold out their considerable catalogs for higher rates, while simultaneously allowing smaller publishers, who's catalogs are less valuable, to choose not to license directly (at what would necessarily be a lower rate, in a competitive marketplace), and simply acquire the benefit of the value "benchmark" established by the larger music publishers, to be applied to the respective Performing Rights Organization, would skew the marketplace and effectively allow the largest market participants to dictate the price for all market participants.

As has been observed in previous rate cases, the "blanket" ASCAP and BMI license is effectively worth more than the individual licenses that is comprised of, largely due to the blanket, full-coverage nature of the license being granted.[31] Once the full coverage of that blanket license is reduced by direct licenses outside of the collective, so to, the value of the remainder of the collective is similarly reduced.

An obligation to give ample advance notice and full disclosure of precisely what rights for what works may be subject to a partial withdrawal is self-evidently appropriate. As the recent Pandora case plainly makes clear, the purported withdrawal of rights, without any facility for licensees to identify the works that would be withdrawn, effectively forces licensees into licensing on any terms that the licensing entity(ies) presents. Not knowing the scope of what

[31] CBS v. BMI, 441 U.S. 1 (1979), at page 21 "Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product." Id., at page 22 "To the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material."

works might not be subject to the license, the licensee faces certain, substantial, "crippling" copyright infringement actions.[32]

Similarly controls that require the consent of Board of the Performing Rights Organization (with any prospective withdrawing rights holder abstaining) prior to effectuating any partial withdrawal, and a limitation that rights holders who partially withdraw of certain licensing rights may not sit on the Board of ASCAP or BMI are self-explanatory. The Board of ASCAP and BMI should be able to decide – without the influence of the member with an interest in the issue - whether and how to implement such withdrawals.

A requirement that songwriters be able to keep their rights within the Performing Rights Organization of their choice, with all payments for the "writer's share" for all exploitations, including any exploitations subject to a partial withdrawal, made to and administered by their Performing Rights Organization, regardless of a music publisher withdrawing partial rights to that songwriter's works, is also absolutely necessary and self-explanatory. As discussed above, songwriters fundamentally rely on the Performing Rights Organizations as part of the music publishing framework. Music publishers cannot be allowed to undermine the very foundation of decades and decades of music publishing and administration agreements with the songwriters to whom they have a fiduciary duty, by simply withdrawing certain rights form ASCAP and BMI. The contractual obligations that exist between songwriters and their music publishers, as fulfilled by the Performing rights Organizations, must be preserved.

Finally, if the Department of Justice is going to consider allowing these partial withdrawals, then the Department itself must revisit its merger guidelines with respect to music publishing. In the first instance, the Department will need to be extra vigilant in its oversight and efforts to

[32] In Re Petition of Pandora Media, Inc., at page 101 "By withholding the list, Sony deprived Pandora of significant leverage in their negotiations. Pandora was faced with three options: shut down its business, face crippling copyright infringement liability, or agree to Sony's terms."

ensure that the largest publishers are not empowered by partial withdrawals of rights as a mechanism to acquire greater catalog and become even bigger market dominators. If smaller publishers begin to acquiesce to consolidation efforts following any changes to the Consent Decrees, the effect might be to exacerbate an even bigger problem of market concentration.

6) Should The Rate-Making Function Currently Performed By The Rate Court Be Changed To A System Of Mandatory Arbitration? What Procedures Should Be Considered To Expedite Resolution Of Fee Disputes? When Should the Payment of Interim Fees Begin And How Should They Be Set?

a) The Rate-Making Function Currently Performed By the Rate Court Should Not Be Changed To a System of Mandatory Arbitration

The rate-making function currently performed by the rate court should not – and likely cannot - be changed to a system of mandatory arbitration. While arbitration sometimes enjoys a popular conception as a cheaper, faster alternative dispute resolution, especially for small claims, experience (as well as numerous studies), has shown that with respect to large-scale and sophisticated cases, it is the opposite. The very special nature of the musical work performance landscape, including both the increasingly-sophisticated services that perform the works and the unique nature of the works, requires a rather detailed review of the facts in any particular rate-case. Recent rate cases have redoubled the understanding that the Federal discovery and litigation process, overseen by sophisticated judges with broad powers and a history of dealing with the subject matter and the parties involved is not only preferable, but indeed necessary, in order to properly adjudicate disputes and rate cases with respect to the licenses attendant to performance of musical works.

In their response to the Copyright Office's recent Music Licensing Study,[33] ASCAP explicitly acknowledged that they are seeking to have the rate-setting procedures applicable to ASCAP

[33] http://www.copyright.gov/docs/musiclicensingstudy/

under the Consent Decree converted to private arbitration with limited discovery[34] and including a presumption that direct deals are reflective of Fair Market Value.[35] BMI's response also alludes to the same concerns.[36] In addition, both ASCAP and BMI are calling for the repeal of §114(i),[37] a provision of the Copyright law that ASCAP and BMI both lobbied to have included,[38] which limits the applicability of sound recording royalties in consideration of musical work rate-setting proceedings. If this amendment passes, it will require massive amounts of additional evidence, by all parties, to demonstrate the significance of the differences between the sound recording industry and the music publishing industries, and the distinctions between sound recording royalties and musical work performance royalties.

Arbitration of rates and other issues involving musical works and sound recordings have proven no more cost effective – and have resulted in far less consistent results – than the ASCAP and BMI rate cases have. Recent rate-setting arbitrations have taken years to adjudicate, cost multiple millions of dollars for each of the involved parties to be litigated, led to wildy disparate rates among competing services, been subject to numerous appeals and even Congressional interventions.[39]

Finally, the Consent Decrees themselves, and following that, any proposed modification, are subject to the continuing jurisdiction of the Federal Courts of the Southern District of New York. It would seem unlikely that the Federal Court with continuing jurisdiction over the Consent

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[34] ASCAP Comments in Response to Copyright Office Notice of Inquiry, http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/, at page 23

[35] Id, at page 24

[36] BMI Comments in Response to Copyright Office Notice of Inquiry, http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/, at pages 8 and 16.

[37] ASCAP Comments in Response to Copyright Office Notice of Inquiry,at page 27, BMI Comments in Response to Copyright Office Notice of Inquiry, at page 9

[38] H.R. Rep. 104-274, at 24 (1995) (describing 114 (i) as dispelling "the fear that license fees for sound recording performance may adversely affect music performance royalties"); In Re Petition of Pandora Media, Inc., fn 30, at page 37

[39] H. R. 7084 the "Webcaster Settlement Act of 2008" amending section 114 of title 17, United States Code, following the Copyright Royalty Board Order which set sound recording royalty rates for webcasters in 2009, to provide for agreements for the reproduction and performance of sound recordings by webcasters.

Decrees would entertain a modification of them that would effectively end that continuing jurisdictional oversight. While it is possible that the Judges who will ultimately decide the applicability of any proposed modifications to the Consent Decrees might be convinced to pass some or all of the rate-setting process under the Consent Decrees to a Special Master or arbitrator, for the reasons outlined above, having these sophisticated proceedings shifted out of the full Federal Court process and over to a less comprehensive process would provide neither a cost savings nor yield any better results.

b) Procedures That May Be Considered to Expedite Resolution of Fee Disputes May Include Appropriate Interim Fees that Should be Set at a Very Low Minimum to Ensure Continued Negotiations

BMI, in their response to the Copyright Office's inquiry into music licensing, suggested that one area where the procedures may expedited is in the area of fee disputes is with respect to interim fees.[40] Indeed, the only minor issue that could represent how the Consent Decrees might be "not suitable for the digital age," could be the allegation that some small services may have acquired a license on an interim basis and gone out of business before making complete payment under the interim license. While we are skeptical of the amounts – both in terms of the number of these "transient" licensees that have come and gone and the actual dollar losses that may have been incurred, as a result - we nonetheless acknowledge that perhaps, following demonstration of the significance of this problem, a limited interim fee payment, to be held in escrow, might be warranted. Where the Performing Rights Organization can unequivocally demonstrate that a prospective licensee lacks any recognizable ability to make full payment of appropriate license fees, when set, some minimum interim license fee might be appropriate. When considering such an amendment, it is important to ensure that any such minimum interim license fee be set at a

[40] BMI Comments in Response to Copyright Office Notice of Inquiry, at pages 3 and 16.

rate that does not either dis-incentivize the Performing Rights Organization from, or exhaust the resources of the licensee, preventing, continuation of diligent efforts to set a fully-applicable rate for the service in question.

c) Payment of Appropriate Interim License Fees Can Begin in the First Regular Payment Period Following Issuance of the License

Again, while we believe that the prevalence of disappearing licensees that utilize significant numbers of works and go out of business prior to making payment for the use of those works - and we are even more certain that any actual monetary damage resulting from any such un-paid licenses is miniscule - DiMA sees no reason why, following demonstration by the Performing rights Organization of the likely inability of a prospective licensee to make an appropriate minimum payment, the Department of Justice should not entertain the possibility of requiring appropriate interim fee payments, payable upon the first regular payment period set forth in the prospective license, with the interim fee payment being held in an escrow account.

7) Should the Consent Decrees be Modified to Permit Rights Holders to Grant ASCAP and BMI Rights in Addition to "Rights of Public Performance"?

If the Consent Decrees Are to be Modified to Permit Rights Holders to Grant ASCAP and BMI Rights in Addition to "Rights of Public Performance," any Such Modification Must be Accompanied by Significant Oversight

The modification of the Consent Decrees to permit rights holders to grant ASCAP and BMI the authority to license rights in addition to "rights of public performance" (such as the right to license "mechanical reproductions" or "synchronization" rights) may present a way to serve competitive purposes with respect to those additional rights. Allowing the "bundling" of disparate rights available (and necessary, in many cases) to be licensed under a small group of licensors that can provide many rights necessary and/or desirable can create sorely-needed efficiencies in the music licensing marketplace.

Notwithstanding what are potential benefits of potentially reducing the number of licensors in the marketplace from which licensees must seek the multitude of licenses for the various separate uses of musical works, it is clear that any consideration of allowing ASCAP or BMI to effectively become central way-points within the broader musical works licensing market absolutely must be subject to the type of oversight that the Consent Decrees currently provide, with respect to the performance license for musical works.

As has been discussed at length in this response, above, within the limited authority of representing only the public performance license for musical works, both ASCAP and BMI have demonstrated significant, repeated and ongoing propensities to engage in what is disturbingly pervasive anti-competitive behavior. Providing these entities with the authority to aggregate and negotiate for even more rights, including very significant rights, within the music industry, must be coupled with a continued – and indeed, increased – level of oversight, to ensure that they do not abuse what would necessarily be even more significant market power, over a larger set of rights.

Those restrictions must include, at a minimum:

- A complete extension of the requirement that ASCAP and BMI issue licenses to potential licensees upon request, thereby averting threats of copyright infringement for failure to accede to ASCAP or BMI's license fee demands;

- Requiring that ASCAP and BMI license similar users similarly, prohibiting ASCAP and BMI from price discriminating within a group of users;

- Requiring ASCAP and BMI to maintain accurate, timely and publicly available to any and all licensees and prospective licensees, databases of all of the works and rights that they represent and are authorized to license, that are machine-searchable by catalog, publisher/administrator and writer, as well as by song. To enable users to make fully informed licensing decisions and facilitate substitution of music from one PRO for another or direct licensing from rights holders. With appreciable consequences for failure to maintain such public disclosures;

- Conferring the jurisdiction of the Federal Court of the Southern District of New York, which currently supervise the ASCAP and BMI Consent Decrees, to act as a "rate court" in

setting reasonable license fees for all licenses being offered by ASCAP or BMG, under the same terms and conditions as are applicable under the Consent Decrees currently;

- Barring ASCAP and BMI from obtaining exclusive rights to license any of the rights of their affiliated copyright owners' works, preserving the right of potential licensees to secure rights licenses for any rights that ASCAP and BMI are authorized to offer directly from composers and music publishers;

- Prohibiting ASCAP and BMI from licensing any of the rights they represent on a fixed-fee blanket license, unless requested by the licensee, so that licensees are able to secure license rights to portions of the catalogs represented by ASCAP and BMI in transactions directly with rights holders (and requiring ASCAP and BMI to recognize and give credit for any such direct licenses, when calculating the fees due for the remainder of their catalog).

Once again, if the Department of Justice is going to consider allowing ASCAP and BMI to engage in the licensing of multiple-rights, it is incumbent upon the Department to examine its merger guidelines with respect to music publishing. The Department should demand significant oversight authority, to ensure that neither ASCAP, nor BMI, nor large music publishers are empowered by the aggregation of even more rights under their authority, to acquire greater catalog and amass even greater market power.

Conclusion

DiMA and its members fully support the Department of Justice in its mission to examine the effectiveness of the ASCAP and BMI Consent Decrees. We are pleased to see the Department invite all interested persons, including songwriters and composers, publishers, licensees, and service providers, to provide the Department with information, comments and perspectives relevant to whether the Consent Decrees continue to protect competition and we remain eager to continue to be involved in the Department's review of these important Antitrust Decrees.

We believe that there is little that needs to be done to ensure that the Consent Decrees remain an important and viable element in the music licensing marketplace. Given that the Department has undertaken this review, there may be opportunity to make clarifications to the language and pursue consistency in the form of the individual Consent Decrees, to ensure that they are clear, comparable and fostering competition. Significant changes however, such as those sought by ASCAP and BMI to relax the rate-setting process, allow partial withdrawals of rights from ASCAP and BMI licensing repertory, and the possible joint licensing of performance rights with other music rights by the Performance Rights Organizations, are substantial and raise significant concerns.

The Department of Justice should carefully consider the requests for substantive changes that fundamentally alter the character and purpose of the Consent Decrees. ASCAP and BMI have managed to flourish, including reaping ever-greater revenues from digital music services, while operating under the Consent Decrees. A call for significant changes to the Consent Decrees at this time seems largely unwarranted and, if undertaken at all, should be done with the utmost caution.

Respectfully submitted,

/s/_____

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Comments of Pandora Media, Inc. In Response to the Department of Justice's Review of the ASCAP and BMI Consent Decrees

Pandora Media, Inc. ("Pandora") welcomes the review of the Department of Justice (the "Department") of the consent decrees that govern the American Society of Composers, Authors, and Publishers ("ASCAP"), and Broadcast Music, Inc. ("BMI"). We recognize that this process is part of a broader review of whether these consent decrees should remain in effect and/or be modified, and we are sensitive to the Department's concerns about the status of these decrees. Our central message is this: while other decrees may be outdated, these decrees are relevant and needed more than ever in light of increasing market concentration in the music publishing industry. They remain critical to constraining ASCAP's and BMI's overwhelming market power and the Department's continued involvement in this area is necessary. The demands of certain music publishers and the performance rights organizations ("PROs") to eliminate or relax the decrees should be rejected.

INTRODUCTION

The apparent cause of the Department's review of these consent decrees is revealing. There has been no outcry from the licensee community that the decrees are no longer necessary or no longer protect them from the collective market power of the PROs.[1] Rather, only one side is demanding that the decrees be eliminated or relaxed: the PROs and the major music publishers who are their members, such as Sony/ATV[2] ("Sony") and Universal Music Publishing ("Universal"). They believe that the rate-making process conducted by the two supervising courts – district courts responsible for setting reasonable, fair market prices and preventing the PROs from charging supracompetitive rates – sets prices for ASCAP and BMI blanket licenses that are too low *for digital media users*.[3] They shroud their desire to raise prices in vague assertions about a rapidly changing marketplace and the "extraordinary evolution in the ways in which music is now distributed and consumed."[4]

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[1] In contrast, licensees were largely in support of the 1994 modification to the BMI consent decree, which provided for a rate court similar to the ASCAP consent decree to resolve license fee disputes.

[2] In June 2012, an investor group led by Sony Corporation of America acquired EMI Music Publishing and announced that Sony/ATV Music Publishing, a joint venture between Sony and the Estate of Michael Jackson, will administer EMI Music Publishing on behalf of the investor group, available at (http://www.sony.com/SCA/company-news/press-releases/sony-corporation-of-america/2012/investor-group-including-sony-corporation-of-ameri.shtml). The combined market share of Sony/ATV and EMI is more than 31%. *See* Music & Copyright, "UMG leads the new order of recorded-music companies, Sony dominates music publishing, available at http://musicandcopyright.wordpress.com/2013/05/01/umg-leads-the-new-order-of-recorded-music-companies-sony-dominates-music-publishing/.

[3] Notably, the PROs and major publishers do not complain of the rates ASCAP and BMI are able to obtain for more 'traditional' media services, such as television and terrestrial radio. For example, John LoFrumento, ASCAP's CEO, recently testified that he does not receive complaints from publishers regarding the rates ASCAP obtains from traditional media services. *In Re Petition of Pandora Media, Inc.*, __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014) (hereinafter "*In Re Pandora* Slip Op."); Trial Tr. (Jan. 23, 2014) at 289-90.

[4] *See* Paul Williams, Statement to the House Judiciary Committee, Music Licensing Under Title 17—Part Two, June 25, 2014. Because these consent decrees are long-standing, they have withstood the advent of numerous 'extraordinary evolutions' of the ways in which music is distributed and consumed. For example, the consent decrees were able to adapt to the adoption of broadcast television, cable television and satellite television, as well as cable radio and satellite radio. . The PROs and their publisher affiliates did not include any of these types of

This is just rhetoric. The publishers and the PROs are frustrated by the extent to which the decrees fulfill their purpose. More to the point, the PROs and publishers are unhappy because the consent decrees prevent them from implementing a scheme that has the purpose (and would have the effect) of raising prices across the board without regard to competitive constraints.

In the end, the catalyst for this consent decree review boils down to dissatisfaction among the two largest music publishers, namely Sony[5] and Universal, which are owned by even larger multinational media conglomerates, which themselves own the world's two largest record labels, with the *relative* fees Pandora pays to record labels.[6] These publishers are not arguing that their catalogs are significantly more valuable to Pandora than their catalogs are to traditional terrestrial or satellite radio. Rather, these publishers argue that it is 'unfair' that Pandora would pay so much *more* to the owners of the sound recordings that embody their musical works.[7]

These publishers have demonstrated no inclination to work with the sound recording copyright owners (which are controlled by the same corporate parent) to

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services in the partial withdrawals and continued to license these services at their historical rates. *See In re Pandora*, Trial Tr. (Jan. 23, 2014) at 345-46.

[5] *See* Ben Sisario, Deals to Split EMI Spur Scrutiny and Criticism, available at http://www.nytimes.com/2012/02/20/business/media/emi-consolidation-with-sony-and-universal-prompts-scrutiny-and-opposition html

[6] Ironically, the rates Pandora pays to record labels to publicly perform sound recordinds are themselves the subject of a compulsory license and judicial rate-setting; *see, e.g.,* National Music Publishers' Association Petition to Participate in the Copyright Royalty Board Proceeding, available at http://www.loc.gov/crb/proceedings/14-CRB-0001/NMPA.pdf.

[7] Evidence introduced during the recent rate-setting proceeding between ASCAP and Pandora revealed that an executive at a major publisher indicated that if Pandora were paying record labels 25% of revenue (the alternative fee structure under the Pureplay Webcaster license under which Pandora pays record labels for the public performance of sound recordings), the publishers would "probably be okay" with the rates Pandora was then paying ASCAP and BMI (i.e., approximately 4% of revenue). *In re Pandora*, Trial Tr. (Jan. 20, 2014) at 1087-1088.

reallocate the total royalties Pandora pays based on the relative values of each copyright owners' contribution to the creation of the music Pandora performs. Instead, these publishers and PROs have attempted to create sham 'withdrawals' from the PROs, use the enhanced market power these largest publishers have been allowed to accumulate under the current regulatory regime to obtain supracompetitive fees, and use those supracompetitive fees to obtain across-the-board increases for everyone. Simply put, they want the Department to endorse a new system that does not resemble a competitive market in any sense of the term. In a truly competitive market not distorted by the collective power of publishers acting in concert by and through the PROs, some publishers would inevitably suffer while others might benefit.[8] And now, if they do not get their way, these publishers have publicly threatened to withdraw entirely from ASCAP and BMI.[9]

The PROs and these publishers' unilateral efforts to weaken or eliminate the consent decrees demonstrate that the decrees continue to serve a critical pro-competitive purpose. The truth is that the consent decrees are just as important today as they were seventy years ago, if not more so. Without the protection the decrees provide, music users would be at the mercy of the PROs and the largest publishers, who now appear to control them. Pandora respectfully urges the

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[8] *See* Phil Galdston, Maria Schneider and David Wolfert, Why Songwriters (and Indie Publishers) Need the PROs, July 29, 2014 10:54 AM EDT (noting that, in the event of large publisher withdrawals from the PROs, "users like Pandora will demand to negotiate lower fees for smaller repertoires. As a result, those writers and independent publishers who remain with the PROs are likely to earn less.") (http://www.billboard.com/biz/articles/news/publishing/6193399/why-songwriters-and-indie-publishers-need-the-pros).

[9] *See* Sony Threatens to Bypass Licensers in Royalties Battle (Jul. 10, 2014), available at http://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html?_r=0; *see also* Statements of David Kokakis in the Transcript for the Copyright Office Los Angeles Roundtable (June 17, 2014) at 32-35.

Department to reject the proposals to modify the decrees, and provides responses to the Department's specific questions below.

I. Background

A. Pandora and the PROs

Pandora is an Internet radio service with a listener base of tens of millions of active users. As an active participant in the rate court process and a company that interacts frequently with the PROs and the major publishers, Pandora is well situated to provide comments on proposed modifications to the ASCAP and BMI consent decrees.

This review of the decrees should start with the obvious: the PROs possess enormous market power. Together, ASCAP and BMI control approximately ninety percent of the public performance rights in musical compositions.[10] Over the years, ASCAP and BMI have frequently competed with each other for songwriter members.[11] Because songwriters can only be members of one PRO, while music publishers almost always have catalogs in ASCAP and BMI (and SESAC)[12], the PROs typically do not "compete" for publishers. The PROs even less infrequently

[10] *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 79-80 (2nd Cir. 2012) ("ASCAP represents about half of the nation's composers and music publishers. . . [and] Broadcast Music, Inc. ('BMI') represents most of the remaining composers."). *See also* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, Sept. 4, 2000 at 6-7 ("ASCAP has in excess of eight million compositions in its repertory. These compositions comprise between 45 and 55 percent of the music performed in most venues. . . BMI has between four and five million compositions in its repertory, also comprising between 45 and 55 percent of the music performed in most venues.").

[11] For example, Neil Diamond and Bob Dylan, formerly ASCAP writers, moved to SESAC in 1995. Eagles members Glenn Frey and Don Henley switched from ASCAP to BMI in 1996. James Taylor and Joni Mitchell, formerly BMI writers, joined ASCAP in 1997.

[12] SESAC LLC is the smallest U.S. PRO and is not presently governed by a consent decree. Presently SESAC is the defendant in two separate antitrust lawsuits. *See Radio Music License Committee , Inc. v. SESAC LLC*, 12-cv-05807-CDJ (E.D. Pa.) and *Meredith Corp. v. SESAC LLC*, 09-cv-09177-PAE (SDNY).

compete with each other for licensees, as services such as Pandora typically require a license from all three PROs to operate.[13]

Although that lack of competition would be expected to yield the highest possible prices, the consent decrees have successfully constrained the PROs' market power. Key protections in the consent decrees include:

- Users' ability to obtain a blanket license upon request (the effective compulsory license provisions) (AFJ2 § VI; BMI Consent Decree §XIV);
- Non-exclusive grants of rights: PROs must allow individual member rights-holders to offer direct licenses to users (and to provide per-program and adjustable-fee blanket licenses as alternative license forms which facilitate such direct licensing activities) (AFJ2 §§ V-VIII; BMI Consent Decree § VIII);
- Users' ability to obtain "through to the audience" licenses (AFJ2 § V; BMI Consent Decree § IX);
- Transparency requirements (albeit weak) (AFJ2 §§ X, XII; BMI Consent Decree §§ VII, XI, XIII); and
- Users' ability to obtain a "reasonable" fee determination from the rate courts overseeing ASCAP and BMI in the absence of a negotiated agreement with a PRO. (AFJ2 § IX; BMI Consent Decree § XIV).

Without these protections, the PROs would be able to combine their market power – along with the threat of copyright infringement liability – to extract supracompetitive rates from licensees.

It is important to situate the consent decrees within the broader context of music licensing. Although the licensing of public performance rights takes place under the strictures of the consent decrees, compulsory statutory licensing regimes

[13] Because the PROs have repertories of copyrighted music that are exclusive of one another (expect for so-called 'split works' which are within both the ASCAP and BMI repertoire), Pandora must obtain a license from both ASCAP and BMI in order to perform all of the music on its service.

are commonplace in the broader music licensing space, including for certain non-interactive sound recording performance rights (and the making of related ephemeral phonorecords) and publishers' mechanical licensing rights for personal, non-commercial use.[14] Because copyright law is primarily intended to encourage the widest dissemination of creative works and licensees need broad access to music rights in order to operate their businesses, Congress has created mechanisms (compulsory licenses) to facilitate efficient licensing of copyrighted music.[15] If the ASCAP and BMI consent decrees had never been established, Congress almost certainly would have created a similar compulsory licensing regime for public performance rights in compositions. In this context, it is inconceivable that Congress and the Department would have enabled a licensing framework along the lines that the PROs and publishers are now urging: one in which the PROs would be free to license (or withhold licenses) in any manner they see fit. The PROs (and certain publishers) insistence that the decrees are "outdated" creatures from a bygone era ignores the reality that music rights historically have been subject to compulsory licensing structures of one form or another.[16]

The proposed modifications to the consent decrees may also create a (unintended) significant market inefficiency in the way music is currently licensed.

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[14] See, e.g., 17 U.S.C. §§ 112, 114, 115.

[15] *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and the useful Arts.'"); *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.).

[16] Moreover, as discussed in more detail below, any change to the process for licensing public performance rights should take into account effects on the broader music licensing market. The availability of other rights subject to statutory licensing regimes raises the question whether it is sound public policy for the Department to make changes to what amounts to just one part of a more complicated market. That is particularly true because Congress created the compulsory licensing regime for sound recordings against the broader backdrop of the consent decree *status quo* and has recently been conducting hearings into the music licensing marketplace.

Specifically, the licensing practice of publishers separating the right to make a sound recording (e.g., the right to make a reproduction of the musical work) from the right to perform the musical work embodied in the sound recording once it is made introduces the potential for an additional "hold-up" inefficiency into the market. Because the owner of the performance right in the musical work does not include this right of public performance in the reproduction license granted to the record label when a record label makes a sound recording, users like Pandora must deal with two parties instead of one. Said differently, if music publishers granted to record labels *both* the right to reproduce *and* the right to perform its musical works, services such as Pandora could obtain all the rights necessary to operate its service solely from the record labels. This is the same basic problem dealt with in the "source" or "through-to-the-audience" license mandated for licensing music in motion pictures.[17]

Because sound recording performance fees and PRO fees are set separately, the result is a ratcheting effect where digital media services are in the middle of a tug-of-war between rights owners (many of whom are under common ownership).[18] ASCAP's and BMI's otherwise economically unjustifiable insistence that digital music services should pay higher rates is an example of this ratcheting effect. In fact, the PROs and certain publishers have freely admitted, even under oath, that

[17] Courts have characterized similar practices as improperly extending the copyright monopoly, *see e.g.*, *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 848-50 (D. Minn. 1948).
[18] *In re Pandora Media, Inc.*, Slip Op. at 62-63.

the genesis of their recent campaign to raise rates for new media arises from "envy" over the rates paid for sound recording performance rights.[19]

B. The major publishers and the partial withdrawals

When the consent decrees were first created, the publishers had not accumulated the market shares they have today. BMI's market share when it entered its consent decree was less than Sony (which now controls the EMI catalogs as well), Universal, and Warner-Chappell, the third major publisher, which is owned by Warner Music Group.[20]

Today, the landscape has changed. Under the combined compulsory licensing regime of Section 115 of the Copyright Act and the ASCAP and BMI consent decrees, major publishers like Sony and Universal have consolidated publishing rights that surely would have raised antitrust concerns absent the consent decrees and statutory compulsory licensing protections to users. Even with these protections, however, smaller publishers and songwriters have felt threatened by this "concentration of the publishing industry."[21]

Dissatisfied with the consent decrees — particularly the effective compulsory license and rate-setting provisions — but unwilling to abandon joint licensing entirely, certain publishers invented the concept of a "partial withdrawal."[22] As Judge Cote explained, "[t]he publishers believed that AFJ2 stood in the way of their

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[19] *Id.* at 120-21.
[20] *See* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, Sept. 4, 2000 at 16.
[21] *See In re Pandora*, Slip Op. at 42-43 (discussing songwriter fears that withdrawn publishers would be less accountable and transparent when administering their rights).
[22] *Id.* at 41. It should be noted that never in the 100 year history of ASCAP or 75 year history of BMI have publishers sought to "partially withdraw" rights from the PROs.

closing" the gap between rates for sound recording rights and public performance rights.[23] "They believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publicly perform a composition."[24] The publishers sold skeptical songwriters on the partial withdrawal idea by promising that "if the major publishers could get higher license rates by direct negotiations with new media companies outside of ASCAP then those rates could be used in rate court litigation to raise the ASCAP license fees."[25] In reality, the selective "new-media" withdrawals were intended to let the publishers target users who could credibly be threatened with copyright infringement damages that could put them out of business, with the result being "hold-up" prices that could then be used to recalibrate the consent decree rates across the board. This threat was even more credible because ASCAP (and BMI) agreed to continue to provide administrative services for the partially withdrawn publishers (and, in the case of ASCAP, at discounted rates which ASCAP's other members effectively subsidized), thereby eliminating any pain the publishers might have experienced by withdrawing from the PROs.[26]

Pandora's experience vividly confirms the anticompetitive results of the partial withdrawals. Predictably, Sony and Universal leveraged the upheaval

[23] *Id.*
[24] *Id.*
[25] *Id.* at 45.
[26] *Id.* at 49 ("the Administration Agreements meant that the withdrawing publishers faced little downside in withdrawing new media rights. They could continue to enjoy the benefits of having ASCAP perform burdensome back-office tasks while licensing internet music entities directly.").

created by their sudden new-media withdrawals from ASCAP – including the threat of massive-scale copyright infringement, and the vacuum created by the sudden absence of consent decree protections for affected PRO interim licensees like Pandora – to establish dramatic, short-term price increases.[27] Then, according to plan, ASCAP tried to use those price increases to benchmark a higher rate for its blanket license.

Judge Cote's opinion describes this anticompetitive behavior in detail, including the following. Sony began the negotiations with Pandora with a "not-too-veiled threat."[28] In response, Pandora repeatedly requested a list of Sony's works so that Pandora could seek to remove them from its service if the parties failed to reach agreement.[29] Despite having such "a list readily at hand," Sony refused to provide it.[30] As Judge Cote found, "Sony decided quite deliberately to withhold from Pandora the information Pandora needed to strengthen its hand in its negotiations with Sony."[31] Without a list of Sony's works, Pandora faced an impossible dilemma: either shut down its service entirely to avoid the risk of crippling copyright infringement liability or agree to significant price hikes in a direct license with Sony. Pandora chose the latter.

The Universal negotiations were to the same effect. Universal's then-CEO Zach Horowitz began the negotiations by "uttering what [Pandora] took to be an

[27] *Id.* at 96-101.
[28] *Id.* at 62.
[29] *Id.* at 64-66.
[30] *Id.* at 66.
[31] *Id.*

implicit threat."[32] Horowitz then proposed an industry-wide rate of eight percent of revenue, which he thought was "reasonable, particularly in light of what Pandora was paying to the record labels for sound recording rights."[33] Pandora's attorney was "aghast. He told Horowitz that in his 20 years in the music industry he had never encountered a situation in which a licensor suggested that rates should effectively double overnight, going from 4% to 8%."[34] Universal ultimately provided Pandora with a list of its works, but required Pandora to sign a confidentiality agreement that prevented "it from using the list to remove the [Universal] works from its service."[35] So Pandora faced the same impossible choice: either shut down its service altogether or agree to a dramatic price hikes. As with Sony, Pandora chose the latter.

All the while, Sony and Universal interfered with Pandora's efforts to conclude a license with ASCAP short of litigation. In her decision determining that the deals negotiated between Pandora and certain withdrawing publishers could not serve as valid benchmarks for Pandora's ASCAP royalty rate, Judge Cote found that "the evidence at trial revealed troubling coordination between Sony, [Universal], and ASCAP, which implicates a core antitrust concern underlying AFJ2[.]"[36] In particular, the evidence showed that:

- "Sony and [Universal] justified their withdrawal of new media rights from ASCAP by promising to create higher benchmarks for a Pandora-ASCAP license and purposefully set out to do just that";

[32] *Id.* at 74.
[33] *Id.* at 75.
[34] *Id.* at 75-76.
[35] *Id.* at 77.
[36] *Id.* at 97.

- "[Univeral] pressured ASCAP to reject the Pandora license ASCAP's executives had negotiated, and Sony threatened to sue ASCAP if it entered into a license with Pandora";

- "ASCAP refused to provide Pandora with the list of Sony works without Sony's consent, which Sony refused to give"; and

- "despite executing a confidentiality agreement with Pandora, Sony made sure that [Universal] learned of all of the critical terms of the Sony-Pandora license" and "ASCAP expected to learn the terms of any direct license that any music publisher negotiated with Pandora."[37]

In sum, "ASCAP, Sony, and [Universal] did not act as if they were competitors with each other in their negotiations with Pandora," which meant that "the very considerable market power that each of them holds individually was magnified."[38]

Judge Cote ultimately held that ASCAP's decree did not permit partial withdrawals and that ASCAP members' works would continue to be available to all licensees upon application. Nevertheless, ASCAP tried to use the Sony and Universal direct licenses as benchmarks in the rate-setting proceeding with Pandora, which licenses Judge Cote rejected.

Meanwhile, the major publishers attempted to orchestrate similar new-media withdrawals with BMI. Like Judge Cote had determined of the ASCAP decree, Judge Stanton held that BMI's decree did not permit such partial withdrawals. In his opinion, however, Judge Stanton went a step further, declaring that the partial withdrawals would in fact operate as full withdrawals.[39] The major publishers, with BMI's assistance, created similar upheaval, uncertainty, and short-term leverage by

[37] *Id.* at 97-98.
[38] *Id.* at 112.
[39] *Broadcast Music, Inc. v. Pandora Media, Inc.*, 13-cv-4037 Order and Op. at 11-12 (Dec. 18, 2013).

purporting to completely withdraw from BMI in late December 2013. Certain publishers then negotiated direct agreements with Pandora, only to "rejoin" BMI days later. By performing that maneuver, the publishers were able to circumvent Judge Stanton's ruling that partial withdrawals are impermissible and extract supracompetitive prices from Pandora once again. Unsurprisingly, BMI has openly discussed its intent to rely on these flawed licenses as benchmarks in its proceedings against Pandora.[40]

Pandora's experiences demonstrate that the complaints about the consent decrees and the partial license grant proposals are not meant to promote more competitive pricing, but rather to circumvent the rate court check on unreasonable license fees.

II. Do the consent decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Are there provisions that are ineffective in protecting competition?

A. The consent decrees continue to serve critical pro-competitive purposes.

The competitive concerns arising from the market power the PROs have acquired through the aggregation of public performance rights held by member songwriters and publishers are as real and significant now as they were when the

[40] *See* BMI on Rights Withdrawal, an Open Letter to the Music Industry, by Del Bryant (Feb. 12, 2013), available at http://www.billboard.com/biz/articles/news/legal-and-management/1538785/bmi-on-rights-withdrawal-an-open-letter-to-the-music. ("We have already cited these marketplace agreements [from Sony/ATV and EMI] in our negotiations with our licensees and we will encourage our Rate Court to consider them as a new indicator of market value."). *See also*, *Broadcast Music, Inc. v. Pandora Media, Inc.*, Pet. for the Determination of Reasonable License Fees (Dkt. 31) at 14 ("The rate quoted by BMI to Pandora is reasonable in light of the several free market licenses negotiated directly between withdrawn publishers including: (i) the license agreement recently negotiated between Sony and Pandora; (ii) the license agreement between EMI and Pandora; (iii) any other agreements between a publisher which has withdrawn its digital rights from BMI's catalog that may be negotiated with Pandora prior to the finalization of the license at issue. . . ").

decrees were established. The PROs are ongoing collaborations among competitors, so the suspect conduct persists. This is not a case of a consent decree proscribing conduct in which the defendant no longer engages. The obligations and restrictions that the consent decrees impose on ASCAP and BMI are still necessary to ensure that the PROs offer the procompetitive user benefits that justify their existence. Indeed, over the years, conditions have become more conducive to anticompetitive behavior. Market concentration has increased significantly among music publishers, and opportunities for exchanging and acting on competitively sensitive information have increased and have become entrenched.[41]

Pandora's experience in the recent ASCAP case provides strong evidence that the decrees are serving their intended purposes. Judge Cote's 136-page decision makes evident the importance of the consent decrees in constraining the market power of ASCAP and BMI.[42] Importantly, as Judge Cote found, the publishers and PROs have demonstrated a propensity toward coordinated anticompetitive behavior.

The PROs and the publishers repeatedly insist that reform is necessary because for some unspecified reason digital media transmissions of musical works warrant higher rates. The PROs and publishers never explain *why* digital media services should be disadvantaged relative to, for example, their terrestrial radio competitors. As Judge Cote held and the Second Circuit affirmed in the earlier

[41] *In re Pandora*, Slip Op. at 42-43, 96-98.
[42] The recent SESAC antitrust cases show that antitrust concerns can arise even with a PRO that has a much smaller share of available works than ASCAP, BMI, or even the major publishers. *See RMCL v. SESAC*, Report and Recommendation, 12-cv-5807 (Dec. 23, 2013).

MobiTV litigation, PRO licenses traditionally have not and should not discriminate against licensees based on the mode of distribution by which the licensee transmits content to users.[43] Whatever the mode of distribution of particular types of content (whether audio/radio content or audiovisual content), the PROs contribute the same input; i.e., a blanket license to perform musical works in its repertoire. Consumers may prefer receiving content through one mode of distribution over another, but the technology enabling such preferred mode of distribution is supplied by the service, not the PRO. If, for example, Internet radio is inherently more or less valuable than terrestrial radio in terms of generating revenue, percentage-of-revenue license fees will naturally reflect that since the royalty payment will grow on a linear basis with the revenue base. There is no reason to charge media companies engaged in the distribution of the same or similar forms of programming discriminatory percentage-of-revenue rates based on the manner in which their programming services reach the consumer.

Indeed, there have been no changes in "how music is delivered to and experienced by listeners" that bear on the "competitive concerns arising from . . . the aggregation of music performance rights held by" ASCAP and BMI.[44] The advent of "new" digital media has increased music distribution; e.g., in the context of radio programming consumers are no longer limited to AM/FM broadcast radio and they can hear music on more devices and enjoy wider programming options. But non-interactive digital media providers (like Pandora) operate for all intents and

[43] *In re Pandora*, Slip Op. at 124.
[44] U.S. Department of Justice, Antitrust Consent Decree Review, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html

purposes like terrestrial and satellite radio – they select and play sound recordings using formulas that will attract listeners in ways that will support advertising and user subscriptions and generate revenue in the same way that revenue is generated by terrestrial and satellite radio. In fact, new media providers represent a more fragmented base of providers than terrestrial radio (which negotiates with PROs on an industry wide basis via the RMLC) or satellite radio, with a single provider (Sirius XM), implying that new media firms have less bargaining power in dealing with licensors and that publishers would incur higher transaction costs dealing directly with new media firms than they would dealing directly with the RMLC or Sirius XM, which are not targets of the partial withdrawals at issue here.

In the end, the Department should not lose sight of the realities of the marketplace. This is not a world of atomistic competition, where individual rights holders negotiate with users in a competitive marketplace.[45] The PROs are duopolies that control the marketplace for blanket licenses to their respective repertories, which have over time grown dramatically in size, and the large publishers such as Sony and Universal can exercise enormous market power.

III. Should the Consent Decrees be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others? If such partial or limited grants of licensing rights to ASCAP and BMI are allowed, should there be limits on how such grants are structured?

As Pandora's experience vividly illustrates, partial withdrawals should not be permitted. The partial withdrawals were designed to enable publishers with enormous market power to selectively participate in PROs, evading the compulsory

[45] *See In re Pandora*, Slip Op. at 102.

licensing and rate court protections for targeted licensees.[46] For a limited subset of licensees, the partial withdrawals remove the decree protections designed to mitigate the anticompetitive effects of collective licensing by the PROs without providing any mechanisms to ensure a competitive environment. This harm is compounded by the fact that the long history of the availability of public performance rights from the PROs has allowed publisher market shares to balloon without much scrutiny. Allowing for *en masse* withdrawal of over 50% of the works available via the PROs (which would be the case if Sony and Universal were to withdraw from either ASCAP or BMI) threatens to create short-term upheaval that, if unchecked, could cause irreparable harm to existing new-media entities.[47]

A. From an antitrust perspective, partial withdrawals are anti-competitive

Pandora recognizes that partial withdrawals may be appealing in theory. That is because, in the abstract, partially withdrawn publishers should compete with each other (not only directly, but also through competition with the very PROs they would still belong to with respect to other users). But reality belies theory. In the real world, partial or limited grants of licensing rights to ASCAP and BMI will not create competition, competitive rates, or valid benchmarks for blanket license rates, as has been suggested (without support) by the PROs and publishers. Indeed, Pandora's experience with the PROs' current efforts to permit "partial withdrawals"

[46] *Id.* at 97–99.

[47] That upheaval would be particularly acute because music publishing rights are often split between two or more songwriters or publishers, making it difficult to identify who holds all of the performing rights. The performing rights in sound recordings, on the other hand, typically are not split between multiple licensors but are controlled by a single record label.

demonstrates that their purpose is to raise prices and not to create or foster competition.

There are a number of reasons why the consent decrees should not be modified to permit partial license grants. *First*, continued publisher involvement in a PRO for some users but not others is a recipe for coordination. Both PROs are operated for benefit the publishers and songwriters, not users. In such a situation, and as Pandora's experience shows, it is unrealistic to think that the PRO will compete against the publishers. The testimony of ASCAP's CEO was that he did not even consider the possibility of charging lower prices than those obtained by withdrawing publishers in an attempt to increase revenues for ASCAP by driving higher amounts of usage of its remaining repertory.[48] Partial withdrawals thus allow publishers to escape the constraints of the rate court without replacing it with the constraints of competition.[49]

It is telling that not all publishers are in favor of partial license grants (or would exercise such a right if given to them). Indeed, Pandora's experience is that some publishers threatened to withdraw but ultimately did not, and those that did withdraw re-entered the PROs after they signed direct deals with Pandora. Presumably, many publishers believed that they would do worse under a regime of partial license grants.[50] The scheme the publishers and the PROs worked out on their own allowed publishers to opt out or not, with the expectation (as publicly

[48] *In re Pandora*, Trial Tr. (Jan. 23, 2014) at 246-47.

[4949] This is particularly true where PROs and music publishers insist on most-favored-nations provisions ("MFNs"), which they sometimes refer to as "schmuck insurance." PROs will often demand MFNs not only against other PROs, but against individual publishers.

[50] *See. e.g.,* Council of Music Creators, Comment to Copyright Royalty Board Notice of Inquiry Regarding Music Licensing.

stated by industry leaders) that all publishers would benefit from higher blanket license prices that would be benchmarked to license agreements negotiated by the few largest publishers who sought to exercise partial withdrawals.

Second, a publisher's continued involvement in the PRO, or the ability to partially withdraw and rejoin at will, creates a perverse incentive for PROs not to compete with withdrawing publishers and instead to use withdrawn publisher rates as benchmarks in rate court. [51] It makes no economic sense to apply the rates that the large publishers can extract through the exercise of their market power to all of ASCAP or BMI. That would give the remaining and, likely smaller, publishers the benefit of the prices obtained by the largest publishers. That would be economically backwards. If larger publishers get more money on the theory that their repertory is more valuable, the smaller publishers should get less money.

In its comments to the Copyright Office's Notice of Inquiry Regarding Music Licensing, ASCAP proposed amendments that would, *inter alia*, among other things, "establish[ ] 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[.]"[52] In other words, ASCAP seeks through the proposed evidentiary presumption to achieve equality of outcomes for withdrawing publishers and those catalogs left for licensing by ASCAP. The courts have consistently held that such an attempt to achieve

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[51] *See* Del R. Bryant, BMI on Rights Withdrawal: an Open Letter to the Music Industry, Feb. 13, 2013 ("We have already cited these marketplace agreements in our negotiations with our licensees and we will encourage our Rate Court to consider them as a new indicator of market value."), http://www.bmi.com/news/entry/bmi_on_rights_withdrawal_an_open_letter_to_the_music_industry.

[52] *See* Comments of ASCAP (May 23, 2014) at 4.

equality of outcomes, when done through private agreements, comprises a *per se* unlawful price-fixing conspiracy.[53]

Rather than carry an evidentiary presumption, the rate courts should continue to weigh the evidence surrounding direct licenses. For example, as Judge Cote's opinion carefully explains, the direct licenses that Sony and Universal negotiated with Pandora did not reflect fair market value because the circumstances surrounding the negotiations were not indicative of a competitive market. In particular, Judge Cote found that Pandora was effectively compelled to transact.[54] Her conclusion noted that this was in part the result of asymmetries in the information available to the negotiating parties, as exemplified by Sony and Universal depriving Pandora of repertory information during negotiations. For these and other reasons recounted in her decision after trial, Judge Cote declined to rely on those direct licenses as benchmarks for rate-setting.[55] On the other hand, the evidence demonstrated that EMI[56] did not seek to leverage its withdrawal or the threat of infringement in the same manner as Sony and Universal. And the rate in the EMI agreement, which was the same rate as Pandora's prior ASCAP agreement, became the rate set by Judge Cote.

For these reasons, among others, the Department should reject the PROs' proposal to adopt an "evidentiary presumption" that all direct licenses entered into by publishers "who have withdrawn rights from a PRO" reflect fair market value.

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[53] *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003) ("Defendants' concern for the weakest among them has a quaint Rawlsian charm to it, but we find it hard to square with the competitive philosophy of our antitrust laws.").
[54] *In re Pandora* Slip Op. at 101.
[55] *Id.* at 97–111.
[56] Pandora executed a direct license with EMI for its ASCAP repertoire in 2012, before Sony acquired EMI.

Third, permitting partial withdrawals would impose significant costs on users and the Department. Some examples are set out below:

Users. It is self-evident that permitting publishers to make partial license grants to the PROs would impose significant new costs on users. Users would need to negotiate licenses from more parties. Moreover, although their investments were made in the context of compulsory music licensing, affected users would be subject to the threat of injunctions and statutory damages in dealing with the subset of rights holders who would benefit from partial withdrawals from the PRO blanket licenses. In addition, users would be subject to entrenched licensing practices that have shifted transaction costs from copyright owners to users. For example, the practice of multiple copyright owners each agreeing to license only their share of a single work (contrary to the normal operation of copyright law as embodied in the consent decrees and the PROs' longstanding membership agreements) could require a user to obtain a license at a different negotiated rate from each co-publisher. In a more competitive market, a user could take a license from one of the copyright owners and let that owner deal with allocating the royalties among the other co-owners.

Similarly, the entrenched practice of requiring services to directly secure public performance rights from music publishers when sound recording companies already secure from music publishers reproduction and distribution rights for the sale of sound recordings requires a service such as Pandora to obtain a license at a separately determined rate from both the record label and the music publisher.

Under the *status quo*, the adverse impact of this fragmentation has been ameliorated by the compulsory blanket license system; i.e., Section 114 of the Copyright Act for sound recording performance rights and the ASCAP and BMI consent decrees for musical work performance rights. Looking at the market from a broader perspective, changing one aspect of the U.S. music licensing regime after a long history of business practices and legislation that developed under that regime would impose serious adverse consequences on services, with no discernible benefit to consumers.

The Department. When a publisher grants only partial licensing rights to a PRO, the publisher is still part of the decision-making process at, and will be receiving distributions from, the PRO. As a result, there may be opportunities for publishers and PROs to co-mingle or otherwise adjust the PROs' internal rules in ways that can be used to frustrate competition. The Department will, therefore, have to take measures to ensure that such co-mingling does not take place.

It should be noted that in AFJ2 the Department abandoned efforts to monitor how ASCAP divides profits among its members, claiming that it had limited ability to untangle how ASCAP accounted for its distributions.[57] Thus, modifying the Decrees to permit partial license grants would require the Department to exercise greater oversight than is currently required over an aspect of PRO operations that the Department is admittedly ill-equipped to police.

[57] *See* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, Sept. 4, 2000, at 40.

In sum, the undefined proposal of allowing "rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others" is so fraught with anticompetitive risk that it should not be permitted. The only policy reason to permit such a change to the consent decrees is to inject competition into what has been a regulated market. As detailed above, the partial withdrawal of rights from PROs would not increase competition, either among publishers or between publishers and PROs.

Moreover, insofar as publishers and PROs assert that partial withdrawals are necessary to facilitate direct licensing transactions, that is simply not the case. There have been numerous instances of direct licensing within the current consent decree framework, ranging from those that were the subject of the *DMX* case to the many direct licenses that have developed in the local television and cable television marketplaces in conjunction with per-program licensing.[58]

Beyond the macro problem of altering one aspect of a more complicated overall market, there are many reasons why letting publishers make partial license grants to PROs is problematic from an antitrust standpoint. The conditions for true competition do not exist. Publisher concentration has increased significantly. The current PRO structure encourages the exchange of competitively sensitive information and coordinated action among PRO member publishers. From the perspective of what the PROs are set up to do (grant blanket/per-program and

[58] *See, e.g., Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32 (2d. Cir. 2012); *United States v. ASCAP (Buffalo Broadcasting Co.)*, 1993-1 Trade Cas. ¶70,153 (S.D.N.Y. 1993) ("*Buffalo Broadcasting I*"); *United States v. ASCAP (Capital Cities/ABC)*, 157 F.R.D. 173 (S.D.N.Y. 1994) ("*Capital Cities/ABC II*"); *United States v. ASCAP (Capital Cities/ABC)*, 831 F.Supp. 137 (S.D.N.Y. 1993) ("*Capital Cities/ABC I*"); *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1985), *cert. denied*, 469 U.S. 1211 (1985) ("*Buffalo Broadcasting II*").

AFBL licenses covering *all* works in their repertories), such information sharing and collective action may be sensible; but it cannot be permitted among the same publishers where the purpose of "partial" licensing is assertedly to foster competition.

As this discussion shows, the PROs' and the publishers' proposal that the consent decrees "sunset" after ten years should similarly be rejected. The consent decrees continue to serve critical pro-competitive purposes, and there is no reason to install a time bomb inside them. For so long as the anticompetitive behavior (actual or potential) that is regulated by the consent decrees persists, the consent decrees should remain in full force and effect.

IV. What, if any, modifications to the Consent Decrees would enhance competition and efficiency?

For the reasons cited above, the Department should reject the requests of the PROs and major publishers to modify the consent decrees because such requests would not enhance competition or efficiency.

V. Do differences between the two Consent Decrees adversely affect competition?

In a perfect world, the material terms of the two consent decrees would be identical. Although the terms of the decrees vary, in Pandora's experience, these differences have not resulted in materially different outcomes. For example, although the remedy awarded by Judge Stanton was different from the remedy awarded by Judge Cote, both courts concluded that publishers are not entitled to partially withdraw from the PROs. Recent history suggests that, even though set by different judges, similar rates are obtained by ASCAP and BMI in rate-setting

proceedings—as they should be. If the Department determines that the consent decrees should be modified, then the language of the decrees should be harmonized.

VI. Should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration? What procedures should be considered to expedite resolution of fee disputes? When should the payment of interim fees begin and how should they be set?

Pandora shares the PROs' concerns about the costs of rate court litigation. While the PROs complain of having to litigate with multiple licensees, services such as Pandora often have to litigate rate settings against both ASCAP and BMI. That said, all but one of the rate court cases since 2005 that ASCAP bemoans in its Comments to the Copyright Office were initiated by ASCAP or BMI. Indeed, over the long history of the rate courts, few rate court cases have gone to trial. The rate courts fulfill their intended purpose and have served the PRO and license community well. Their decisions are reliable and create precedents upon which parties can rely; and the cost of litigation encourages settlement.

Abolishing the rate courts, on the other hand, would unjustifiably strengthen the PROs' hand and prejudice applicants. As Pandora has learned from its own experiences, the PROs are in a demonstrably better position at the beginning of any rate case dispute. The PRO knows far more about the marketplace than the licensee because the PRO has access to the details of all its agreements with myriad licensees. The PRO may also know much about the applicant's business, which is often publicly available (as is surely the case with Pandora). The licensee, on the other hand, knows only the terms of the agreements to which it is a party. This huge information deficit requires federal court supervision and application of the

federal rules of civil procedure and evidence (not typical arbitration rules) to cure. It is unlikely that Pandora could have unearthed the critical evidence upon which Judge Cote relied in the kind of short-form arbitration that the PROs now advocate.

It is also noteworthy that Judge Cote repeatedly invited ASCAP to propose ideas to reduce the cost of rate court litigation. We are not aware of any proposals ASCAP has made to Judge Cote on this front. In Pandora's view, every efficiency of private arbitration that ASCAP cites in its Copyright Office Comments could be accomplished via streamlined procedures in the rate court. That should be the focus of discussion and dialog, as Judge Cote has invited. Elimination of the federal rules and principles of *stare decisis*, to the contrary, would be a huge setback to the licensee community.

VII. How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?

Pandora submits that the existing transparency requirements adversely affect competition because they are too weak. Transparency is key to a competitive marketplace for performance rights. The Department need look no further than Judge Cote's decision to understand why. Her decision underscores how publishers (and ASCAP) took advantage of the lack of transparency regarding ownership of publishing rights. As explained earlier, Sony and Universal capitalized on Pandora's lack of information about the works in their catalogs. Because Pandora could not identify who owned which works, it faced the dilemma of either shutting down entirely or agreeing to significant price increases.

To solve this problem, the consent decrees should require that PROs post information to the public on a searchable basis in commercially usable formats; e.g., real-time, application programming interface-enabled and searchable work-by-work, publisher-by-publisher, writer-by-writer, and also available in bulk. Both the ASCAP and BMI publicly available databases include information identifying the recording artist(s) associated with the sound recording(s) embodying a musical work. This information is critically important to services such as Pandora and should be included whenever available. This would enable the user community to more readily determine (i) who owns/controls the works they may wish to license and (ii) what works (and sound recordings in which they are embedded) they must avoid using to avoid infringement claims if they do not wish to accept the terms offered by a publisher/writer whose works are not available through a PRO (*e.g.,* after a PRO "withdrawal").

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CONCLUSION

Pandora supports the Department in its review of the ASCAP and BMI consent decrees. We look forward to working with the Department, along with other stakeholders and interested parties, the Copyright Office and the House Judiciary Committee's Subcommittee on Intellectual Property, on the important issues surrounding music licensing.

Respectfully submitted,

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