Statement of Christopher S. Harrison on Behalf of Pandora Media, Inc.

Before the

U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights

How Much for a Song?: The Antitrust Decrees that Govern the Market for Music

March 10, 2015

Chairman Lee, Ranking Member Klobuchar, and distinguished members of the Subcommittee.

Thank you for inviting me to testify. My name is Christopher Harrison, and I am the Vice-President, Business Affairs at Pandora Media, Inc. The mission of Pandora and our more than 1400 employees is to unleash the infinite power of music by being the effortless source of personalized music enjoyment and discovery for our 80+ million listeners.

Summary

Where others may see a music industry in turmoil, Pandora sees abundant opportunities for new leadership. We are helping to create a music industry that benefits the entire ecosystem. We do this by making the enjoyment of music more effortless, personal, and rich with discovery for listeners, while simultaneously giving music-makers more resources and information for connecting with fans. Just as importantly, we are a significant new revenue stream for music makers, incurring nearly $450 million in royalties in 2014 alone and having paid over $1.2B in royalties since we launched in 2005.

Key to securing that bright future for all is putting an end to the short-sighted and misguided zero sum dialogue that sometimes permeates the music industry. Let me be clear: Pandora believes it is essential for all constituents in the music ecosystem to work together to find win-win-win solutions that benefit listeners, music makers, and distributors alike. We are eager to work constructively with all involved to make that happen. Creating the thriving industry we all desire requires a market that is open, transparent and competitive.

Unfortunately, there are a small but significant number of obstacles that threaten this future and require the attention of this Subcommittee and other policymakers. Among the most significant obstacles is an alarming lack of transparency. There is no authoritative database of

copyright ownership information to which a service such as Pandora could turn if it had to license directly these millions of copyrights owned by tens of thousands of copyright owners. Those databases that are available (e.g., ASCAP, BMI and some music publishers maintain online databases) can only be searched on a song-by-song basis and often contain conflicting information. In order to foster greater competition, we recommend the creation of a single, publicly available, database of record that would house all relevant music copyright ownership information. By enabling services to quickly ascertain who owns which rights to a work, a single database of record would also enable services to identify, on a catalog-by-catalog basis, the owners of the songs they perform, which would encourage true competition among copyright owners for distribution on digital platforms. While the transparency provided by such a database would mitigate the anticompetitive behavior Pandora recently experienced, transparency alone is a necessary, but not sufficient, solution to the problems that Pandora has faced over the past few years.

I. Pandora and Licensing Musical Works Through PROs

Launched in 2005, Pandora is the most popular Internet radio service in the United States. Over eighty million people actively listen to Pandora each month, where they enjoy the music of more than 100,000 recording artists, 80% of which are not performed on terrestrial radio.

Pandora achieved this success by investing heavily in what we call the Music Genome Project, a sophisticated taxonomy of musical information.[1] For 15 years our trained music analysts have been manually cataloging songs along up to 450 distinct musical characteristics per recording to power Pandora's service. Our large team of data scientists has similarly invested years in developing and perfecting cutting edge algorithms to optimize our song selection. Our listeners can create stations based upon a "seed" that is either an artist name or song title, and the station will deliver a stream of music that is based upon that original seed. We also allow listeners to click "thumbs up" or "thumbs down" when listening to a particular song, and we use individual feedback and the collective feedback amassed from over 50 billion responses to further refine the song selection for listeners. The result is a radio experience that responds to an individual's tastes.

[1] *See* About the Music Genome Project, *available at* http://www.pandora.com/about/mgp.

Like all radio services, Pandora must secure copyright licenses in order to operate. Among the rights Pandora must secure is the right to publicly perform musical works. Authors and composers create musical works, with the rights typically assigned to music publishers, who further authorize the PROs to license performance rights. These PROs aggregate the rights to works from hundreds of thousands of writers and publishers, and then offer "one stop" licensing of public performance rights for a wide variety of uses, such as for radio, television and in hundreds of thousands of commercial locations, including offices, schools, bars, restaurants, gyms, etc.

Pandora supports the critical role that PROs play to support the music ecosystem. The PROs benefit songwriters and publishers by saving them the administrative headache of licensing the many thousands of licensees directly. The PROs also benefit licensees such as Pandora by providing an efficient means of securing performance licenses to millions of works through a single transaction. But the efficiency of the PROs carries risks. In aggregating the rights to otherwise competing catalogs of works under a single umbrella, the PROs create a significant risk of achieving supra-competitive prices. To ameliorate the risk of above-market pricing, both ASCAP and BMI operate under consent decrees that they entered into to resolve antitrust charges leveled by the Department of Justice in the 1940s. While the decrees have been subject to some modifications, the core provisions of the decrees have remained in place because the antitrust risks inherent in the PRO business model persist even after decades of DOJ oversight.

II. Marketplace Consolidation in Music Publishing

An open, transparent and competitive music marketplace cannot exist without the continuation of a sensible and efficient legal framework to promote competition and prevent market abuses. One key feature of this legal framework is the subject of this hearing: preventing anti-competitive behavior through the enforcement mechanism of consent decrees. I thank the Subcommittee for reviewing the ASCAP and BMI consent decrees that provide essential protections and are integral to forging this bright future. While we are open to sensible updates to the consent decrees, any modification must ensure a vibrantly competitive market characterized by independent pricing activity, which the record evidence demonstrates does not exist at this time.

During your review of the decrees, I believe that you will find that excessive consolidation among publishers and coordinated activity among PROs and publishers severely harms competition, discourages new entrants into the music distribution business, and ultimately diminishes access to diverse voices and music for the tens of millions of Americans that listen to Pandora, as well as other internet radio services every month.

Over the past 20 years both the House and Senate Judiciary Committees have devoted significant time and effort to examining the importance of copyright protections in the music licensing space. This hearing is one of the few that will focus on the competitive health (or glaring lack thereof) of the music rights licensing marketplace. Pandora welcomes this revived interest in antitrust scrutiny because we have arrived at a critical crossroad that will have a dramatic impact on music distributors, users and ultimately, consumers.

As this hearing takes place, the largest music publishers and PROs demand changes to the very antitrust consent decrees designed to forestall their well-documented anticompetitive conduct. In the past year, four different federal district court judges found evidence of the same egregious misconduct that gave rise to the original consent orders over 70 years ago:

- In December 2013, in the rate setting involving Pandora and BMI, Federal District Court Judge Louis Stanton found that music publishers attempts to deny a license to Pandora violated BMI's consent decree: "BMI cannot combine with [music publishers] by holding in its repertory compositions that come with an invitation to a boycott attached."

- Two different federal District Court judges found sufficient evidence that SESAC, another PRO that does not operate under a consent decree, engaged in monopolistic behavior and likely violated the Sherman Antitrust Act.

- In a rate court case involving Pandora and ASCAP, federal District Court Judge Denise Cote found: "the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying [the ASCAP consent decree, as amended]."

The Department of Justice has opened its own investigation into the conduct of the PROs and the music publishers as well as the appropriateness of modifying the consent decrees. Pandora welcomes the Department of Justice's review of both the ASCAP and BMI consent decrees as well as its investigation into the anticompetitive behavior of the music publishers and the PROs in their dealings with digital music services such as Pandora. This Subcommittee's effort in this regard provides a critical oversight function to ensure that the marketplace for music licensing is open, transparent and competitive.

The sort of anticompetitive behavior found by these federal district court judges has long been condemned as unlawful under the Sherman Act, for our economic system demands that competitors actually compete, not collude to increase prices. Incredibly, the publishers and PROs now demand the elimination of these rules so that they can be *rewarded* for their conduct by having the consent decrees amended to gut many of their core protections. Pandora believes this demand, if accepted, would seriously harm competition by allowing anticompetitive behavior to go unchecked, permitting publishers and PROs to artificially inflate licensing rates, and ultimately harm consumers by degrading music services and increasing costs for access to music.[2] Moreover, Pandora believes that industry practices that have become ingrained over the years make it likely that the kind of anticompetitive behavior found in the four decisions that I cited will be repeated.

III. The Role of the Consent Decrees

The consent decrees are in place to provide essential protections – supported by federal court enforcement authority – to all players in the music licensing space from the collective power of the PROs and their publisher members. In brief, they: require the PROs to provide licenses to willing licensees on non-discriminatory terms; ensure that the songwriters and

[2] The partial withdrawals proposal may even harm songwriters by increasing large publishers' leverage over them as well as over users. *See* Songwriters Guild of America, Inc., "Response of the Songwriters Guild of America, Inc. to the Solicitation of Public Comments by the United States Department of Justice Regarding the Question of the Continued Efficacy of the Consent Decrees to Which the Performing Rights Societies Known as American Society of Composers, Authors and Publishers ('ASCAP') and Broadcast Music, Inc. ('BMI') Remain Subject," at 5 (Aug. 6, 2014) ("SGA has determined that allowing partial withdrawal would be devastating to creators[.]"), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307845.pdf.

publishers working through the PROs cannot improperly inflate the price of public performance rights through collusive price-setting; and provide for the right for a fair royalty rate to be established by a federal judge when free market negotiations between the PROs and prospective licensees break down.

In recent years, the concern about the undue concentration of power exerted by the PROs and large publisher members has increased in the wake of further merger activity, such as Sony ATV's acquisition of the right to administer the world's largest music publisher EMI, effectively reducing the number of major publishers from 4 to 3.

Despite this dramatic industry consolidation, the PROs and publishers are mounting a major campaign to substantially weaken the protections of the consent decrees. Dramatic claims are made that, absent these modifications, songwriters will be unable to earn a living wage. An unjaundiced review of the financial performance of the PROs and music publishers, however, belies such claims. The PROs have increased their collections and distributions of royalties dramatically over the last ten years. In fact, ASCAP just announced it collected more than $1 billion in royalties in 2014.[3] Incredibly, these record royalty receipts come after ASCAP and BMI agreed to *lower* the fees paid by terrestrial radio by a billion dollars.[4] Universal Music Publishing, the world's second largest music publisher, just announced its revenue *increased* by more than 4% last year.[5]

Given this increasing revenue of the PROs and music publishers is improving, what is motivating the efforts to gut the protections of the consent decrees? What seems to be behind this effort is the music publishers' objections to the even higher rates Pandora pays to record labels to publicly perform sound recordings by digital audio transmissions. Yet these objections

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[3] *See* Ben Sisario, "ASCAP Topped $1 Billion in Revenue Last Year, Lifted by Streaming," N.Y. Times, Mar. 4, 2015, at B3, *available at* www.nytimes.com/2015/03/04/business/media/ascap-topped-1-billion-in-revenue-last-year.html.

[4] Inside Radio, *New deals with BMI and ASCAP end two years of negotiations* (Aug. 29, 2012).

[5] In fact, Universal Music Publishing's revenue grew by 4.2% in 2014. *See* Tim Ingham, *Universal Music Group Sales Fell 6.7% in 2014 – As EU Income Overtook America*, Music Business Worldwide (Feb. 27, 2015), *available at* http://www.musicbusinessworldwide.com/universal-revenue-drops-6-7-in-2014-as-eu-overtakes-america/.

ring hollow when one considers that it is the affiliated companies of the largest music publishers – the major record labels – that have advocated for this very discrepancy based on the significantly greater investments record labels make to bring music to market. Pandora and other digital music services are caught in a fight between affiliated entities where the goal of the common owner is to extract ever-increasing fees from licensees.

While music publishers and the PROs cloak their requests for increased royalties in the rhetoric of free-market capitalism, what they really seek is a licensing regime that is structured to insulate publishers and PROs against the forces of competition. In a workably competitive market, publishers would compete with each other on price for performances on Pandora's service. It is worth noting that consent decrees have always permitted any publisher to negotiate a direct license with any user; indeed, the legitimacy of ASCAP and BMI depends on the ability of publishers to enter into individual licenses. Yet, through the years, the PROs and publishers have resisted direct licensing. Today, they take the perverse position that it is the PRO license itself that impedes their ability to deal directly with users, and will only offer direct licenses if the PRO license does not include their works. But their proposal will harm users. The public statements and behavior of the PROs and certain major publishers evidences intent to raise prices without risk. Rather than a competitive market with "winners" and "losers," the PROs and publishers apparently seek an environment in which coordination among them can be accomplished with little to no risk and where competitive forces can be avoided – so that every copyright owner gets paid more, devoid of the pressures of the healthy forces of free market pressures.

Below I describe the specific conduct Pandora has experienced, and then explain why Pandora believes the consent decrees, if modified, should be subject to significant protections for licensees so as not to harm competition.

IV. Pandora's Recent Experience With the PROs and Music Publishers

Pandora's recent rate court trial against ASCAP resulted in a decision by Judge Cote full of important factual findings, which I commend in its entirety.[6] In brief, Sony/ATV ("Sony") and Universal Music Publishing Group ("Universal"), two of the world's largest music

[6] *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014).

publishers, frustrated with the consent decree supervision of PRO pricing practices, pushed ASCAP to amend its rules to allow publishers to only withdraw ASCAP's rights to license "new media" users like Pandora, while including provisions to "eliminat[e] any risk to the publisher if the withdrawal proved to be a bad idea."[7]

When Pandora filed a petition to have its ASCAP license rate determined by the rate court in September 2012, Universal and Sony (both members of the ASCAP Board) acted to thwart an agreement between Pandora and ASCAP that ASCAP management had already all but accepted.[8] Sony then claimed to partially withdraw from ASCAP, and created a "hold up" situation premised on its ability to "shut down Pandora" through threat of massive infringement liability.[9] Sony both denied Pandora's request for a list of its withdrawn works and prevented ASCAP from giving Pandora that information, using the fear, uncertainty, and doubt created by the lack of information and the time crunch to extract a 25% rate increase.[10] Universal followed Sony's lead, and relying on confidential information improperly leaked by Sony about its own deal, made similar threats to Pandora and conditioned providing information about its withdrawn works on Pandora's on not using the information to take down those works—essentially demanding that Pandora enter a separate license or be subject to massive infringement damages if it – without knowledge – played Universal's music.[11]

Believing that Universal's proposal was unreasonable, Pandora sought and obtained partial summary judgment in the ASCAP rate court that the selective withdrawals could "not affect the scope of the ASCAP repertoire subject to Pandora's application for an ASCAP license."[12] Judge Cote further found that ASCAP could not show that license rates generated by the negotiations between Pandora and the withdrawing publishers were appropriate benchmarks, explaining that Sony and Universal "each exercised their considerable market power to extract supra-competitive prices."[13] She also found that "the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern

[7] *Id.* at 337.
[8] *Id.* at 341-43.
[9] *Id.* at 343-44.
[10] *Id.* at 344-47.
[11] *Id.* at 347-49.
[12] *Id.* at 350.
[13] *Id.* at 357.

underlying [the ASCAP consent decree] and casts doubt on" whether the licenses were the product of a competitive market because ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora," and the fact that "they coordinated their activities with respect to Pandora" meant that "the very considerable market power that each of them holds individually was magnified."[14]

At the same time that Pandora was negotiating a license with ASCAP, Pandora was also negotiating with BMI, which had similarly agreed with the large publishers to allow partial withdrawals. Pandora sought a ruling in the BMI rate court invalidating the selective withdrawals on the same grounds that Judge Cote had invoked against the ASCAP withdrawals, but Judge Stanton held that the BMI consent decree's prohibition on partial withdrawals actually meant that a publisher's new-media withdrawal effectively removed that publisher's works from BMI for *all* purposes. The large publishers turned Judge Stanton's ruling to their advantage, telling Pandora immediately after the December 18, 2013 ruling that they would be completely withdrawn from BMI as of January 1, 2014, and that Pandora therefore needed to negotiate direct agreements with them in the waning days of 2013 or risk infringement liability. Incredibly, at the very same time Sony and Universal were also negotiating "suspension" agreements with BMI that would *retroactively* return the publishers to BMI. This allowed them to extract higher license rates from Pandora as 2013 came to an end without actually risking their ability to license other users through BMI. Unaware of these "suspension" agreements and faced with threats of massive copyright infringement liability, Pandora entered into a covenant not to sue with Sony and a license with Universal — both at supra-competitive rates.

V. Creating a Truly Competitive Market

As Judge Cote found, there is significant evidence of coordination among publishers and the PROs for the right to publicly perform musical works. A competitive market must be transparent, where sellers are vying against each other to achieve sales to buyers. The key to this is the ability of customers to substitute various sellers' products for one another: if one seller raises its prices, buyers can shift their purchases to other sellers. In the market for music, if one publisher requests too high a fee, a licensee should be able to substitute other works at a lower

[14] *Id.* at 357-58.

price. This is possible in a competitive market, because sellers in competitive markets are transparent about what they are selling, and buyers know what they are getting when they choose to buy. In a competitive market, sellers compete on price in order to achieve greater market share in order to sell more products than their competitors and generate higher total revenue. Because of this, competitive markets have winners and losers: some sellers compete well and are rewarded with more business, while other sellers may do poorly and achieve less success.

Pandora welcomes this kind of competitive market in music licensing, where music publishers compete to increase market share by competing on price – i.e., the fees charged to publicly perform the musical works controlled by individual music publishers. But publishers have shown time and time again that they are not trying to establish a competitive market where users have the ability to substitute among competing offerings. Rather, they are working in unison to avoid competition so every publisher gets to benefit from higher prices without having to compete for business.

The market as it exists today gives monopolistic market power to multiple entities (including those with small ownership interests) and allows the holders of fragmented rights to engage in hold up, thus limiting competition.

As we experienced with ASCAP and may be experiencing with BMI, moreover, rights holders and PROs are more than willing to coordinate to increase their leverage. Publisher coordination further increases the power of the large publishers by ensuring they will not be undercut by the PROs or by other publishers. In a free market, one would have expected each of ASCAP and BMI to seek market share at the expense of any withdrawing publisher to increase the total royalties collected by such PRO. Yet such competition never occurred. In fact, the leaders of both ASCAP and BMI testified that each never even considered competing on price with withdrawn publishers.[15]

The ASCAP and BMI consent decrees serve an important function: they limit the impact of both the structural non-competitiveness of the music licensing marketplace and restrain the

[15] Paul Williams Dep. Tr. at 36:7-16 (Sept. 10, 2013), *In re Pandora Media, Inc*., 6 Supp. 3d 317 (S.D.N.Y. 2014); Trial Tr. at 229:7-11 (Feb. 11, 2015), *Broadcast Music, Inc. v. Pandora Media, Inc*., No. 13 CV 4037 (S.D.N.Y. 2015); Mike Masnick, *Surprise: ASCAP and Music Labels Colluded to Screw Pandora*, Techdirt (Feb. 12, 2014), *available at* https://www.techdirt.com/articles/20140209/01061226149/details-come-out-about-how-ascap-colluded-with-labels-to-screw-pandora.shtml.

long-standing anticompetitive conduct of market participants. They also ensure the efficiency of "one-stop" licensing while limiting the PROs' (and their members and affiliates') ability to harm competition through collusive behavior. The consent decrees have been so effective that the antitrust agencies have permitted multiple mergers in this space premised on the protections afforded to users by the consent decrees (amongst other reasons), and there has been little need for further enforcement actions despite any number of conditions that could raise competitive concerns. The consent decrees are thus an essential aspect of competition in this market.

VI. Ensuring a Vibrant Music Publishing Marketplace for the Future

While we continue to remain optimistic about the future of music streaming, the government has a critical role to play to guarantee a functionally competitive music ecosystem. Over seventy years of abuses, including the coordinated behavior I described above that occurred last year, require continued regulation to ensure that a hugely consolidated industry cannot leverage their market power for unfair gain. This Subcommittee's examination of the consent decree review is critical to ensuring a positive result. The key consideration for Congress should be: how to make the system work for the benefit of all stakeholders—consumers, musicians, distributors, publishers, and labels. There is no reason that one entity must lose for the other to win. We encourage policymakers to examine ways to make the system work for everyone in a way that moves this debate and industry forward.

Thank you again for your consideration of these important issues. I am available to answer any questions the Subcommittee may have.

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