

Questions for the Record

How Much for a Song?:

The Antitrust Decrees that Govern the Market for Music

Senator Lee

Beth Matthews

During the hearing, the potential coordination among the publishers and ASCAP referenced in Judge Cote's opinion in *Pandora v. ASCAP* came up repeatedly.

- What is your response to the allegations mentioned in the hearing and in Judge Cote's opinion?

Response:

ASCAP respectfully disagrees with the suggestion in Judge Cote's *Pandora* opinion that there was "troubling coordination" between certain music publishers and ASCAP. ASCAP has never engaged in any form of wrongful "coordination" with its members. Nor did Judge Cote find that there had been any such wrongful "coordination" between ASCAP and its members. Indeed, as the Copyright Office observed in its recent report concerning Copyright and the Music Marketplace, Judge Cote did not make any finding, or reach any conclusion, as to whether the purported "coordination" was "wrongful or legitimate." U.S. Copyright Office, COPYRIGHT AND THE MUSIC MARKETPLACE, at 154 (February 2015) (hereinafter, the "Copyright Office Report") (citing *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 357-58 (S.D.N.Y. 2014)). Judge Cote's opinion is currently on appeal before the Second Circuit, and ASCAP has explained in detail in its appeal briefs why there was no basis for Judge Cote's purported concern about coordination between ASCAP and its publisher members. Rather than repeat those arguments here, I am attaching copies of ASCAP's appellate briefs; the "coordination" issue is discussed on pages 46-50 of ASCAP's main appeal brief, and on pages 19-22 of ASCAP's reply appeal brief.

Nor is there any reason to suspect, as some have suggested in their comments to the Subcommittee, that modification of the Consent Decree will somehow lead to collusive conduct in the future. The Consent Decree will remain in effect, and ASCAP and copyright owners will continue to be bound by the Sherman Act. As the Copyright Office noted in its recent report, regardless of what restrictions are included in the Consent Decree, the DOJ retains the ability to "investigate and address potential anticompetitive behavior on an as-needed basis." Copyright Office Report at 156. These protections are more than sufficient to ensure that modification of the Consent Decree will not lead to "collusion" between ASCAP and its members.

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ASCAP argues that modifying the Consent Decree to allow for partial withdrawals by its members will help promote a competitive market.

- Why is that the case?

Response:

Modifying the Consent Decree to permit ASCAP to accept partial grants of rights—thereby enabling members effectively to withdraw certain rights from ASCAP—will promote competition in a number of different ways. First, partial grants will promote the disaggregation of rights and foster competition between ASCAP and its members, as well as with other PROs and music licensing entities, as the members’ “partial exit” from ASCAP will enable them to enter the market as additional sellers. Second, by allowing members to directly license some licensees without bearing the costs or risks of directly licensing all licensees, partial grants increase the economic attractiveness of direct licensing in general, and thus create more opportunities for ASCAP members to enter into direct licenses that compete with ASCAP, other PROs (such as BMI and SESAC), and other copyright holders. Third, permitting partial grants of rights will create competition among PROs and non-PRO competitors to administer the copyright owners’ direct licenses, which will encourage PROs to become even more efficient, leading in turn to lower administrative costs for the PROs and potential savings that can be passed on to licensees. Fourth, the market for direct licenses that will develop as a result of the partial grants of rights will result in agreements between willing buyers and willing sellers—free from the constraints of compulsory licensing—that are more likely to reflect the true value of public performance rights. As such, these licenses will provide true market benchmarks for subsequent negotiations and ASCAP Rate Court proceedings, and ultimately improve the rate-setting process overall, a result that benefits every songwriter and publisher. Finally, allowing ASCAP to accept partial grants of rights will preserve the features of collective licensing that accrue to the benefit of both licensees and music creators.

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I understand that ASCAP is making significant investments in transparency. Transparency is important for two reasons: first, it allows potential licensors to properly assess the value of the catalog they are acquiring a license for; second, it allows them to avoid costly infringement suits.

- What do your transparency efforts look like?
- Will potential licensors be able to rely on the information you provide to protect them from infringement suits?

Response:

ASCAP strongly believes that transparency of data is crucial for a properly functioning music licensing marketplace. Indeed, ASCAP has structured its business operations around this principle, in its relationships with its customers, as well as with its members.

Since 1950, the ASCAP Consent Decree has required that ASCAP make available to the general public information as to ASCAP members and the works comprising the ASCAP repertory. The 2001 amendments to the Decree expanded ASCAP's transparency requirements; ASCAP must make available for free a "public electronic list" consisting of separate databases of current ASCAP members and ASCAP works, showing titles, writers, and current publishers or other copyright owners of each work. ASCAP has provided this information in two ways: via ASCAP's searchable online ACE (ASCAP Clearance Express) database, and on a DVD-ROM that is made available to anyone on request.

In response to calls for even greater transparency and data search functions, in March 2015 ASCAP upgraded its ACE database to permit users to view or download the complete catalog of any ASCAP writer or publisher member (the latter including the combined catalogs of certain major publishers). Moreover, if any ASCAP member resigns from ASCAP and removes its catalog of works from the ASCAP repertory, ASCAP will also provide a list of the withdrawn works to any licensee (or potential licensee), upon request.

We believe that as a result of these developments, ASCAP makes available to music users the most robust and comprehensive data regarding musical works available from any source. We are confident that a music user will be able to rely on this data to determine whether they require an ASCAP license; and if so, that an ASCAP license will provide them with the rights they need to perform lawfully the songs in the ASCAP repertory and protection from infringement claims with regard to performances of those ASCAP works.

ASCAP is also transparent to its members. As a membership organization, ASCAP believes that its members have a right to complete information regarding their royalties. For decades, ASCAP has published its distribution rules. ASCAP also provides members with detailed information regarding their royalty distributions and employs dedicated member service representatives to discuss with members any questions regarding their membership and their royalties. ASCAP members enjoy full interactive online access to their confidential royalty distribution detail that they can access at any time.

Of course, providing a high level of data transparency is a laborious and expensive endeavor. ASCAP's repertory is comprised of millions of individual works, many with multiple writers and publishers. The repertory is fluid, evolving on a daily basis as new works are added or removed, and catalogs are transferred or sold to new owners. Nevertheless, ASCAP expends very significant resources to ensure that it has, and can make available, the most current information about its member and their catalogs, working in concert with writers, publishers and other collecting societies around the world to ensure that our data is as accurate as possible. To that end, it should be emphasized that ASCAP's efforts are only a single piece of the larger music ecosystem. It is imperative that all players in the marketplace—copyright owners, licensors and music services alike—follow ASCAP's example and ensure that accurate data is made available on a fully transparent basis. This, in turn, will ensure the proper and efficient licensing of musical works and distribution of royalties to all entitled parties.

Questions Posed by Senator Orrin G. Hatch

1. Question for all panel members:

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?

ASCAP Response

The arrangements between songwriters and music publishers are matters of private negotiation between those parties to which ASCAP is not privy. Such contracts are separate agreements made outside of their relationship with ASCAP and have no bearing on the royalty payments made by ASCAP to its members. Accordingly, ASCAP respectfully cannot comment on those private songwriter-publisher agreements. Nevertheless, ASCAP appreciates the importance of transparent dealings and believes that transparency of data is crucial for a properly functioning music licensing marketplace. Indeed, ASCAP has structured its business operations around this principle, in its relationships with its customers, as well as with its members.

As a membership organization, ASCAP believes that its members have a right to complete information regarding their royalties. For decades, ASCAP has published its distribution rules. ASCAP also provides members with detailed information regarding their royalty distributions and employs dedicated member service representatives to discuss with members any questions regarding their membership and their royalties. ASCAP members enjoy full interactive online access to their confidential royalty distribution detail that they can access at any time. We would hope that all entities in the music licensing ecosystem – including songwriters and publishers – arrange for similar transparency in their transactions and operations.

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**Questions of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing on
“How Much For a Song?: The Antitrust Decrees That Govern the Market for
Music”
March 10, 2015**

Question for the Record for All Witnesses

The ASCAP and BMI consent decrees with the Department of Justice exist in the context of a larger and complicated music licensing ecosystem that many say is in need of reform. I believe strongly that any comprehensive music licensing improvements must ensure: that all music creators are fairly compensated for all of their works; that innovative, legitimate delivery methods can continue to benefit consumers and marginalize illegitimate alternatives; and that technology can bring increased transparency to the data that is essential to an efficient licensing system.

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

A: Despite the debate and conflicting opinions on certain specific issues in the current music licensing discussions, there appear to be three points to which practically every party agrees. The first is that the music licensing system demands the utmost in efficiency, for the benefit of music creators, music services and, ultimately, the listening public. The second is that music creators – songwriters and performing artists alike – deserve to be fairly compensated for the use of their work. The third, essentially a corollary of the first two, is that collective licensing as practiced by ASCAP for 100 years is the most effective and efficient means by which to serve the needs of music creators, businesses that perform music, and music listeners everywhere, and must remain as a necessary piece of the licensing solution.

While those goals had been met for many decades under the current regulatory regime that governs how music users are licensed, it is clear that technological changes in the way people listen to music and in the economics of the music business, particularly for songwriters and composers who do not share the same revenue streams as recording artists, demand commensurate changes to the regulatory regime. In today’s regulated marketplace, it is becoming increasingly difficult for music creators to realize a competitive return for their creative efforts, and for organizations such as ASCAP to serve appropriately the needs of its members (music creators), its customers (music licensees) and the music listening public. Accordingly, two immediate changes to the regulatory system are necessary.

First and foremost, the antiquated ASCAP Consent Decree must be updated. Instead of ensuring an efficient competitive marketplace that provides a fair market return to ASCAP’s members, numerous provisions of the current ASCAP Consent Decree have had the opposite effect. For example, digital music services are increasingly interested in

licensing efficiently all of the rights needed to operate their services in one transaction, but ASCAP is prohibited from licensing rights in musical works beyond the right of public performance. And, when ASCAP and a music user cannot reach a final agreement on licensing rates or terms, the parties are forced to resort to an extremely time-consuming, labor-intensive and expensive rate court process costing millions of dollars in litigation expenses. Recently, the ASCAP rate court interpreted the ASCAP Consent Decree as prohibiting ASCAP's members from obtaining more control over the licensing of the musical works in their catalogs by retaining for themselves the exclusive right to license certain music users; a result counter to the pro-competitive goals of the Consent Decree. Simply put, constrained by an outdated Consent Decree, ASCAP can no longer meet the evolving needs of writers, publishers, music licensees and, ultimately, consumers.

Second, certain modest amendments to the Copyright Act are necessary. For example, evidentiary limitations imposed by Section 114(i) of the Copyright Act have perpetuated an unprincipled disparity in the compensation provided to songwriters for the use of their songs, as compared to the compensation provided to record companies for the use of their sound recordings. And, rate standards imposed under Section 115 for mechanical licenses have resulted in below fair market rates paid to songwriters.

The continued viability of collective licensing in the United States is in jeopardy. Without changes to its Consent Decree, ASCAP may face the complete resignation of certain of its largest publisher members, a result that could be as damaging for music users as it could be for ASCAP and its remaining members. Without a robust collective licensing system, the increased cost of having to negotiate licenses with hundreds of thousands of individual copyright owners would likely be passed on to consumers and stymie the growth of innovative new services that would benefit consumer choice and experience. And without amendments to the Copyright Act, songwriters will continue to suffer below-market returns for the use of their labor.

The simplest and most immediate solution to these problems is the amendment of the ASCAP Consent Decree and the Copyright Act to reflect the realities of the modern music marketplace and achieve more efficient and effective collective licensing, including. We propose modifying the ASCAP Decree to (1) shift rate-setting to an expedited private arbitration system; (2) allow new media services to secure licenses from PROs on a bundled basis; and (3) allow PROs to accept partial grants of rights from its members. Additionally, ASCAP strongly supports passage of the Songwriter Equity Act, a piece of legislation that will help songwriters achieve a fair market rate of return.

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