Testimony of Matt Pincus
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Before the Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"How Much for a Song?: The Antitrust Decrees that Govern the Market for Music"

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Introduction

Good morning, Chairman Lee, Senator Klobuchar and members of the Subcommittee. My name is Matt Pincus and I am the founder and Chief Executive Officer of SONGS Music Publishing, a music publishing firm located in New York, Los Angeles, and London. I also currently serve as a member of the Board of Directors of both the National Music Publishers' Association (NMPA) and ASCAP.

I am honored to appear before you today to provide my perspective as a music publisher and small business owner on the ASCAP and BMI consent decrees and the current review of these decrees being conducted by the Justice Department.

Anyone who looks at the complicated music licensing landscape and the many interests involved can quickly lose sight of what is fundamentally at the heart of the hearing today: creators' intellectual property rights that are protected by the Constitution of the United States.

The public performance right of songwriters and music publishers – the right for our songs to be played publicly in bars and restaurants, over broadcast and internet radio, or through digital music services – is inherently a free market right. And, to the benefit of both rights-holders and music users, most of our songs have historically been licensed collectively through performing rights organizations such as ASCAP and BMI. However, because of cases of alleged anticompetitive conduct that took place more than 70 years ago, these rights are not negotiated in a vibrant, free market, but are instead licensed in an environment highly-regulated by government imposed consent decrees.

The music industry today is not the same as when the consent decrees were entered into in 1941, before every song could be enjoyed on your computer, on your phone, or in your car. Advances in digital technology have dramatically changed the way music is consumed and how music publishers license our rights. It has become clear that the ASCAP and BMI consent decrees have failed to adjust properly to meet these changes, leaving songwriters and music

publishers unable to negotiate freely and fairly public performance licenses either collectively or directly in a marketplace. Ultimately, the consent decrees have made it impossible for songwriters and publishers to negotiate the true market value of their creative property because we cannot say "no."

Further, although the music industry is one of constant change and growth, the consent decrees do not sunset and there are no formal mechanisms to ensure that they are regularly reviewed. They continue to inhibit the development of a fair, working free market. I applaud the Department of Justice for initiating this long-overdue review of these consent decrees and am hopeful that today's hearing will help to underscore that meaningful changes are imperative in order for licensing performance rights to work in today's ever-evolving digital environment.

Today, there are many large technology companies who have been able to use the consent decree provisions to benefit financially and competitively under the current licensing system. These companies oppose reforms that would increase competition, transparency, and flexibility and would allow copyright owners such as SONGS to negotiate in a fair and unfettered market place. Ironically, many of these entities are large companies that hold an overwhelming share of their own market. For example, Pandora has 78% of the Internet radio market.[1] Apple has 63% of the music download market.[2] Google, the company that owns the largest music service in the world – YouTube, boasted $66 billion in revenue for 2014[3]. The music publishing industry is a small player in a world of global, billion dollar corporations. I understand that these companies may believe they can only grow and maximize profits through the continued regulation of songwriters and music publishers. But, as a small business owner, I should not be required to subsidize global corporations to the detriment of my own business and the songwriters I represent.

The ability of songwriters and music publishers to license performance rights unencumbered by government regulation, whether collectively or directly, is critical to the ongoing viability of our businesses and the continued creation of the songs we all love. Licenses for the intellectual property rights of movies, books, video games, magazines, television shows and recorded music are all negotiated in the free market while songwriters and music publishers remain subject to heavy regulation under antiquated consent decrees. In its recent Music Licensing Study, the Copyright Office acknowledged that the "consent decrees impose significant government-mandated constraints on the manner in which ASCAP and BMI may operate" and it recommended "productive reconsideration" of the decrees by the Justice Department.[4]

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[1] Pandora Media, Inc., Form 10-K for fiscal year ended December 31, 2014.
[2] *Apple's iTunes rules digital music market with 63% share*, Kevin Bostic, April 16, 2013, http://appleinsider.com/articles/13/04/16/apples-itunes-rules-digital-music-market-with-63-share.
[3] *Google Inc. Announces Fourth Quarter and Fiscal Year 2014 Results*, January 29, 2015, http://investor.google.com/earnings/2014/Q4_google_earnings.html.
[4] *Copyright and the Music Marketplace*, pp. 150, Copyright Office Report, February 5, 2015.

In my testimony, I will explain how the current regulatory oversight of the ASCAP and BMI consent decrees is unfairly burdening and devaluing the rights of music publishers and songwriters. And, I will also identify modifications to the decrees that I believe would allow for a more competitive, free and fair market for all copyright owners and music users.

Changes to Consent Decree Favored by Music Publishers

As a music publisher, the consent decrees directly, negatively impact my business and I believe it is necessary to modify several specific provisions that are harming competition and inhibiting development of a fair, free performance rights market.

Although music licensing has changed drastically since ASCAP and BMI were created in 1914 and 1939, respectively, the PROs continue to play important roles for music publishers. As the numbers and categories of services continue to expand, PROs play a vital function in facilitating licensing for the public performance right where it would otherwise be inefficient and difficult for publishers to license those rights. This was and continues to be the case, especially for independent publishers, many of which do not have the resources to enter into direct license agreements with every potential music user.

ASCAP's and BMI's ability to represent effectively music publishers and songwriters depends on modifications that permit them to negotiate fairly and more freely with services and allow licensing, rate setting and payment of royalties in an expeditious manner that keeps up with the pace of digital innovation and new technology.

Rate setting procedures must be amended to allow for negotiations and payments that more closely reflect a free market

The existing rate setting procedures must be reworked to address a number of problems. Music publishers, like SONGS Music Publishing, are by every measure small businesses that rely on fast, cost-efficient licensing and timely and accurate payment of royalties. However, the consent decrees have instead resulted in an inflexible, time-consuming and costly rate court procedure.

First, users can obtain a license upon request and begin using songs before a rate has been negotiated or payments are made for those music uses. Second, where the parties cannot agree on a rate, the rate is determined by a rate court. The rate court process is expensive and long, often taking years to resolve. The royalty rates determined by the court are not required to be based on or reasonably tied to rates negotiated in the free market.

When a music user can obtain a license simply upon request and begin using musical works immediately without having to pay or set funds aside for payments in the future, there is no incentive for that user to negotiate a fair rate or to bargain in good faith. And, often there is a good chance that a digital service will use musical works and then go out of business before ever compensating songwriters or music publishers for that use. The consent decree structure

of allowing immediate use of musical works without requiring corresponding royalty payments for that use is harmful to music publishers, because as small businesses we are especially dependent on performance revenue sources and face significant financial harm when our content is used without compensation. Music publishers who represent up-and-coming songwriters with contemporary hits, like SONGS, are particularly harmed by the delay in setting and payment of rates and lack of revenue flow. Any ASCAP and BMI consent decrees must require that where a royalty rate has not been negotiated, applicants begin paying an interim default rate as soon as that music user obtains the benefits of a collective license. This will ensure that publishers and songwriters get paid for works licensed as those works are used and not years later – or never.

Further, any consent decree necessary should be modified to provide for rate setting through binding arbitration that would be faster, less expensive and more efficient for all parties. Songwriters and music publishers are particularly harmed by the cost and length of the current rate court proceedings, the costs of which are passed on through high ASCAP and BMI administrative fees. As part of the arbitration process, arbitrators should be required to consider any rates agreed to in the free market through direct licensing. Arbitrators applying the presumption that rates agreed to in the free market by willing buyers and willing sellers represent the best benchmarks for rate setting would ensure that these proceedings result in rates that reflect competitive market license negotiations. The introduction and consideration of free market rates is especially important for independent music publishers because, although some independent publishers may have the ability to directly license some categories of rights, the consideration of these direct license rates will ensure that those independent publishers that do not have this ability will benefit from competition and benchmarks developed in the free market.

Public performance rights are unregulated under Copyright Law and direct licensing of performance rights should be allowed under the Consent Decrees.

Under the Copyright Act, publishers have the ability to exploit rights, including performance rights, in the free market. Historically, there have been many benefits for both music owners and music users to collectively license performance rights. However, as the recent attempt by certain publishers to directly license digital performance rights has highlighted, the collective licensing system is broken. For music publishers, government regulation has led to an untenable collective licensing structure that is inefficient and costly, and has resulted in the devaluation of our rights and musical works.

The consent decrees have effectively left music publishers with two harmful, all-or-nothing business decisions. The first is to avail themselves of the benefits of collective licensing for all performance rights and accept the high costs, inefficiencies and below-market royalty rates that result from government regulation. The second is to fully withdraw all performance rights from collective licensing, thereby destroying longstanding licensing efficiencies and business relationships that have proven beneficial to all parties. Neither choice is economically

beneficial to my business as a music publisher and both result from the regulation of my performance rights through the consent decrees.

Moreover, for some music publishers, the complete withdrawal of performance rights may not be a feasible option. The prohibition on withdrawing certain categories of rights is not only an imposition on publishers' rights to control their content. It is also contrary to the original intent behind the consent decrees, which were designed to prevent PROs from demanding exclusivity in licensing performance rights and to ensure that direct licensing could occur between publishers and users.

Although smaller music publishers are less likely to withdraw their catalogs for all categories of users, even those publishers may be capable of withdrawing their catalogs for specific categories of users where it is more efficient and economically beneficial to conduct individual license negotiations in the free market. The consent decrees should be modified to allow publishers to engage in direct licensing for some categories of users as technology improves and make it easier for publishers to work directly with music users. As a result, the potential for anticompetitive collective action would be greatly reduced or eliminated.

While allowing publishers to withdraw licensing rights for certain categories of users would help prevent anticompetitive collective action and allow for greater competition and efficiency in the performance rights market, it would also economically benefit music publishers in a number of ways.

Music publishers able to withdraw certain categories of rights would benefit from retaining more control over the exploitation of rights and avoiding paying sometimes significant administrative fees. Further, allowing publishers to withdraw selectively certain categories of rights would allow them to bundle various types of licenses to their works, creating a more efficient and streamlined licensing process that benefits both publishers and music users.

Finally, while some publishers may prefer not to withdraw any rights from ASCAP or BMI, granting other publishers the ability to do so would provide for the development of a true performing rights market that would better illustrate the value of publishers' performance rights and provide benchmarks for rate setting processes.

Periodic Review

It has become clear to me—and to every music publisher—that the consent decrees and the regulated system they impose upon the licensing of performance rights have not kept pace with the rapid technological development of music use. It is my understanding that the current, stated position of the Justice Department is that consent decrees that do not include a sunset provision are against public policy. This makes sense, and the ASCAP and BMI decrees should be modified to include an automatic sunset provision or, at the very least, a provision requiring regular review and reconsideration of the continuing justification of regulating songwriters and music publishers. Given that music has been at the heart of much of the technological change

surrounding the distribution and monetization of intellectual property and that many of the users that currently license public performance rights did not exist at the time of the last decree modifications, a sunset clause or required period review is critical to preventing harm and encouraging a fair and competitive market. Business models and license terms are changing at an ever-increasing speed and music publishers need the flexibility to change and adapt – a flexibility not afforded by the current regulatory scheme.

Music Publishers and their agents should have the flexibility to license digital services seeking multiple rights

If there is one concept that songwriters, music publishers and music users can agree on, it is that music licensing in the digital age is inefficient and overly complicated. All parties are looking for an effective way to license today's digital music services that, unlike traditional services such as radio, may require a number of rights in order to use music content legally. For example, digital services like Spotify, Rhapsody or Beats require both performance and mechanical rights. In order for a service to become properly licensed, it is required to enter into separate agreements with ASCAP and BMI for performance rights, as well as either the publisher itself or another third party authorized to administer mechanical rights. Due to the restrictions imposed by the consent decrees, ASCAP and BMI are unable to provide the products and services that these music services increasingly demand. The inability of ASCAP and BMI to offer customized agreements for unique users disincentivizes new services and results in the loss of potential revenue for publishers.

The consent decrees should be modified to allow publishers to authorize, at their exclusive discretion, ASCAP and BMI to license as the publisher's agent digital services that require mechanical rights, as long as the PROs do so in a non-discriminatory manner. Mechanical rights, unlike other rights of music publishers that are negotiated in a free market, are currently subject to government set compulsory rates, which could allow efficient licensing by the PROs without expanding government regulation to publisher rights currently negotiated in the free market. While publishers must be allowed to maintain absolute control over their content, they should be able to grant PROs the right, on a case-by-case basis, to license mechanical and performance rights to particular services that require both rights to operate.

An open, competitive performance rights market is a transparent market

Some digital music services have asserted the lack of transparency in the licensing of performance rights of songs as justification for continued government regulation through the consent decrees. I disagree with this assertion and believe that this argument is a red herring being used to continue regulation of songwriter and music publisher performance rights. Whether collectively licensing performance rights through a PRO or directly licensing other copyrights in the free market, SONGS Music Publishing has always been fully transparent in our license negotiation and administration. In fact, yesterday my company made publicly available full metadata on our entire repertoire – including represented shares and, where available recording (ISRC) codes – in prevailing data formats, including the Google XML

standard and raw CSV data. But, just as importantly, I believe that consent decree modifications that bring musical work performance licensing closer to a competitive, free market, can only benefit and improve transparency.

Conclusion

Now is the time to ask why songwriters and music publishers should continue to be subjected to onerous government regulation while other creators negotiate rights in a vibrant and effective free market. I would submit that regulating songwriters and music publishers makes no more sense than dictating how much music services can charge consumers.

I believe that the Department of Justice has an important and necessary role in enforcing antitrust laws against the anticompetitive actions of specific parties. But, that role should not be used expansively to regulate small business owners and prevent the free market development of an entire industry for almost 75 years.

As a music publisher, my livelihood depends on licensing to anyone and everyone who wants to use my songs. That is the reality in a free market. If given freedom, I, like other music publishers, will exercise it responsibly to the benefit of my company and the songwriters with whom I work.

Thank you again for the opportunity to share my views with you today.

Appendix A

Background on Matt Pincus and SONGS Music Publishing

Matt Pincus is the founder and CEO of SONGS Music Publishing, the leading US contemporary independent music publisher. A 100% internally owned enterprise with its headquarters in New York and offices in Los Angeles, London and Nashville, SONGS represents 350 songwriters across the spectrum of contemporary music. SONGS writers include Grammy Award winner and Golden Globe nominee Lorde, R&B superstar The Weeknd, super-producer DJ Mustard (the leading urban producer in the world with 21 Top 20 Pop and R&B hits since 2012), EDM superstar Diplo (Usher, Madonna, Justin Bieber, MIA, Sia, Major Lazer), and many more. SONGS has registered in the top 10 of Billboard's Publisher Quarterly for the past 6 quarters, claiming as much as 5% of overall US radio airplay.

As the collective profile of SONGS writers has grown, the company has begun to define best practices in the evolving digital music business. The company is one of a small handful of independents to deal directly with major digital concerns like YouTube, Google Play, Amazon, and others.

As SONGS breaks ground in the digital market, Matt has become a leading voice in today's music publishing industry. He is currently the only frontline independent publisher to serve on the board of directors of both the National Music Publishers Association (NMPA) and The American Society of Composers, Authors, and Publishers (ASCAP). On behalf of NMPA, Matt served on the committee negotiating the successful 2012 settlement of the Copyright Royalty Board process setting compulsory mechanical rates. Matt is now a recognized public voice on digital music issues, in particular in the debate over payments to music publishers for online videos, where his advocacy helped bring about landmark agreement securing payments from major record labels to independent music publishers, and in settlements providing payments to music publishers from the leading YouTube Multi-Channel Networks.

Matt is also a member of the board of directors of Community Impact, Columbia University's undergraduate community service program, and a member of the board of trustees of the Wooden Nickel Foundation, a non-profit organization benefitting cultural arts and other institutions.

Background on Music Publishing

A music publisher is a company or individual that represents the interests of songwriters by promoting and licensing the use of their songs. Music publishers are often involved at the very beginning of a songwriter's career. After signing a writer to a publishing deal, a publisher will do everything from helping the writer find co-writers to securing artists to record the writer's songs. Frequently, when a songwriter enters into a relationship with a publisher, the publisher will advance desperately needed money to the writer to help pay living expenses so the writer can focus on what he or she does best: write music.

Songwriters and music publishers attempt to earn a living through three primary means of utilizing their separate copyright – mechanical reproductions, public performances, and audio-visual synchronizations. The ratio of how much each contributes to the bottom line has been in flux in recent years as listeners move away from ownership models such as CDs and downloads toward streaming and video as their preferred mode of music consumption.

It is important to note that songwriters and publishers depend on royalties for their livelihood. Unlike recording artists, most songwriters cannot supplement their income through touring, merchandise sales, or endorsements.

To understand the role of music publishers it is critical to first recognize that every recorded song contains two copyrights: 1) the musical composition – the notes and lyrics of the song – which is owned by the music publisher/songwriter, and 2) the sound recording – the recording artist's recorded version of the song – owned by the record label/recording artist. Even if the recording artist is the songwriter, two copyrights are created – one for the sound recording and one for the musical composition.

Music publishers partner with songwriters to promote and license their musical compositions by issuing 4 different types of licenses:

- **Reproduction (Mechanical) Licenses**
  Music distributed in physical form (CDs, Records) and digital form (includes downloads, interactive streaming, ringtones, and several other categories). The royalties are generally collected and paid by the Harry Fox Agency. This represents about 25% of a music publisher's income.

- **Public Performance Licenses**
  Music broadcast on radio (terrestrial, satellite and Internet streaming), in live venues, and other public places such as bars and restaurants. The royalties are collected and paid by public performance societies (ASCAP, BMI, and SESAC). Each user receives a blanket license from each performing rights society, in exchange for a royalty fee. This represents about 50% of a publisher's income.

- **Synchronization Licenses**
  Music used in film, television, commercials, music videos, etc. Publishers enter into direct licenses with users. This represents about 25% of a publisher's income.

- **Folio Licenses**
  Music published in written form as lyrics and music notation either as bound music folios or online lyric and tablature websites. Publishers enter into direct licenses with users. This represents <5% of a publisher's income.