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By email

John R. Read, Chief
Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 4000
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Re: ASCAP-BMI Decree Review

Dear Mr. Read:

I appreciate this opportunity to participate in your review of the ASCAP and BMI consent decrees and commend you for undertaking your review.

By way of background, I am an attorney in private practice in Austin, Texas. I have represented clients in the music and "music tech" areas for 25 years in Austin, Los Angeles, New York and Palo Alto.

In addition to traditional music clients, I also have represented music users and struggled along with everyone else during the digital transition that is still ongoing. I worked on early licensing breakthroughs including negotiating the first integration of front line artists in a videogame soundtrack in 1994 and some of the first digital music entrants starting in 1997. This comment is written from my own perspective as an observer of the songwriter market the government regulates and not on behalf of any client.

It is well to remember that "copyright owners" in the Internet era are frequently songwriters themselves and are not necessarily the biggest music publishers in the world. Given the declining music revenues caused in part by advertiser supported piracy[1] that is permitted to flourish[2] alongside extreme

[1] Ellen Seidler, "Google's Piracy Profit Machine Continues Unchecked" available at http://voxindie.org/googles-piracy-profit-machine-chugs-along

interpretations of the safe harbor provisions of the Copyright Act by some of the same multibillion dollar multinational corporations[3] arrayed against songwriters,[4] it is more unlikely for songwriters to be able to secure a publishing agreement. This is true even of artist-songwriters with recording agreements. Because the consent decrees take a "one size fits all" approach, when I refer to "copyright owners" I mean a range of songwriters and music publishers from the smallest to the largest.

The Justice Department's notice requesting public comment raises many good questions regarding the consent decrees. I respectfully suggest that the consent decrees undermine songwriters in at least these important ways: use of the consent decrees as a hammer by well-financed music users; confusion surrounding withdrawal and direct licensing; use of consent decrees in an inefficient manner that prevents both leveraging licensing technology and the formation of alternative dispute resolution mechanisms; and creation of inefficiencies in licensing that are burdensome to both music users and songwriters.

Do the Consent Decrees Make Negotiations a Mere Box to be Checked?

It is obvious that the music user market has changed substantially from the time of either the ASCAP or BMI[5] consent decrees or even their most recent modifications. One major change in the music user market is that many current music users of the regulated PRO blanket licenses vastly outweigh copyright owners in litigation budgets, market capitalization, lobbying influence and other measures of market power. So I suggest that the cost burden of rate court litigation disproportionately favors the well-funded music user compared to the music makers.

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[2] Rep. Adam Schiff, "International Piracy Watchlist," http://schiff.house.gov/press-releases/international-antipiracy-caucus-unveils-2012-international-piracy-watch-list; Adweek, "Lawmakers Pressure Advertising Community to Stop Ad Supported Rogue Sites" available at http://www.adweek.com/news/technology/lawmakers-put-more-pressure-advertising-community-stop-ad-supported-rogue-sites-157164

[3] See Digital Citizens Alliance report on how Google and YouTube profit from a variety of illegal activities behind various safe harbors, "Google & YouTube and Evil Doers: Too Close for Comfort" (June 2013) http://www.digitalcitizensalliance.org/cac/alliance/getobject.aspx?file=YouTube

[4] See Google Transparency Report available at http://www.google.com/transparencyreport/removals/copyright/?hl=en. Google received 26,000,000 take down notices in the last month as of this writing, many of which were for the same works on the same sites again and again.

[5] Hereinafter "the regulated PROs".

I am not suggesting that anyone is negotiating in bad faith or questioning anyone's motives. I am merely suggesting that if cost is little or no object and litigation is an additional step guaranteed to music users, it is reasonable to expect that there will be some music users who use that litigation, or the threat of it, as the closing if negotiations do not go to their liking. Particularly if no regulated PRO can stop the use of their music.

If the government wishes to motivate negotiation and consensus through the consent decrees, this review might be a good time to ask if the consent decrees have the opposite effect. I suggest to you that the well-financed music users view the rate court as a mere cost of doing business that can be justified to stockholders, a cost that may not even be material on a balance sheet basis for dominant incumbents like Pandora or Sirius, much less for Google with a $350 billion-plus market capitalization.[6]

But the cost of rate courts is very material to the songwriters who are on the receiving end of the litigation, a material cost that further reduces the real royalty rate derived from the license at issue. One could say that the government's insistence on litigation as a dispute resolution procedure for the regulated PROs inevitably results in lower real royalty rates for songwriters.

While songwriters have long faced members of the powerful National Association of Broadcasters in rate courts, the last decade has seen new opponents enter the market. Songwriters currently are opposed in the rate courts and on Capitol Hill not only by the National Association of Broadcasters, but also by Google (the dominant search engine and music video platform), Sirius (the dominant satellite radio provider), Pandora (the dominant webcaster) and many other tech companies whose combined market capitalization must approach $1 trillion depending on the particular collaboration.

[6] Today's GOOG stock quote pegs Google's market cap at $386.93 billion, which well exceeds the entire value of the worldwide music industry many times over. Stock quote available at http://finance.yahoo.com/q;_ylt=Atc4KfBuWlWIN9ytE47HGLyiuYdG;_ylu=X3oDMTBxdGVyNzJxBHNlYwNVSCAzIERlc2t0b3AgU2VhcmNoIDEx;_ylg=X3oDMTBsdWsyY2FpBGxhbmcDZW4tVVMEcHQDMgR0ZXN0Aw--;_ylv=3?uhb=uhb2&fr=uh3_finance_vert_gs&type=2button&s=goog

For example, a recent "Congressional briefing"[7] hosted in Washington by the Digital Media Association ("DiMA") and the National Association of Broadcasters had a relatively new face at the sponsor table—the Computer and Communications Industry Association.[8] CCIA members[9] represent vast wealth and lobbying muscle even discounting the CCIA's common membership with DiMA[10] of Google and Pandora.[11]

The relative bargaining positions of music makers and music users is highly relevant to a discussion of the merits of the consent decrees and especially the rate courts. I invite you to review the last 10 years of rate court decisions and

[7] The DiMA, the NAB and the CCIA hosted a panel entitled "Preserving the DOJ Consent Decrees Governing ASCAP and BMI: the Justice Department's Investigation Into Anticompetitive Behavior by the Music Publishers and Performing Rights Organizations," in 2226 Rayburn House Office Building on July 21, 2014. The title of the panel bears no resemblance to the Justice Department's request for comments and actually mischaracterizes the stated purpose of the Department's review in a meeting targeted at Congressional staff.

[8] It should not be overlooked that Google likely has considerable leverage over Pandora if for no other reason than Pandora uses Google's Doubleclick affiliate for its advertising sales. Pandora acknowledges to its investors that its agreement with Doubleclick exerts considerable influence on Pandora's business. "***We rely upon an agreement with DoubleClick, which is owned by Google, for delivering and monitoring our ads. Failure to renew the agreement on favorable terms, or termination of the agreement, could adversely affect our business."*** 2014 Annual Report of Pandora Media, Inc. (Form 10k) at p. 24 (emphasis added), available at http://investor.pandora.com/phoenix.zhtml?c=227956&p=proxy. Google was allowed to acquire Doubleclick through which it asserts this influence over the webcasting music market through Pandora, a dominant firm in the webcasting market.

[9] See CCIA Members currently listed at http://www.ccianet.org/about/members/

[10] See DiMA membership (includes Google's YouTube subsidiary) currently listed at http://www.digmedia.org/about-dima/members

[11] Another example both of the opportunities for concerted action and of this David and Goliath order of battle is found with the short-lived Internet Radio Fairness Coalition formed by the Consumer Electronics Association, the CCIA, DiMA, Clear Channel and a number of other broadcaster groups. (Press release available at http://www.prnewswire.com/news-releases/internet-radio-fairness-coalition-launches-to-help-accelerate-growth-and-innovation-in-internet-radio-to-benefit-artists-consumers-and-the-recording-industry-175775071.html.) The coalition was formed to support the Internet Radio Fairness Act (H.R.6480 and S.3609) that would have legislated royalty rates, packed the Copyright Royalty Judges and extended Sherman Act jurisdiction over individual creators in a confusing manner, available at http://www.gpo.gov/fdsys/pkg/BILLS-112hr6480ih/pdf/BILLS-112hr6480ih.pdf and at https://beta.congress.gov/bill/112th-congress/senate-bill/3609?q=%7B%22search%22%3A%5B%22s3609%22%5D%7D . We should expect to see more alliances of these massive media companies against songwriters and I would not be surprised if you received comments from many of them.

then ask yourself if you agree with my observation: The availability of the rate court has made negotiations with regulated PROs a mere box to be checked by well-financed music users on the way to litigation.[12]

It may not be fair to the government, but based on my conversations it is often difficult for songwriters to understand why their government permits multinational corporations with concentrated media dominance like Google and Clear Channel largely to escape antitrust regulation, but then decides that the American people must be protected from *songwriters*—for 73 years. (Companies like Google seem to escape regulation even when Google uses its dominant market position to cram down take-it-or-leave-it terms[13] on songwriters[14] and independent record companies.[15] "Gang of Four"[16] and DiMA member Amazon[17] also is notorious for take it or leave it overreach in its music publishing agreements[18] and commercial relations with other creators.[19])

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[12] We are currently attempting to determine whether there have been any negotiations with a DiMA member that have not "fallen through" and proceeded to litigation in the rate court.

[13] Letter from American Association of Independent Music to Federal Trade Commission (June 4, 2014) available at http://www.a2im.org/downloads/FTC_Letter_June_4_2014.pdf .

[14] Castle, "And Don't Forget the Songwriters: YouTube is out of touch with the lives of creators, available at http://musictechpolicy.wordpress.com/2014/06/29/and-dont-forget-the-songwriters-youtube-is-out-of-touch-with-the-lives-of-creators/

[15] See, e.g., Dredge, "YouTube Subscription Music Licensing Strikes Wrong Notes With Indie Labels", The Guardian (May 22, 2014) available at http://www.theguardian.com/technology/2014/may/22/indie-labels-youtube-subscription-music

[16] Google's Eric Schmidt openly describes Amazon, Apple, Facebook and Google as the "Gang of Four"—Amazon, Apple and Google are members of DiMA. See, e.g., Erick Schonfeld, "Eric Schmidt's Gang of Four: Amazon, Apple, Facebook and Google" available at http://techcrunch.com/2011/05/31/schmidt-gang-four-google-apple-amazon-facebook/

[17] Amazon's market capitalization is $145 billion, again several times bigger than the worldwide music industry. Quote available at http://finance.yahoo.com/q;_ylt=AoL5KC8ZhLzGNw7nNXdu3Rip_8MF;_ylc=X1MDMjE0MjQ3ODk0OARfcgMyBGZyA3VoM19maW5hbmNlX3dlYl9ncwRmcjIDc2EtZ3AEZ3ByaWQDBG5fZ3BzAzEwBG9yaWdpbgNmaW5hbmNlLnlhaG9vLmNvbQRwb3MDMQRwcXN0cgMEcXVlcnkDQU1aTiwEc2FjAzEEc2FvAzE-?p=http%3A%2F%2Ffinance.yahoo.com%2Fq%3Fs%3DAMZN%26ql%3D0&type=2button&uhb=uhb2&fr=uh3_finance_vert_gs&s=AMZN

[18] See "Form Amazon Publishing Agreement" available at https://musictechpolicy.files.wordpress.com/2014/05/form-amazon-license.pdf

[19] See Jamie Condliffe, "Amazon Admits It's Screwing with Hachette and Will Until It Gets Its Way" (May 28, 2014) available at http://gizmodo.com/amazon-admits-its-screwing-with-hachette-and-will-until-1582531755

I suggest that the influence of these actors across multiple market verticals cannot be viewed in a vacuum if the Justice Department wants to get a full picture of how its consent decrees are being used to increase market dominance by members of the "Gang of Four" and other dominant players.

What Happened to the Bundle of Rights?

It is axiomatic that under the 1976 Copyright Act, copyright is a bundle of rights.[20] Copyright owners are largely free to exploit their rights or subdivisions of copyright in whole or in part.[21] This is arguably the fundamental reason why PROs exist—to administer the performance right[22] subdivision of the bundle.

Methods of monetizing songs have evolved with technology as the marketplace identifies new methods of exploitation. Generally speaking, promoting licensing of these new methods seems to be the broad policy goal of the consent decrees. The government has also determined that promoting licensing is so important that it effectively trumps the songwriter's right to say "no," a provision of the consent decrees that the regulated PROs were required to agree.

After the last Pandora decision in the ASCAP rate court,[23] it appears that the consent decree is being interpreted to require that copyright owners withdraw from ASCAP altogether in order to enjoy the right to license a subdivision of their bundle of exclusive rights, replacing the songwriter's decision with the Court's own interpretation of the government's requirements. (The same applies to BMI.)

Respectfully, I fail to see the logic, utility or authority for the government establishing an arbitrary bright line limit on how far the copyright bundle can be

[20] See 17 U.S.C. Sec. 106.

[21] See 17 U.S.C. Sec. 201(d)(2) ("…Any of the exclusive rights comprised in a copyright, *including any subdivision of any of the rights specified by section 106*, may be transferred…and owned separately"(emphasis added)); see also *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) ("The 1976 [Copyright] Act recast the copyright as a bundle of discrete 'exclusive rights,' § 106, each of which 'may be transferred...and owned separately….' § 201(d)(2)," at 484.)

[22] See 17 U.S.C. Sec. 106(4) ("[T]he owner of copyright under this title has the exclusive rights to do and to authorize…in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly".)

[23] *In re Petition of Pandora Media Inc*., 12-cv-08035, U.S. District Court, Southern District of New York (Manhattan)

subdivided.

If the government permits copyright owners to license all of the performance right through regulated PROs, why should the government take a songwriter's right to license a subdivision of the performance right outside of the consent decree?[24] This is particularly true of digital performance rights that were barely commercialized or did not exist at all at the time of the last modifications of the respective consent decrees.

I understand why the music users would like us to believe that the government intended to regulate uses that did not exist at the time of the modifications, but I hope you can empathize with songwriters who find this rather stunning logic and take a contrary view.

This arbitrary limitation on the statutory right to subdivision essentially dares copyright owners to disassociate themselves from the regulated PROs, a course that I fully believe they will eventually follow. If enough copyright owners are effectively forced to withdraw from the regulated PROs in order to enjoy an actual free market for subdivisions of their rights permitted by the Copyright Act, both ASCAP and BMI surely will be diminished to the great disadvantage of songwriters.

I suggest that the market should be trusted to do a better job of creating licensing opportunities as likely would occur if copyright owners were free to decide how to license their property. The rate courts' position seems at odds with the elegance of the bundle of rights solution that underpins our private property traditions of personal liberty.

Updating the Consent Decrees for Licensing Technology

Discussions of technology and the music business are usually directed at innovation in modes of distribution benefitting consumers. I suggest that if the consent decrees are to be continued indefinitely into the future, an additional goal should be updating the consent decrees to recognize efficiencies in licensing technology benefitting *copyright owners*. If licensing technology supports the subdivision of copyright, all the more reason not to deprive copyright owners of their statutory rights.

[24] "[A] private property right includes the right to delegate, rent, or sell *any portion of the rights* by exchange or gift at whatever price the owner determines." Armen A. Alchian, Property Rights available at http://www.econlib.org/library/Enc/PropertyRights.html (emphasis added).

Contemporary state of the art licensing technology that was available in 1943 or 1964 (or even 1994 and 2001) bears no resemblance to efficient solutions that are currently available to copyright owners and music users. Ignoring this fact may actually create greater *inefficiencies* in the market. Copyright owners should be trusted to take their own investment decisions in building solutions for licensing subdivisions of their bundle of rights.

Should Songwriters Be Prohibited from Developing Alternative Dispute Resolutions to Licensing?

I suggest that the consent decrees prevent the market from developing robust alternative dispute resolution mechanisms that may reduce transaction costs for all concerned. If the rate court did not exist, how would the parties to licenses resolve their differences? It is not a great leap to anticipate that these disputes would be resolved in the same way many other arguments are resolved in America—some form of mediation or binding arbitration before mediators or arbitrators *mutually selected by the parties* in accordance with agreed-upon private rules in a venue the parties agree.

Many songwriters do not understand why *they* are forced into an expensive rate court proceeding that can only occur in New York before one of two judges. The same is true of the less well-financed start-ups on the other side of the deal.

Why should litigation be the only dispute resolution method and why should New York have the exclusive jurisdiction over these disputes? I think one can assume without fear of much contradiction that New York is probably the most expensive litigation venue in the country that favors the publicly traded multinational that may well have Wall Street lawyers on retainer already.

Access to Process

It also must be said that independent songwriters who have an interest in attending these rate court proceedings can only do so if they have the means to travel to the New York venue to "get their day in court." While these songwriters may not have a right to have their hearing located in a convenient tribunal, is it fair for the government to require that the venue for rate courts will always be a single federal courthouse in a far away Eastern city?

If the government determines that answer is "yes," an obvious solution would be for the songwriters to be able to attend virtually. A minor update for the consent decrees to consider is requiring that all rate court proceedings be webcast so that any member of the public, including songwriters whose

livelihoods are at issue, would have the opportunity to at least watch the proceedings. Since the government has established special courts just for songwriters, it seems that the songwriters could also have special rules that allow them to participate more directly in the process, perhaps through social media.

Streamlining the Licensing Process

In fairness to the digital retailer, the current consent decree process prohibits songwriters from allowing regulated PROs to license both the performance and statutory mechanical rights[25] for interactive streaming. This places an undue burden on both the music user and the copyright owner. The service must acquire licenses and produce statements for the identical uses from two different sources. Both sides bear incremental licensing costs.

I do not see a principled reason that regulated PROs cannot license both the performance right and the statutory mechanical reproduction right for the identical songs for the identical exploitation among the identical parties on a single accounting statement and payment.

This seems particularly true because the regulated PROs play no role in the rate setting process for statutory mechanical licenses. Allowing the regulated PROs to issue these licenses would simply be an administrative convenience to the digital services, particularly the smaller digital services that cannot take advantage of the rate courts and probably cannot afford membership in DiMA or the CCIA. The cost of that convenience should probably be shared between the copyright owners and the music user.

I appreciate the opportunity to participate in this review.

Sincerely,

Chris Castle /s/

Christian L. Castle

CLC/ko

[25] 17 U.S.C. Sec. 115.