

**PUBLIC COMMENTS OF THE
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
REGARDING REVIEW OF THE ASCAP AND BMI CONSENT DECREES**

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The American Society of Composers, Authors and Publishers (“ASCAP”) respectfully submits the following comments in response to the June 4, 2014 request of the Antitrust Division of the U.S. Department of Justice (“DOJ”) for public comments relating to potential modifications of the ASCAP and Broadcast Music, Inc. (“BMI”) consent decrees.

I. INTRODUCTION

For 100 years, ASCAP has represented the rights of songwriters and composers and kept American music flowing to millions of listeners worldwide. Today, our 500,000 songwriter, composer and music publisher members depend on ASCAP to negotiate licenses, track public performances, distribute royalties and advocate on their behalf. Through a century of innovation, ASCAP has served as the primary gateway for businesses seeking to perform copyrighted music, ensuring that they may obtain licenses to do so at reasonable market rates. As we consider our next 100 years, we firmly believe that ASCAP’s collective licensing model is the most effective, efficient and compelling model to serve the needs of music creators, businesses that perform music and music listeners everywhere.

The marketplace for music, however, is changing dramatically. New technologies are transforming the way people listen to music, substantially altering the economics of the music business, particularly for songwriters and composers. Streaming music through services such as Pandora, Spotify and iTunes Radio is quickly surpassing physical music sales and digital downloads in popularity. Digital audiovisual services such as Netflix and Amazon are revolutionizing the ways in which the world watches television and movies, changing the traditional media landscape. Music is now enjoyed by more people, in more places and over more devices. But the regulatory regime that

governs how public performances are licensed has failed to keep pace. As a result of certain provisions in the ASCAP Consent Decree, it is becoming increasingly difficult for ASCAP to serve the needs of its members (music creators), its customers (music licensees) and the music listening public.

These developments in the marketplace have shown that the current Consent Decree is inadequate in a number of ways and needs to be modified. First, the Consent Decree has been recently interpreted by the court that administers it (the “Rate Court”) to prohibit ASCAP from accepting partial grants of rights from its members, creating a situation that restricts ASCAP members’ ability to enter into direct licenses through “arms’ length” transactions at true market value. This, in turn, may ultimately compel major music publishers to withdraw from ASCAP altogether and place the viability of collective licensing at risk. Second, Rate Court proceedings under the Consent Decree have become extremely time-consuming and labor-intensive, costing the parties millions in litigation expenses. Due to the absence of clear guidance in the Consent Decree, Rate Court proceedings have resulted in license rates that many believe do not reflect the rates that would be negotiated in competitive market negotiations and, thus, do not reflect the true value of the rights at issue. Finally, the Consent Decree prohibits ASCAP from licensing rights in music compositions other than public performance rights—such as synchronization rights and mechanical rights—while its unregulated competitors (such as SESAC and Global Music Rights), as well as BMI, are free to license such rights. This places ASCAP at a competitive disadvantage in a marketplace in which its licensee customers are increasingly demanding the ability to license multiple rights from a single source.

If the ASCAP Consent Decree is not modified to address these developments, the continued viability of collective licensing in the United States is at risk. Indeed, without changes to the Consent Decree, ASCAP may face the complete resignation of certain of its largest music 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.

To remedy these problems, ASCAP proposes a number of modifications to the Consent Decree to reflect the realities of the modern music marketplace and which would result in more efficient and effective collective licensing, including: (1) allowing ASCAP to accept partial grants of rights from its members; (2) shifting to rate-setting through expedited private arbitration and establishing an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders for rights not granted to a PRO provide the best evidence of reasonable rates; and (3) allowing ASCAP to license multiple rights in music compositions and otherwise eliminating asymmetries between the ASCAP and BMI consent decrees that limit ASCAP's ability to compete effectively.¹ These proposed changes, discussed in detail below, will promote competition by facilitating direct licensing, increase efficiency by streamlining and

¹ ASCAP also proposes to modify the ASCAP Consent Decree to (i) remove the restrictions on ASCAP's foreign conduct contained in AFJ2 § IV, which are not present in the BMI consent decree; (ii) give ASCAP the ability to refuse to admit to membership songwriters or music publishers under certain circumstances (which it currently is unable to do); and (iii) include a provision requiring regular re-review of the Consent Decree to determine (among other things) whether it continues to serve the public interest or should be terminated.

improving the rate-setting process and will allow ASCAP to better serve licensees by enabling it to license multiple rights in musical compositions.

II. HISTORY OF ASCAP AND THE ASCAP CONSENT DECREE

A. ASCAP and Performing Rights Organizations

Founded in 1914, ASCAP is the oldest and largest music PRO in the United States and the only one still operated and governed by its members—the songwriters and music publishers who make their living creating music. ASCAP operates on a non-profit-making basis, distributing all license fees collected, less operating expenses, as royalties to those whose works are publicly performed. In 2013, ASCAP distributed to its members as royalties approximately 88% of all royalties it collected, making it the most efficient PRO in the world with the lowest overhead rate.

Today, ASCAP represents more than 500,000 composers, songwriters, lyricists and music publishers and licenses a repertory of millions of copyrighted musical works. PROs such as ASCAP negotiate and administer licenses for the non-dramatic public performance rights in works in their repertories, monitor music usage by and collect fees from licensees, distribute royalty payments to their members and protect from infringement their members' exclusive public performance rights. ASCAP licenses the public performance rights in the musical works in its repertory on a non-exclusive basis to a wide range of licensees, including broadcast television stations and networks, cable television operators and networks, radio stations, Internet sites and digital music services, performance venues and other public establishments that play music, such as bars, restaurants, hotels and retail stores.

When ASCAP was founded, its membership included virtually all songwriters and music publishers whose works were performed in the United States. Yet, for many

years, ASCAP has competed for members with two other U.S.-based PROs, BMI and SESAC. Founded in 1939, BMI manages a repertory of musical works that is now nearly as large and performed nearly as often as ASCAP's repertory. SESAC, founded in 1930 as a private family-owned business, has become a more significant competitor of ASCAP's and BMI's in the past twenty years, since its purchase by investors in 1992. ASCAP and BMI are both governed by antitrust consent decrees with the DOJ, whereas SESAC is not. In addition, ASCAP and BMI are now competing against new organizations, such as Global Music Rights, another unregulated for-profit entity recently launched by longtime music industry executive Irving Azoff in conjunction with MSG Entertainment, which have emerged in an effort to exploit opportunities in the marketplace created by outdated music licensing regulations. These organizations are actively vying for the right to license multiple rights to music users on behalf of songwriters and music publishers.

The benefits of collective licensing through PROs have long been acknowledged.² A license offered by a PRO provides efficiencies both for rights holders, who would otherwise struggle to individually license or enforce the millions of performances of their works on an individual basis, and licensees, who would otherwise find it difficult—if not impossible—to clear the rights for their performances. Consider, for example, the many thousands of bars, nightclubs and concert venues that perform live music, recorded music (*e.g.*, by DJs) and music in audiovisual form. No single copyright owner could efficiently license all such users, and no such establishment could ever efficiently clear all of its performances if forced to negotiate separately with each individual copyright

² See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

owner. Moreover, apart from a collective licensing organization, no entity could efficiently monitor the billions of performances that occur annually—in a plethora of ways and across various media—in order to distribute the fees paid for such performances. Collective licensing permits copyright owners to spread the costs of licensing and monitoring music usage among all members, thereby reducing costs to a manageable level and ensuring that more of the money collected is paid to songwriters and music publishers as royalties. Collective licensing also encourages music creation both by providing music creators prompt and adequate compensation, and by allowing music creators to focus their energies on their craft rather than having to expend resources on monitoring and enforcing their copyrights.

Of course, licensees also benefit tremendously from their own ability to negotiate for the right to perform music on a collective basis. PROs routinely negotiate licenses with larger industry representatives or associations such as the Radio Music License Committee and Television Music License Committee, which respectively represent thousands of commercial radio and television broadcast stations, as well as associations representing hotels, universities and other businesses.

However the music licensing system evolves in the future, it is safe to say that collective licensing will remain a necessary component if that system is to operate efficiently for the benefit of music creators, licensees and listeners alike.

B. ASCAP Membership

ASCAP is a membership organization governed by a Board of Directors elected by and from the membership. The ASCAP Board is comprised of an equal number of

songwriters/composers and music publishers.³ ASCAP's Board establishes the rules and regulations that govern ASCAP membership.⁴ Although ASCAP's rules have changed over time to reflect industry developments, ASCAP has remained steadfast in its central paradigm of ensuring that songwriter and music publisher members are treated equally. Specifically, for every royalty dollar that ASCAP distributes for performances of a given musical composition, 50 cents are paid to the songwriter(s)/composer(s) (often referred to as the "writer's share") and 50 cents are paid to the music publisher(s) (often referred to as the "publisher's share"). This direct payment of royalties to ASCAP's songwriter members occurs irrespective of agreements entered into between songwriters and music publishers that may provide for a different division of other types of royalty income (such as mechanical or synchronization royalties) or that may provide for recoupment of advances against such other royalty streams.⁵ Indeed, the right to license through and receive remuneration from ASCAP for the public performance of their works is so central

³ See ASCAP, Articles of Association of the American Society of Composers, Authors and Publishers (2002), available at <http://www.ascap.com/~media/files/pdf/members/governing-documents/articles.pdf>.

⁴ See ASCAP, Compendium of ASCAP Rules and Regulations, and Policies Supplemental to the Articles of Association (2013), available at <http://www.ascap.com/~media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf>.

⁵ Historically, songwriters relied on music publishers to handle all business aspects of their creative efforts and entered into songwriter agreements with music publishers that assigned to the publishers the songwriters' copyrights in return for a share in the resulting income (traditionally fifty percent). Although such songwriter agreements are still in place, songwriters and composers are less likely to rely on music publishers for their business services while utilizing music publishers mainly for administration services (e.g., registration of songs, collecting royalties, engaging sub-publishers abroad). Songwriters often create their own publishing company to retain partial or total ownership of their copyrights, and enter into either co-publishing agreements with music publishers that share the publisher's share of royalties or administration agreements with established companies under which the administration company receives a small portion of the publisher's share. In such cases, ASCAP divides the music publisher's share of royalties between the publisher owner and the publisher administrator.

to music creators, that it has long been standard industry practice to exclude performance royalties from composer work-for-hire agreements.⁶

ASCAP's membership is as varied as its repertory, which represents every genre of music. And, true to its principles of fairness, ASCAP's licensing is agnostic to its repertory; a blanket license permits a licensee equal access to all or any types of music in the repertory, whether top 40 hits or older, rarely performed catalog works. More extensive information regarding ASCAP's membership, distribution process and other benefits of ASCAP membership is available at ASCAP's website at www.ascap.com.

C. Relationship with Foreign PROs

ASCAP represents not only U.S. songwriters and music publishers, but also hundreds of thousands of foreign songwriters and music publishers through reciprocal license agreements with over 90 foreign PROs, which represent, in the aggregate, nearly every developed country in the world. Under such reciprocal agreements, foreign societies authorize ASCAP to license their repertories on their behalf, and ASCAP remits a portion of its domestic receipts to the foreign PROs for performance of their members' works in the U.S. Similarly, ASCAP authorizes foreign PROs to license the ASCAP repertory in their territories. Considering the importance of U.S. music around the world, ASCAP's ability as a PRO to negotiate these reciprocal agreements provides a substantial benefit to the U.S. economy. For example, in 2013, ASCAP paid foreign PROs \$66 million, but ASCAP received payments from foreign PROs of approximately \$330

⁶ In this manner, a film composer who provides services to a producer on a work-for-hire basis, traditionally in consideration of an "up-front" fee, may realize "back-end" performance royalties through ASCAP when the films are streamed online or performed on television or via other non-theatrical media. (ASCAP is not permitted to license performances by motion picture exhibitors as discussed below.) Performance royalties comprise a substantial share of income for most film and television composers.

million, or almost one-third of its total revenue, for the performance of ASCAP members' music abroad.

D. The ASCAP Consent Decree

In 1941, the DOJ brought suit against ASCAP for alleged violations of federal antitrust laws. The case was settled with the entry of a consent decree that prohibited ASCAP from receiving an exclusive grant of rights from its members and required ASCAP to charge similar license fees to music users that are “similarly situated.”⁷ The ASCAP Consent Decree has only been amended twice—in 1950 and 2001⁸—and, as discussed below, it is now apparent that the Consent Decree has failed in certain respects to accommodate the rapid and dramatic changes in the music licensing marketplace brought about by the extraordinary evolution in the ways in which music is now distributed and consumed. As a result, the collective licensing model that has, for the past century, benefited music creators, licensees and consumers alike, and which is essential for a viable music licensing system in the future, is at risk. ASCAP believes that further modifications to the Consent Decree are needed to ensure ASCAP’s licensing can meet the needs of today’s competitive marketplace.

⁷ *United States v. Am. Soc’y of Composers, Authors & Publishers*, 1941-43 Tr. Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

⁸ In addition to the 1950 and 2001 amendments, an order was entered in 1960 regulating ASCAP’s relationship to its own members, including how ASCAP surveyed music use and made distributions of license fees. See *United States v. Am. Soc’y of Composers, Authors & Publishers*, 1960 Tr. Cas. (CCH) ¶ 69,612 (S.D.N.Y. 1960). This 1960 Order was itself amended several times before being largely abrogated by the Second Amended Final Judgment (“AFJ2”) in 2001. See *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41 Civ. 1395, 2001 WL 1589999 (S.D.N.Y. 2001).

1. *The 1950 Amended Final Judgment*

ASCAP and the DOJ agreed to the entry of a revised consent decree, known as the Amended Final Judgment (“AFJ”), in 1950.⁹ AFJ included and clarified the provisions of the original decree in several respects. Section V(A) of AFJ required ASCAP to issue licenses upon request to all applicants, thus strengthening the mandate of the 1941 Consent Decree that ASCAP may not refuse to offer a license to any applicant. AFJ also established more specific restrictions on ASCAP with respect to music licensing, including the express prohibition against ASCAP’s acquiring or licensing rights other than for the public performance of musical works.¹⁰ ASCAP was also prohibited by AFJ from discriminating in license fees between similarly situated licensees.¹¹ Perhaps the most significant innovation of AFJ was Section IX, which created a “Rate Court” to determine ASCAP’s fees when ASCAP and prospective licensees could not reach a negotiated agreement.

2. *The Second Amended Final Judgment (AFJ2)*

In the late 1990s, ASCAP and the DOJ recognized that substantial changes in the music industry, including the growth of cable television and the emergence of the Internet, as well as shifts in antitrust enforcement policies, necessitated additional changes to the ASCAP Consent Decree. They negotiated a third iteration of the decree, known as the Second Amended Final Judgment (“AFJ2” or the “Consent Decree”),

⁹ *United States v. Am. Soc’y of Composers, Authors & Publishers*, 1950-51 Tr. Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) (“AFJ”).

¹⁰ *Id.* § IV(A). This restriction, however, does not apply to rights other than those associated with musical compositions. *See* Dep’t of Justice, Mem. of the United States in Response to Public Comments on the Joint Mot. to Enter Second Amended Final Judgment 7, *United States v. American Soc’y of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. Mar. 16, 2001) (explaining that AFJ2 § IV(A) does not enjoin ASCAP from administering rights other than those associated with musical compositions).

¹¹ AFJ § IV(C).

which took effect in 2001, prior to the biggest developments of the digital music era, including the introduction of Apple's iPod.

Under AFJ2, as with the prior iterations of the decree, ASCAP members may only grant to ASCAP the non-exclusive right to license non-dramatic public performances of their works, and ASCAP is prohibited from interfering with its members' right to license directly.¹² ASCAP must, upon written request, grant a music user either a blanket license that allows that user to perform all of the works in the ASCAP repertory for a fee that "does not vary depending on the extent to which the music user in fact performs ASCAP music," or a "per-program" or "per-segment" license, the fee for which will vary depending on which programs or segments contain ASCAP music not otherwise licensed.¹³

E. Rate Court Proceedings Under the ASCAP Consent Decree

Section IX of AFJ2 details the Rate Court process for the resolution of fee disputes between ASCAP and music users that have applied for an ASCAP license. It provides that, within 60 days of a music user's written request for a license, ASCAP must either propose a fee or formally request additional information that may be needed to make such a proposal.¹⁴ If the parties are still unable to negotiate a license fee, the

¹² AFJ2 § IV(A), (B). ASCAP is also prohibited from licensing to movie theaters the right of public performance for music synchronized with motion pictures. *See id.* § IV(E). The basis for this prohibition stems from an antitrust suit concerning the means by which ASCAP and its members licensed the performances of ASCAP music in audiovisual works exhibited in motion picture theaters. *See generally Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888 (S.D.N.Y. 1948). The judgment in *Alden-Rochelle* was vacated upon the entry of AFJ.

¹³ AFJ2 §§ II(E), II(J)-(K), VII(A)(1). Although they provide the same effective structure, "per-program" licenses are currently available for broadcasters while "per-segment" licenses are available for online and background/foreground music services. Both provide music users with savings when much of their discrete programming does not require licensing from ASCAP (either because the programs have no ASCAP music or all ASCAP music performed has been licensed directly).

¹⁴ *Id.* § IX(A).

applicant may commence a Rate Court proceeding 60 days after ASCAP issues its rate proposal or request for additional information, whichever is later.¹⁵ ASCAP may file its own application with the Rate Court 90 days after issuing its rate proposal or information request.¹⁶ Section IX also provides that either an applicant or ASCAP may apply to the Rate Court to fix interim fees pending the negotiation or litigation of reasonable final fees.¹⁷ The court must set interim fees within 90 days of an application, while proceedings to determine final fees must be trial-ready within one year of the initial Rate Court petition.¹⁸ These Rate Court proceedings are held in federal district court in the Southern District of New York, before a judge appointed for an open-ended term. There have been only two judges appointed in the past 30 years.

Before the entry of AFJ2, a resort to Rate Court was typically used only to spur further negotiations. This has changed in recent years, as Rate Court applications have increasingly led to trials, court-determined rates and full appellate review. Over the last 30 years, ASCAP has been engaged in more than 30 rate proceedings; of those, 14 have been filed since 2005, costing ASCAP tens of millions of dollars to defend music creators' interests.

III. CHANGES IN THE MUSIC LICENSING MARKETPLACE

Since 1914, ASCAP's licenses have evolved to meet changes in music use brought on by advances in the technologies used to perform music. For example, as the radio, television, cable and satellite industries emerged and developed, ASCAP ably met their licensing needs. Although the methods through which ASCAP licenses music on

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* § IX(F).

¹⁸ *Id.* § IX(F), (E).

behalf of its members are, in most instances, technology-neutral, ASCAP has recently experienced a number of complications in its negotiations with “new media” music services—services that perform music over the Internet or wireless networks, and that typically play far more music than traditional media licensees.

These new media music services have upended the basic “one-to-many” paradigm that predominated across the first six decades of the Consent Decree: Licensees, whether radio stations, broadcast or cable television programming services, bars and restaurants, or other traditional media platforms, publicly performed music to many listeners simultaneously. Spurred on by the proliferation of wireless communication devices and the penetration of broadband services into American households, a wide array of increasingly personalized, interactive services now allow consumers to access music from virtually anywhere, on any device and at any time on a “one to one” on-demand basis. More choice and greater consumer control has led to vastly increased music usage, as new music services like Pandora, iTunes Radio and Spotify (to name a few) require access to a massive variety of songs in order to provide users with an optimally tailored content consumption experience. These services perform virtually wall-to-wall music for their users with limited commercial interruptions, and provide each user with a personalized stream, using music with much greater intensity than traditional broadcast platforms. This tectonic shift in the technological landscape has presented a variety of significant challenges for ASCAP, as it struggles to adapt to changes in the marketplace while bound by the constraints imposed by the Consent Decree.

A. Negotiating Rates with New Media Users

As discussed above, under the Consent Decree, ASCAP must grant a license to any music user who requests one, and the user is entitled to begin performing ASCAP

music as soon as a written license request is submitted.¹⁹ This allows the user to perform all of the works in the ASCAP repertory, without the threat of infringement, before fees are negotiated by the parties or set by the Rate Court. However, the Consent Decree does not currently compel either ASCAP or an applicant to commence a Rate Court proceeding in the absence of agreement on final license terms, nor does it establish a definite timeline for the negotiation of a final fee, elements of the licensing process that certain users have begun to exploit as a dilatory tactic to avoid paying true market-determined fees for the right to perform the ASCAP repertory.

Specifically, because ASCAP licenses are compulsory and fees can be set retroactively, certain music users have strategically delayed or extended the negotiating process, choosing to remain applicants or interim licensees indefinitely—in some cases a decade or longer—without paying fees to ASCAP or providing ASCAP with the information necessary to determine a reasonable final fee. In some cases, established music users have decided that interim license rates are more favorable than anticipated rate increases, and have made strategic choices to stay on interim terms until ASCAP determines it must commence an expensive Rate Court proceeding.²⁰ In other cases, new applicants have applied for a license—claiming the shelter of the Consent Decree’s guarantee of a right to perform ASCAP members’ music while an application is

¹⁹ *Id.* § VI.

²⁰ Until final fees are negotiated or set by the Rate Court, ASCAP and a license applicant may enter into an “interim” license as a placeholder. In such cases, however, “interim” fees are set only by mutual agreement or Rate Court determination, and still do not represent actual value. In the case of new services without a history of licensing with ASCAP—particularly new digital services that have failed to earn revenues—interim fees are often contested, allowing such users the benefit of access to ASCAP’s millions of songs without paying any fee. Even where an interim fee is paid, it is often at less than full value. When such interim fees continue for a period, ASCAP risks such applicants exiting the marketplace, whether due to bankruptcy, dissolution or otherwise, leaving ASCAP with an inability to set final fees and true-up any fee balance.

pending—while simultaneously disclaiming the need for such a license and refusing to provide the information necessary for ASCAP to formulate a fee proposal.

In the scenarios above, ASCAP must decide whether to use its limited resources to pursue a lengthy and arduous Rate Court proceeding, or, alternatively, accept what it may believe is a below-market rate and permit users to remain as applicants or interim licensees longer than would be preferred. This problem is more pronounced for new services or services that are susceptible to changing market conditions, such as digital services. As compared to traditional music users like terrestrial radio stations or television broadcasting networks, the potential scale and type of music use can now vary widely among new media licensees, further complicating the process through which ASCAP values the requested license.²¹ Moreover, the speed with which new media licensees enter and exit the market has increased. As a result, ASCAP's need for information from an applicant regarding its plans for a particular service has increased, both to calculate a reasonable fee but also—in the event that the applicant refuses to provide information—to assess the potential costs and benefits of petitioning the Rate Court to set a reasonable fee. When applicants ignore ASCAP's requests for information, ASCAP can lack even the basic information necessary to determine whether Rate Court litigation is justified.

B. Licensing of Multiple Rights in Musical Works

The public performance right licensed by ASCAP on behalf of its members is only one of several exclusive rights provided to copyright holders of musical

²¹ So, too, has the wide variance in the nature of new media users made it impossible for ASCAP to engage in industry-wide negotiations such as those that have traditionally resulted in negotiated, uniform license terms.

compositions.²² Other rights include the right to reproduce and distribute musical works as phonorecords (often referred to as the “mechanical right”); the right to use a recording of a musical work in timed relation with visual images, for example as part of a motion picture or television program (the “synchronization right”); and the right to print or display a composition’s lyrics (the “print right”). At present, AFJ2 prohibits ASCAP from accepting grants of or licensing any right beyond the right of public performance.²³ Mechanical and synchronization licenses are negotiated individually by music publishers or their agents (such as the Harry Fox Agency), with fees typically paid to music publishers, who in turn pay the requisite royalties to songwriters under their separate songwriter agreements.

This division of licensing was sufficiently convenient in the traditional analog world in which licensees rarely needed licenses for multiple rights. For example, broadcast radio stations had no need for anything beyond a public performance license, while record companies only needed mechanical licenses in order to sell records or CDs. The introduction of digital technology, however, has changed the traditional licensing environment. New media music users often require licenses for multiple rights. A wide variety of digital music services display lyrics as songs are streaming, necessitating both public performance and print licenses. Digital music services that stream music on an

²² 17 U.S.C. § 106.

²³ AFJ2 § IV(A). As noted above, ASCAP is also prohibited from licensing to movie theaters the right of public performance for music synchronized with motion pictures. *Id.* § IV(E). As a result, the U.S. is the only developed country where PROs cannot license directly motion picture theaters for their performances of copyrighted music in their films. ASCAP’s inability to license movie theaters for such performances (while routinely licensing such theaters for other performances of music, such as music in the lobby or before the exhibition begins) has been a constant source of friction with foreign societies, who complain that the United States is not trading fairly in performing rights. A significant portion of fees received by ASCAP members from foreign societies is attributed to theatrical performances of musical works in U.S. films exhibited abroad. ASCAP’s inability to license such performances in the U.S. negatively impacts composers of musical works in motion pictures.

on-demand basis need a public performance license as well as a mechanical license.

Currently, these services must license each right separately, an outcome that is inefficient and may discourage new media users from properly licensing their services.

IV. MODIFICATION OF THE CONSENT DECREE

Collective licensing through PROs generates tremendous efficiencies for both the creators and users of music. Most of ASCAP's members are individual songwriters and small music publishing businesses that otherwise would not have the resources to navigate the legal complexities of music licensing. These members are freed from individual licensing, enforcement and royalty collection obligations, and are thus able to focus their attention on creating music. Licensees are, through a single license with a single entity, authorized to perform any or all of the millions of songs in ASCAP's repertory (including additional songs that enter the repertory during the term of the license and countless foreign works). Without ASCAP and other PROs, music users that perform more than a handful of musical works would face the prohibitive expense of countless negotiations with a multitude of copyright owners. Well-intentioned and law-abiding music users would risk infringement for failing to obtain licenses for every single copyrighted composition performed; less well-intentioned services, when faced with the prospect of complicated piecemeal negotiations, might simply skip the licensing process altogether. Copyright owners would also bear the burden of inefficient catalog-by-catalog, if not song-by-song, direct negotiations. Even the largest music publishers lack the information, resources and experience necessary to negotiate with each of the numerous broadcasters, Internet services, nightclubs, restaurants and other users that regularly perform publicly their copyrighted works.

ASCAP has solved all of these problems in a simple and effective manner. In addition to the straightforward efficiencies of collective licensing, ASCAP has developed substantial expertise in tracking performances, collecting license fees and enforcing copyrights, which allows it to turn over a higher percentage of its revenues as royalties (nearly 88%) than any other PRO in the world. ASCAP has also developed expertise with respect to the valuation and proper pricing of public performance licenses. The ASCAP blanket license also ensures that the price of public performance rights does not discourage the performance of musical works. Because the fee for a blanket license does not vary with the number of performances of ASCAP music, music users may perform any work as often as they want during the term of the license without paying separately for incremental uses.

Unfortunately, the efficiency and effectiveness of ASCAP's collective licensing of musical works is unnecessarily hindered by the Consent Decree. These problems, and ASCAP's proposed solutions, are discussed below.

A. The Consent Decree Should Be Modified to Permit ASCAP to Accept Partial Grants of Rights

The problems with the current ASCAP rate-setting process, and the inability of ASCAP to offer multiple rights in music compositions to music users, have fueled a new interest on the part of owners of copyrights in musical works to license their works directly to certain users or categories of users on an exclusive basis. The ability to enter into such direct licenses with music users has taken on new importance in recent years for a number of reasons.

First, many ASCAP members have become concerned that licensing their compositions through ASCAP does not allow them to realize the true market value of

their copyrights, particularly with respect to the use of their works by streaming music services. In particular, some members have questioned whether the rates that certain music users—specifically new media services—pay to license ASCAP music represents the true value of the rights at issue. Relatedly, some members have expressed concerns that, in the absence of market-based transactions between willing buyers and willing sellers, the Rate Court is able to set rates that accurately reflect the true value their copyrights would receive from such music users in a free and competitive market.

Second, some ASCAP publisher members have expressed an interest in licensing their public performance rights together with other rights when appropriate. As discussed below, allowing ASCAP to offer synchronization, mechanical and print rights would improve the efficiency of existing licensing practices, but ASCAP is currently prohibited from offering them.

Finally, some ASCAP publisher members want increased flexibility to manage their own rights and negotiate contractual terms directly with particular music users. For example, music publishers might negotiate shorter term licenses agreements or agree to compensation in a form other than monetary royalties—such as equity shares or promotional initiatives.

For these reasons, among others, certain members began in late 2010 to contemplate withdrawing from ASCAP altogether. To address these members' concerns, ASCAP modified its rules in 2011 to permit members to modify their membership agreements (instead of terminating them completely) and withdraw from ASCAP only the right to license new media services, leaving with ASCAP the right to license all other music users (*e.g.*, television and radio stations, bars and restaurants), which ASCAP has

long effectively licensed and which would be more difficult for music creators to license individually. (BMI made similar changes to permit its affiliates to make similar withdrawals of new media rights.) Three major music publishers subsequently withdrew their new media rights from ASCAP—EMI Music Publishing, Sony/ATV Music Publishing and Universal Music Publishing Group. Each then entered into direct licenses with a number of new media users, including Pandora and Apple (for its recently launched iTunes Radio service). For essentially the first time, the music publishers negotiated direct licenses on a “willing buyer-willing seller” basis with music users.

A recent ruling by the ASCAP Rate Court (and a ruling by the BMI Rate Court that had a similar effect), however, put a stop to this new approach to licensing. Both courts interpreted their respective consent decrees not to permit a partial withdrawal of rights as to certain categories of music users, in effect requiring music publishers to choose either to be “all in” or “all out”—*e.g.*, either to leave their works in the ASCAP (or BMI) repertory and thereby allow ASCAP (or BMI) to license their works to all users, or to resign entirely from ASCAP (or BMI) and license directly their works to all users.²⁴ Because some music publishers believe they need to be able to exercise exclusive control over the licensing of their works in certain situations, these court decisions may soon lead to those music publishers’ complete resignation from ASCAP and BMI. Despite the clear efficiencies of collective licensing for both music creators and users—and the

²⁴ On September 17, 2013, the ASCAP Rate Court granted a motion for summary judgment brought by Pandora, holding that the membership modifications did “not affect the scope of the ASCAP repertory” for the term of Pandora’s final license. Opinion & Order at 30, *In re Petition of Pandora Media, Inc.*, No. 12 Civ. 8035 (S.D.N.Y. Sept. 17, 2013), ECF No. 70. The court’s reasoning focused on Consent Decree construction, with emphasis on provisions of AFJ2 that entitle applicants and licensees to perform “all of the works in the ASCAP repertory.” *Id.* at 17 (quoting AFJ2 §§ VI, IX(E)). The BMI Rate Court later came to a similar—though not identical—conclusion, holding that “BMI [could] no longer license [withdrawn works] to Pandora or *any other applicant.*” Opinion & Order at 2, *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037 (S.D.N.Y. Dec. 19, 2013), ECF No. 74 (emphasis added).

complexities and expense that would inevitably arise in the absence of collective licensing—this outcome is a real possibility and a serious threat to the future of collective licensing in the U.S.

This result can be avoided by modifying the ASCAP Consent Decree to permit ASCAP to accept partial grants of rights from its members (and making a parallel modification to the BMI consent decree). The Consent Decree modifications should also provide that ASCAP may *refuse* to accept such a partial grant of rights in situations where ASCAP determines that it would not make economic sense for it to license only those limited rights.²⁵ These modifications would preserve the benefits of collective licensing in many situations, while allowing copyright holders to pursue direct non-compulsory licenses when it is economically efficient and beneficial to do so. They would also afford greater latitude in structuring license arrangements, ultimately benefitting copyright owners and music users alike. Further, by encouraging the negotiation of direct licenses by truly willing buyers and willing sellers outside of the context of the Rate Court, these modifications should facilitate transactions that reflect the true value of those rights in a competitive market and thereby provide informative benchmarks for the rate-setting process.

Allowing ASCAP to accept partial grants of rights from its members is also consistent with the Copyright Act, which explicitly conceives of the property rights conferred by copyright as divisible and capable of being assigned or licensed either in

²⁵ To the extent the Consent Decree is modified to permit ASCAP to license multiple rights in addition to public performance rights (as discussed in Part IV.C, below), ASCAP would not condition its acceptance of a member's partial grant of public performance rights on the member also granting other rights to ASCAP. ASCAP thus would not, for example, refuse to accept a partial grant of public performance rights unless the member also grants ASCAP the right to license mechanical or synchronization rights.

whole or in part.²⁶ Copyright owners themselves are not confined to “all in or all out” licensing arrangements; they do not have to grant the right of reproduction or the right to prepare a derivative work to a licensee simply because they have also granted the licensee the right of public performance.²⁷ Allowing ASCAP to accept partial grants of rights from its members would therefore harmonize the Consent Decree with copyright law more generally, and it would eliminate the restraint on its members’ property rights imposed by the ASCAP Rate Court’s interpretation of AFJ2.

B. The Consent Decree Should Be Modified to Replace the Current Rate-Setting Process with Expedited Arbitration

ASCAP also proposes to modify the Consent Decree to implement an expedited arbitration process for the resolution of disputes over rates and other terms. The proposed arbitration process would include a streamlined schedule for an applicant²⁸ to provide necessary information to ASCAP, for ASCAP to quote a rate, and (if the parties are unable to agree on a rate) for the parties to commence and complete arbitration in an expedited fashion, thereby eliminating the need for—and uncertainty surrounding—interim licenses. In connection with the proposed expedited arbitration process, ASCAP also proposes establishing a presumption that rates and other financial terms of direct licenses agreed upon by music users and copyright owners independently of the Consent Decree’s rate-setting process are the best benchmarks for setting ASCAP’s rates.

These proposed modifications would achieve several important objectives. First, they would replace the current Rate Court process, which has become unduly costly and

²⁶ See 17 U.S.C. §§ 106, 201(d).

²⁷ See *id.* § 201(d)(2) (any rights specified in Section 106 may be transferred separately).

²⁸ The term “applicant” as used throughout is intended to describe both new licensees that have not previously been licensed by ASCAP and existing licensees seeking to renew or negotiate a new license with ASCAP.

time consuming. Second, they would substantially reduce (perhaps to zero) the number of licensees on non-final “interim” licenses, as well as users who publicly perform the ASCAP repertory for years without any license in place. Third, by establishing a presumption that direct licenses between willing buyers and willing sellers are the best benchmarks for determining the ASCAP rate, these modifications should result in rates and other terms that accurately reflect the true market value of public performance rights in musical compositions.

These modifications are needed for a number of reasons. As discussed in more detail below, the current Rate Court process has resulted in great expense and prolonged uncertainty for both ASCAP and licensees. In addition, the Rate Court process has produced unintended consequences that are detrimental both for licensees and ASCAP’s members. AFJ2’s lack of clear guidance as to what constitutes reasonable rates and other terms has created uncertainty and produced outcomes that do not reflect the true market value of public performance rights as reflected in direct licenses negotiated outside of the shadow of the Rate Court. This uncertainty also incentivizes applicants to litigate rather than negotiate. A presumption that rates in such direct licenses are reasonable would thus ensure that the rate-setting process results in rates that are informed by competitive market outcomes. In addition, such a presumption would help shape ASCAP’s negotiations with current or future licensees, providing guidance as to market rates, likely reducing the need to resort to litigation in order to set rates and other terms and discouraging any effort, on the part of ASCAP or licensees, to use the rate-setting process strategically to avoid market rates.

Finally, a number of licensees, secure in the Consent Decree's requirement that ASCAP issue compulsory licenses, have effectively chosen to remain on interim licenses—in some cases a decade or longer—sometimes without paying fees to ASCAP or providing ASCAP with the information necessary to determine a reasonable final rate and terms. This problem is particularly pronounced for new services or when rapidly changing marketplace conditions complicate the process of determining appropriate rates and other terms.

ASCAP's proposal addresses all of these issues by switching to an expedited arbitration process with narrowly focused discovery, guided by the best evidence of the true market values of public performance rights. Taken together, ASCAP's proposed modifications to the Consent Decree will lower the costs of the rate-setting process and reduce uncertainty and increase efficiency, ultimately benefitting both ASCAP and its licensees.

1. *The Current Rate Court Process Is Costly and Inefficient*

The ASCAP Rate Court was meant to provide a forum for the efficient and timely determination of rate disputes. But in practice, Rate Court litigation has resulted in great expense and prolonged uncertainty for both ASCAP and license applicants. Although AFJ2 mandates that proceedings must be trial-ready within one year of the filing of the initial petition, that deadline is rarely met, largely because the parties are permitted the full range of pretrial-motion practice and discovery afforded by the Federal Rules of Civil Procedure. Recent Rate Court proceedings have all lasted more than a year when measured from the date of the applicant's original application to the Rate Court's final

fee determination.²⁹ This does not account for the time spent on post-trial appellate proceedings or possible proceedings on remand, which can delay the determination of a final fee even beyond the original expiration date of the license at issue.³⁰

Rate court proceedings have also proven to be extremely expensive for the parties involved. Although the presiding judge can attempt to streamline the process by enforcing the timeline set by AFJ2, the parties are still entitled to broad fact and expert discovery and must adequately prepare for complicated trials. In addition to enormous internal administrative and labor costs, ASCAP and applicants have collectively expended many millions of dollars on litigation expenses related to Rate Court proceedings, much of that incurred since only 2009. Of course, each licensee bears only the expense of its own ASCAP Rate Court proceeding; ASCAP must bear the expense of them all.

In addition to these easily measurable costs, both ASCAP and applicants must contend with the commercial uncertainty that comes from an extended adjudication process. Until the Rate Court sets the final rates and other terms, both ASCAP and the licensee are subject to the risk that rates and other terms in a final license will apply retroactively to the date upon which the interim license was granted, which introduces

²⁹ See *United States v. Am. Soc'y of Composers, Authors & Publishers (In re Am. Online, Inc.)*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (approximately 17 months); *In re MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010) (24 months); *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010) (just under 50 months, although some delay attributable to the transition in Rate Court judges); *In re Pandora Media, Inc.*, --- F. Supp. 2d ---, 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014) (approximately 16 months).

³⁰ For example, the final rates for ASCAP's licenses with RealNetworks and Yahoo! for license periods beginning in January 2004 and July 2002, respectively, were not determined until 2011, well beyond the five-year license term contemplated by AFJ2. Stipulation and Order of Dismissal, *United States v. Am. Soc'y of Composers, Authors & Publishers (In re RealNetworks Inc.)*, No. 09 Civ. 7761 (S.D.N.Y. Oct. 13, 2011), ECF No. 13 (stipulating to settlement); Stipulation and Order of Dismissal, *United States v. Am. Soc'y of Composers, Authors & Publishers (In re Yahoo! Inc.)*, No. 09 Civ. 7760 (S.D.N.Y. Jan. 5, 2012), ECF No. 27 (stipulating to settlement).

uncertainty that can impact accounting and other administrative processes, as well as budgeting and strategic planning.

2. *Expedited Arbitration Is a More Efficient Alternative*

The expense and delay of Rate Court proceedings could be substantially reduced by modifying the Consent Decree to establish an expedited arbitration process that would include narrowly focused discovery and a strict timeline for the commencement and completion of the arbitral process. Expedited arbitration proceedings would serve two purposes. First, both music creators and music users would benefit from a more definite timeline and cheaper resolution of license fee disputes. Second, expedited arbitration would discourage applicants for compulsory licenses from indefinitely resting on mere license applications or remaining on interim licenses. Indeed, by shortening and fixing the amount of time necessary for determination of a final license fee, expedited arbitration might eliminate the need for interim fee proceedings altogether for new applicants or for existing licensees' new services.

Contrary to suggestions that may be made by certain licensees as part of the Consent Decree review process, there is no reason to believe that implementing ASCAP's proposal for expedited arbitration would result in *more* litigation relative to the current scheme, or that the current Rate Court process somehow serves to "deter" litigation. As an initial matter, although there may be relatively few Rate Court trials in which the Court has issued a final determination, there have in fact been a substantial number of Rate Court proceedings that have been terminated by settlement after significant expenses have been incurred in preparation for Rate Court litigation. Furthermore, even if there were an *initial* increase in litigation if ASCAP's arbitration proposal were implemented, the more efficient resolution of disputes through the

arbitration process would soon provide a body of decisions to enable licensees and ASCAP to better predict litigation outcomes and arrive at negotiated rates and other terms more quickly and with greater frequency. In the long term, the number of arbitrations would necessarily decline as certainty as to outcomes grows. This is a key advantage over the existing Rate Court procedure, where final determinations of rates and other terms are comparatively few owing to the expense of litigation and the sizable risk involved, and therefore guideposts for negotiation and settlement are sparse.

3. *The Rate Court Process Lacks Guidance as to Reasonable Rates*

ASCAP and its members are equally troubled by the lack of clarity regarding what factors the Rate Court should consider when setting a “reasonable fee” and the weight given to those factors. In recent proceedings, the Rate Court’s analysis of potential “benchmark” license agreements has highlighted the ambiguities created by AFJ2 and resulted in the setting of rates that ASCAP believes do not reflect the true market value of an ASCAP license.

AFJ2 does not provide clear guidance regarding how a “reasonable fee” should be set for musical work public performance licenses. Under AFJ2, the Rate Court must determine whether the fee ASCAP has proposed is “reasonable,” and, if not, set “a reasonable fee based on all the evidence.”³¹ Because the Consent Decree does not define “reasonable,” the ASCAP Rate Court has often looked to the concept of “fair market value” to evaluate the reasonableness of ASCAP’s proposal. Both the Rate Court and Second Circuit have held that “fair market value” is “the price that a willing buyer and a willing seller would agree to in an arm’s length transaction,” and have found that this

³¹ AFJ2 § IX(D).

value can best be determined by the consideration of analogous licenses or benchmark agreements from a competitive market.³²

Yet, as the Second Circuit has acknowledged, many of the licenses presented as benchmarks—those between ASCAP or BMI and various licensees—are inherently different from the licenses that would obtain in a free market.³³ This is because a seller's ability to refuse to sell is a key requirement for a true market transaction, and neither ASCAP nor BMI are free to refuse to license their repertoires under their respective consent decrees. In the absence of benchmark rates set through competitive market transactions involving non-compelled sellers, the Rate Court has often resorted to "very imperfect surrogates, particularly agreements reached either by [the] parties or by others for the purchase of comparable rights."³⁴ ASCAP has been bound by decisions based on these "imperfect surrogates," both in its licenses with an applicant in a given proceeding and in those subsequently offered to similarly situated licensees.

The last two years, however, have seen an increase in the number of direct licenses negotiated between music publishers and music users outside of the compulsory licensing regime imposed by the ASCAP and BMI consent decrees. These direct licenses provide "economic data that may be readily translated into a measure of competitive

³² *United States v. Broad. Music, Inc. (Music Choice II)*, 316 F.3d 189, 194 (2d Cir. 2003) ("In making a determination of reasonableness (or of a reasonable fee), the court attempts to make a determination of the fair market value—the price that a willing buyer and a willing seller would agree to in an arm's length transaction. This determination is often facilitated by the use of a benchmark—that is, reasoning by analogy to an agreement reached after arms' length negotiation between similarly situated parties.") (internal citations omitted); *In re MobiTV*, 712 F. Supp. 2d at 232-33, 247 (same) (quoting *Music Choice II*, 316 F.3d at 194).

³³ See, e.g., *Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 577 (2d Cir. 1990) ("[S]ince there is no competitive market in music rights, the parties and the Court lack any economic data that may be readily translated into a measure of competitive pricing for the rights in question.").

³⁴ *Id.*

pricing” in the market for public performance rights.³⁵ Indeed, the Second Circuit and Rate Courts have already recognized the value of such benchmarks to the rate-setting process, acknowledging that direct licenses provide evidence of the true market value of public performance rights in a competitive market rather than a “hypothetical” value determined by the Rate Court.³⁶

Nevertheless, the Rate Court has continued to focus on the “hypothetical” fair market value of performance rights using compulsory licenses as benchmarks.³⁷ As a result, some rates have been, and may continue to be, set at rates below what the evidence indicates are market levels.³⁸ The use of compulsory license benchmarks rather than competitive market benchmarks may also result in very different rates for similarly situated music services, depending on whether the service entered into direct licenses with music publishers, negotiated a rate with a PRO outside of Rate Court, or applied to have a rate set by the court. Composers’ and songwriters’ compensation, in turn, will vary depending on whether their music publishers engage in direct licensing or license

³⁵ *Id.*

³⁶ *Id.* at 569 (“Fair market value is a factual matter, albeit a hypothetical one.”). See also *Broad. Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 47 (2d Cir. 2012) (noting that where applicant did not have a direct licensing program, its rates agreed to with PROs “were less competitively set” than they would have been if applicant used direct licensing or if “music rights were more ‘scattered among numerous performing rights societies’”) (quoting *Showtime*, 912 F.2d at 570); *THP Capstar*, 756 F. Supp. 2d at 537-38 (considering “the existence of direct licensing relationships” in an AFJ2 rate-court proceeding); *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 360-61 (S.D.N.Y. 2010) (holding that direct licenses between applicant and several individual music publishers could serve as appropriate benchmarks).

³⁷ *In re Pandora Media, Inc.*, --- F. Supp. 2d ---, 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014) (rejecting direct licenses as market benchmarks in favor of preexisting rates in compulsory licenses negotiated in the shadow of the Rate Court).

³⁸ *Id.* (setting license fee at 1.85% of revenue, even though direct licenses proposed as benchmarks established that rates as high as 3.0% of revenue would be reasonable). This, in turn, may simply encourage additional Rate Court litigation, as applicants seek below-market rates set by the court, rather than competitive rates that would result from out-of-court negotiations.

their music through a PRO. Both outcomes are inconsistent with AFJ2's intent to guarantee similar rates for similarly situated music users.

4. *Creating a Presumption that Direct Licenses Are the Best Evidence of Reasonable Rates*

These problems could be resolved by the establishment of an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders for rights not granted to a PRO provide the best evidence of reasonable rates. Including this proposed presumption in a modified Consent Decree would help ensure the integrity of the rate-setting process by guaranteeing that the arbitrators' determination of a reasonable rate and other terms is informed by true market outcomes achieved in comparable arms'-length transactions. Because direct licenses are entered into by music publishers and licensees operating outside of the shadow of the Consent Decree, they reflect competitive market prices that are not distorted by any potential "market power" that might arise from collective licensing by copyright owners (the concern that originally led to regulation of BMI and ASCAP in the first place) or by the PROs' inability to withhold rights from an applicant. As such, these direct licenses are fundamentally different—and inherently more reliable indicators of market rates—than benchmarks that the Rate Court has previously relied upon. Comparable direct licenses are the best evidence of the value of public performance rights—the very embodiment of the goal articulated for the determination of a reasonable fee by the Second Circuit since 1990³⁹—and including a presumption to that effect in a modified Consent Decree would significantly improve the rate-setting process.

³⁹ The "fair market value" of a proposed license is "the price that a willing buyer and a willing seller would agree to in an arm's length transaction." *Music Choice II*, 316 F.3d at 194 (internal quotation marks and citations omitted); *Showtime*, 912 F.2d at 569.

C. The Consent Decree Should Be Modified to Permit ASCAP to License Multiple Rights in Musical Compositions

Many licensees must obtain multiple rights in musical compositions in order to operate lawfully. Currently, these licenses must be obtained from multiple different licensors. ASCAP, however, is currently prohibited by its Consent Decree from licensing rights other than public performance rights (a restriction that does not exist in the BMI consent decree or apply to any of ASCAP's unregulated competitors). Modifying the ASCAP Consent Decree to allow ASCAP to license multiple rights in musical compositions would promote competition and benefit both rights holders and music users.

In particular, new media licensees have been driving increased demand for licensing of multiple rights in a single transaction, a significant change from traditional licensees—*e.g.*, radio, television, taverns, background music services—which only required the right of public performance in musical compositions from ASCAP. For example, services that stream music on an on-demand basis clearly demonstrate the need for one-stop shopping for rights in musical works. These services are considered “interactive” within the meaning of the Copyright Act—they must obtain both a public performance license *and* a mechanical license under Section 115, which allows the service to make reproductions of the work that are ancillary to the streaming process. At the moment, these services typically license performance rights through a PRO such as ASCAP and mechanical rights directly from the copyright owner, administrator or a designated agent.⁴⁰ Mechanical licenses under Section 115 are obtained on a song-by-

⁴⁰ As discussed below, we note that some of ASCAP's competitors are not prohibited from licensing multiple rights in music compositions.

song basis. ASCAP, in contrast, licenses public performance rights on a blanket repertory-wide basis, and could do the same for reproduction rights.

The licensing of musical works by interactive music services would be more efficient if the ASCAP Consent Decree were modified and such services could negotiate with ASCAP to license both rights in a single transaction. Indeed, because this change could extend the benefits of collective licensing to a wide range of additional music users, it should be made more broadly, so that ASCAP could accept grants of, and license all, rights in musical works—mechanical, synchronization and print rights in addition to public performance rights. A change of this sort would respond to consumer demand for simplification of the licensing process. Music users that need multiple copyrights are increasingly seeking the efficiency and convenience of “one-stop shopping” for their licenses, and would prefer to avoid the delay and costs of multiple transactions. It would also encourage innovation by reducing the licensing burden on new music users. Songwriters, composers, lyricists and independent music publishers would also benefit from this change because the increased administrative efficiency of utilizing ASCAP as a one-stop shop would greatly reduce transactional costs and administrative expenses, ultimately providing them a greater monetary return for the use of their works.

Furthermore, amending AFJ2 to permit licensing of multiple rights in musical works would allow ASCAP to compete more effectively in both the domestic and international licensing marketplaces. Although AFJ2 prohibits ASCAP from licensing mechanical, synchronization and print rights, the BMI consent decree, as noted above, does not contain a similar prohibition. Other ASCAP competitors, such as SESAC and new market entrants like Azoff MSG’s Global Music Rights, are also able to license

multiple rights, as are ASCAP's music publisher members, when they choose to license music users directly.⁴¹ Indeed, one of the reasons cited by major music publishers for their increased focus on the direct licensing of public performance rights is their interest in negotiating licenses for multiple rights with those new media licensees who require them.

Although ASCAP's domestic competitors have not yet sought to license multiple rights, there is reason to expect that they will seek to do so in the near future. For example, it has been reported that the Harry Fox Agency ("HFA"), the single largest agent for managing mechanical reproduction rights, is up for sale.⁴² If one of ASCAP's unconstrained competitors were to acquire HFA, then that competitor would have a significant competitive advantage over ASCAP.

ASCAP's inability to offer licenses for multiple rights is also placing it at a competitive disadvantage with respect to foreign PROs, many of which are already engaged in the process of licensing multiple rights. For example, PRS for Music, the UK PRO, and the Australasian Performing Right Association ("APRA"), the PRO for Australia and New Zealand, license both mechanicals and public performance rights.⁴³ Similarly, GEMA, the German PRO, licenses synchronization, mechanical and public

⁴¹ See, e.g., *FAQ/Help*, Universal Music Publishing Group, <http://www.umusicpub.com/#contentRequest=licensefaq&contentLocation=sub&contentOptions=> (last visited Aug. 4, 2014) (synchronization rights); *Licensing Request*, Warner/Chappell Music, http://www.warnerchappell.com/TemplateAction?system_action=getsync_departments¤ttab=licensing (last visited Aug. 4, 2014) (synchronization and mechanical rights).

⁴² See Ed Christman, "SESAC Parent Considers Acquisition of Harry Fox Agency," *BILLBOARD.COM*, May 23, 2014, available at <http://www.billboard.com/biz/articles/news/publishing/6099105/sesac-parent-considers-acquisition-of-harry-fox-agency>.

⁴³ See PRS For Music, "Rights," available at <http://www.prsformusic.com/Pages/Rights.aspx> (last visited Aug. 4, 2014); APRA AMCOS, "What We Do," available at <http://www.apraamcos.com.au/about-us/what-we-do/> (last visited Aug. 4, 2014).

performance rights.⁴⁴ ASCAP is prevented from competing with these societies over rights other than public performance rights not only in the U.S. marketplace, but abroad as well.⁴⁵

The impact of this asymmetry will only intensify as foreign PROs continue to explore their options for entering new markets by issuing such bundled licenses on a multi-territorial basis. For example, the European Parliament recently issued a Directive on collective management of copyright and related rights and multi-territorial licensing that provides new rules on music copyright licensing to enable online providers to more easily obtain licenses to transmit music in more than one EU country.⁴⁶ And ASCAP's negotiations with licensees have already been adversely impacted by these developments. In particular, ASCAP has proposed to certain digital service licensees that, if they seek to expand their services beyond the United States, ASCAP would be happy to discuss amending their licenses to include additional foreign territories. The digital service licensees have consistently declined ASCAP's offer on the ground that they can secure all of the additional rights their services require, such as mechanical rights, from foreign PROs (which have reciprocal agreements with ASCAP) in a single transaction. This situation not only restrains competition more broadly by hindering ASCAP's ability to compete in the global marketplace, but it directly harms ASCAP's composer, songwriter and music publisher members: Foreign PROs tend to take more deductions and impose

⁴⁴ See GEMA, "GEMA Membership: It's worth being a member," *available at* <https://www.gema.de/en/music-authors/new-here/become-a-member.html> (last visited Aug. 4, 2014).

⁴⁵ See AFJ2 § IV(A) (prohibiting ASCAP from holding rights in compositions other than the right of public performance both inside and outside of the United States).

⁴⁶ See European Comm'n, *Directive on collective management of copyright and related rights and multi-territorial licensing—frequently asked questions* (Feb. 4, 2014), *available at* http://europa.eu/rapid/press-release_MEMO-14-79_en.htm (last visited Aug. 4, 2014).

higher overhead fees than ASCAP, thereby diminishing the royalty distributions that songwriters and music publishers would otherwise receive if ASCAP was administering the licenses. ASCAP's members, and the U.S. music licensing marketplace overall, would be better served if ASCAP could compete on equal footing with its competitors by offering licenses for multiple rights.

Modifying the Consent Decree to permit ASCAP to license multiple rights would promote competition in three ways. *First*, it would enable ASCAP to enter the marketplaces for rights other than those of public performance, adding an experienced, established competitor to those marketplaces and expanding licensee choice. *Second*, it would enhance competition among PROs for members and affiliates—as explained above, neither BMI nor SESAC, nor any potential market entrants, are proscribed from licensing synchronization, mechanical or lyric rights. That ASCAP is discriminated against in this regard disadvantages its members vis-à-vis their competitors who are affiliated with other PROs, and more generally denies songwriters and music publishers the option of using a trusted, transparent agent to administer their full panoply of rights. *Third*, permitting ASCAP to license multiple rights in addition to public performance rights would extend the benefits of collectively licensing to these other forms of rights, reducing licensee transactions costs and thereby reducing the costs passed through to end users. This would also facilitate innovation by allowing new licensees to further reduce the effort and expenditure required to secure the full complement of rights associated with musical compositions that they require.

V. CONCLUSION

ASCAP thanks the DOJ for its interest and willingness to engage in the much-needed process of Consent Decree reform. Revolutionary changes in the means by which

musical works are transmitted to consumers have transformed the competitive landscape for music licensing. These developments require parallel changes in the Consent Decree in order to ensure that the interests of music users, creators and listeners are similarly protected in the digital age.

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