From: Sjingl[redacted]
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To: ATR-LT3-ASCAP-BMI-Decree-Review <ASCAP-BMI-Decree-Review@ATR.USDOJ.GOV>
Subject: COMMENTS REGARDING THE ASCAP CONSENT DECREE

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MUSICAL APARTHEID - THE ASCAP CONSENT DECREE

by Steve Karmen

I am an ASCAP composer and music publisher.

Hearings were recently held by a House Judiciary Sub-Committee to discuss how future payments will be made for the uses of music in the vast new digital market place. Testimony was heard from providers of music (performance rights societies—ASCAP, BMI— copyright owners, music publishers, songwriters, and recording artists); and from buyers and users of music (radio and TV broadcasters, and Internet streaming web sites). The only clear result was that the providers want to earn more and the users want to pay less.

Congress, the Department of Justice, and the Copyright Office will ultimately decide what changes should be made, but whatever the outcome, if there is not a radical revision of the internal mechanisms of the biased ASCAP consent decree, then the greatest robbery of creative income in the history of the music business will continue unchecked.

ASCAP is a clearing house. Members' music is licensed to broadcasters by the pound, under a "blanket license" formula, where broadcasters pay one fee—a negotiated percentage of the broadcasters' income—for the unrestricted uses of all the music in ASCAP's repertoire. Twice through the years the broadcasters tried to end the blanket license concept—in the *"CBS Case,"* and the *"Buffalo Broadcasting Case,"* each time seeking to pay only for the specific music they actually used—and twice the courts ruled for ASCAP, affirming that the blanket license is the only fair way to compensate music owners for performances of their works.

In 1940, the DOJ sued ASCAP under anti-trust laws for overcharging the broadcasters. The settlement resulted in the *1960 Consent Decree* which created rate courts to adjudicate disputes instead of endless litigation.

Taking advantage of the government's naiveté about the music business, deep

within the decree ASCAP was permitted to concoct a *"category-credit"* system to determine royalty payments to members. Under this musical *Apartheid* approach, "a featured performance"—another word for pop song—would earn 100% of a payment credit, the highest payment rate, while credit percentages for all other categories of music—theme music, background music, advertising music, etc.—lagged far behind. (*"Featured performance,"* is an ASCAP manipulation of words: under the blanket license there is no such thing as a featured performance because *all* music is featured and paid for *equally* by the broadcasters.)

The consent decree specifically states that distributions must be based ***"...primarily on the basis of objective surveys of performances periodically made by or for ASCAP..."*** (Consent Decree language).

These surveys have never been made. The proof is indisputable: when ASCAP was founded a century ago, popular song owners divided all the income, which then came from live performances of their music in theaters and saloons. After radio was invented, and theme, background, and advertising music became part of broadcast life, the popular song rate still commanded the top 100%. Later, after the invention of television, and still later, after the invention of the Internet, the popular song rate continues at 100% of a payment credit. In a constantly-changing industry, no one can claim that an objective survey has been made when the top rate category has been locked at 100% for *one hundred years*.

Further, the 1960 decree permitted members owning long running songs—primarily the publishers and estates of old-time "standards" composers—to accumulate extra votes in the annual Board of Director elections, thereby assuring certain members of self-election and their continuing, unchallenged control of the ASCAP distribution system.

An individual member has no recourse. When composers join ASCAP, they must waive all rights to pursue grievances in the courts, but instead must submit disputes only to an internal Board of Review; and following an adverse decision at that level, then to a panel of impartial Arbitrators. However, in 1998, ASCAP appealed to Federal Judge William Conner, arguing that an independent *"ad hoc"* panel of arbitrators should not have the power to overrule the professional expertise of the ASCAP Board. The Judge agreed, and finally and forever emasculated the internal Board of Review protest process, leaving all distribution matters to the exclusive control of the Board of Directors.

The music business of 1960 is no more. Declining record sales (mechanicals) and the availability of on-line music has forced the consolidation of many

companies into a few behemoths that control the entire industry. Performance income has become the last constant source of revenue for these giants.

After more than seventy years, the Government now has the opportunity to reverse this egregious and illegal abuse. ASCAP should be ordered to switch to a "durational" payment system, the same rational system in use all over the world with the exception of the United States, where payments are made to composers and publishers based on the length of their music that is broadcast, and not some biased category system that allows the select few the ability to methodically strip away the largest unsubstantiated share for themselves.

Respectfully submitted,

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