From: Dean Kay <dea[redacted]
Sent: Tuesday, August 5, 2014 4:03 PM
To: ATR-LT3-ASCAP-BMI-Decree-Review <ASCAP-BMI-Decree-Review@ATR.USDOJ.GOV>
Subject: Music Creators Seek Reform of Consent Decree - By David Newhoff

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Please include the following articles in your review... They state my point of view.

Thank you.

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Music Creators Seek Reform of Consent Decree
By David Newhoff Posted on August 4, 2014

In his recent testimony before congress, songwriter and president of ASCAP Paul Williams remarked that it was astonishing to realize that he and fellow witness, songwriter Rosanne Cash, were subject to more government regulation than the multi-billion-dollar corporations whose interests were represented in the same hearing. What Williams was referring to with that remark is the fact that licensing fees for certain public performances of works by composers and songwriters are still predicated on a WWII-era consent decree between ASCAP and the DOJ. This decree granted a federal judge (aka the "rate court") the sole right to set rates for these public performances, but for a market that looks nothing like the one we have today.

It is thanks to these outdated licensing terms that we continue to hear from various music composers and writers that, for instance, millions of plays of their songs on a streaming service like Spotify is worth less than a couple-hundred bucks. And as the songwriters and composers presently lobby for change, we'll surely be hearing plenty of hew and cry from Pandora, Spotify, and Google. After all, when these tech companies evangelize *new models*, *innovation*, and *disruption*, they only really mean it if it's good for their bottom line; so if a half-century-old law or system allows them to exploit someone else's work in order to add a few million to their own coffers, then "old models" sound just fine. They won't come out and say "leave the old system in place;" that would be too regressive-sounding and too bluntly honest. Instead, they'll try to scare consumers in one way or another that their streaming services will cease to operate or have to adopt new pay models or charge more for access, and so on; but the reality is that while these services dangle cheap and free in front of consumers in the short term, failure to reform the present system may result in higher prices, disenfranchised licensees, and/or decreased diversity in production over the long term. Meanwhile, there's no question songwriters and composers are getting pretty well hosed, shackled to an obsolete model from which they can neither effectively opt out nor negotiate within as free agents in a normal supply/demand market.

This matters now because streaming is how consumers want to listen to music, and why wouldn't we? If I'm in the mood to listen to a song I haven't downloaded, I launch Spotify just like anyone else. Who wouldn't want such on-demand convenience? And for free? But our convenience is presently subsidized by the dramatic underpayment of songwriters and composers who are increasingly dependent on revenue from this new way we want to listen to music. At the same time, these creators of the music we love are the folks without any other source of revenue. They don't tour, and they don't sell merchandise. Elton John is a big damn star and a knight and all that, but I don't think anyone ever bought a Bernie Taupin tee shirt, if you know what I mean.

Music licensing can be confusing. There are multiple ways to use music and different rights associated with each

use as well as multiple stakeholders with any given track. Readers will thank me for not attempting to wade too deeply into all the variables; I'd probably get some of it wrong, and it's not exactly spellbinding. Suffice to say that the rights associated with the consent decree and its reform are public performance rights covering uses like radio broadcasting, music streaming, live performance by musical artists, and uses in venues like bars, restaurants, and theaters. Licenses for these types of use are granted automatically upon request, and they are generally bulk licenses covering tens of thousands of songs for a single, annual fee paid to a performing rights organization, commonly called a PRO.

ASCAP was the first PRO (founded in 1914) and is the largest of these organizations, followed by BMI, but in the present landscape, other PROs have emerged that are not subject to the consent decree. Still, a PRO the size of ASCAP enables hundreds of billions of typical public performances for users through a collective licensing and fee structure that compensates the organization's membership of composers, songwriters, and publishers. For instance, the coffee house where I'm writing at the moment has a sign on the door with the logos of the three leading PROs because this place hosts open-mic nights and other live performances, and it has music playing continuously during normal hours. A little venue like this pays a relatively low licensing fee that provides blanket coverage for this type of public performance, allowing any local musician to come in and play any cover she wants for whatever size crowd will fit in here. In a similar way, if I wanted to use music incidentally on this blog site, I could get a license with the three major PROs for a few hundred bucks a year and have the use of just about every song in existence.

Without reform of the consent decree, the PROs could see the resignation of major publishers from membership, effectively abandoning collective licensing. This would mean individual negotiations between publishers and new media services, which would almost certainly increase costs that would be passed on to consumers one way or another and would also create unnecessary burdens for traditional licensees like my local coffee house. It is not hard to imagine a future in which the full adoption of music streaming wipes out a whole class of professional music creators. After all, nobody can argue that a sustainable market can be built on a model in which "success" in the primary market buys a half-order of groceries once in a while. And regardless of what the Pandoras etc. may say in defense of the current system, there is simply no way they can promise that a world without professional songwriters and composers will not be a world devoid of the kind of music we've been lucky to enjoy so far.

Adding insult to injury, many start-up Internet companies offering music streams as the foundation of their business model are employing stall tactics to avoid paying any licensing fees at all. The Silicon Valley culture has a long tradition of steal now, apologize and pay something later, and the PROs are seeing this first-hand with various web businesses. Once the request for a license is made, it has to be granted; but then the PRO requests information about the applicant's use, audience, etc. in order to set a fee. ASCAP and the others are seeing a trend in which these companies stall on providing information and, therefore, stall on paying any fees while freely using all the music they want in order to grow their business. (Man, I'd like to see somebody try that with construction and the cement supply company. Just once.) The recourse available to the PRO in this case is federal court, which is costly and time consuming.

Presently, the songwriters, composers, and publishers are proposing certain reforms to congress that release them from this outdated consent decree and enable them to negotiate (still through the PRO) more flexibly in response to current market realities. For instance, ASCAP proposes shifting cases from the purview of the federal rate court to a more expedited process of private arbitration; and it calls for voluntary rather than compulsory licenses in order to create bundles of works, allowing the PRO to license music more complexly than the all-or-nothing model that exists now. With these types of reforms, the PROs feel they can negotiate sustainable fees for songwriters and composers while keeping intact the collective licensing paradigm that keeps public performance licensing easy and affordable for tens of millions of users.

DOJ Has Collusion Backwards. Google and YouTube Executives Move Into Spotify.

By David C Lowery aka The Trichordist -- As the guardian reported last week, a high ranking Google Executive has taken a seat on Spotify's Board. This weekend we learned that the Google/YouTube's Shiva Rajaraman is moving from YouTube to Spotify. Rajaraman was part of the team launching YouTube's music subscription service that would compete with Spotify. While it is quite common for technology executives (and entertainment executives) to move from one company to another, and for one company to have a seat on the board of another company, the fact that both of these companies are involved in licensing songs and recordings should raise concerns with The DOJ. Why? Because it makes a mockery of the consent decrees that govern songwriters in their negotiations with these services. Because in effect the consent decrees are now backwards. There is a very real possibility of collusion and anti-competitive behavior from the services. (some would argue it's already happened with YouTube's indie label outrage.) Couple this with the enormous resources that these companies have and it seems pretty ridiculous to keep songwriters under the consent decree.

One of the rationales of the World War II/Cold War era consent decrees was that songwriters and their PROs (our equivalent of unions) could collude against broadcasters (and now webcasters) to fix prices. But remember the consent decrees were enacted in the days that radio station ownership was severely limited. In 1941 ASCAP had a very strong negotiating position when it was up against individuals that might own one or two radio stations. But those ownership limits have since been lifted and we now have companies like Clear Channel with over 840 stations. In the digital realm we have Google/YouTube which is in effect an online video monopoly. Pandora has 77% of the webcasting market and is a near monopoly. Everyone knows the internet wants only one or two of each kind of service, it seems prone to monopoly. So it seems a little strange to think the federal government needs to protect these effective monopolies from songwriters.

It's even stranger when you consider the NOW very real possibility for collusion that exists on the part of broadcasters and webcasters. Google/YouTube essentially has a seat on the board of Spotify and the Rajaraman has left YouTube for Spotify. Are we really supposed to believe that details of deals and negotiations with Spotify are not gonna get back to YouTube? Are we supposed to believe the deals the major labels cut with YouTube won't get back to Spotify? We already know that Google/YouTube conspired with other technology firms to depress wages for software engineers by entering into an illegal agreement with other firms to not "poach" each others engineers. Shouldn't the DOJ be examining Google/YouTube and now Spotify for collusion? Instead of songwriters?

And this isn't even taking into account that the major labels own a large portion of Spotify? This is a clusterjam™ of epic proportions.

The DOJ has collusion backwards. The consent decree should not be pointed at the songwriters