UNIVERSAL MUSIC
PUBLISHING GROUP

Universal Music Publishing, Inc. ("UMPG") represents some of the world's most important contemporary songwriters and artists. We also own, control or administer some of the world's largest catalogues of Christian/Gospel music, classical music and production music. The songwriters and copyright owners UMPG represents look to us to ensure that they receive fair compensation for creating the music that we all know and love. On behalf of the many songwriters and composers we represent, as well as on our own behalf, we submit these comments to the Department of Justice on the question of whether consent decrees governing the collective licensing of public performance rights should be modified. In particular, UMPG seeks to modify those consent decrees to clarify that copyright holders may maintain their exclusive rights to negotiate public performance licenses directly with some music users, while continuing to license through performing rights organizations like ASCAP and BMI with respect to other music users.[1]

Our country's economy relies on a properly functioning private marketplace – a marketplace in which parties individually negotiate and reach deals with each other – as the backbone of competition. Any deviation from that model, for example when parties act collectively instead of in their individual economic interests, must be justified and often requires safeguards. To ensure that the pooling of copyrights to create blanket licenses would not have anticompetitive effects, the Department of Justice, ASCAP and BMI long ago entered into two separate consent decrees. Those consent decrees provide certain government oversight of the negotiations that are conducted through ASCAP and BMI. As originally conceived, this oversight aimed to ensure that the users of musical compositions would have the option of continuing to license copyrighted works as they did before ASCAP was formed – that is, by direct negotiations with copyright holders.

Those who use copyrighted works have the freedom to choose whether to use the ASCAP and BMI blanket licenses or to negotiate licenses directly with copyright holders. But today, songwriters, publishers and composers do not have that same freedom. Under two federal courts' recent interpretations of the ASCAP and BMI consent decrees, copyright holders who participate in performing rights organizations may not similarly choose whether they will license via a performing rights organization blanket license, or retain for themselves the exclusive right

[1] We simultaneously have sought review in the appellate courts of the federal court ruling construing the ASCAP consent decree to preclude limited grants of rights. As explained in our brief on appeal, we believe that the existing ASCAP consent decree allows limited grants of rights. But because the federal court has disagreed, we support clarifying both of the consent decrees to resolve the issue.

2100 COLORADO AVENUE SANTA MONICA CA 90404-3504 TEL 310 235 4700 FAX 310 235 4900
www.umusicpub.com
A UNIVERSAL MUSIC COMPANY

to negotiate directly with a particular music user. UMPG and the songwriters and composers whom it represents support the performing rights organizations' efforts to change this dynamic. Copyright owners should be free to choose to individually negotiate deals with particular music users, rather than being compelled to participate in the blanket licenses for all purposes. In other words, we should be permitted to participate in performing rights organizations with respect to some music users, but not with respect to others, at our election. We shouldn't be required to be either "all in" or "all out."

The consent decrees were put in place to ensure that joint-licensing activity would not harm competition – competition typically considered healthiest when conducted pursuant to our traditional free market system of private negotiations and deals. That system has served this country since its inception and is the bedrock of our economy. We believe it is improper that consent decrees aimed at *limiting* the negative impact to competition presented by collective licensing should now *compel* songwriters and composers to participate in that collective licensing for all purposes. Indeed, before construing the ASCAP consent decree to require copyright holders to be "all in" or "all out," the federal court charged with enforcement of that consent decree previously found that its purpose was to limit ASCAP's "ability to exert undue control of the market for music licensing rights through [the] control of a major portion of the music available for performance and [the] use of the blanket license as a means to extract non-competitive prices." *United States v. ASCAP*, 157 F.R.D. 173, 177 (S.D.N.Y. 1994). It furthers that purpose delineated by the Court to allow copyright holders to *decrease* the performing rights organizations' role in licensing music rights as we propose.

The European Union recently adopted this approach, stating that rights holders should have the flexibility to "withdraw from a collective management society any of the rights, categories of rights or types of works and other subject-matter of their choice" on reasonable notice. [2] The United States should do the same. We support this proposed modification of the consent decrees for the following reasons:

First, under the consent decrees, if either ASCAP or BMI, on the one hand, and a particular music user, on the other, cannot agree on a royalty rate for a license, the consent decrees require that a federal court determine the rate, which typically happens after protracted hearings and at a

[2] European Parliament and Council, Directive 2014/26/EU of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, 2014 O.J. (L 84) Art. 5, § 4.

2100 COLORADO AVENUE SANTA MONICA CA 90404-3504 TEL 310 235 4700 FAX 310 235 4900
www.umusicpub.com
A UNIVERSAL MUSIC COMPANY

great expense to all interested parties. We believe that forum is ill-suited for determination of fair rates, and in particular for rates concerning emerging digital services for which reasonable benchmarks do not yet exist.

The federal court is charged with determining a market rate – that is, what a willing buyer and willing seller would agree to pay. Federal courts considering the question of what a market rate would be do so by analyzing other agreements reached between buyers and sellers in the open marketplace. By reference to these "benchmark" agreements, federal courts assess what would constitute a fair rate if obtained between a willing buyer and a willing seller. The problem with new digital streaming services is that there is a scarcity of available benchmarks in the open market. That absence of information causes the federal courts to err on the side of constraining prices, when the available market information suggests that the rates for songwriters and copyright owners should be considerably higher.

For example, the music service Pandora has paid songwriters $90 for 1 million spins of a song, which is indicative of not only the service's inability to monetize effectively but also of the below market rates.[3] How do we know that the applicable rate is unfair? For one thing, similar services have negotiated deals with publishers outside of the performing rights organizations and achieved much higher rates. Also, sound recording copyright owners have reached deals for 12 to 14 times what Pandora pays for the same stream – this huge disparity in sound recording rates compared to publishing rates does not exist in any other licensing context. The consent decrees have resulted in court-administered price controls on singers' and songwriters' work – and, therefore, their livelihoods. That is not the model for competition in the marketplace of the United States. Songwriters and composers who actually create music should not be forced to subsidize companies that do little more, if anything, than distribute or broadcast such music.

Second, as other copyright owners are not confined to "all in or all out" licensing arrangements, the proposed modifications are fully in keeping with the letter, spirit and purpose of the law governing copyrights – the Copyright Act. The Copyright Act expressly allows copyright holders to license their works individually, and to do so in whole *or in part*. *See* 17 U.S.C. §§ 106, 201(d). The artificial constraint on performing rights in musical works is not consistent with the rights we hold, and should be rejected as inconsistent with congressional intent.

---

[3] June 25, 2014 Hearing before U.S. House of Representatives Judiciary Subcommittee on Courts, Intellectual Property and the Internet, Oral Remarks of Songwriter and ASCAP President Paul Williams.

2100 COLORADO AVENUE SANTA MONICA CA 90404-3504 TEL 310 235 4700 FAX 310 235 4900
www.umusicpub.com
A UNIVERSAL MUSIC COMPANY

Finally, we want the flexibility to reach license deals that are not limited to our receiving royalties in exchange for the right to publicly perform our music. We want to be able to negotiate deals that include not just monetary compensation, but involve consideration in other forms. For example, we would like the ability to invest in promising new services by allowing the use of our music in exchange for promotional guarantees for our songwriters. Under the blanket licenses, we are limited to receiving royalties. This limitation undervalues our music and constrains our ability to engineer new deals in this digital era.

For the foregoing reasons, UMPG respectfully requests modification of the consent decrees.

2100 COLORADO AVENUE SANTA MONICA CA 90404-3504 TEL 310 235 4700 FAX 310 235 4900
www.umusicpub.com
A UNIVERSAL MUSIC COMPANY