August 6, 2014

David C. Kully
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 4000
Washington, DC 20001

Re: Antitrust Division Review of ASCAP and BMI Consent Decrees

Dear Mr. Kully:

On behalf of National Public Radio, Inc. ("NPR"), its Member licensees, and public radio stations and producers generally, the following comments are offered in response to the request for comment in the above-referenced matter and in support of expanded licensing of music through compulsory licensing, including the ASCAP and BMI Consent Decrees (the "Consent Decrees").

NPR is a non-profit membership corporation that produces and distributes noncommercial educational ("NCE") news and informational programming, including All Things Considered® and Morning Edition®, as well as music and other cultural programming, all through more than 1000 public radio stations nationwide. NPR Member stations are themselves significant program producers and community institutions. NPR, its Members, and other public radio producers have also embraced digital content distribution platforms, mobile applications, and social media tools to disseminate public media content and engage the public. The comments offered below therefore reflect a unique and important perspective on the Consent Decrees and on music licensing matters generally.

Compulsory music licensing is essential to public radio's ability to serve the American people. NPR, its Member stations, and other public radio producers and distributors have provided direct and free access to public media content via the Internet since the mid-1990s. With respect to the subject of this proceeding, NPR and its Member stations stream their broadcast music programming and create and make available original music web content through their websites, mobile devices (including branded iPhone and Android applications), RSS feeds, and other technologies. By using existing and emerging digital platforms, public radio is expanding the quantity and quality of music-oriented public radio content available to the American public well beyond that traditionally available via the broadcast medium.

The hallmark of public radio since its earliest days has been thoughtful curation and music discovery of new and underappreciated artists and genres. Public radio enriches the nation's culture and has introduced non-mainstream artists and music genres, such Celtic, Folk, Bluegrass, and World, to new audiences. Public radio also provides access to more traditional

music genres, such as classical and jazz, that otherwise have very few commercial outlets. Indeed, classical music ranks highest among musical genres in public radio programming, accounting for 25 percent of total broadcast hours on NPR Member stations. Compulsory licensing has long been central to public radio's ability to develop music and other cultural programming, first for broadcast, and, more recently, for distribution via new media platforms.

In enacting the Copyright Act of 1976 ("the Act"), the last comprehensive copyright reform measure, Congress recognized the special role and circumstances of public broadcasters in creating and distributing content that serves to educate and inform a broad audience. In Section 118 of the Act, in particular, Congress established a compulsory licensing scheme that allows public broadcasting entities and copyright owners to obtain licenses for "published nondramatic musical works and published pictorial, graphic, and sculptural works." 17 U.S.C. § 118. Significantly, Section 118 also contains an exception to the antitrust laws which has allowed the parties to negotiate voluntary licenses in lieu of an administrative process for determining the rates and terms of use for the covered copyrighted works. *See* id. § 118(b). Section 114(b) of the Act allows public broadcasters the right to use sound recordings in "educational television and radio programs" that are "distributed or transmitted by or through public broadcasting entities" without requiring them to obtain a license from the copyright holder to reproduce, prepare derivative works, or distribute copies of the work to the public. *Id.* § 114(b).

Congress enacted these special provisions of the Act because public radio stations and producers are non-profit and governmental entities motivated solely by a public service mission. *See* 17 U.S.C. §§ 114(b), 118(f) (citing 47 U.S.C. § 397 (11)). As such, public radio stations and producers must produce programming subject to financial constraints and other circumstances that distinguish public broadcasters from commercial media. These provisions of the Act do not represent a subsidy from copyright owners of musical works and sound recordings, and NPR is committed to fairly compensating the creators and artists involved in producing such works. These provisions were enacted with an understanding of the special nature of public radio programming and the practical difficulty that individual marketplace licensing would impose. *See* H. Rep. No. 1476, 94th Cong. 2d Sess. 117 (1976). The intention was to "assure a fair return to copyright owners without unfairly burdening public broadcasters." *Id.* at 118.

These Copyright Act compulsory licensing provisions have played an important part in the growth and development of public broadcasting over the nearly 40 years since enactment of the Act and particularly in public radio's use of musical works. As a system of locally licensed, locally owned and governed, locally staffed, and locally programmed stations, public radio would face a daunting challenge if forced to clear all music use through individual marketplace negotiations. As public radio seeks to develop and disseminate music and other high-quality educational content through new media platforms, existing and expanded compulsory licensing will be even more critical to public radio's continued pursuit of its educational mission.

<u>The ASCAP and BMI Consent Decrees continue to serve important purposes in facilitating the licensing of musical works</u>. The Consent Decrees mirror Section 118 of the Act in serving important purposes in the licensing of musical works. Like Section 118, the Decrees make

possible the comprehensive licensing of musical works among a large and disparate group of users and rights holders. Concluding individual license negotiations on an industry-wide scale to use or continue using music would otherwise occur only at great cost and with great uncertainty. In addition, and like Section 118, the Consent Decrees provide a mechanism for determining the rates and terms of use in the event the parties are unable to reach a negotiated resolution. In both cases, the user is also able to obtain a "through to the audience" license. Finally, both Section 118 and the Consent Decrees preserve the ability of users to secure direct licenses from individual ASCAP/BMI members outside of the performing rights organization blanket license.

While both Section 118 and the Consent Decrees share these important features, the existence of Section 118 does not obviate for public broadcasters a continuing need for the ASCAP and BMI Consent Decrees. One important difference between the two is the express Consent Decree requirement that ASCAP and BMI grant a license to use musical works in their respective repertory upon mere request, with the rates and terms determined either through negotiation or judicial resolution. Section 118 does not contain the same feature. Although public broadcasters and ASCAP and BMI have heretofore been able to resolve licensing issues without gaps in licensing affecting ongoing music use, the existence of the Consent Decrees provides a fail-safe measure in the event the parties are unable to resolve the matter through blanket license negotiations or the Section 118 adjudicatory process.

More fundamentally, Section 118 was enacted to accommodate use of musical works in traditional over-the-air broadcasting, while the Consent Decrees, despite their age, accommodate any distribution technology that enables the performance of musical works. In particular, while Section 118 encompasses the performance of "a [musical] work by or in the course of a transmission," covered performances are limited to those "made by a noncommercial education broadcast *station*" and the production of programs "for the purpose of transmissions [by such stations]." 17 U.S.C. § 118(c) (*emphasis added*). This provision would not necessarily prevent the licensing of musical works for use via digital platforms, but it constrains the licensing of musical works in a manner unmatched by the Consent Decrees.

The Consent Decrees therefore serve an essential function in assuring the ability of public radio to serve the public via new media and in non-traditional ways. In this respect, public radio is no different than other users of musical works. Since public radio already clears music for uses not addressed by Section 118 or the Consent Decrees, terminating or substantially limiting the scope and terms of the Consent Decrees would make the process of clearing music for public media use substantially more burdensome administratively and financially than it already is. Given the limited resources with which public radio operates, increased reliance on direct marketplace licensing would likely have significant adverse consequences for public radio.

<u>The Consent Decrees should *not* be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others</u>. Compulsory licensing, whether through Section 118 or the Consent Decrees, performs an essential function for public broadcasting by facilitating the licensing and use of musical works in a relatively cost effective manner. Allowing rights holders to withdraw their works with respect to some uses or users

would undermine and potentially defeat the publicly beneficial purpose of such licensing beyond the consequences for competition. It would have this consequence in several ways.

First, withdrawing a portion of works from a performing rights organization's catalog will increase the administrative and financial cost of clearing musical works for use on a blanket basis. Where such works are used on an ongoing basis, the need to acquire rights from all of multiple sources creates a risk that protracted negotiations with a particular rights holder will prevent the use of *any* musical works because of the practical difficulty of identify and excluding the works of a particular rights holder from use. That task might be less difficult for a centralized content source, but a decentralized system, such as public radio, comprising a wide variety of content producers and distributors of which NPR is only one, could make the task extremely difficult and expensive.

Second, allowing rights holders to withdraw works from licensing by a performing rights organization with respect to particular types of use would accord the rights holder significant bargaining leverage over individual users. If a rights holder can effectively pick and choose among users with respect to the use of musical works via particular digital platforms, the ability of users to exploit technology to offer services in new and different ways could be significantly compromised. Indeed, because musical works typically must be licensed on a blanket basis and without regard for the individual works within a repertory, compulsory licensing through the Consent Decrees should continue to require comprehensive availability of performance rights to musical works.

Finally, several safeguards should be implemented to address circumstances in which rights holders withdraw their entire catalogs from a performing rights organization. First, the rights holder and the relevant performing rights organization should publish an agreed-upon listing of the works being withdrawn so that users of such works can take steps to pursue alternative license arrangements or discontinue use of such works. Second, because rights holders may be able to use the withdrawal of their catalog from the performing rights organization's repertory to gain bargaining leverage in direct license negotiations, such direct license arrangements should not be considered to reflect a fair market transaction, at least in the immediate aftermath of the withdrawal and for some time thereafter. Third, any blanket license obtained prior to the withdrawal should remain in effect for the duration of its term, notwithstanding the withdrawal. Otherwise, users of such works would face the prospect of having to renegotiate the right to use the same musical works within what may be a relatively short period of time. Fourth, the withdrawing rights holder and the relevant performing rights organization should provide significant advance notice of the impending withdrawal so that users of the relevant works have time to respond to the impending withdrawal. Fifth, works in which a withdrawing rights holders owns less than 100 percent should remain licensable through a performing rights organization that represents the other rights holder(s) of the work in question.

<u>Replacing the rate-setting function currently performed by the rate court with a system of mandatory arbitration should be undertaken only with great care</u>. While the significant cost associated with any federal court litigation might, at first blush, argue in favor of a more

streamlined process, care must be taken to consider the practical consequences of any proposed change to the current rate setting process. Indeed, the current process offers important features that *encourage* individual licensing in lieu of rate court proceedings, and individual blanket licensing generally should be encouraged.

One important consequence of the current rate setting process is, in fact, to encourage parties to resolve licensing matters through negotiation. While resort to the rate court remains an important backstop, parties have a financial incentive to avoid such proceedings precisely because of the significant cost involved. The relatively few rate court proceedings that have occurred is a testament to the deterrence value of such costs and to the incentive of such a process to resolving licensing matters through voluntary blanket license negotiations. By substituting a rate setting process that promises reduced cost, the consequence may in fact be to require greater reliance on such a process and to deter private blanket licensing.

A second important consequence of the current rate setting process is reliability and relative predictability of outcomes. Under the current system, the parties to a licensing dispute are familiar with a process that has been demonstrated to produce results that, on the whole, achieve appropriate outcomes. Substituting a system of mandatory arbitration, particularly if it relies on arbitrators chosen on an ad hoc basis, will likely encourage parties to take risks that the outcome of such a process will favor their position in a given matter. Such a system will therefore tend to discourage voluntary blanket licensing efforts. Any alternative form of rate setting should therefore be pursued with an eye toward predictability and reliability to encourage voluntary licensing efforts.

In this regard, policymakers should draw a lesson from the replacement of the Copyright Royalty Tribunal with a process that featured Copyright Arbitration Royalty Panels ("CARP") convened on an ad hoc basis to resolve disputes concerning compulsory license rates and claims for royalties. *See* Copyright Royalty Tribunal Reform Act of 1993, Public Law 103-198, 107 Stat. 2304. The CARP system of ad hoc arbitration was soon replaced by the current system of permanent Copyright Royalty Judges in large measure because the ad hoc nature of the CARP decision making produced inconsistent and therefore unpredictable results, and the process was unnecessarily expensive. H.R. Rep. No.408, 108th Cong., 2d Sess at 8 (2004). Any attempt to replace the current rate court process should take care to avoid making the current process less certain, more expensive, and discouraging of private blanket licensing.

<u>Through the Consent Decrees or otherwise, compulsory licensing of music should be expanded</u>. Blanket access to musical works through the performing rights organizations, with the option to negotiate directly with the underlying rights holder, has played an important part in the proliferation and variety of music content available to the public. Rather than limiting the blanket licensing of musical works, efforts should be made to expand licensing of such works and related musical components.

The digital performance of sound recordings, in particular, is subject to limitations that substantially limit the utility of the statutory license set forth in Section 114(d)(2) of the Act,

particularly for public radio. *See* 17 U.S.C. §§ 114(d)(2), 114(j)(13). Thus, musical programs created for public radio broadcast – for instance, to acknowledge the passing of an important musical artist – often cannot be streamed on the Internet because of the limit imposed on the number of consecutive selections of sound recordings permitted to be streamed from a particular artist or album. This forces public radio to create separate programming depending on the method by which it will be distributed which, due to the limited resources of public radio, is needlessly inefficient and often limits the availability of such specially curated programming without furthering any important public policy goals. Section 114(d) also does not cover digital downloads of programming or more interactive services, which severely limits public radio's participation in these important technologies.

In sum, the current music licensing regime should better reflect the special educational goals and resource limitations of public radio broadcasters and facilitate the licensing of all music elements necessary to distribute music programming across all public radio platforms. The current music licensing system, while helpful in some aspects, is still costly and inefficient. Public radio content producers require ready access to materials so programming decisions can be made quickly and efficiently with an eye toward distributing content across multiple platforms. Rights holders do not always value educational programming sufficiently to offer less costly licenses or they may limit the scope or duration of content use. As a result, the program production process can encounter long delays as rights are cleared and programming choices often must be revised due to rights issues. NPR therefore encourages the Justice Department to consider modifications to the Consent Decrees that facilitate the creation and dissemination of musical content so public radio can fulfill its important public service mission.

As you consider the comments submitted in response to your review of the ASCAP and BMI Consent Decrees, NPR looks forward to providing any additional assistance you may require.

Respectfully submitted,

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