Before the
United States Department of Justice
Antitrust Division
Washington, D.C. 20001

In the Matter of	
Antitrust Consent Decree Review	*United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.)

COMMENTS OF PUBLIC KNOWLEDGE

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Public Knowledge submits these comments in response to the Department of Justice's ("DOJ") Notice of Inquiry,[1] soliciting comments on the DOJ's consent decrees with the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI").

INTRODUCTION

The DOJ's consent decrees with ASCAP and BMI have promoted competition and transparency in the public performance licensing market for musical compositions. The consent decrees have prevented ASCAP and BMI from leveraging their significant market power in anticompetitive ways against digital music services and artists, and have ultimately encouraged a more competitive music market that benefits consumers.

Recent evidence sends a stark warning of the market harms that could occur if the consent decrees are weakened. The attempts of the largest publishers to coordinate and partially withdraw their rights from the performing rights organizations ("PROs") demonstrated how increased consolidation in the music publishing market has given the largest publishers and the PROs the incentive and ability to behave anticompetitively, to the detriment of online music services and the consumers who use them. Additionally, business practices that have arisen in the also-concentrated recorded music market show what could happen without effective consent decrees: the largest rightsholders could use their leverage to demand disproportionate fees, large advances, or equity in new services in non-transparent deals that leave consumers, small rightsholders, and artists at a systematic disadvantage.

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[1] *Antitrust Consent Decree Review*, United States Department of Justice (last visited Aug. 3, 2014), http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.

As the DOJ moves through its review of the consent decrees, it must ensure the consent decrees continue to protect against anticompetitive behavior and promote an efficient, competitive music marketplace.

I. THE CONSENT DECREES PREVENT ANTICOMPETITIVE BEHAVIOR AND PROMOTE A ROBUST MUSIC LICENSING MARKET.

A review of the ASCAP and BMI consent decrees' impact on the market reveals that they still provide significant benefits to the licensing marketplace and are still necessary to protect a competitive and robust licensing market. The consent decrees are an important part of the music licensing structures operating today to promote efficiency and ease of licensing to encourage the development of lawful services, while protecting competition among copyright owners and distribution services. As a result, a wider variety of music distribution platforms compete to offer better offerings and lower prices to listeners.

A. The ASCAP and BMI Consent Decrees Have Encouraged the Benefits of Collective Licensing While Preventing Anticompetitive Harms.

Collective licensing can create certain efficiencies in the market, but can also create the risk that collective licensing organizations will be able to wield market power anticompetitively.[2] Collective licensing offers the benefit of decreased transaction costs, both in negotiating and administering licensing fees. Collective licensing mechanisms should, however, include certain protections for licensees, including protections that prevent anticompetitive behavior.

The ASCAP and BMI consent decrees have helped listeners, independent artists, and competitive new music services. The consent decrees have allowed diverse licensees—from local bars to online streaming services—to pay many artists at once while obtaining reasonable

[2] *See* Jonathan Band and Brandon Butler, *Some Cautionary Tales About Collective Licensing*, 21 MICH. ST. INT'L L. REV. 687 (2013).

rates. The consent decrees have thus helped make the licensing and payment process more efficient while minimizing the risk of anticompetitive practices by the largest PROs.

1. The Consent Decrees Protect Competition, Benefit Songwriters and Small Publishers, and Result in More Competitive Choices for Consumers.

Perhaps most importantly, the ASCAP and BMI consent decrees ensure that music users will have access to reasonable, non-discriminatory licenses for the PROs' repertory. The consent decrees prevent ASCAP and BMI from discriminating between similarly situated licensees.[3] In the event that ASCAP or BMI cannot agree on a reasonable fee with a licensee, a district court may hear the parties' dispute and decide upon a reasonable rate.[4] In such a case, ASCAP and BMI have the burden of proving the reasonableness of the fees they request.[5] Licensees can then perform ASCAP's or BMI's repertory during litigation, subject to the court's interim or final determination of a retroactive reasonable fee.[6]

By ensuring licensees have access to reasonable, non-discriminatory licenses, the consent decrees allow new digital music platforms to launch and legally perform songs without becoming beholden to ASCAP and BMI. New services are allowed to operate on a level playing field with existing services, encouraging competition among music services to flourish and giving market entrants the opportunity to succeed or fail on the merits of their offerings to consumers. As a result, the market has seen digital music services launch and compete without, for example, needing to pay extraordinary advances or sell partial equity to ASCAP or BMI to obtain licenses. This has helped digital music services survive based on the quality and price of

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[3] *United States v. ASCAP*, Civ. No. 41-Civ-1395, § IV.C (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree"); *United States v. BMI*, Civ. No. 64-Civ-3787, § VIII.A (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree").

[4] ASCAP Consent Decree § IX.A; BMI Consent Decree § XIV.A.

[5] ASCAP Consent Decree § IX.B; BMI Consent Decree § XIV.A.

[6] ASCAP Consent Decree § IX.F; BMI Consent Decree § XIV.B.

their offerings instead of their connections to rightsholders, and it has ensured independent musicians need not worry that ASCAP or BMI will employ certain licensing tactics that could disadvantage independent writers or smaller publishers.

The consent decrees have also brought transparency to ASCAP and BMI's practices, to the benefit of licensees and rightsholders alike. For example, ASCAP must publicly list the works in its repertory.[7] Although there continue to be complaints regarding whether ASCAP always meaningfully makes its repertory list available to licensees, the requirement to do so helps licensees value ASCAP's repertory and determine a reasonable license fee. By helping licensees understand exactly what they are licensing, the ASCAP consent decree increases efficiency in negotiation and prevents ASCAP from artificially inflating its fees through uncertainty and confusion.

For its songwriter and publisher members, ASCAP's consent decree requires it to objectively distribute the money it collects (minus its costs) to members, and to disclose its distribution formula to members.[8] Similarly, BMI must make its performance payment rates available to members.[9] These transparency provisions help artists by giving songwriters access to the rates being paid to the PRO and to themselves. This information helps members decide which PRO offers them the best deal and prevents at least one area of artist compensation from being shrouded in secrecy.

The consent decrees also benefit songwriters and small publishers by requiring ASCAP and BMI to accept writers who have at least one work regularly published and publishers whose

[7] ASCAP Consent Decree § X.

[8] ASCAP Consent Decree § XI.B.1-2.

[9] BMI Consent Decree § VII.A.

works have been used or distributed on a commercial scale for at least one year.[10] Without this provision, ASCAP and BMI could adopt practices similar to SESAC, which does not accept all applicants and uses a subjective application process.[11] In contrast, the consent decrees offer songwriters and publishers at least two options for PRO membership, which especially benefits newer songwriters and publishers that may not yet have the largest or most valuable catalogs but could benefit the most from centralized licensing and administration.

The consent decrees also protect songwriters' and publishers' ability to license their works directly. Under the ASCAP consent decree, members only grant ASCAP non-exclusive rights and retain the right to individually license their works.[12] BMI must, upon request, allow the writers and publishers of a song to grant a non-exclusive license directly to a music user.[13]

2. The Original Justifications for Entering Into the Consent Decrees Remain Valid Today.

Moreover, the reasons for creating the consent decrees are still valid today. ASCAP and BMI are still by far the dominant players in the market for public performance rights. Without the consent decrees, these two PROs would have the ability to leverage their market power against innovative new services even more dramatically than the major labels or largest publishers have been able to. If anything, consolidation in the music industry as a whole has only increased significantly since ASCAP and BMI entered into the consent decrees, and they are if anything only more necessary to protect competition today than when they were created. Additionally, the coordinated plans described by Judge Cote in the rate court litigation between

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[10] ASCAP Consent Decree § XI.A; BMI Consent Decree § V.A.

[11] *See How to Affiliate With SESAC*, SESAC (last visited Aug. 2, 2014), http://www.sesac.com/WritersPublishers/affiliate.aspx.

[12] ASCAP Consent Decree § IV.B.

[13] BMI Consent Decree § IV.A.

ASCAP and Pandora reveal that the publishers and PROs are well aware that they could potentially coordinate their negotiations to benefit each other at the expense of consumers, music delivery services, and independent publishers and songwriters.[14] To weaken or remove the consent decrees after such a clear warning would only be inviting less competition and innovation in the online music marketplace.

B. The Consent Decrees Serve the Ultimate Goal of Promoting a Better Music Marketplace.

The consent decrees are an important piece of the licensing structures that protect and promote a more competitive, robust music marketplace. The consent decrees and other music licensing structures should aim to create an ecosystem where artists can get their music out into the market and receive a fair price for it; users can choose between multiple competing, affordable music services; and new distribution services can innovate without being beholden to gatekeepers. Ultimately, a well-functioning music distribution system must serve listeners and musicians. Every company in the middle—from record labels to rights clearinghouses to online distributors—exists to help those two groups connect more efficiently.

The music licensing system should encourage a competitive, innovative market of new services that are accountable to consumers and artists. When companies at every point in the distribution chain face competition (including disruptive competition), that competition pushes service providers to better answer the needs of users and creators alike. Rightsholders that face competition will be motivated to strike deals with bold new distribution channels and to offer more artist-friendly contract terms to the musicians they provide services to.[15] Similarly, music streaming services that face competition from new upstarts will be pressured to find novel,

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[14] *See In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395 (S.D.N.Y. Mar. 18, 2014).

[15] *See* Jodie Griffin, *Rewind, Reclaim: Copyright Termination in the Music Business*, PKTHINKS (Mar. 2014), *available at* http://www.publicknowledge.org/documents/rewind-reclaim.

innovative ways to reach new audiences. Additionally, by preventing companies from abusing market power now, the Department of Justice can avoid the too-frequent pattern of consolidation begetting yet more consolidation.[16]

To relieve bottlenecks and encourage innovation, music licensing structures—including the consent decrees—should encourage competitive, robust, and sustainable music distribution markets. This means, for example, music licensing structures should treat like services alike. This will prevent existing technologies or platforms from gaining an unearned advantage over newer, and potentially better, technologies simply by virtue of enjoying a privileged status under existing licensing structures.

1. Online Music Services and Listeners

It is no surprise that digital distribution services are increasingly popular with consumers. Online services give users more flexibility in choosing when and where they access music, and often add new features and functionalities past what previous technologies could do. Consumer demand for online services has grown significantly, with the number of subscribers to both paid and unpaid music services expected to double over the next three years.[17] Recent research has found that 64% of people aged 12-24 and 34% of people aged 25-54 listen to online radio on at least a weekly basis.[18] In interactive streaming, Spotify recently announced it has more than 10 million paying subscribers and 40 million active users worldwide—up from 6 million paying

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[16] *See* John Bergmayer, *Yet More Media Consolidation Is Not the Cure to Problems Caused by Media Consolidation*, PUBLIC KNOWLEDGE (July 8, 2013), http://www.publicknowledge.org/news-blog/blogs/yet-more-media-consolidation-not-cure-problem.

[17] Lucas Mearian, *Music Industry Sucks Life from Subscription Services*, COMPUTERWORLD (Feb. 14, 2014), http://www.computerworld.com/s/article/9246365/Music_industry_sucks_life_from_subscription_services (citing *Digital Music Subscription Services: 2013*, Generator Research (Nov. 12, 2013)).

[18] Paul Goldstein, *Selling Music Audiences to Advertisers is the Future of Recorded Music Revenue*, HYPEBOT (Apr. 30, 2014), http://www.hypebot.com/hypebot/2014/04/selling-music-audiences-to-advertisers-is-the-future-of-recorded-music-revenue-.html (citing Edison Research).

subscribers and 24 million active users one year ago.[19] An estimated 28 million people worldwide pay for a music subscription, up from 20 million in 2012 and 8 million in 2010.[20] And in 2013, global revenue from subscription and streaming platforms in particular jumped 51.3%, to more than $1 billion.[21]

With technologically neutral policies, new music distribution platforms will have a fair shot at thriving in a sustainable way, which could unleash a robust online distribution market to the benefit of everyone. From the consumer's perspective, online music services allow users to access, discover, and re-discover music more easily than ever before. New digital music services also decrease the costs of manufacturing and distribution, which in a competitive marketplace would be passed on to consumers as cost savings or improved service.

Particularly as Internet access spreads and music-playing devices become increasingly portable and connected, online music services allow audiences to access music in places previous technologies could not reach. Online music services also offer a panoply of music choices to users, allowing consumers to access the music that most resonates with them and encouraging deep musician-fan relationships. The global nature of the Internet allows a single niche online radio station to attract a geographically diverse listenership, and sophisticated music analysis technology helps users more easily access music that fits their specific tastes. This lets musicians

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[19] Bruce Houghton, *Spotify Shows Strong Growth: 40 Million Active Users, 10 Million Paid Subscribers*, HypeBot (May 21, 2014), http://www.hypebot.com/hypebot/2014/05/spotify-shows-strength-growth-40-million-active-users-10-million-paid-sunscribers.html.

[20] *Music Subscription Revenues Help Drive Growth in Most Major Markets*, IFPI (Mar. 18, 2014), www.ifpi.org/news/music-subscription-revenues-help-drive-growth-in-most-major-markets; Tim Ingham, *Beggars Assessing Streaming Royalty Rates as Income from Sector Soars*, MUSIC WEEK (Apr. 7, 2014), http://www.musicweek.com/news/read/beggars-assessing-streaming-royalty-rates-as-income-from-sector-soars/058145.

[21] *Music Subscription Revenues Help Drive Growth in Most Major Markets*, IFPI (Mar. 18, 2014), www.ifpi.org/news/music-subscription-revenues-help-drive-growth-in-most-major-markets.

with geographically diverse fan bases develop those audiences in a way that previous music distribution systems never could.

2. Online Music Services and Artists

Artists also stand to benefit from the emergence of online music services. When online music platforms reach new listeners, future fans can discover their next favorite band. Online radio platforms could easily (and often do) incorporate ways for fans to learn more about the musicians they are listening to, and even can enable direct merchandising or ticketing opportunities. Online music services have also leveled the playing field to help unsigned and independent artists remove unnecessary middlemen and reach fans directly, if they so choose.

On a very basic level, new music platforms help artists by providing pathways to reach new audiences. Although the appropriate royalty levels will always be subject to some level of debate, it is undeniable that online music distributors now collect a significant portion of many artists' royalties. For example, Spotify alone has paid out $1 billion to copyright owners since its inception.[22]

Digital distribution services also have the potential to give artists more control over their own careers. New services can make it easier for musicians to bring their works to market without necessarily relying on a publisher or record label to handle marketing, promotion, and distribution. For example, while it was traditionally near-impossible for musicians to convince a large record store to carry their albums without being signed to a record label, unsigned artists can now use the iTunes distribution service to sell copies of their recordings to the public. Artists

[22] Bruce Houghton, *Spotify Shows Strong Growth: 40 Million Active Users, 10 Million Paid Subscribers*, HYPEBOT (May 21, 2014), http://www.hypebot.com/hypebot/2014/05/spotify-shows-strength-growth-40-million-active-users-10-million-paid-sunscribers.html.

can use these powerful distribution technologies to reach diverse audiences while maintaining control over the timing, length, and musical content of their professional projects.

New digital distribution services can also eliminate artists' need for a middleman to reach their fans. New online social media platforms enable songwriters to promote their work and develop relationships with recording musicians and fans. And online distribution tools and platforms allow artists to reach users via their own websites or on new platforms and distribute their music to fans directly.[23] An artist may still decide that she would prefer to "hire" a publisher or record label to perform those services in exchange for copyright ownership and a large chunk of future royalties, but digital disintermediation gives the artist a meaningful choice between a the dominant intermediaries and an independent career.

When new technologies help break down barriers for independent artists, a songwriter need not give up her copyright to be distributed through the most popular platforms and, with effective consent decrees, she will be paid transparently and fairly compared to a songwriter using a major publisher. Make no mistake: online music services present an enormous opportunity to create sustainable platforms that are both artist- and consumer-friendly. Encouraging the sustainable and independent development of these services should be of concern to parties on all sides of the music business.

II. Without the Consent Decrees, the PROs and Largest Publishers Could Leverage Their Market Power Against Online Music Services, Songwriters, and Small Publishers.

Where licensing bottlenecks occur, licensors with market power can veto new services, use their catalogs as leverage to obtain partial ownership in new market entrants, or demand disproportionately high royalties, to the detriment of consumers and independent artists alike.

[23] *See, e.g.*, CASH Music, www.cashmusic.org.

Heavy market concentration—whether among rightsholders, or distribution companies—thwarts a competitive and innovative music marketplace. An online music market dominated by vertically integrated firms gives companies the ability and incentive to make it more difficult for new services to gain entry, raise prices for consumers, and strike deals with the other largest market players, leaving independent artists out in the cold.[24] And when it comes to market concentration in the music business, there is much cause for concern. In recorded music, the market is dominated by three major labels—Universal Music Group (UMG), Sony Music Entertainment, and Warner Music Group—which control a combined 75% of the market, with UMG alone controlling 36.7% of the market.[25] Among publishers, Sony/ATV Music Publishing alone controls over 29.4% of the market, making it 30% larger than its nearest publishing competitor, Universal Music Publishing Group, and more than twice the size of Warner's music publishing operations.[26] Concentration among rightsholders is particularly threatening to emerging competition, because ownership of a huge catalog of copyrights makes it impossible for new distributors to launch without a license from those rightsholders.

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[24] For example, Bloom.fm recently reported it has been banned from Apple's iAd network because it competes with Apple's iTunes Radio service. Bruce Houghton, *Apple Bans 'iTunes Radio Competitor' Bloom.fm*, HYPEBOT (Apr. 11, 2014), http://www.hypebot.com/hypebot/2014/04/apple-bans-itunes-radio-competitor-bloomfm-.html.

[25] *UMG and WMG See Gains in Recorded-Music Market Share in 2013, While Sony/ATV Dominates Music Publishing,* MUSIC & COPYRIGHT, INFORMA TELECOMS & MEDIA (May 6, 2014), https://musicandcopyright.wordpress.com/2014/05/06/umg-and-wmg-see-gains-in-recorded-music-market-share-in-2013-while-sonyatv-dominates-music-publishing/#more-1166. These numbers do not, however, include sound recordings owned by independent labels or musicians but distributed through one of the major labels. To the extent that the major labels' distribution contracts with smaller labels allow them to set (or refuse to set) prices and rates with digital distributors for those labels' recordings, those contracts increase the majors' leverage over digital distributors.

[26] *UMG and WMG See Gains in Recorded-Music Market Share in 2013, While Sony/ATV Dominates Music Publishing,* MUSIC & COPYRIGHT, INFORMA TELECOMS & MEDIA (May 6, 2014), https://musicandcopyright.wordpress.com/2014/05/06/umg-and-wmg-see-gains-in-recorded-music-market-share-in-2013-while-sonyatv-dominates-music-publishing/#more-1166.

On the distributor side, Pandora has over 70% of the online radio market (and 9.28% of the overall U.S. radio market),[27] while Apple dominates the digital download market with nearly 800 million users and a growth rate of 710,000 accounts per day.[28] While relatively low switching costs help other distributors compete with these companies, concentration among distribution platforms can give online music services less incentive to offer lower prices and better services to listeners and more incentive to strike tougher deals with independent artists (or threaten to cut them out completely). This is why it is so important that music licensing structures enable new services to enter and bring more competition to the marketplace.

A. Weakened Consent Decrees Could Result in Coordination Between PROs and Publishers to Raise Prices for Music Services.

It is clear the major publishers and largest PROs would coordinate to magnify their market power against licensees without the consent decrees, because that is exactly what a district court recently found when certain publishers attempted to partially withdraw their rights from the PROs.[29]

By consolidating public performance rights for compositions across most songwriters and publishers, the PROs have raised significant competition concerns.[30] Together the three PROs control almost all of the market for public performance rights, and ASCAP alone has a market

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[27] Olga Kharif and Andy Fixmer, *Apple Internet Radio Entry Could Put Pandora in Play*, BLOOMBERG (Sept. 20, 2012); *Pandora Announces April 2014 Audience Metrics*, Pandora (May 6, 2014), http://investor.pandora.com/mobile.view?c=227956&v=203&d=1&id=1927379.

[28] Bruce Houghton, *One New Stat from Apple Shows Why iTunes is [Almost] Unbeatable*, HYPEBOT (Apr. 24, 2014), http://www.hypebot.com/hypebot/2014/04/one-new-stat-from-apple-shows-why-itunes-is-almost-unbeatable.html.

[29] *In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 2014 WL 1088101 *35 (S.D.N.Y. Mar. 18, 2014).

[30] *See In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc. v. Pandora Media, Inc.*, Nos. 13-cv-4037, 64-cv-3787 (S.D.N.Y. Dec. 19, 2013); *Meredith Corp. v. SESAC LLC*, No. 09-cv-9177 (S.D.N.Y. Mar. 3, 2014).

share of 45-47%.[31] And particularly now that EMI Music Publishing has been purchased by a Sony/ATV-led consortium in a deal completed last year, the music publishing space is also significantly consolidated. The music publishing business is dominated by three companies: Sony/ATV (29.4%), Universal Music Publishing Group (22.6%), and Warner Chappell (13.2%) hold a combined three-firm market share of more than 65%. Similar to the major labels, the major publishers' market share gives them the incentive and ability to use their catalogs as leverage against new distribution services, especially those that threaten their existing business models.

The recent attempts of publishers to withdraw public performance rights for new media services from ASCAP and BMI illustrate how concentration in the industry has given the largest publishers and the PROs the incentive and ability to leverage their catalogs against new music services, absent guidance from structures like the consent decrees. In 2011, ASCAP attempted to change its Compendium to allow publishers to withdraw new media rights from ASCAP. This would allow affiliated record labels and publishers to combine their leverage by offering public performance rights and sound recording rights to digital music services at the same time, and also would allow publishers to exert their recently increased market power from consolidation in the industry. As the district court noted in ASCAP's subsequent litigation with Pandora, "Large publishers were in general enthusiastic about such a change, but the songwriters and independent publishers were less so."[32] Songwriters and at least some independent publishers expressed concern that withdrawing new media rights from ASCAP would make songwriters vulnerable to less transparent accounting and potential payments disputes with their publishers and would

[31] It is difficult to be certain of the current market shares based on currently available sources, but these are the number most commonly quoted for the PRO market. *See In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395 (S.D.N.Y. Mar. 18, 2014).

[32] *In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395 (S.D.N.Y. Mar. 18, 2014).

contribute to the overall problems caused by consolidation in the industry.[33] ASCAP Chairman Paul Williams argued to songwriters that publishers negotiating directly would be able to use their market power to negotiate steep license fees, which ASCAP could then use to establish higher royalties in the rate court.[34] Courts have since denied both ASCAP and BMI's plans to allow publishers to withdraw their public performance rights for new media services while keeping those publishers' public performance rights for other uses. The episode does, however, demonstrate the publishers' incentive and willingness to coordinate with each other and the PROs and use their increased market share to raise prices for musical composition licenses to the detriment of smaller artists and consumers.

The PROs' recent rate court litigation illustrates what could happen without adequate structures to ensure efficient and fair licensing structures. The largest publishers and the largest PROs have been allowed to acquire enormous market power, which can be used to distort the normal incentives licensors would have in a competitive marketplace. Added to these anticompetitive incentives, if the largest publishers could license directly to new services with their affiliated major record labels, the new services would be even more beholden to the demands of these mega-copyright owners. Having already allowed the market to grow this concentrated, our music licensing system must now account for this fact and ensure parties can nevertheless achieve reasonable licensing terms in the market.

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[33] *Id.*

[34] *Id.*

B. Weakened Consent Decrees Could Allow Publishers and PROs to Leverage Their Market Power Similar to Negotiations Between Major Record Labels and Digital Music Services.

To more fully understand the potential harms that could occur without mechanisms to ensure reasonable and non-discriminatory licensing, it is useful to examine the recent state of the recorded music licensing market. The major record labels do not operate under consent decrees like the PROs, and even with statutory licenses available for certain webcasters, rates remain high enough to give the major labels significant leverage over licensees. This has resulted in the major labels demanding license terms that prevent new services from launching or burden them with heavy advances, disproportionate royalty fees, or partial equity sales.

In order to launch a download or streaming service a company must obtain a license from sound recording copyright owners, which are often record labels. For many services today, users demand a comprehensive selection of songs, so it is especially critical to obtain licenses from the three largest record labels—Universal Music Group, Sony Music Entertainment, and Warner Music Group. Together these three companies control the vast majority of the market for sound recordings. As a result, when music licensing structures give the major labels the right to deny access to their catalogs, the labels have been able to make extraordinary demands of services that need their permission to launch new music offerings.

The market power of the major record labels is felt especially acutely by streaming services. Interactive streaming services must get record labels' direct permission to offer their catalogs to users, and non-interactive streaming services must either negotiate directly or operate under a statutory license, the rates for which have thus far been set too high for licensees to earn a profit.[35]

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[35] *See* 17 U.S.C. § 114; Lucas Mearian, *Music Industry Sucks Life from Subscription Services*, *supra* note 17.

The major record labels have the incentive to stifle or seize control of new digital distribution platforms because those platforms begin to level the playing field among major labels, independent labels, and unsigned artists. Digital platforms are more likely to include unknown or niche music because, unlike their physical space predecessors, they are not constrained by strict time limits (like AM/FM radio) or space limits (like physical stores). As a result, the emergence of new digital platforms abolishes the physical scarcity of brick-and-mortar marketplaces and causes major record labels to lose one of their main selling points to musicians—namely, that they alone have the connections and influence that a musician absolutely needs to get his or her music out in the marketplace. Thus, the dominant incumbent labels are particularly incentivized to use their leverage to create artificial distribution scarcity by stifling or controlling digital platforms that will decrease their influence as compared to smaller competitors or unsigned acts.

As audience demand currently turns to a streaming, cloud-based model, new distribution services will have trouble launching without licenses from each of the major labels, and ultimately may never succeed if a single major label can withhold a significant percentage of the recorded music market even after other labels have started working with the service. Even in today's marketplace, a major label can wield sufficient power to demand that potential new digital music services pay the label hefty advances and a high percentage of future revenue, or give the record label an equity stake in the new company.[36] This sort of control puts the major labels in a position to "make or break" any new service, allowing them to hamper innovation

[36] These practices also hurt independent labels, which are left with a smaller slice of the pie after online services have acquiesced to the major labels' demands. Recently, the CEO of Merlin, an organization that represents independent labels, voiced concern that the major labels' practice of demanding disproportionately high royalties and enormous advances squeezes out independent labels' royalties while making it harder for new online services to enter the market. Janko Roettgers, *Merlin CEO: Major Labels are Setting New Music Services Up to Fail*, GIGAOM (Oct. 12, 2013), http://gigaom.com/2013/10/12/merlin-ceo-major-labels-are-setting-new-music-services-up-to-fail/.

and/or demand exorbitant terms and conditions. As a result, consumers must either miss out on potential new services or pay excessive fees for those services.

If a major label can undercut the success of a new digital music platform by withholding the rights to a substantial percentage of the market from that platform, it may be able to maintain its market dominance through anticompetitive conduct rather than innovating and competing against new market entrants. If a digital platform never launches because it would not have been able to attract enough users without the catalogs of the three major labels, an independent label would never have the opportunity to take advantage of that platform to promote its artists head-to-head against major label artists.

A major label can also license its copyrights to a new digital distributor, but demand payments in excess of its true market share, burdensome advance royalty payments, or exclusivity in return. For example, Beyond Oblivion, a digital music service founded in 2008 and backed by News Corp. and Allen & Co., aimed to provide users with a nearly unlimited selection of music on devices that held Beyond Oblivion software. The service filed for bankruptcy in late 2011 before it had even launched, but bankruptcy proceedings revealed that Beyond Oblivion owed outstanding debts of $50 million each to Sony Music Entertainment and Warner Music Group—an astonishing figure for a service that never distributed or publicly performed a single recording. These kinds of high advance royalties can hinder a digital startup from launching a successful and sustainable product. They also discourage investors, who must shoulder higher levels of risk for any digital music distribution service that requires direct licensing from record labels.

Finally, a large record label can use its ability to deny licenses as leverage to gain partial ownership in new digital music services.[37] These deals only serve to entrench incumbent power structures and stifle innovation in the online music business, and music licensing structures should certainly not force this result on the industry by making new services choose between unsustainably high compulsory license rates and private deals with the dominant copyright owners. Spotify, for example, is partially owned by all of the major record labels, and has been dogged with accusations of giving independent and unsigned musicians a lower royalty rate than major label musicians for the same number of streams. Even where major label ownership of distribution platforms does not lead to claims of direct discrimination, systematic vertical integration only contributes to a highly concentrated market where a new service must obtain the permission of its largest competitors in order to launch. For example, the music identification service Shazam has sold Warner Music Group's owner Access Industries, Universal Music Group, and Sony Music Entertainment each a $3 million stake in the company.[38] Access Industries also owns the music subscription service Deezer.[39] Since the acquisition of EMI by Universal Music Group, yet more online music services have sold partial equity to the major labels as part of obtaining licenses.[40] Increased vertical integration among the largest copyright

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[37] *See* Mark Cooper & Jodie Griffin, *The Role of Antitrust in Protecting Competition, Innovation, and Consumers as the Digital Revolution Matures: The Case Against the Universal-EMI Merger and E-Book Price Fixing* (June 14, 2012), http://publicknowledge.org/case-against-umg-emi.

[38] Hannah Karp, *Warner, Universal, Sony Buy Stakes in Music app Shazam*, WSJ DIGITS (May 14, 2014), http://blogs.wsj.com/digits/2014/05/14/warner-universal-sony-buy-stakes-in-music-app-shazam/.

[39] *Id.*

[40] *See* Paul Resnikoff, *Artists Will Receive Nothing from the $3 Billion Beats Acquisition, Sources Say…*, DIGITAL MUSIC NEWS (June 9, 2014), http://www.digitalmusicnews.com/permalink/2014/06/09/artists-will-receive-nothing-3-billion-beats-acquisition-sources-say; Adam Satariano, *SoundCloud Said to Near Deals With Record Labels*, BLOOMBERG (July 10, 2014), http://www.bloomberg.com/news/2014-07-10/soundcloud-said-to-near-deals-with-record-labels.html.

owners and distribution and processing services only create new barriers to competition at each point in the supply chain, to the detriment of musicians and their fans alike.

C. Anticompetitive Behavior Among the Largest Rightsholders Creates Bottlenecks for Distributors, to the Detriment of Consumers.

The potential bottlenecks explained above, if left unattended, could thwart promising new music services and prevent competition among online music distribution companies. As described above, when the largest copyright aggregators can wield outsized leverage against distribution services, those licensors can use their market power to demand high royalties, advance payments that squeeze out independent musicians, and partial ownership in new companies. When distribution companies must accept these kinds of terms as a price of entering the business, investors who might have otherwise contributed to more competing independent companies are discouraged from entering the space. Those distribution services that do launch may then not only be affiliated with the largest copyright owners in the industry, but will have few meaningful direct competitors. This only further entrenches the dominance of the companies that already have the upper hand.

For example, despite the great promise of online radio, many webcasters have left the business and a surprisingly small number have achieved a critical mass of market share. Notably, the companies that have lost their online radio businesses include large corporations like Yahoo! and Microsoft, in addition to many small entrepreneurial webcasters. When companies with deep technological expertise and enormous financial backing cannot create a profitable online radio service, questions arise as to whether small start-ups and independent companies have a fair chance of reaching a sustainable business model.

The financial difficulties of online radio companies in turn discourage investment in the field. As Union Square Ventures partner Fred Wilson noted, music services face extremely high

startup costs compared to other industries, like software development.[41] A music startup may even need around $60 million just to arrange for the necessary licenses to launch its service.[42] As a result, this makes it more difficult for would-be music company founders to find funding for independent companies. Wilson did, however, predict that more advertising dollars would eventually enter the online radio space—but this prediction can only come true if online music services are sustainable enough to survive the transition.

III. ANY CHANGES TO THE CONSENT DECREES MUST CONTINUE TO ENSURE A COMPETITIVE, EFFICIENT MARKET.

The consent decrees have provided substantial benefits to the music licensing market and to consumers and artists. In contrast, the publishers' attempted partial withdrawals and the development of the major record labels' market power are stark warnings of the consequences that weakening the consent decrees could have on the composition licensing market. Ultimately, the PROs and the publishers continue to control large enough market shares to behave anticompetitively against licensees, and their recent actions demonstrate that they are willing to do so when given the opportunity. Public Knowledge therefore urges the Department of Justice to ensure the consent decrees continue to protect competition in music licensing.

Any changes to the consent decrees must be carefully designed to continue to protect competition, and must be adequate to handle the increasing concentration among music publishers. Provisions that would allow the PROs to undermine competition or transparency in the market would threaten the development of new music service, leaving consumers with less choice, more limited services, or higher prices. Public Knowledge therefore urges the

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[41] Sarah Mitroff, *So You Want in on the Music Biz? Fred Wilson Has 4 Things to Tell You*, WIRED (Nov. 16, 2012), http://www.wired.com/business/2012/11/music-startups/.

[42] Eliot Van Buskirk, *5 Ways Major Label Music on SoundCloud Would Be Awesome*, EVOLVER.FM (Feb. 7, 2014), http://www.hypebot.com/hypebot/2014/02/5-ways-major-label-music-on-soundcloud-would-be-awesome.html.

Department of Justice to approach with caution any proposal to alter the consent decrees in a way that could threaten the still relatively nascent online music market.

CONCLUSION

The ASCAP and BMI consent decrees have served an important role in promoting competition and encouraging a robust music composition licensing market despite the dramatic market concentration among the PROs. Additionally, the recent attempt of publishers to partially withdraw their rights from the PROs and the market power leveraged by the major record labels against online music services both provide important insights into the harms that could result from weakened consent decrees. Public Knowledge therefore urges the Department of Justice to ensure the consent decrees continue to support a competitive, robust, and transparent licensing market.

Respectfully submitted,

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