Before the
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Washington, D.C.

COMMENTS OF THE RADIO MUSIC LICENSE COMMITTEE, INC. AND THE TELEVISION MUSIC LICENSE COMMITTEE, LLC

INTRODUCTION

The Radio Music License Committee, Inc. ("RMLC") and the Television Music License Committee, LLC ("TMLC") jointly submit these comments in response to the United States Department of Justice Antitrust Division ("DOJ" or the "Antitrust Division") request for public input on, among other things, whether the Consent Decree entered into between DOJ and the American Society of Composers, Authors and Publishers ("ASCAP") (the "ASCAP Consent Decree") and the Consent Decree entered into between the DOJ and Broadcast Music, Inc. ("BMI") (the "BMI Consent Decree") (collectively, the "Consent Decrees") continue to protect competition. *See* Antitrust Division Opens Review of ASCAP and BMI Consent Decrees, *available at* http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.

I. The Radio Music License Committee

The RMLC, an organization funded by the radio broadcasting industry, represents the collective interests of the vast majority – some 10,000 – commercial radio stations in the United States in connection with certain music licensing matters. The RMLC consensually has been negotiating license fees and terms with ASCAP and BMI for decades in an effort to secure license fees for the public performance of copyrighted musical works that resemble as closely as possible those that would emerge in a competitive marketplace.

Periodically, when such negotiations have reached impasse, the RMLC has coordinated and funded "rate court" litigation under the auspices of the ASCAP and BMI Consent Decrees,

seeking the assistance of the federal judiciary in securing fair and reasonable license fees for the broadcast radio industry. To date, the RMLC has always been able to come to agreement with both ASCAP and BMI over fees and terms for the right to publicly perform the musical works in those performing rights organizations' ("PROs'") repertories prior to invocation of the supervising courts' authority to determine final license fees.

Currently, radio stations operating pursuant to the most recently negotiated RMLC agreements with ASCAP and BMI pay license fees to each of those PROs in the approximate aggregate amount of $150 million annually. These license fees represent a significant portion of the total royalties collected annually by those PROs.

In stark contrast to its experience with ASCAP and BMI, the RMLC has never had any success in negotiating with SESAC, LLC ("SESAC") – a third U.S. PRO that, unlike ASCAP and BMI, is not subject to an antitrust consent decree. In fact, due to the licensing posture and practices of SESAC, the RMLC felt compelled to bring an antitrust lawsuit in the Eastern District of Pennsylvania seeking relief from what the lawsuit contends to be anticompetitive practices by SESAC that have resulted in significant overcharges to radio stations for their uses of SESAC music. As discussed further herein, that lawsuit is ongoing.

II. The Television Music License Committee

The TMLC, an organization funded by voluntary contributions from the television broadcasting industry, represents the collective interests of some 1,200 local commercial television stations in the United States in connection with certain music performance rights licensing matters. In that capacity, much like the RMLC, the TMLC has interacted extensively, over decades, with the two larger U.S. PROs – ASCAP and BMI – assisting local television broadcasters in attempting to secure fair and reasonable musical works public performance rights licenses through a combination of industry-wide negotiations and, as necessary, funding and

managing antitrust and federal "rate court" litigation aimed at minimizing the market power enjoyed by those organizations and maximizing the local stations' opportunities to benefit from competitive licensing of music performance rights.

The TMLC also has periodically interfaced with SESAC, a PRO with a smaller repertory than ASCAP or BMI, but nevertheless an organization that wields significant market power in relation to the licensing of the musical works within its repertory. The TMLC currently is funding a class-action antitrust lawsuit brought by owners of local television stations contending that SESAC's licensing practices in relation to class members have had the purpose and effect of eliminating price competition over the public performances of SESAC-repertory music. That proceeding is set to go to trial in mid-2015.

Collectively, local commercial television stations pay some $140 million annually in musical works public performance license fees to ASCAP, BMI, and SESAC combined – a significant portion of the total royalties collected annually by those organizations.

COMMENTS

I. The Music Licensing Marketplace

Radio broadcasters and, with certain exceptions, local television station broadcasters[1] are themselves responsible for obtaining licenses for the public performance of copyrighted musical works in the programming and commercial announcements they air.

For local television stations, a preponderance of such programming and commercial announcements is not produced by the stations themselves but, rather, by third parties, who select

[1] Currently, consistent with the Consent Decrees' preference, the ABC, CBS, NBC, Univision, and TeleFutura networks obtain "through-to-the-viewer" licenses from ASCAP, BMI, and SESAC covering public performances of the music embedded in the programming they distribute, including performances made by their local-station affiliates when those stations broadcast the network programming. Accordingly, no separate licenses from those PROs are needed by those networks' local station affiliates to broadcast that network programming.

and irreplaceably incorporate the music (along with all other programming elements) into the programming.[2] The producers and syndicators of such programming obtain and license to the stations with which they contract all of the copyright and other rights necessary to broadcast the programming (including those for creative inputs such as a script, choreography, acting, and directing), with the sole exception of the non-dramatic public performance rights to the copyrighted music therein.[3] Because of this historic practice, the local stations are themselves required to procure the necessary non-dramatic musical works public performance rights as a condition of broadcasting the programming they have licensed. Insofar as this imposition takes place *after* the music has already been irrevocably embedded in the programing, there is no meaningful opportunity for the stations to negotiate with the composers or publishers of that music over its value. This stands in contrast to the opportunity for fostering the competitive licensing of such performance rights that can and would occur at the time of music selection were the program producers instead to negotiate with the rightsholders in the music directly to secure those rights on the stations' behalf. Indeed, this form of producer "source licensing" is precisely the manner in which theatrical motion picture music performance rights have been licensed for more than 65 years, as a result of a combination of private antitrust litigation and existing decretal provisions in the ASCAP Consent Decree.[4]

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[2] Indeed, local television stations are contractually prohibited from altering the music contained in third-party produced programming and commercial announcements.

[3] This is so despite the fact that the program producers are already negotiating with musical works rightsholders, both to contract for any new music to be created and (with respect to pre-recorded programming) to convey a separate copyright right – a synchronization or "sync" right – permitting the producer to incorporate the selected music into the audiovisual work.

[4] *Alden-Rochelle Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948).

Radio broadcasters face a similar dilemma. Like television broadcasters, radio broadcasters have no control over the music content of the syndicated programming and commercial announcements they air. This material is produced by third parties that do not secure the necessary public performance rights on broadcasters' behalf. They also have no control over the use of so-called "ambient" music – music that is heard in the background of live events such as when a marching band performs during halftime of a sporting event.[5] While radio broadcasters do have control over the feature musical compositions performed in the programming that the station itself creates, the stations are, in many cases, limited in their options. For example, a top-40 format station must play the current top hits. It cannot substitute a hit from the 60s or 70s for a current hit. In addition, even in the cases where the radio station does have complete control over the music content it airs, as a result of the PROs' longstanding refusal to provide complete and up-to-date repertory information in any usable form, the stations have no ability to definitively determine the rightsholders of the necessary performance rights.

As a result of these longstanding industry arrangements, which well-serve the economic interests of composers and music publishers affiliated with the PROs, but disserve the interests of broadcasters in the competitive licensing of public performance rights, the RMLC's and TMLC's constituent broadcasters have for generations had no practical option but to enter into blanket license arrangements with ASCAP, BMI, and SESAC in order to comply with copyright

[5] The broadcast of such ambient music will typically constitute a non-compensable "fair use." *See, e.g., Italian Book Corp., v. ABC, Inc.*, 458 F. Supp. 65, 68 (S.D.N.Y. 1978). A determination of "fair use," however, is a highly fact specific, case-by-case process, and a reasonable alternative is a PRO license covering all such uses, "fair" and otherwise. Pricing of such a license should, of course, reflect the possibly non-compensable nature of many of the covered uses.

law.[6] The extraordinary leverage this need has provided the PROs is evident. *See, e.g.*, Memorandum in Aid of Construction of the Final Judgment, *United States v. BMI*, 64 Civ. 3787 (LLS), dated June 4, 1999 (S.D.N.Y.), at 3-4 ("The PROs' pooling and blanket licensing of copyrights creates antitrust concerns. Because both ASCAP and BMI have so many compositions in their repertories, most music users cannot avoid the need to take a license from each PRO.... As a result, the PROs have market power in setting fees for licenses."). Historically, each PRO has sought to maximize that leverage by seeking supra-competitive license fees from broadcasters while, at the same time, resisting affording these licensees forms of license that would inject at least some degree of competition into the music licensing marketplace. As we next detail, it is only the protections afforded to local radio and television broadcasters by the Consent Decrees that have restrained to a degree ASCAP's and BMI's (though not SESAC's) otherwise unbridled exercise of their market power.

II. The Protections Afforded Broadcasters by the ASCAP and BMI Consent Decrees Are Essential to Limit the Ability of Those PROs To Fully Exert Their Monopoly Power

As explained in greater detail in the Comments of Dr. Adam B. Jaffe ("Jaffe Comments"), attached hereto as Appendix A, and as repeatedly recognized by reviewing courts and the Antitrust Division, collective licensing of the type engaged in by the PROs indisputably implicates the exercise of significant market power that can have anticompetitive consequences, most notably by eliminating competition among otherwise competing composers and music publishers for performances of their works.[7] *See, e.g.,* Brief for the United States as Amicus

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[6] Even inadvertent infringement exposes the infringer to statutory damages penalties under copyright law. Penalties for willful infringement can run as high as $150,000 per work infringed. 17 U.S.C. § 504(c).

[7] *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) ("[I]n the licensing of music rights, songs do not compete against each other on the basis of price."); *BMI*

Curiae, *In Re Application of THP Capstar Acquisition Corp.*, Case No. 11-127, dated May 6, 2011 (2d Cir.), at 1 (The PROs "aggregate rights from copyright holders, license them on a non-exclusive basis to music users, and distribute royalties to their members. These and other functions provide some efficiencies, but also give the PROs *significant market power*." (emphasis added)); Jaffe Comments at 3-5. To be sure, while "individual composers do have some degree of market power as an ordinary function of product differentiation" it is "[t]he PROs' aggregation of composers' license rights [that] increases that power exponentially." Brief for the United States, *United States v. BMI (In Re Application of AEI Music Network, Inc.,)*, Case No. 00-6123, dated June 26, 2000 (2d Cir.), at p. 24 n. 15. The very *raison d'etre* of the Consent Decrees as they relate to ASCAP's and BMI's dealings with users is to rein in that market power. *See* Memorandum of the United States In Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 41-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 15-16 ("the [ASCAP Consent Decree] contains a number of provisions intended to provide music users with some protection from ASCAP's market power.").[8]

The significance of these Decrees is no less today than in the past. The fundamental structure and operations of these PROs remains unchanged: they exist to license collectively, at

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v. CBS, 441 U.S. 1, 32-33 (1979) (Stevens, J., dissenting) ("[T]he blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.").

[8] *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012) ("[T]he rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."); *United States v. BMI (In re Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005) ("[R]ate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights."); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) (rate court not simply a "placebo" intended to rubber stamp the "fees ASCAP has successfully obtained from other users.").

maximum attainable levels, the copyright rights of tens of thousands of otherwise competing rights owners. *See generally* Brief for the United States as Amicus Curiae, *In Re Application of THP Capstar Acquisiton Corp.*, Case No. 11-127, dated May 6, 2001 (2d Cir.), at 1-2 (noting Consent Decrees were the result of earlier Government antitrust challenges designed "to cabin the exercise of [those PROs'] [market] power"). The constraints viewed by the Government at the time of entry of, and subsequent modifications to, the Consent Decrees as necessary conditions for allowing such collusive behavior to exist remain every bit as necessary to this day. Indeed, both the TMLC and RMLC have found it necessary to invoke the protections of the Consent Decrees in their most recent rounds of dealings with these PROs in order to secure reasonable license fees as well as obtain competition-enhancing license alternatives to the all-or-nothing, unvarying-fee blanket license which always has been the license form of choice for ASCAP and BMI.

Although well understood by the Antitrust Division, we believe it worthwhile to underscore the most critical provisions of the existing Consent Decrees on which local radio and television broadcasters have relied and continue to rely:

First, the Consent Decrees bar "gun to the head" licensing tactics by requiring ASCAP and BMI to issue licenses to broadcasters on request, averting threats of copyright infringement for the broadcasters' failure to accede to these PROs' license fee demands. As explained by Professor Jaffe, this prevents ASCAP and BMI from restricting supply – a mechanism used by cartels to elevate price above the competitive level. Jaffe Comments at 4.

Second, the Consent Decrees empower the federal court in the Southern District of New York, which supervises the Consent Decrees, to act as a "rate court" in setting "reasonable" license fees in the event of negotiating impasse. The rate courts have interpreted this

"reasonable" fee standard as requiring them to set rates that most closely resemble those that would emerge in a competitive marketplace. *United States v. ASCAP (In Re Applications of RealNetworks, Inc. and Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) ("Fundamental to the concept of 'reasonableness' is a determination of what an applicant would pay in a competitive market..."); *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, No. 13-95 (WCC), 1993 WL 60687, at *16 (S.D.N.Y. Mar. 1, 1993) ("*Buffalo Broadcasting*") ("[T]he rate court must concern itself principally with defining a rate ... that approximates the rates that would be set in a competitive market.") (internal quotation marks and citation omitted).

The Antitrust Division, as recently as 1994, recognized the importance of both preventing PROs from withholding access to their repertories, as well as being subject to a rate court check on their pricing. Indeed, the addition of the BMI rate court provision – one adopted at the joint urging of BMI and users such as the RMLC and TMLC constituents – was supported by the DOJ because, among other things, it "viewed the provision as promoting the public interest in competition as defined by the antitrust laws." Brief for the United States, *United States v. BMI (In Re Application of AEI Music Network, Inc.)*, Case No. 00-6123, dated June 26, 2000 (2d Cir.), at 22.[9] The Government reasoned that "empowering the Court to resolve licensing disputes when negotiations between BMI and music users break down is sound enforcement policy," and noted the role of a rate court "as an effective restraint on potential abuse of market power." Memorandum of the United States in Response to Motion of Broadcast Music, Inc. To Modify The 1966 Final Judgment Entered In This Matter, *United States v. Broadcast Music, Inc.*,

[9] "BMI and the government agreed at the time the rate court provision was entered that it was to be a constraint on BMI's market power.... That BMI has market power, the ability to exercise some control over price, is plain." *Id.* at 24 (internal citation omitted).

64 Civ. 3787, dated June 20, 1994 (S.D.N.Y.), at 9.[10] For its part, BMI agreed: "The proposed modification [to add a Rate Court] substitutes a rate court mechanism for BMI's right to withhold access to its repertoire, thus further limiting any possible market power BMI might derive as a result of its accumulation of performing rights to over 2 million compositions. Therefore, the proposed modification is clearly consistent with a key purpose of the Consent Decree – limiting any alleged market power BMI may have – as it now exists." Memorandum of Defendant Broadcast Music, Inc. In Support of Motion to Modify Consent Decree, *United States v. BMI*, 64 Civ. 3787, dated June 27, 1994 (S.D.N.Y.), at 30. BMI went on to note that the "creation of a BMI rate court is procompetitive because it adds a licensing alternative and does not detract from the parties' existing ability to reach privately negotiated agreements. Nor would the creation of a rate court have any impact upon the right of any music user to obtain music rights directly from BMI's songwriters, composers, and publishers in the free market." *Id.* at 31. Absolutely nothing has changed in relation to the markets for local broadcast radio and television music performance rights that warrants revisiting those conclusions.

Third, the Consent Decrees serve to bar ASCAP and BMI from obtaining exclusive rights to license their affiliated copyright owners' works – thereby preserving the right of users such as radio and television broadcasters to secure performance rights licenses directly from composers and music publishers where feasible and to request that third-party suppliers of programming and commercial announcement otherwise do so on their behalf.[11] As explained by Professor Jaffe,

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[10] *See also id.* at 12 ("[T]he opportunity to ask the decree court to determine a reasonable licensing fee may provide additional protection against any attempt by BMI to exercise market power in the pricing of its blanket license.").

[11] As discussed elsewhere in these comments, the efficacy of producer source licensing has nevertheless proven to be quite limited under current market conditions.

this allows for the possibility of competition alongside the collective license. Jaffe Comments at 4. As we later discuss, the starkly different practices engaged in by SESAC – which has tied up key television composers with *de facto* exclusive licenses locking local stations into SESAC blanket licenses – serve only to underscore the continuing need for this basic legal protection in relation to ASCAP and BMI.

Fourth, the Consent Decrees mandate that ASCAP and BMI offer broadcasters economically viable alternative forms of license beyond a fixed-fee blanket license, thereby enabling broadcasters to secure public performance rights to at least portions of their music uses in transactions directly with rightsholders (or via producer source licensing), and to do so without double paying for the same rights. As the Antitrust Division has noted, this protection serves "to assure that music users have competitive alternatives to the blanket license, including direct and per-program licensing …," so as to provide such users with "important protections against supracompetitive pricing of the [PRO] blanket license…." Memorandum of the United States in Response To Motion of Broadcast Music, Inc. To Modify the 1966 Final Judgment Entered In This Matter, *United States v. BMI*, 64 Civ. 3787, dated June 20, 1994 (S.D.N.Y.), at 10-11, 12; *see also Buffalo Broad. Co., Inc. v. ASCAP*, 744 F.2d 917, 925 (2d Cir. 1984) (noting the importance of license alternatives); Jaffe Comments at 4. Again by reference to SESAC, recent experience has shown the anticompetitive effects on local television broadcasters of SESAC's refusal to offer a meaningful alternative to a price-inflexible blanket license.

Fifth, the Consent Decrees require that ASCAP and BMI license similar users similarly, thereby preventing ASCAP and BMI from price discriminating within a group of users.

Finally, the Consent Decrees require that ASCAP and BMI offer through-to-the-audience licenses to broadcasters so requesting, thereby preventing ASCAP and BMI from double-dipping

and collecting license fees at multiple stages of a distribution chain and allowing for "more licensing decisions to be made by the entities that control the musical content of programs or other broadcasts, and thus are in the best position to benefit from potential competition among PROs or individual rights holders." Memorandum of the United States In Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 41-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 21.

The long experience of local television and radio broadcasters (and other ASCAP and BMI licensees) attests to the significance of the monopoly-power-constraining functions of these Consent Decrees.

A. The Consent Decrees Serve to Mitigate The Monopoly Pricing Power of ASCAP and BMI

The foregoing key decretal provisions, as enforced by the courts, have played a pivotal role in affording broadcasters (as well as others) with sorely needed relief from the monopoly pricing power possessed by ASCAP and BMI. This was recently demonstrated for radio broadcasters in the negotiations between those PROs and the RMLC that culminated in the current license agreements – negotiations that took place in the wake of the recent financial crisis during which the radio industry saw its revenues fall by billions of dollars. Despite this dramatic change in economic circumstances, ASCAP and BMI both sought to perpetuate the windfall in license fees they had been able to secure from the radio industry as a result of this economic downturn. It was only by utilizing the judicial ratemaking provisions of the ASCAP and BMI Consent Decrees, including securing a favorable interim fee ruling from the ASCAP rate court,[12]

[12] Recognizing this dramatic change in the economic circumstances of the radio industry, in an interim fee proceeding, the ASCAP rate court dramatically slashed – by some $40 million – the then-most recent annual final fees paid to ASCAP by the radio industry. *In re Application for the Determination of Interim License Fees for Cromwell Group, Inc., and Affiliates, et al.*,

that the radio broadcasting industry was able to reach negotiated terms with both PROs at acceptable fee levels.

The aforementioned Consent Decree provisions, as enforced by the rate courts, have similarly provided local television stations with substantial relief from the monopoly pricing power of ASCAP and BMI. Historically, local television stations were required by ASCAP and BMI to accept traditional blanket licenses conveying the rights, *en masse*, to their entire repertories of music, and to pay those PROs a percentage of their revenue, despite the fact that "there can be little doubt that the stations' revenues are not a direct function of the ASCAP music that they utilize in their programming."[13] *Buffalo Broadcasting*, 1993 WL 60687, at *32. Moreover, the pricing structure of these blanket licenses was not related to either the extent of a television station's actual use of a given PRO's music or a licensee's success in obtaining non-dramatic performance rights to a portion of the music it used through other licensing mechanisms. The combined leverage possessed by the PROs in licensing music over which the stations have no control and in refusing to afford the stations pricing structures for those licenses that would make alternative licensing arrangements for at least some portion of the musical works used by the stations economically feasible effectively stifled any competitive licensing of non-dramatic music performance rights to local television stations.

Memorandum Opinion and Order, Civ No. 10-0167 (DLC)(MHD) (S.D.N.Y. May 13, 2010). This ruling enabled final-fee resolutions with both ASCAP and BMI.

[13] The license repertories of ASCAP, BMI and SESAC are exclusive to one another; accordingly, there is no competition between and among the PROs to license a given composer's musical compositions. Brief for the United States, *United States v. BMI (In Re Application of AEI Music Network, Inc.)*, Case No. 00-6123, dated June 26, 2000 (2d Cir.), at 25 ("BMI does not compete with ASCAP in the sense that users will purchase licenses from one or the other; since their repertories are different, most bulk users take licenses from both. Their relationship vis-à-vis users may be more accurately described as co-monopolists in the sale of blanket licenses.") (internal citation omitted).

Utilizing the judicial ratemaking provisions of the ASCAP and BMI consent decrees, the local television industry has succeeded in reining in the pricing of ASCAP and BMI blanket licenses to a significant degree. *See Buffalo Broadcasting*, 1993 WL 60687, at *86. Through the rate-setting process, the local television industry was able to: (i) secure a ruling that determined that the value of ASCAP's license to local television broadcasters is not a function of their revenue, thereby terminating percentage-of-revenue licenses between local television stations and ASCAP; (ii) building on that precedent, secure license fees at levels dramatically below those sought by ASCAP and BMI; and (iii) (as more fully addressed below) establish the parameters of a per program license that was designed, for the first time, to offer the "genuine choice" between per program and blanket licenses guaranteed to broadcasters under the ASCAP Consent Decree. By this combination of relief – coupled with other decree-enabled advances next described – local television broadcasters have been able to bring music performance licensing fees down closer to competitive norms, and thereby to redirect hundreds of millions of dollars towards other areas of broadcast expenditure, including the payment for musical works performance rights secured in direct and source license transactions.

To be sure, judicial supervision over the rates charged by ASCAP and BMI has also benefited other users. The rate courts have time and again rejected the fee proposals proffered by these PROs in favor of significantly lower fees that are more reflective of competitive market rates. These outcomes are not, as some have suggested, the by-product of courts or judges running amok; rather, they reflect the results of full trial records following extensive discovery (governed by the Federal Rules of Civil Procedure) and issue joinder between leading law firms and expert economists, typically followed by impartial review by the United States Court of Appeals for the Second Circuit. Some of the more salient examples include:

- *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990) – setting fees for cable television program services at 60% of those sought by ASCAP.

- *ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012) – rejecting ASCAP's $15.8 million fee proposal for content aggregator, and instead setting fees at $405,000 – some 2.5% of the fee sought by ASCAP.

- *BMI v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012) – setting fees based on actual competitive market data at 33% of those sought by ASCAP and 45% of those sought by BMI.

- *In re Petition of Pandora Media, Inc.*, Civ. No. 12-8035 (DLC), 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014) – rejecting ASCAP's proposal of fee increases of more than 60% over a five year license term.

B. The Alternative License Forms Required by the Consent Decrees Provide Broadcasters with Some Ability to Secure Non-Dramatic Performance Rights in Competitive Transactions

Judicial enforcement of the ASCAP and BMI consent decrees has also provided broadcasters with licensing alternatives to the PROs' favored all-or-nothing blanket license that are designed to open up at least some degree of competition in the local stations' licensing of non-dramatic musical works public performance rights. These license alternatives "ensure that a music user has an incentive to try to license some of its music directly even if it must license other music from the PRO." Memorandum of the United States In Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 41-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 15. The Antitrust Division has time and again noted the importance of such licensing alternatives: "to assure that music users have competitive alternatives to the blanket license, including direct and per-program licensing …," so as to provide such users with "important protections against supracompetitive pricing of the … blanket license…." Memorandum of the United States in Response to Motion of Broadcast Music, Inc. To Modify The 1966 Final Judgment Entered In This Matter, *United States v. Broadcast Music, Inc.*, 64 Civ. 3787, dated June 20, 1994 (S.D.N.Y.), at 10-11, 12.

For the most part, the emergence of commercially feasible license alternatives has come about only through court intervention and over strenuous objections from ASCAP and BMI. In dealings with broadcast television stations, those PROs fought at every turn either to deny access to such license alternatives, or to make them illusory as a matter of economic reality. By way of prominent example, it took years of rate court litigation by local television broadcasters to establish the parameters of a per program license that would embody the ASCAP Consent Decree's guarantee of a "genuine choice" to local television stations between per program and blanket licenses. *See, e.g., Buffalo Broadcasting,* 1993 WL 60687, at *57 ("ASCAP's per-program proposal is designed to further its aim of keeping the per-program license technically available, but practically illusory for virtually all stations."). As noted by the Antitrust Division, "notwithstanding the [Consent Decree] requirement that ASCAP [and BMI] offer broadcasters a genuine economic choice between the per-program and blanket license, ASCAP has resisted offering a reasonable per-program license, forcing users desiring such a license to engage in protracted litigation, and often successfully dissuading users from attempting to take advantage of competitive alternatives to the blanket license." Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 41-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 28

In recognition of the competitive significance of the *Buffalo Broadcasting* ruling, the DOJ subsequently incorporated the core structural and pricing formulation of the per program license into what is now the current ASCAP Consent Decree – indeed, extended the benefits of that ruling to all manner of broadcast licensees. This decree modification was necessary as "the per-program provisions of [the prior ASCAP Consent Decree] have proved to be less effective than intended in facilitating direct licensing." Memorandum of the United States In Support of

the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 14-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 24.

BMI, whose own consent decree contemplates similar access to the per program license, thereafter generally conformed its licensing practices to these dictates in its dealings with local television stations. The availability of this competition-inducing alternative to the all-or-nothing pricing structure of the blanket license has enabled many local stations to begin to take advantage of the workings of a competitive marketplace. Currently, more than 450 local television stations (out of approximately 1,200) have availed themselves of the per program license from either of ASCAP and BMI (or both), and have at least partially controlled their music expense by, for example, entering into direct licensing transactions for the non-dramatic public performance rights to the musical works used in their locally-produced programming. In a more limited number of instances, viable per program licenses have enabled stations to secure licenses from third-party program producers that have secured performance rights from the rightsholders on the stations' behalf. All told, these direct and source license transactions have resulted in stations and program producers paying millions of dollars directly to composers and publishers, all outside of the blanket license process.[14]

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[14] When stations and producers pay composers and publishers directly, they ensure that the public performance fees go to the creators of the music that is actually broadcast, as opposed to creators of other music. The PROs, on the other hand, are "black boxes" through which it is difficult, if not impossible, to trace the money they receive from broadcasters directly to the money they pay to any particular member. Since the PROs are dominated by the publishers of popular songs, they have the incentive to bias their complicated allocation formulae in favor of popular songs, at the expense of television score. Owners of television score might prefer to license the performance rights to their works directly to broadcasters, but they will have no opportunity to do so if the broadcaster must double-pay for the direct license and the blanket license, i.e., as long as the broadcasters do not get full credit on their blanket fees for the cost of their direct licenses. The current per-program license is an imperfect solution because just one second of third-party music in a program eliminates the possibility of receiving credit for that program by licensing the remainder of the score directly. The current system helps broadcasters

Radio stations have similarly been able to take advantage of the per program license guaranteed them by the Consent Decrees. Currently, some twenty percent of commercial radio stations – primarily news- and talk-format stations – have availed themselves of the per program license, and have thereby reduced their license fee obligations dramatically from what they would otherwise pay under the traditional blanket license.

In addition to the per program license, broadcasters and other licensees recently secured entitlement to an adjustable-fee blanket license ("AFBL").[15] As the DOJ explained, the AFBL serves, as least to some degree, to

> enable[] a music user to pit rights holders against one another in direct licensing competition. This competition would make the music licensing market more similar to other competitive markets in our economy where a user negotiates directly with sellers and will choose to buy more from those sellers that offer the best terms. As a group, the BMI rights holders would prefer to avoid bidding against each other to offer the best direct licensing terms. Yet, this type of competition would put pressure on each rights holder to lower its prices for its directly licensed music, in turn putting downward pressure on and producing lower-priced competitive benchmarks for BMI's blanket licenses.

Memorandum of the United States on Decree Construction Issues, *BMI v. DMX, Inc.*, 08 Civ. 216 (LLS), dated Apr. 13, 2010, (S.D.N.Y.), at 3.

This competition-enhancing fee-determination mechanism also came about only as a result of the existence of the Consent Decrees and only after costly rate court litigation to secure it. Even following the Second Circuit's authoritative construction of the BMI Consent Decree as

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who own all the music in some programs, but provides no relief for a broadcaster who owns most of the music in all of its programs but all of the music in none. The TMLC has been advocating for an adjustable-fee structure for a blanket license that would help address this problem. As discussed below, without Rate Court mandates, the PROs would not have voluntarily offered such licenses.

[15] An AFBL provides credits for works the performance rights to which have been separately acquired in alternative licensing transactions. Unlike with the per program license, there is no need to clear an entire program (or time period) of the PRO-affiliated works for the station to receive a credit.

requiring BMI to offer all manner of users an AFBL, *United States v. BMI (In re Application of AEI Music Network, Inc.)*, 275 F.3d 168 (2d Cir. 2001) ("*AEI*"), BMI refused voluntarily to extend such relief to the local television industry, forcing the local television industry to litigate over, and prevail on, what should have been a settled issue. *WPIX, Inc. v. BMI*, Opinion and Order, 09 Civ. 10366 (LLS) (S.D.N.Y. Apr. 28, 2011). Similarly, in its rate-setting proceeding with background music supplier DMX, ASCAP took the position that it was not required to offer such a blanket license pricing option, notwithstanding the materially identical provisions of its Consent Decree to those undergirding the *AEI* decision and the compelling competitive benefits an AFBL affords users. This position was swiftly rejected by Judge Cote. *In re Application of THP Capstar Acquisition Corp.,* 756 F. Supp. 2d 516, 541 (S.D.N.Y. 2010). As the Court noted:

> AJF2 is an antitrust consent decree providing a mechanism for the setting of reasonable license fees in a unique market in which ASCAP indisputably exercises market power. While ASCAP may be unwilling to offer a blanket license with a carve-out for a direct licensing program, the terms of AFJ2, the decisions interpreting and applying AFJ2, and the record evidence from this trial each indicate that such a license is appropriate and justified here. Indeed, DMX has shown that such a license will add competition to the marketplace. *Id.*

While this latest alternative license structure is in its infancy for television broadcasters and is not yet contractually available to radio broadcasters, it offers similar promise to the per program license in loosening ASCAP's and BMI's monopoly grip over the music licensing marketplace. As with the per program license, this opportunity to inject competition into the market would not have come about in the absence of the Consent Decrees and the judicial enforcement mechanisms they offer for the protection of licensees.[16]

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[16] There are ample examples of other users resorting to the judiciary to enforce alternative licenses guaranteed them under the ASCAP and BMI decrees. For example, in *Turner Broadcasting*, the court construed ASCAP's consent decree as requiring ASCAP to issue cable program services so requesting them through-to-the-viewer licenses covering the public performances of music in the services' programming made by cable system operators. ASCAP (as well as BMI) had refused voluntarily to issue such licenses in an attempt separately to extract

The importance to a competitively functioning music performance rights marketplace of opening up meaningful alternative license avenues to the PROs' preferred all-encompassing and fee-inflexible blanket license has been most plainly demonstrated to date by the experience of DMX, a background music supplier. In the aftermath of the *AEI* decision confirming users' entitlement to an AFBL, DMX, which is in the somewhat unusual position of controlling the music it programs, went into the marketplace and secured hundreds of direct licenses from music publishers whose catalogs collectively accounted for upwards of 30% of the musical works performed by DMX. In so doing, DMX created a marketplace in which composers and publishers could compete with each other on the basis of price to secure a greater share of performances on the DMX service.

Both the ASCAP and BMI rate courts, and later the Second Circuit, recognized that these direct licenses entered into in competitive market conditions not only provided a check on the ability of ASCAP and BMI to exercise their considerable market power, but also provided the best evidence of the value of musical works public performance rights licenses.[17] Using these competitive market direct licenses as "benchmarks," and prescribing payment formulae under AFBLs such that DMX would not pay twice for its direct license efforts (once directly to the composers and publishers and then again to the PROs), both rate courts set fees substantially below those sought by ASCAP and BMI – indeed, well below those that ASCAP and BMI had

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license fees at the cable operator level with respect to the music embedded in such programming. *United States v. ASCAP (In re Application of Turner Broad. Sys.)*, 782 F. Supp. 778 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 21 (2d Cir. 1992).

[17] *BMI v. DMX Inc.,* 683 F.3d 32 (2d Cir. 2012); *BMI v. DMX Inc.,* 726 F. Supp. 2d. 355 (S.D.N.Y. 2010)*; In re Application of THP Capstar Acquisition Corp.,* 756 F. Supp. 2d 516 (S.D.N.Y. 2010).

historically been able to secure from the background music industry.[18] This is a classic example of a competitive market at work, and also a demonstration of the degree to which markets that have not been opened up to competitive licensing transactions are subject to significant price overcharges at the hands of the PROs.

As the above demonstrates, the suggestions that such rate court supervision is no longer necessary or that the impartial federal district court and appellate judges who oversee this process have deprived owners of musical works of fair compensation are unfounded. Quite instead, the pattern of price corrections and other decree enforcement measures implemented by the federal judiciary following vigorously contested trials and appeals is testimony to the continuing need for judicial supervision of ASCAP and BMI.

III. Evidence That The Protections Afforded by The Consent Decrees are Still Needed Today Is Readily Found in The Broadcaster Experience with SESAC

Confirmation of the salutary purposes served by the Consent Decrees is found in the broadcast industry's comparative experience with SESAC, a currently unregulated U.S. PRO. Despite the fact that it is significantly smaller than both ASCAP and BMI, SESAC has been able to amass, through the aggregation of the copyrights of thousands of otherwise competing composers and publishers, monopoly power. With this monopoly power, as judicial findings in two separate pending antitrust litigations attest, SESAC today is engaging in essentially the same activities that prompted the government to sue ASCAP and BMI decades ago, culminating in the ASCAP and BMI decrees. These activities include (among others): (i) extracting supra-competitive rates for its blanket license; (ii) refusing to offer any viable alternatives to its all-or-nothing blanket license; (iii) eliminating any opportunity to secure non-dramatic public performance rights for musical works in the SESAC repertory other than through the SESAC

[18] *Id.*

blanket license, including by entering into *de facto* exclusive licensing arrangements with its key affiliates; (iv) revoking interim licensing authorizations and then threatening copyright infringement lawsuits if broadcasters do not acquiesce to SESAC's license fee demands; and (v) refusing to provide broadcasters (and others) with complete and up-to-date information on all of the works in its repertory in any usable form, thereby eliminating the broadcaster's ability to definitively determine if a particular work is in the SESAC repertory.

SESAC's persistence in engaging in this course of conduct compelled broadcasters to bring two separate antitrust actions against SESAC – one class action suit brought by members of the local television industry and one by the RMLC – in an effort to rein in this abuse of market power.

The local television action was brought in early 2009 and is currently set to go to trial in mid-2015. SESAC's repeated efforts to have the case dismissed have been rejected. First, in 2011, SESAC's motion to dismiss was denied. In doing so, the district court held that the local television station plaintiffs plausibly stated antitrust claims under the modern antitrust pleading precedent of *Bell Atlantic v. Twombly*. *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (NRB), __ F.Supp.2d __, 2011 WL 856266, at **5, 15 (S.D.N.Y. Mar. 9, 2011).

More recently, in 2014, in an opinion from the federal district court denying SESAC's motion for summary judgment and setting the case down for trial following full fact and expert discovery, the court observed, among other key findings, that:

- "[t]he evidence would … comfortably sustain a finding that SESAC … engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (PAE), __ F.Supp.2d __, 2014 WL 812795, at *10 (S.D.N.Y. Mar. 3, 2014).
- "there is strong evidence that [SESAC's] [per-program license] is, in fact, illusory" such that "a jury could find that a local station cannot avoid SESAC's blanket license, because no alternative to it is realistically available." *Id.* at *30.

- the de facto exclusive licensing arrangements with key affiliates "effectively eliminated direct licensing as a means by which stations could license these affiliates' music" and that the penalties for direct licensing in the de facto exclusive agreements constitute "substantial evidence … [from] which a jury could find that SESAC effectively forced local stations to buy its blanket license." *Id.* at ** 10, 30.

- the confidentiality provisions in these de facto exclusive licensing agreements could reasonably be viewed as serving to keep "the huge penalties for direct licensing—penalties that might be viewed as 'red flags' of anti-competitive intent—from catching the eye of an antitrust regulator." *Id.* at *27.

- the effective elimination of licensing alternatives to SESAC's blanket license means that "stations must pay supra-competitive prices for the one license that is available—SESAC's blanket license." *Id.* at *34.

- "the evidence is more than sufficient" for a jury to find that "SESAC's conduct harmed competition, and that this harm outweighed any pro-competitive benefits of that conduct." *Id.*

- "it is undisputed that SESAC possesses monopoly power in [the relevant] market" and that "[i]t also appears undisputed that SESAC has the power to control prices over that market as currently structured." *Id.* at *36.

The antitrust action brought by the RMLC, while still in its relatively early stages, is similarly telling. In late 2013, Magistrate Judge Lynne Sitarski conducted an evidentiary hearing on the radio industry's preliminary injunction motion, with both fact and expert economic witnesses testifying for both sides. With the benefit of this testimony, the Magistrate Judge concluded that the RMLC had a likelihood of success on the merits of its antitrust claims. This ruling was later adopted by District Judge C. Darnell Jones, II. Among the key findings of the Court were that:

- "there is no evidence to support the conclusion that SESAC's blanket license has been the customer's preferred choice in the face of available alternatives. To the contrary, SESAC's blanket license is the user's <u>only</u> choice." (emphasis in original). *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5087, Report and Recommendation, at 29 (E.D. Pa. Dec. 20, 2013)

- "the only representative broadcaster who attempted to forego SESAC's blanket license was threatened with an infringement suit by SESAC before eventually agreeing to the license." *Id.* at 30.

- "the current record suggests there is no restriction on SESAC's ability to raise its prices. This ability, coupled with SESAC's 100% market share of the unique product – the collection of songs in its repertory – further supports a finding that the challenged conduct has produced anticompetitive effects in the relevant market." (emphasis in original). *Id.*

- "SESAC has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no alternatives but to purchase their licenses." *Id.* at 33.

- "A station cannot bypass a SESAC license by obtaining bundle of direct licenses for all of the works in SESAC's repertory because they cannot accurately and reliably determine the content of SESAC's repertory." *Id.* at 15.

More recently, in June 2014, the district court denied in part SESAC's motion to dismiss, allowing the proceeding to move forward to the discovery phase.

While the final antitrust verdict is not yet in in either case, the findings of multiple federal district court judges emphatically underscore the anticompetitive consequences of allowing significant aggregations of music performance copyrights to be exploited without the forms of oversight contained in the ASCAP and BMI Consent Decrees. Were those restrictions relaxed or eliminated, ASCAP or BMI could very well take the view, as SESAC did, that they operate in an "antitrust free zone," *Meredith Corp.*, 2014 WL 812795, at *33, and revert to the very sorts of practices that SESAC has dubiously sought to exploit. The lengthy and costly history of self-help efforts on the part of the television and radio industries, requiring repeated resort to rate court proceedings to secure reasonable license fees as well as license alternatives promotive of competition against the stolid resistance of ASCAP and BMI, suggest the likelihood of precisely such a reversion. Such a retrenchment by these PROs in the absence of decree supervision would, moreover, almost assuredly lead to a different, even more costly, era of antitrust litigation – a prospect that would serve no efficiency or other public interest.[19]

[19] Without doubt, the most recent antitrust precedents relating to ASCAP and BMI evaluated the lawfulness of those PROs' licensing activities in light of the existence of their respective consent

IV. The Changes to the Consent Decrees Proposed by ASCAP and BMI Would Only Serve to Enhance Their Ability to More Fully Take Advantage of Their Market Power

A. Eliminating the Consent Decrees, or Allowing Them to Sunset, Will Leave ASCAP and BMI with Unmitigated Monopoly Power

Without the protections afforded by the Consent Decrees, broadcasters would face the Hobson's Choice of accepting whatever license fees and terms are demanded by ASCAP and BMI or foregoing use of copyrighted music altogether (effectively putting them out of business). This stark reality alone counsels against eliminating the Consent Decrees' core protections for users.

In this regard, while it may be the case, as ASCAP and BMI contend, that there is now a general presumption that consent decrees should "sunset" after some period of time, this presumption plainly does not apply in the present circumstances. As the DOJ has long recognized, this presumption is wholly inappropriate when there has been long-standing and continued reliance on the consent decree at issue by industry participants. *See, e.g.*, Memorandum of the United States in Response to Defendant Honeywell International's Motion for Order Terminating the Final Judgment, *United States v. Allied Chemical & Dye Corp., et al.*, Civ. Action No. 41-320 at n. 7 (S.D.N.Y. Aug. 8, 2007), *available at* http://www.justice.gov/atr/cases/f233800/233816.htm ("Among the circumstances where continuation of a decree entered more than ten years ago may be in the public interest [is] … longstanding reliance by industry participants on the decree as an essential substitute for other forms of industry-specific regulation where market failure cannot be remedied through structural relief.") That reliance is coupled here with the fact that the decrees, while remedial in nature, do

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decrees. *See, e.g., Buffalo Broad. Co. v. ASCAP,* 744 F.2d 917, 925, 927 (2d Cir. 1984); *BMI v. CBS*, 441 U.S. 1, 11 (1979).

not fundamentally call for cessation of the conduct giving rise to them so much as regulate that conduct. Were the existing constraints relaxed or eliminated, the very conduct that fostered the decrees could and would perpetuate – only without the surrounding protections for users designed to mitigate the anticompetitive force of ASCAP's and BMI's collective license authority and the competition-eliminating potential it carries with it. *See* Jaffe Comments at 8-9.

B. There is No Sound Rationale For Replacing Rate Court Proceedings With Binding Arbitration

The recent suggestion by the PROs that the rate courts be replaced with binding arbitration should be seen for what it is, and be rejected. Almost without exception, the rate cases that are filed involve significant entities (often, entire industries) and/or significant issues of consent decree interpretation. Often, such proceedings implicate many years – even decades – of prior relevant license experience, which can include prior rate court litigation between the parties or other asserted benchmark licensees. These complexities are uniquely well-suited for federal court resolution. What is more, having a single jurist assigned for a period of years as a given PRO's rate court judge avoids the prospect of re-educating each new arbitrator in the intricacies of music licensing. And retaining federal court jurisdiction promotes the orderly development of, and enables reliance in counseling on, prior precedent. Such precedent undoubtedly fosters the settlement of many license disputes without the need to resort to the ratemaking process.

We note as well that prior to the outset of any rate-setting proceeding, the PROs have a dramatic informational advantage over any licensee insofar as the PROs have access to all of their agreements with myriad licensees along with the fees paid pursuant to those agreements. Licensees, on the other hand, have access to only those agreements to which they are a party. Access to such information is of critical importance as these license agreements oftentimes serve

as the "benchmarks" on which the parties' competing fee proposals are based. Without this information, licensees would be extremely limited in their ability to provide the court with comprehensive analyses of market dynamics in aid of offering optimal benchmarks for the court's consideration. Relatedly, prior rate court records demonstrate the importance of securing full information as to the interactions between these PROs and their key affiliates as they relate to the license circumstances of the user or user group involved in a rate dispute. *See, e.g., BMI v. DMX, Inc.*, 726 F. Supp. 2d 355, 360 (S.D.N.Y. 2010) (noting the lengths BMI was willing to go to prevent direct licensing); *In re Petition of Pandora Media, Inc.*, __ F. Supp. 2d__, 2014 WL 1088101, at *35 (S.D.N.Y. Mar. 14, 2014) (noting the "troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying [the ASCAP Consent Decree.]…").

Plenary discovery governed by the Federal Rules of Civil Procedure serves to mitigate this information imbalance and levels the playing field such that both sides can gain access to relevant information to fully formulate and refine their fee proposals and general litigation strategy. It is highly likely that any arbitration-type mechanism, in contrast, would provide far more limited discovery tools, to the distinct disadvantage of licensees.[20]

There is, moreover, absolutely no evidence that either the ASCAP or BMI rate court has failed diligently to perform its assigned function. In the infrequent cases that are brought, the parties generally consensually agree upon pre-trial and trial schedules, and the respective sides' sophisticated counsel actively benefit from the party and third-party discovery devices made

[20] Binding arbitration may, of course, be an appropriate dispute resolution method in other circumstances and not all disputes need to be resolved in federal court under the Federal Rules. Here, however, there is no reason to replace rate court proceedings that have worked effectively for many decades, particularly given how infrequently such proceedings have been litigated.

available by the Federal Rules. Never in the RMLC's or TMLC's experience has ASCAP or BMI complained about the delay in getting a rate case to trial, nor exhibited the slightest concern over the expenditure of resources getting there. With close to a billion dollars of annual royalty income apiece, such expenditures by ASCAP and BMI in aid of precedents that typically affect wide swaths of their license activity are simply a routine cost of doing business. Nor have ASCAP and BMI been heard to complain about the availability of appellate court review of district court rate and decree interpretation rulings, to which appellate process those organizations have frequently resorted from outcomes with which they have been dissatisfied.

Quite instead, the impetus for assertedly streamlined arbitration is ASCAP's and BMI's thinly-veiled dissatisfaction with the substantive rulings of their rate courts, which repeatedly have refused to rubber stamp the purported "willing buyer/willing seller" agreements proffered by these PROs; which have required them to afford users meaningful license alternatives to all-or-nothing, fixed-fee blanket licenses; and which have seen through transparently collusive arrangements with their largest members and affiliates designed to thwart meaningful direct licensing opportunities or create a coercive license environment that artificially drives the prices of such direct licenses well above competitive norms. Stated differently, ASCAP's and BMI's complaint as to the current ratemaking framework is not that it fails to function efficiently; it is instead that it fails to promote the monopoly conditions and supra-competitive economic outcomes sought by them and their affiliated rightsholders. Given the very rationale of the rate court mechanism, it would be perverse to consider scuttling it for having achieved its very purpose.

C. The Partial Withdrawal Scheme Concocted by the PROs in Concert with their Major Publisher Affiliates Should be Rejected

The PROs' collaborative interest with their largest distributees in securing rights of so-called partial withdrawal in the ostensible interests of fostering more competitive licensing of music performance rights should be viewed with a healthy dose of skepticism. When subjected to the light of judicial scrutiny, this interest was exposed as little other than a concerted effort between and among the PROs and certain major music publishers artificially to create "marketplace evidence" as to the value of music performance rights arising out of direct license transactions at a moment when major publishers have maximum leverage in their dealings with users, and to turn around and use the supra-competitive fees so garnered to bootstrap higher license valuations of the PROs' remaining repertories. In short, the goal of the proponents of this decree modification has been to fashion a licensing scheme whereby licensees would end up paying supra-competitive license fees to *all* composers and music publishers – both those that withdrew and those that remained with the PRO collectives. The requested relief is accordingly not only tainted by the unclean hands of its proponents; to grant it also would ironically serve to undermine the fundamental purpose of the Consent Decrees to restrict ASCAP's and BMI's ability, collusively with their rights holders, to extract supra-competitive prices from users.

As discussed in greater detail by Professor Jaffe, the purpose and motivation behind this requested relief is not driven by a desire to embrace the workings of a competitive marketplace in which individual composers or music publishers would compete with each another on the basis of price to secure an increased share of the performances made by a particular licensee. Such competition can occur – and indeed has occurred[21] – in the presence of the Consent

[21] *BMI v. DMX Inc.,* 683 F.3d 32 (2d Cir. 2012); *BMI v. DMX Inc.,* 726 F. Supp. 2d. 355 (S.D.N.Y. 2010)*; In re Application of THP Capstar Acquisition Corp.,* 756 F. Supp. 2d 516 (S.D.N.Y. 2010).

Decrees. To the contrary, the major publishers, each of which has amassed considerable market power as a result of aggregating the copyrights of otherwise competing composers, wish to partially withdraw from the PROs and circumvent the protections of the Consent Decrees solely to exploit their market power as against certain licensees. As explained by Judge Cote in the recent Pandora proceeding, "[t]he publishers believed that [the ASCAP Consent Decree] stood in the way.... They believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publically perform a composition." *In re Petition of Pandora Media, Inc.*, __ F. Supp. 2d__, 2014 WL 1088101, at *14 (S.D.N.Y. Mar. 14, 2014).

This record demonstrates that there is no compelling Consent Decree-related interest to be served by according the sought-after relief. If a given publisher truly believes that its interests are not served by its continued participation in ASCAP or BMI, it is free to terminate one or both of those relationships. The RMLC and TMLC are not advocating such a result, indeed, prefer that it not come about.[22] However, the half-in/half-out proposal has not been demonstrated to promote any legitimate competitive interests and seems transparently designed instead to promote anticompetitive collusive ends.

D. If Partial Withdrawals Are To Be Considered, There Must Be Constraints Put in Place To Protect Against the Resulting Market Power

As explained above and by Professor Jaffe, modifying the Consent Decrees to allow for partial withdrawals is almost certain to increase market power and drive music performance royalties further above the competitive level. If, however, the Department nonetheless were to

[22] The prospect of major music publishers licensing significant repertories of copyrighted works unbounded by constraints like those embodied in the Consent Decrees would pose its own antitrust concerns.

consider modifying the Consent Decrees to allow for such partial withdrawals, it also should give consideration to appropriate conditions to be imposed on the PROs to at least partially offset the likely adverse consequences of so doing.

At a minimum, those conditions should include:

- a clear articulation of the categories of licenses and licensees that are and are not subject to such partial withdrawals and the stated rationale for the creation of such categories.
- advance notice of no less than a year before a partial withdrawal can become effective, so as to provide the impacted licensees with at least some opportunity to plan around that event.
- providing affected licensees with access to a complete list of the withdrawn works well in advance of the withdrawal (and in real time) in a usable format, as well as complete information as to which of the licensees' programming contains the withdrawn works, so as to maximize the ability of the licensees to consider their future options in relation to continued use of the affected musical compositions.[23]
- barring partial withdrawals in relation to licensees that do not have complete or near-complete control over the music they perform.
- requiring that ASCAP and BMI be allowed to continue to license so-called "incidental" (music in commercials) and "ambient" (music in the background of live events) performances of otherwise withdrawn works.

E. There is No Need for a Presumption that Direct Licenses are the Best Evidence of "Reasonable" Rates

As part and parcel of their dubious interest in permitting partial withdrawals, and in anticipation of the supra-competitive fees they expect the withdrawing publishers would be able to extract from targeted users, the PROs have proposed that the Consent Decrees be amended to include a presumption that such direct license transactions are "reasonable" (*i.e.*, that they reflect

[23] The Songwriters Guild of America is in agreement that complete transparency is necessary in the event that the DOJ allows for partial withdrawals. *See* Written Statement of the President of the Songwriters Guild of America, Inc., Rick Carnes, for the hearing record of the U.S. House of Representatives Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet, July 15, 2014 hearing on Moral Rights, Termination Rights, Resale Royalty, and Copyright Term, at 11.

the workings of a competitive marketplace). This is a remarkable turn-about of position for ASCAP and BMI, which fought tooth and nail to disparage the precedential force of untainted direct license evidence in the DMX litigations. Even there, the outcome resulted from actual fact and economic testimony, not from any "presumptions" of reasonableness. *A fortiori* in the current context, where the impetus for such suggestion is the fee bonanza ASCAP and BMI would hope to experience building on direct licenses generated from their jerry-rigged partial withdrawal proposal, the proposed presumption is an improper one. The direct licenses that the PROs now wish to shield from similar rate court scrutiny are almost certain to be thoroughly infected with market power and scarcely warrant exalted evidentiary status in a search for competitive-market-approximating license fees.

V. The Consent Decrees Can Be Amended So As To Further Promote a More Efficient and Competitive Marketplace

A. ASCAP and BMI Should be Required To Provide Complete Transparency As To The Works in Their Repertories

One major stumbling-block in creating a more efficient and competitive marketplace is a lack of transparency. Currently, each of the three U.S. PROs maintains databases that identify the PRO affiliations of composers and publishers as well as the music content of thousands of television and radio programs (and even some commercial announcements). In addition, there is an international database that identifies the PRO affiliations of composers and publishers that is compiled by the International Confederation of Societies of Authors and Composers ("CISAC"), with the financial support of the U.S. PROs (among others). The PROs, however, have gone to great lengths to ensure that users do not have access to any of these databases. This anticompetitive practice, which further entrenches PRO blanket licenses and discourages competitive licensing transactions between individual copyright owners and music users, should be eliminated.

There is no rational reason why real-time access to information revealing just which composers and musical works are affiliated with which PROs, as well as what music of which PRO is contained in users' programming, should not be made publicly available. Nowhere else are broadcasters asked to pay for intellectual property that is unidentified. In fact, the federal district court overseeing the RMLC antitrust litigation against SESAC has recognized the need for, and competitive benefits of, complete repertory transparency. *RMLC v. SESAC Inc.*, 12-cv-5807, Report and Recommendation, (E.D. Pa. Dec. 20, 2013), at 33 ("SESAC has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no alternatives but to purchase their licenses."). The ASCAP rate court came to a similar conclusion with respect to the repertories of the publishers that attempted to partially withdraw from ASCAP and BMI. *In re Petition of Pandora Media, Inc.*, __ F. Supp. 2d__, 2014 WL 1088101, at **23-28 (S.D.N.Y. Mar. 18, 2014).

B. The Efficiency of the Rate-Setting Process Can Be Improved

While the RMLC's and TMLC's broadcast constituencies support continued availability of robust rate court procedures supervised by the federal courts, subject to the Federal Rules of Civil Procedure and Evidence, and buttressed by plenary appellate review, they do support several modifications in current practice that can be made to meaningfully increase the efficiency of rate court proceedings.

First, the "firewall" codified in Section XIII of the BMI Consent Decree that serves to maintain separate BMI and ASCAP rate courts should be eliminated. If there ever was a scintilla of rationale for maintaining separate adjudicative fora for ASCAP and BMI disputes, it is wholly lacking now. The mandates of the respective rate courts are the same and the operative provisions of the ASCAP and BMI Consent Decrees as relate to users are likewise comparable. Increasingly, the same licensees and licensee groups are faced with litigating simultaneously

with ASCAP and BMI in their respective rate courts before different jurists. The duplication of effort is both extremely costly and serves no useful purpose. Both the TMLC and RMLC found themselves in precisely that posture in recent rate-making proceedings – responding to separate sets of discovery demands, internally inconsistent claims of music market share, and the like, and a rebuff from BMI at any suggestion of coordinating pretrial activities between the cases.

Combining ASCAP and BMI ratemaking in a single rate court would, among other benefits: (i) streamline the costs of rate court proceedings for users facing the prospect of litigating with both ASCAP and BMI, (ii) minimize the potential for conflicting decisions as to the "reasonable" rates for fundamentally identical BMI and ASCAP licenses to the same users and (iii) avoid the prospect of a given licensee or licensed industry paying over 100% of the reasonable value of its combined public performances of ASCAP and BMI music. In relation to this last point, in the RMLC's and TMLC's experience, ASCAP and BMI invariably inflate their claimed market shares and invoke incompatible methodologies for arriving at them. A unitary – or at least coordinated – rate proceeding that can take account of the contentions of both PROs could rationalize such competing claims. The fact that ASCAP and BMI commonly point in rate proceedings to the user's license fee payments to the other PROs as asserted evidence of the fees to which they themselves are entitled, it is only logical to bring the two largest PROs into a single forum to thrash out both the reasonable value of their respective repertories and the relative shares of a universe value of public performance rights to which each is entitled.

Second, requiring active mediation at various points in the litigation process would serve the interest of facilitating settlements. Active mediation, during which the parties must present and defend their key theories and supporting analyses before a magistrate judge (or other court-appointed neutral third party), would, at a minimum, serve to bring about faster issue joinder,

allow parties to more fully evaluate the strengths and weaknesses of their positions at an earlier stage, and enable them to benefit from the candid reactions of a neutral third party.

* * *

We thank the Department for considering these comments and stand ready to supplement them as requested.

Respectfully submitted,

Dated: August 6, 2014

/s/ R. Bruce Rich

R. Bruce Rich
Benjamin E. Marks
Jacob B. Ebin
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8000

Counsel for Radio Music License Committee, Inc. and Television Music License Committee, LLC

APPENDIX A

Before the

UNITED STATES DEPARTMENT OF JUSTICE

ANTITRUST DIVISION

Washington, D.C.

Comments of Dr. Adam B. Jaffe

August 6, 2014

I. Qualifications and Assignment

My name is Adam B. Jaffe. I am the Director and a Senior Fellow of Motu Economic and Public Policy Research, a non-profit research organization located in Wellington, New Zealand. I am also Fred C. Hecht Professor in Economics Emeritus at Brandeis University in Waltham, Massachusetts. From 2003-11, I was Dean of Arts and Sciences at Brandeis. Before becoming Dean, I was the Chair of the Department of Economics. Prior to joining the Brandeis faculty in 1994, I was on the faculty of Harvard University. During the academic year 1990-91, I took a leave of absence from Harvard to serve as Senior Staff Economist at the President's Council of Economic Advisers in Washington, D.C. At the Council, I had primary staff responsibility for science and technology policy, regulatory policy, and antitrust policy issues.

I have authored or co-authored over eighty scholarly articles and two books. I have served as a member of the Board of Editors of the *American Economic Review*, as an Associate Editor of the *Rand Journal of Economics*, and as a member of the Board of Editors of the *Journal of Industrial Economics*. I am a Research Associate of the National Bureau of Economic Research (NBER), in which capacity I co-founded and co-directed for many years the NBER *Innovation Policy and the Economy* Group. At Brandeis and Harvard, I have taught graduate and undergraduate courses in microeconomics, antitrust and regulatory economics, industrial organization, law and economics, and the economics of innovation and technological change.

I have served as a consultant to a variety of businesses and government agencies on economic matters, including antitrust and competition issues, other regulatory issues, and the valuation of intellectual property, including music performance rights. I have been qualified as an economic expert in federal courts in the Southern District of New York (proper basis for music performance license fees in cable television, 2001 and appropriate structure and benchmark fee for music performance license in background music service, two separate cases in 2010),

Idaho (evaluating market power and allegations of anticompetitive behavior, 2002), and in the Southern District of New Jersey (commercial success as a factor in patent obviousness determination, 2009). My testimony has also been accepted and used by state courts, state regulatory agencies, the Federal Energy Regulatory Commission and its Administrative Law Judges, private arbitration panels, and arbitration/royalty panels convened by the U.S. Copyright Office/Library of Congress.

I have consulted for both owners and users of intellectual property on its valuation and the interaction between intellectual property and competition. I have consulted for the Copyright Clearance Center on the valuation of photocopying licenses and the American Chemical Society on paper and digital journal subscriptions and the relationship between the two. I chaired the Brandeis committee that drafted its current Intellectual Property Policy. I have testified on behalf of both plaintiffs and defendants in patent cases involving a consumer product, a medical device, a software program, and pharmaceuticals. I testified at the request of the Chairman before the U.S. House Subcommittee on Courts, the Internet and Intellectual Property on patent policy reform.

With respect specifically to the licensing of music performances involving performance rights organizations (PROs), I have prepared written expert reports and presented testimony on behalf of local television stations, cable television channels, and a background music service in ASCAP and BMI "Rate Court" proceedings, conducted pursuant to Consent Decrees between these entities and the U.S. Department of Justice, Antitrust Division (DOJ), in federal court in the Southern District of New York. I assisted in the design and development of a television music use survey that the Television Music License Committee, LLC (TMLC) continues to use today. In 2006, I also testified on behalf of local television stations in their arbitration with SESAC for the 2005-07 license period. In addition, I testified on behalf of the Public Broadcasting Service in its copyright office arbitration with ASCAP and BMI in 1998.

In 2010, I testified on behalf of the background music service DMX in separate cases in the BMI and ASCAP Rate Courts.[1] My testimony in both cases was to the effect that: (1) the traditional method of licensing music performance rights through a "blanket license" that aggregates rights held by numerous different copyright owners confers market power on BMI and ASCAP; (2) the fees paid by DMX in direct licensing contracts with music publishers demonstrated that the historical blanket license fees charged by ASCAP and BMI were well above the competitive level; and (3) an Adjustable Fee Blanket License (AFBL) could mitigate that market power if designed correctly. My testimony was used by both Judge Stanton and Judge Cote in their decisions, both of which established an AFBL as an alternative to the traditional ASCAP and BMI blanket licenses, using the formula I recommended, and

[1] *In Re Application of THP Capstar Acquisition Corp.*, 756 F.Supp.2d 516 (S.D.N.Y. 2010); *Broadcast Music, Inc. v. DMX, Inc.*, 726 F.Supp.2d 355 (S.D.N.Y. 2010).

at a license fee level tied to the direct-license benchmark that I recommended. These decisions were affirmed by the Second Circuit in 2012.[2]

I submitted an expert report on behalf of the plaintiff local television stations in their Section 1 and Section 2 lawsuit against SESAC. My opinions regarding the appropriate definition of the market for antitrust analysis, SESAC's market power in that market, and the anticompetitive consequences of SESAC's actions were positively cited by Judge Engelmayer in his 2014 decision on SESAC's motion for summary judgment.[3]

I have been asked by the TMLC and the Radio Music License Committee, Inc. (RMLC), as well as Viacom, Inc. and Netflix, Inc., two other major distributors of television content via cable, satellite, Internet, and other means, to provide an analysis of the economic functioning of the ASCAP and BMI Consent Decrees, and to comment from an economic perspective on the issues raised in the Department's Request for Comments.

II. The Consent Decrees represent appropriate application of antitrust principles to the music licensing market

Copyright gives creators a monopoly over their own works; rightsholders licensing their works individually have the right to charge whatever they choose, and would not be subject to any restriction on their licensing practices or prices. There is no legal or regulatory restriction on the right of any individual composer to operate in this manner today.

Composers and music publishers have chosen, however, to organize themselves into Performing Rights Organizations or "PROs." The PROs (ASCAP, BMI and SESAC) offer "blanket" licenses that convey to broadcasters and other users the right of public performance to the works of thousands of individual composers at a single price. We would not allow wheat farmers or law firms to band together and offer access to their products only on a package basis at a fixed price, because we expect that if they did so they would insist on higher prices than each could get on their own.

It might seem that this logic does not apply to music performance rights, because music creators "already have" a monopoly granted by copyright. But the copyright monopoly covers only a creator's own works; it does not convey the right to monopolize the combined works of many creators. In some contexts, program producers might feel that they have to have a specific work or a specific composer, in which case competition from other composers would be irrelevant. But in many cases, such as the choice of background or theme music for a television series, there

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[2] *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012).
[3] *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (PAE), __ F.Supp.2d __, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014).

might be many different works and many different composers that would do. We would expect in those circumstances that composers would compete with each other to have their music used and performed. This competition would determine the royalty rates for use of the music. This is precisely the type of competition we observe in the licensing of synchronization rights when music is embedded in audiovisual content, as discussed below. With respect to performance rights, however, the bundling of thousands of composers and thousands of works together in a blanket license eliminates that potential competition.

The ASCAP and BMI Consent Decrees came about because the Antitrust Division challenged this collusive behavior in which those PROs monopolized the combined works of many creators. The logic of the decrees is that appropriate restrictions on the behavior of the PROs can allow them to engage in collusive pricing while mitigating the anticompetitive consequences that would otherwise flow from such behavior.

The nature of the restrictions imposed by the Consent Decrees is directly tied to this function, that is, the restrictions control or mitigate the ability that the PROs would otherwise have, by virtue of collusive pricing, to elevate licensing royalties above the level that would result from competition among different music rightsholders. Specifically:

1. ASCAP and BMI must grant a license to anyone who requests one—because restricting access to the collective product is the mechanism by which a cartel (i.e., the PRO) elevates the price.

2. If ASCAP or BMI cannot reach agreement with a licensee on the royalty rate, that royalty is determined by a neutral party (the "Rate Court")—because otherwise the PROs' control of the repertory of thousands of composers would allow them to insist on royalty rates far in excess of what those composers could individually negotiate.

3. ASCAP and BMI are prohibited from restricting their affiliated rightsholders' ability to negotiate individually to license their works—in order to mitigate their collusive market power by allowing for the possibility of competition alongside the collective licensing.

4. ASCAP and BMI are required to offer licensees "genuine alternatives" to the blanket license, and to allow licensees to adjust to some limited extent their blanket license fees to reflect works for which they have secured performance rights directly from the rightsholders—again in order to mitigate the collusive market power of blanket licensing by allowing competing mechanisms to operate in parallel with the collective blanket license.

Not surprisingly, ASCAP and BMI would prefer to operate without these restrictions. But from a public policy perspective, the predicate for a performance-royalty-

licensing regime without these restrictions should be independent licensing by distinct copyright owners, subject to action under the antitrust laws (for example, if they attempt jointly to set the price for portfolios of works from multiple distinct rightsholders). If, on the other hand, the rightsholders wish to continue to price performance rights jointly through blanket licenses, then the above restrictions are entirely appropriate to mitigate the market distortions of unrestricted collusion.

III. The Rate Courts Have Functioned to Move Music Royalties Away from Monopoly Levels and Towards the Competitive Level

As noted above, part of the compromise inherent in the Consent Decrees is that ASCAP and BMI are permitted to engage in collective licensing, but given the likely effect of such collusion on royalty levels, royalties are set by the Rate Courts if the parties cannot agree. To fulfill this role, the Rate Court is charged with setting "reasonable" royalties, and has tied "reasonable" in this context to the rate that would prevail in a competitive market. *United States v. ASCAP (In Re Applications of RealNetworks, Inc. and Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) ("fundamental to the concept of 'reasonableness' is a determination of what an applicant would pay in a competitive market."); *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, No. 13-95 (WCC), 1993 WL 60687, *16 (S.D.N.Y. Mar. 1, 1993) ("[T]he rate court must concern itself principally with defining a rate ... that approximates the rates that would be set in a competitive market.").

ASCAP and BMI have argued that the Rate Courts have operated, particularly in the digital domain, to suppress music performance royalties below "market" levels. Comments of the American Society of Composers, Authors and Publishers, dated May 23, 2014, U.S. Copyright Office, Docket No. 2014-03 ("ASCAP Copyright Office Comments"), at 24-27, 34-35; Broadcast Music, Inc.'s Comments on Copyright Office Music Licensing Study, dated May 23, 2014, U.S. Copyright Office, Docket No. 2014-03 ("BMI Copyright Office Comments"), at 8-9, 13-15. In particular, ASCAP has pointed to Judge Cote's decision to reject license agreements reached between publishers and Pandora during the period when ASCAP permitted partial withdrawal as a benchmark for the blanket license royalty. ASCAP Copyright Office Comments, at 26-27. As discussed further below, Judge Cote rejected these agreements as benchmarks because the evidence is clear that they were the result of the publishers' market power. This does not represent a structural flaw in the Rate Court process; it represents ASCAP's unhappiness with the Court's insistence on constraining its market power.

The underlying source of the PROs' and publishers unhappiness with the current performance royalty landscape seems to be that musical works performance royalties for non-interactive digital music services are much lower than the sound recording royalty rates for the same licensees. It is important to note in this context that this disparity results from an explicit decision by the CRB that sound recording performance royalties should not be tied to music composition performance

royalties. *See, e.g., Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 72 Fed. Reg. 24,084 (May 1, 2007). And, of course, the zero royalty paid for sound recording performances in traditional radio has never been seen by the PROs as an appropriate reference point for determining if the music performance royalties for those licensees are too high.[4]

The available evidence from experience with the musical works performance royalty market itself suggests, to the contrary, that while Rate Courts exert downward pressure, performance royalties generally remain above the competitive level. First, in circumstances where licensees have been able to utilize direct (non-collective) licensing on a significant scale in a reasonably competitive marketplace in which individual rightsholders were competing against each other on the basis of price to have their works performed, the resulting prices have been well below the rates of collective licenses. DMX provides packages of recorded music that retail stores and other businesses play in the "background" in their establishments. As such, DMX has direct control over which music is "performed" by its service, and the nature of the service is such that programmers have great flexibility as to which music to use. While historically the rights to these public performances were conveyed by a blanket license, in 2006 DMX embarked on a campaign to secure public performance rights directly from individual music publishers ("direct licenses"), with the explicit intention of using these directly acquired rights in place of those secured through the PROs at the blanket license rates.

Over a period of 5 years, DMX was able to secure hundreds of direct licenses from music publishers – both small and large – whose catalogs collectively accounted for upwards of 30% of the musical works performed by DMX. *In re Application of THP Capstar Acquisition Corp.,* 756 F.Supp.2d 516, 528 (S.D.N.Y. 2010). The effective rate in these publishers' licenses for the music in the ASCAP repertoire was the publishers' pro-rata share of about $11 per DMX location. *Id.* at 548. In contrast, the previously established ASCAP rate, based on ASCAP's license with Muzak, another

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[4] The conclusion that the concern about musical works performance royalties in non-interactive digital media is not based on any evidence that they are below competitive market levels, but rather is purely a kind of sound recording "envy," was confirmed by Peter Brodsky of Sony/ATV in his negotiations with Pandora. He told Pandora that it was only the "differential" between the sound recording royalty and the musical works performance royalty that was the problem, and that if the sound recording rate were significantly lower Sony/ATV would not be seeking a higher musical works performance royalty. *In Re Petition of Pandora Media, Inc.*, __ F.Supp.2d__, 2014 WL 1088101, *22 (S.D.N.Y. Mar. 14, 2014). In this regard, it is worth noting that ASCAP attributes the Rate Court's putative failure to set its rates at the proper level to the Court's reliance on benchmarks that are, in ASCAP's view, depressed by the requirement that ASCAP not deny a license to any user. ASCAP Copyright Office Comments, at 25-27. Yet, the very sound recording performance rates that are at the heart of this so-called "disparity" were set by the rate-setting bodies under the compulsory license provisions of 17 USC section 114.

background music service was, on a comparable basis, approximately $30-40 per location, depending on how specific features of the Muzak license are considered. *Id.* at 524.

This dramatically lower rate for the direct licenses was the result, at least in part, of publishers' expectations that DMX would favor the music owned by its direct licensees in formulating its programs, so that the lower rate would be offset by a larger share of the overall DMX royalty pie. *Id.* at 550. That is, while the blanket license eliminates any possibility of competition for performances, this direct license regime effectuated competition. If the Rate Court and the Consent Decree regime more generally were suppressing royalties below the competitive level, publishers should be unwilling to license directly at an even lower rate. The fact that publishers in this competitive regime chose to accept royalty rates considerably less than half the Rate-Court-influenced ASCAP rate suggests strongly that the Rate Court, at least in this case, was perceived to be willing to sanction rates well above the competitive rate.

This licensing experience of DMX provides an example of a competitive market for musical works performance royalties at work, and demonstrates that in this context such competition produces royalty rates much lower than those produced by collective licensing. There is no way to know precisely how this experience would translate to other performance royalty licensing contexts, but it is at least suggestive that the economic prediction that collective licensing elevates royalties is correct and is quantitatively significant.

A second source of evidence regarding the relationship between Rate-Court-influenced royalties and the competitive price level is at the opposite end of the competitive spectrum. SESAC, the one United States PRO that is not subject to a consent decree, has clearly been able to raise its royalty rates in a manner inconsistent with normal competitive market forces. Despite the fact that it is far smaller than both ASCAP and BMI, SESAC has been able to amass, through collective licensing, monopoly power. With this monopoly power, SESAC, freed in 2008 from externally-imposed constraints, demanded from local television stations significant, ongoing royalty increases. This was so despite the fact that the data showed SESAC music use by local television stations declining, and the industry (and the economy generally) was in the throes of the "Great Recession." It is my understanding that SESAC dealt with radio stations in a similar fashion. Nevertheless, in part because SESAC does not publish a complete listing of the works it licenses and the individual writers/publishers owning all or part of those works, television and radio stations felt that they had no feasible alternative but to take a SESAC blanket license; indeed some stations were informed by SESAC that it was withdrawing interim authorization for performance of its music and therefore the station would be subject to copyright infringement claims if it did not agree to the license terms demanded. *RMLC v. SESAC, Inc.*, Civ. No. 12-5807, Report and Recommendation, (E.D.Pa. Dec. 20, 2013); *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (PAE), __ F.Supp.2d __, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014). Eventually, all stations gave

in to SESAC's demands. This ability to dramatically raise one's price, as SESAC has done, without suffering any loss in business is the hallmark of monopoly power. *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (PAE), __ F.Supp.2d __, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014).

IV. The ASCAP and BMI Rate Courts are reasonably flexible and appropriate mechanisms for the task of ensuring reasonable music performance royalties

The foregoing discussion shows that the problem the Consent Decrees are designed to solve is a real one. It is nonetheless fair to ask whether or not the decrees constitute a reasonable solution to this problem. ASCAP and BMI have portrayed the Consent Decrees and the Rate Courts as obsolete and/or heavy-handed regulatory mechanisms. ASCAP Copyright Office Comments, at 20-27, 37-39; BMI Copyright Office Comments, at 7-9, 13-21. These are misleading characterizations.

While the advent of digital technologies and the growth of the Internet have changed the modes of distribution by which music performances requiring licensing are delivered, they do not change the underlying reality that collective pricing for thousands of compositions creates monopoly power that is not present in the individual composers' copyrights. Hence while conducting a review of the Consent Decrees may be appropriate, there is no analytically valid basis to suggest that these new technologies undermine the need for the oversight the Consent Decrees provide.

Another issue raised by some PROs (in their prior comments responsive to the February 2014 NOI of the U.S. Copyright Office) is that the DOJ has a general presumption that antitrust consent decrees should "sunset" after some period of time. There are, however, good reasons why the general presumption that antitrust consent decrees should "sunset" after some time does not apply here.

First, most antitrust enforcement actions emerge out of a particular set of market conditions at a point in time. In most markets, companies that manage to establish some kind of monopoly position can be expected to be unable to sustain any such dominance if prohibited from engaging in anticompetitive behavior for some period of time. But the market power associated with the collective pricing by the PROs is fundamentally different. It is not the result of a narrow or temporary set of circumstances—it is inherent in the licensing structure they have chosen to establish, and around which the industry has organized itself for decades.

Second, the general presumption that consent decrees should be of finite duration in no way implies that when a consent decree ends the firms involved are subsequently somehow exempt from the antitrust laws. But BMI and ASCAP do not seem to be proposing ending their practice of collective licensing. What they apparently seek is weakening or removal of the Consent Decree restrictions, while

they would continue to be permitted to license collectively. The analogy to such a proposal is not "sunsetting" of a narrow consent decree, it is broad exemption from the antitrust laws that apply to everyone else.

Finally, some commenters have emphasized that the Rate Courts are expensive and time-consuming. The time and expense required for Rate Court proceedings has to be considered in context. First, it is only a very small number of cases in which it is needed. Year in and year out, ASCAP and BMI have thousands of licensees and license agreements. Only a handful of these agreements have been handled by the ASCAP or BMI Rate Courts over the decades in which the Consent Decrees have been in existence. For the rest, the Rate Courts provide a "backstop" that mitigates the monopoly pricing that collective licensing would otherwise generate, but they do so without actually being used. Thus, the time and expense of the small number of Rate Court cases that are actually needed is more than balanced by the benefit created in all licensing negotiations by its mere existence in the background.

Even in the cases where it is invoked, the cost of Rate Court should be viewed relative to the economic stakes involved in determining the reasonable fee. BMI and ASCAP have presented no evidence that the cost of Rate Court is burdensome or disproportionate. Indeed, both organizations brag that their overall administrative costs—of which participation in Rate Court is itself only a small fraction—are low by international standards and relative to the value that they deliver.[5]

V. The Opportunity for Greater Competition and Less Reliance on Collusive Pricing

The Consent Decree structure of accepting joint pricing of music performance rights, but constraining the ability of the PROs to exploit their resulting market power, is unnecessary and undesirable to the extent that it might be feasible instead to price music performance rights through a functioning competitive market. In this section, I will describe how such a competitive market could feasibly emerge, at least with respect to those music performances that come about through pre-recorded audiovisual broadcasts.

The essence of the problem faced by audiovisual broadcast media who wish to perform copyrighted music is that they are obligated to ensure that they have

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[5] That the cost of Rate Court is low relative to the stakes is demonstrated by ASCAP's behavior in the Pandora Case. In December of 2012, ASCAP and Pandora negotiators had reached agreement on the terms of a license. ASCAP then decided at the last minute that the consequences for its relationship with some of the publishers if it agreed to the license would be adverse, and so it rejected the negotiated agreement and allowed the Rate Court proceeding to move forward instead, presumably with reasonable knowledge of what that would cost. *In Re Petition of Pandora Media, Inc.*, __ F.Supp.2d__, 2014 WL 1088101, *21 (S.D.N.Y. Mar. 14, 2014).

permission for all of the music performances they broadcast, but they do not have complete control or the information necessary to satisfy that obligation. A potential solution to this problem would be for the parties that do have the information and control regarding music in programming and commercials to secure music broadcast performance rights at the time the music performance is embedded in the programming. This could include the producers of syndicated programs, movies and commercials, all of whom already secure all of the other creative rights needed to create and broadcast the program. The value of the performance rights secured by producers for the benefit of subsequent broadcasters would be incorporated in the contracts or other economic arrangements that govern the broadcaster's use of the material. Broadcasters would still need to acquire the rights for the music in the programs that they produce themselves; in that regard they would then be performing the same function that other programming producers perform.

In this world, the cost of acquiring the right to perform music in broadcasts would be determined by competition among composers/publishers. If a producer wished to incorporate a musical work into a program, movie or commercial, it would contact the copyright owner, and together they would determine the terms and conditions (including the compensation to be paid, if any) under which that owner would permit the desired broadcast performances. The producer could then consider whether to incorporate the music under these terms and conditions, try to negotiate better terms, or not incorporate the music at all.

Note that, in this hypothetical competitive market, even though the copyright owner has an absolute monopoly on the right of performance in *her* work, the terms and conditions that are specified for the license of that right are subject to the forces of competition, at least to some degree. If the copyright owner (whether a composer writing new music or a publisher licensing previously-created works) sets the price too high, then the producer has the option of either substituting a different pre-existing work available on more favorable terms and conditions from a publisher or hiring a composer to create a new musical work for the contemplated program. Of course, if the producer is making a documentary about the Beatles, then it is unlikely to want to do so without using any Beatles music. If the producer is making a documentary about rock-and-roll in the 1960s, there are many different songs, available from a wide variety of copyright holders, that it could use. For local news broadcasts, there may be many composers available to write a news theme. Thus, competitive market forces would determine the market price for the right to broadcast each particular performance. The extent of discipline that this competition would impose would depend on the musical work and the circumstances of the performance, but the principle that competition exists would always be present.

This hypothetical competitive market for broadcast music performance rights would involve transaction costs. That is, programming producers and copyright owners would potentially have to expend time and/or money negotiating and then paying the fees. These costs would likely be passed on to the downstream

broadcasters, so that the cost of programming would be increased to reflect both the value of the performance rights conveyed by the copyright holders and the costs of acquiring those rights.

Of course, virtually all real markets involve transaction costs; the observation that transaction costs would exist cannot be taken to imply that a hypothetical market structure is necessarily impractical. A typical audiovisual program embodies multiple creative or artistic inputs, such as a script, visual images, acting, and direction. Many of these artistic elements also involve copyright rights, and hence, diverse permissions are necessary to broadcast a television program (including copyright performance rights other than those for musical compositions). Generally, the producer of an audiovisual program or commercial obtains, and conveys to the broadcaster, all of the rights needed for the broadcast of the program – with the sole exception of the right to perform the musical compositions publicly.

Indeed, the creation of audiovisual programs (including movies) or commercials already requires the program producer to interact with the owner or agent of any musical works used. Whether the music is specially composed for the program or not, incorporating it in an audiovisual recording requires the acquisition of the "synchronization" right for that musical work. This "sync" right is distinct from the performance right, but it is held by the same party that must grant the performance right. It is not obvious why also acquiring the closely related public performance right for the same musical composition at the same time would entail burdensome transaction costs.[6]

Movies shown on broadcast media require the acquisition of the public performance rights for the music in those broadcasts, and under current practice those rights are typically secured by the broadcaster through one of the PROs. As discussed above, the right to perform the music in the movie on television could be secured by the movie producer at the time the movie is made. In the case of movies, the feasibility of this potential arrangement is dramatized by the fact that the movie theaters also need to secure the right for the public performance of the movie music in their venues—and *this* public performance right is, in fact, secured by the producer at the time of production and then conveyed to the theaters. Effectuating competition for broadcast performance rights in movies would require only adding the broadcast performance right to the theater venue performance right (and sync right) already secured by movie producers at the time of production.

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[6] At the time a program is produced, the number of future performances of the program would be unknown, so any compensation for the right to make these future performances would have to reflect that uncertainty, either by paying a fixed sum based on expected performances, or offering contingent compensation based on future success. But this difficulty is also present for the other artistic components of the production, for which all of the necessary rights are typically acquired at the time of production on either a buy-out basis or based on the future success of the production.

The competitive market for the music performance rights in movie theaters was brought about in large measure by a private antitrust lawsuit. In *Alden-Rochelle Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), operators of motion picture theatres challenged certain provisions of ASCAP's by-laws which prevented ASCAP's members from conveying music performance rights to movie producers, forcing theaters to take a blanket license for music performance rights which were not available from movie producers. A federal court concluded that ASCAP violated the antitrust laws and issued an injunction stopping ASCAP and its members from licensing music performance rights for performances in movie theaters to anyone but the movie producers. As a result, movie theaters do not need licenses to exhibit motion pictures; they pay for the music performances in their venues through the rental or other contracts they hold with movie distributors, and this compensation flows back through the distribution chain. Music creators and publishers are compensated for these performances as part of whatever contract they made with the movie producer.

The economics (including transaction cost considerations) of music performances in theaters and music performances in the broadcast of syndicated programs, movies and commercials are similar. (When I use the word "broadcast" in this sense, I mean any downstream exhibition of the audiovisual content, whether it be via broadcast, satellite, mobile, Internet or other means.) In both cases, the party making the performance (movie theaters in one case, broadcasters in the other) does not control the choice of music, but rather receives a pre-recorded set of musical choices. In both cases, the party making the audiovisual recording (who thereby does control the choice of music) is already negotiating at the time of production for other artistic rights, including other rights held by the same parties that hold the music performance rights. Thus, if it is the case that the licensing of public performances of music in all pre-recorded audio-visual programming can be handled in a workable unregulated competitive market like that which currently exists for licensing performances of music in movie theaters, then one should question the appropriateness of continuing to permit joint pricing in these media.

VI. Modification of the Consent Decrees to Allow Partial Withdrawal Should be Evaluated on the Basis of Its Likely Impact on Market Performance

ASCAP and BMI have proposed modifying the Consent Decrees so that music publishers could withhold their repertoires from collective licensing of particular potential licensees or classes of licensees. The Department should evaluate this proposal on the basis of its likely impact on market performance.

In the abstract, one could imagine that partial withdrawal would operate to increase competition and thereby improve market performance. The available evidence suggests, however, that the consequence of allowing partial withdrawal would be solely to allow publishers to exercise market power to increase performance

royalties. Given this, making this change would not be consistent with the underlying purpose of the Decrees.

As a threshold matter, it is important to note that under the existing Decrees, publishers are entirely free to negotiate directly with music users any license agreements they wish. Of course, in the current framework, any music user considering such a direct license will evaluate it with the knowledge that the licensee has the alternative of relying instead on the PRO license. The reason the publisher might wish to withdraw from the PRO before entering into negotiation over a direct license is that the PRO alternative weakens the publisher's bargaining power in the negotiation.

But consider more precisely the nature of the economic constraint PRO membership places on a direct-license negotiation. The potential licensee knows that it has access via the PROs to licenses that are supposed to reflect "reasonable" royalties, although the only mechanism available to the licensee to ensure that the royalties are indeed reasonable is the Rate Court, which the PROs and publishers complain is expensive and time-consuming. Logically this implies that any publisher that offers a potential licensee a direct license on "reasonable" terms could plausibly expect that such an offer would be accepted. It would be as good as the licensee should expect to get from the PROs, without the possibility of the cost of Rate Court. This suggests as a logical matter that the goal of partial withdrawal is to remove from the negotiating equation the licensee's access to reasonable royalties, so that royalties higher than the reasonable level can be extracted.[7]

A. Framework for analysis of market power in licensing of music performance rights

In determining whether permitting partial withdrawal is consistent with the purposes of the Consent Decrees, it will be important to analyze the consequences for competition in the licensing of musical works performance rights. The nature of music licensing, particularly on broadcast media, is such that even a relatively small share of the overall music library can make a seller's/ licensor's license essential or close to it. This results from the fact that there are circumstances in which licensees have little or no control over what music is actually performed, and the statutory

[7] At least some publishers appear to be claiming that the Rate Court imposes music performance royalties that are below the reasonable level, although the only evidence they have presented to support this complaint is that music composition performance royalties are substantially below sound recording performance royalties. If it were, in fact, the case that the Rate Court is systematically setting composition performance royalties below the reasonable level, then the appropriate solution to that problem is to change Rate Court procedures or criteria to address it. Allowing partial withdrawal is not a logically appropriate solution if the fundamental problem lies in the decisions that the Rate Courts are making.

penalties for even accidental infringement can be large. This background is vital to understanding the consequences of partial withdrawal.

The first question to analyze is the extent to which multiple withdrawn publishers might effectively compete against each other and the PROs in licensing music performance rights. For this to occur, it would have to be the case that the blanket license of one could substitute, at least to some degree, for the blanket license of the others. At a minimum, for broadcast licensees with limited or no control over the music they broadcast, this is not the case. In order to function, such a broadcaster must have a license to publicly perform music from the repertories of each of these organizations. The reason is that a blanket license from one publisher or PRO protects the station only against the possibility of infringement of that licensor's compositions. Since so much of the broadcaster's programming is pre-recorded, and they are responsible for the music performances in commercials and for programs for which they do not know the identity of the music and/or are not contractually permitted to edit/replace the musical works embedded in the programming, it is not possible for such a broadcaster to limit its music performances to compositions licensed by a few publishers or PROs.

SESAC controls a repertory that is comparable to or smaller than the repertory of a major music publisher. For the ongoing private antitrust litigation filed by a group of local television stations against SESAC, I prepared an analysis of the relevant antitrust market and SESAC's market power in that market. I found that the relevant market is the set of titles in the SESAC repertory, and because SESAC faces no competition from ASCAP or BMI, and, because of its anticompetitive practices, faces no competition from invidiual music rightsholders in its efforts to license that repertory; that SESAC holds literally a 100% market share in that market (no station operates without a SESAC blanket license); and that SESAC holds considerable monopoly power in the market because stations cannot operate without a SESAC license because, without a license, they cannot avoid infringing.

Although that litigation is ongoing, Judge Engelmayer has issued a decision dealing with SESAC's motion for summary judgement, and in that context he favorably cited all of the above-expressed opinions about the relevant market and SESAC's market power in it. *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (PAE), __ F.Supp.2d __, 2014 WL 812795, **31-32, 36 (S.D.N.Y. Mar. 3, 2014). Although I have not undertaken this analysis for any individual publisher, and the conclusions would depend to some extent on the nature of the licensees against whom withdrawal were invoked, these results should provide a cautionary background for the analysis of the competitive consequences of partial withdrawal. Certainly, market shares calculated as a publisher's share of all music titles cannot be used naively as indicators of market power; depending on the context, a publisher with even a relatively small share of all titles may have the equivalent, for market power analysis purposes, of a 100% market share.

B. Evidence on likely consequences of partial withdrawal

In analyzing the likely consequences of partial withdrawal, it should be assumed that if partial withdrawal is allowed at the discretion of the publisher, it will be invoked only if the publisher expects it to result in increased profits. Conceptually, such an increase could come from one of three sources:

(1) the publisher could expect that it could negotiate a license with terms such that it would increase its share of the total royalties paid by a licensee or licensees (at the expense of other publishers);

(2) the publisher could expect that it could operate the licensing arrangement more efficiently than the PRO, and hence increase its *net* proceeds for a given royalty level; or

(3) the publisher could expect to use its market power to increase royalties over the "reasonable" level to be expected in a PRO license.[8]

To the extent that publisher motivation for partial withdrawal were driven by the first two considerations, market performance would be improved, so that permitting it could be seen to be consistent with the underlying purpose of the Decrees. To the extent, however, that the publisher motivation derives from the third source, permitting partial withdrawal undermines the Decrees.

There is considerable evidence that publishers do not intend to use partial withdrawal to compete for share or to reduce costs, but rather they see it as a vehicle for using their market power to increase royalties. The evidence derives from their actions and their statements during the period of time in which partial withdrawal was implemented by the PROs, before it was found to be inconsistent with the current Consent Decree language.

Consider first the theoretical possibility that a publisher might wish to withdraw in order actively to compete for a larger share of music performances and thereby increase its music royalties. Note first that as a conceptual matter, withdrawal from the PRO is not a necessary step in this strategy. If a publisher wishes to deviate from the collusive royalty level to compete for market share, it can do so without withdrawing. It would be, by assumption, offering royalty terms *better* than those offered by the PRO, so its continued membership in the PRO would not have an impact on a licensee's willingness to agree to a direct license.

The behavior of the publishers who did partially withdraw from ASCAP also makes clear that this was not about some kind of competition for share. In particular, both Sony/ATV and UMPG, when in negotiations with Pandora over a music performance

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[8] As discussed above, if the Rate Courts are setting royalties below the "reasonable" level that problem should be addressed directly, so that theoretical possibility should not be considered in evaluating the proposal to allow partial withdrawal.

license outside of ASCAP, refused to provide Pandora with an electronic list of their titles.[9] *In Re Petition of Pandora Media, Inc.*, __ F.Supp.2d__, 2014 WL 1088101, **24, 27-28 (S.D.N.Y. Mar. 14, 2014). It is hard to imagine a seller in a workably competitive market believing that they could get away with negotiating to sell their product while actively concealing from the potential buyer the exact nature of the product to be purchased. Certainly, a seller that is trying to increase share at the expense of competitors would not behave in this way.

The publishers' behavior is also inconsistent with their desiring partial withdrawal to reduce costs. On the contrary, after withdrawal, ASCAP's largest publishers, namely each of EMI, Sony/ATV and UMPG, reached agreements with ASCAP so that ASCAP could continue to administer the collection and distribution of royalties from any licenses these "withdrawing publishers" concluded with Pandora or other affected licensees. *Id.* at *17. So that was not the reason.

In the end, there is no mystery about what the publishers sought and what they got. They induced Pandora to agree to a higher royalty rate because it could not rid itself of their music, or could do so only at great cost. Sony/ATV's Martin Bandier bragged that "Sony had leveraged its size to get this 25% increase in rate." *Id.* at *25.

ASCAP anticipated that the benefit of the higher royalties extracted via the publishers' market power would not be limited to Pandora. As stated by Judge Cote:

> The publishers found an ally on this issue in writer and ASCAP chairman [Paul] Williams, who agreed with the new media rights withdrawal strategy. His email illustrates the strategy he pursued to get writers to support the publishers' partial withdrawal of rights from ASCAP: My job is to make this transition as smoothly as possible in the board room ... to assuage the fears of the writers who may see this as an ASCAP death knoll ....[W]e are in fact giving [the major publishers] the right to negotiate. The end result being that *they will set a higher market price which will give us bargaining power in rate court*. *Id.* at *16 (emphasis added).

ASCAP agreed to grant the publishers the right of partial withdrawal at least in part because it anticipated that the publishers' market power would allow them to extract higher royalties, and that those higher royalties could in turn be used as benchmarks to achieve higher royalties for other rightsholders. Indeed, the evidence in the Pandora/ASCAP case referenced by Judge Cote indicated that ASCAP did not even consider charging a lower price than that achieved by withdrawing publishers in order to drive greater volume of use of the repertory of remaining works licensable by ASCAP – thus confirming that ASCAP was not competing (nor

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[9] UMPG, after initial refusal, eventually provided a list, but only under a Non-Disclosure Agreement that explicitly prohibited Pandora from using the list to modify its programming.

intending to compete) over price with the withdrawing publishers, as Judge Cote noted. *Id.* at *35.

Thus the actual experience with partial withdrawal allows us to resolve the theoretical ambiguity as to what its impacts might be. As summarized by Judge Cote:

> The publishers believed that AFJ2 stood in the way of their closing this gap [referring to the gap between the musical works performance royalty and the sound recording royalty]. They believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publically perform a composition. *Id.* at *14.

The Department should reject modification of the Consent Decrees to allow partial withdrawal because the evidence shows clearly that the motivation for partial withdrawal, and its likely consequence, is enhancement of market power.

VII. If Partial Withdrawal is to be Permitted, Conditions Should be Imposed to Mitigate the Likely Increase in Market Power

For the reasons explained above, allowing partial withdrawal is likely to increase market power and drive music performance royalties further above the competitive level. If, however, the Department nonetheless decides to agree to modify the Decrees in this direction, it should impose conditions that could partially mitigate the adverse consequences.

First, the PROs should make continuously available on the web an electronic listing of the repertoire that has been withdrawn, and any works not so listed should be deemed to remain licensable by the PROs, so as to limit the ability of the withdrawn publishers to use uncertainty as to the works in their repertories to enhance their market power. The publishers have demonstrated their inclination to use such uncertainty to enhance their market power, and this should not be permitted.

Second, although the desire for partial withdrawal seems to have emerged from publishers' desire to extract greater royalties from a specific class of licensees, if the right is granted it is not clear that it would be invoked only in that context. If the Department were to consider allowing partial withdrawal, the PROs and publishers should be asked to articulate the characteristics of potential licensees for which they believe allowing partial withdrawal furthers the purposes of the Consent Decrees. Of particular concern in this regard is that withdrawal should not be structured so that it could be used with respect to licensee categories that have minimal control over the choice of the music that is performed.

Third, depending on the definition of the licensees with respect to which partial withdrawal might be permitted, it may become necessary to specify that partial withdrawal should not be permitted to be effective with respect to incidental music uses (for example, music in commercials) and ambient music uses (music heard in the background of live events). These performances are generally not under the control of the licensee, and so a licensee who does not have the back-up option of a PRO license would be in a position of essentially unavoidable infringement if they did not agree to a proposed license from a significant publisher. This would give that publisher unacceptable market power and clearly result in outcomes inconsistent with the Decrees.

Finally, as noted above, it is clear from their own statements that the PROs and publishers desire partial withdrawal in part so that higher royalties extracted by publishers with market power can then be used as benchmarks to raise the PRO royalty levels. Indeed, ASCAP has gone even further, arguing for "establishing an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders who have withdrawn rights from a PRO and similar licensees provide the *best evidence* of reasonable rates." ASCAP Copyright Office Comments, at 4 (emphasis added). For the reasons discussed above, this is an outrageous suggestion, and one that was explicitly rejected by Judge Cote in the Pandora decision. In effect, ASCAP is asking to nullify both the reasoning and the outcome of the Cote decision, and this should not be permitted.