Before the
United States Department of Justice
Anti-Trust Division
Washington, D.C.

In the Matter of Antitrust Consent Decree Review Request for Public Comment

COMMENTS OF THE COUNCIL OF MUSIC CREATORS

A non-profit organization of songwriters and composers

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The Council of Music Creators

The Council of Music Creators is a non-profit membership organization founded in New York in 2013, and made up of songwriters and composers from across the United States who have joined together to promote and strengthen the right of music creators to control the use of our work and to share fairly in its exploitation. We are a contemporary grassroots organization knit together by common ideology and a desire to preserve the professions of songwriting and composing for the next generation of music creators.

We recognize that changes in the music business are inevitable, and we embrace those that help us reach wider audiences, increase respect for our art, and improve transparency within our business. However, we vigorously oppose changes that enable illegal or unauthorized use of our work, allow others to unfairly benefit—whether directly or indirectly—from its use, decrease transparency in our business transactions, or diminish our right to license our works through the entities we choose.

The Council of Music Creators appreciates the opportunity to provide these comments to the Antitrust Division of the United States Department of Justice regarding the Consent Decrees of ASCAP and BMI.

The Consent Decrees of ASCAP and BMI Are Unique

We base our comments on the following premises:

- the framers of the Constitution of the United States, in Article I, Section 8, recognized the significant value that the creative work of authors can bring to a civilized society;
- the protection of authors and their creative works for the benefit of society is the fundamental purpose of the Copyright Law of the United States;
- the Consent Decrees that govern the affairs of the Performing Rights Organizations ASCAP and BMI ("PROs") are unique in that they must simultaneously serve to promote competition among music business interests that have gained control over copyrights, guarantee that music consumers will have access to the protected work, and preserve legal and market mechanisms that protect the interests of authors.

ASCAP, on which we will focus, was founded in 1914 by a small group of prominent composers and songwriters who recognized that despite their individual success, none of them had the financial ability, administrative know-how or market power to successfully negotiate licenses for public performance of their works with the growing universe of music users[1]. Common sense and a rudimentary understanding of the economies of scale dictated the formation of a collective licensing entity, and ASCAP was born.

ASCAP's governing structure of a Board of Directors consisting of equal numbers of member-elected publishers and writers reflects a recognition on the part of its founders of

[1] Throughout these Comments, 'user(s)' and 'licensee(s)' are interchangeable.

the need for a desirable and necessary balance: the business acumen of publishers would help create an efficient, sophisticated music industry operation, and music creators would have an increased ability to check the actions of music publishers to prevent any potential abuse. (BMI lacks the same governing structure as ASCAP, but competitive pressures between the two organizations have led BMI to adopt payment systems and policies that are largely in line with those of ASCAP.)

A consent decree is defined as "an agreement or settlement to resolve a dispute **between two parties** [emphasis added] without admission of guilt."[2] Thus, the Consent Decrees, which the Anti-Trust Division of the Department has negotiated with ASCAP over the past seventy years (and which we believe have silently guided many of actions and policies of BMI), are unusual—perhaps, unique—agreements, as they are among ***three*** distinct groups: writers, publishers, and the Department of Justice. And it should be noted that while two of the three parties, writers and publishers, hold interests that are frequently in accord, that is not always the case. The Decrees do not necessarily provide for circumstances in which those interests depart from one another.

With the above in mind, we strongly urge the Department not to overlook the role these documents have played and continue to play in the lives and fortunes of music creators, or ignore its responsibility to ensure that its decisions and actions do not undermine the protection of authors implied in the Constitution.

The Consent Decrees Are Outdated and Must Be Revised

The Department asks if the Consent Decrees continue to serve important competitive purposes today, and the answer is clearly "No," not as currently written, interpreted and utilized.

The Consent Decrees of ASCAP and BMI were originally devised to prevent either of the PROs from exercising too much market power over music users and raising prices beyond a level which they might achieve in an open market. For nearly 60 years they achieved this purpose, providing users with an efficient way to license a vast repertory, music creators and their publishers with an efficient system for the collection and distribution of license fees, and consumers with access to the repertoire of protected works.

The music business itself was relatively stable during this period: the business operations and types of music usage of licensees were generally known to the PROs, the number of new market entrants was limited, new technologies for delivering music fit within established paradigms and were purveyed by known entities, and fluctuations in license fees were incremental. While licensees always thought they paid too much, and music creators and publishers always thought they received too little, the Consent Decrees helped the market for performance rights achieve and maintain relative stability.

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[2] "Consent Decree." West's Encyclopedia of American Law. Ed. Shirelle Phelps and Jeffrey Lehman. 2nd ed. Vol. 3. Detroit: Gale, 2005. 103-104. Gale Virtual Reference Library. Web. 7 Apr. 2014.

The advent of the internet and the revolution it brought in the music marketplace changed every rule and every role, including those of the Decrees. As a result, today all parties face a profoundly altered landscape. Sophisticated users have launched services with new business models built on the not unrealistic assumption that the cost of music will not only be held below market value, but that rates may well fall. These entrepreneurs are armed with new technologies and legions of lawyers that exploit arcane provisions of the Consent Decrees to delay the determination and payment of license fees for as long as possible—in some cases until well after the founding entrepreneurs have cashed out of businesses that have gone bust. Some of these new breed of licensees have used the enormously expensive and time-consuming process of the rate court (or even the threat of rate court litigation) to keep the fees they pay below market value.

The net effect of this performing rights licensing turmoil has been a bonanza for consumers who enjoy unprecedented access to the copyrighted work of songwriters and composers at below-market rates, and for the companies that pay low licensing fees to purvey this music through a variety of technological gadgets and delivery systems, while increasing their market capitalization and planning their IPOs. On the other side of the transaction, major music publishers, who are understandably dissatisfied with the rates they have been granted by the rate court, are threatening to withdraw entirely from the PROs, so that they can protect their copyrights and establish realistic rates for performances that are more in line with an open market. And of the three parties, songwriters and composers are left in the worst position, with many of them seeking other avenues of work, disillusioned with the corporate greed and governmental bureaucracy that is robbing them of their opportunity for just compensation.

All of this is a direct result of Consent Decrees that are out-of-step and out-of tune with the current music industry marketplace. So, do these documents need to be changed? If the United States intends to keep its predominant position in the world of music creation and stay true to the goals of copyright, the answer is clearly, "Yes."

The Consent Decrees Offer Anti-Trust Protection for Collective Licensing, but Some Provisions Could Be Made More Efficient

The Department asks, what if any, modification to the Consent Decree would enhance competition and efficiency? In this section, we will address only the provisions of the ASCAP Consent Decree.

All parties agree that collective licensing offers the most efficient market process by which users of music can obtain the rights they need and the audience can enjoy the music they want to hear. Therefore, the immunity from antitrust prosecution offered by the Consent Decree is essential to the proper functioning of the market for the benefit of all parties. While that process may be efficient, its benefits are currently being undermined by provisions that are highly *inefficient*: the application process and

compulsory license, the prescribed mechanism for dispute resolution, and the restrictions on the kinds of rights ASCAP can administer on behalf of its members.

The Consent Decree requires ASCAP to grant a license to anyone who requests one, whether or not the applicant has provided any information to ASCAP about its use of music ***or not***, or whether or not a fee has been negotiated. As a result, some recent applications to ASCAP have consisted of a single sentence: "*We hereby apply for a license for anything we do that might require a license.*" It can sometimes take months for ASCAP to obtain the necessary information from a potential user in order to determine a reasonable license fee. As we noted earlier, many new applicants to ASCAP do not fit a traditional user mold, so without the necessary information about an applicant's intended use, ASCAP is at a significant disadvantage. Meanwhile, even though no fee has been paid, the user has complete, unrestricted access to the entire ASCAP repertoire and can perform that music—and can financially benefit from such performances—without fear of infringement.

Even a young entrepreneur with a lemonade stand knows that giving away the product first and discussing price later is not good business practice. And yet that's what the Consent Decree requires of ASCAP. The Decree should be amended to require applicants to provide complete and accurate information about their intended use of music over the license period for which they are applying. Until ASCAP has received all of the information necessary and a successful negotiation between licensor and licensee has been completed, the applicant should not be considered licensed and should not be permitted to perform the ASCAP repertoire without fear of infringement.

The mechanism prescribed by the Consent Decrees for the resolution of disputes over license fees is the federal rate court. The rate court should be abolished in favor of arbitration. Similarly, restrictions on the rights which ASCAP may administer on behalf of its members are anachronistic and promote inefficiency. We will address both of these issues, below.

The Consent Decrees of ASCAP and BMI Should Be Conformed

The Department asks if the differences in the Consent Decrees of ASCAP and BMI adversely affect competition. For all practical purposes, ASCAP and BMI serve exactly the same functions for both music users, on the one hand, and music creators and their agent publishers on the other. While their governing structures may be different, the fact that their decrees are not aligned seems to be more an accident of history than of design.

Both organizations provide a highly efficient mechanism for licensing of performance rights, and the competition between them for members (in BMI's case, "affiliates"), repertoire, and license fees serves to maintain an economic balance in the marketplace. Indeed, in large part, BMI was formed for the purpose of keeping ASCAP from exercising its considerable (at the time) market power—a goal shared by the Department of Justice. To a large extent, it has succeeded.

Today, the organizations co-exist and provide reasonable checks and balances on each other, to the benefit of music creators, publishers, licensees, and consumers. However, BMI's Consent Decree provides the flexibility for BMI to license rights other than those of public performance, while ASCAP is constrained from doing so. Although this disparity has not yet resulted in a competitive disadvantage for ASCAP, it is likely to do so in the near future as licensees seek the multiple rights required for new businesses paradigms.

We strongly recommend that their decrees be conformed to prevent either one from gaining a government-sanctioned advantage over the other.

Limited Grant of Rights Should Not Be Permitted Without Full Transparency

The Department asks if the Consent Decrees should be modified to allow rights holders to grant ASCAP or BMI the right to license their performance rights to some music users but not others, and if so, how such grants should be structured.

Unless and until mechanisms are established that will provide music creators with the security and transparency they now enjoy under the PRO licensing structure, we believe that amending the Consent Decrees to permit limited grants of rights (or, as it more commonly known and more accurately described, the "right to withdraw" rights for certain classes of users) is not in the best interests of music creators and should not be permitted.

Over the last seventy years the music industry has developed traditions, practices and legal instruments that recognize, assume, and in some cases specify, the existence of our performing rights organizations as *de facto* institutions for the licensing and collection of performance rights. Allowing publishers to withdraw these rights for certain classes of users without the institution of a system that would guarantee music creators just compensation under "direct" licenses would remove existing protections for authors.

Every writer and publisher knows and understands that when a dollar comes into a PRO, it is split into two equal parts: a writer's share, divided among writers, and a publisher's share, divided among publishers. This simple but essential mathematical truth provides music creators (and administered publishers) with a degree of certainty unavailable in direct licensing deals.

Some publishers have recently made the argument that writers will be better off if publishers are permitted to issue direct performance licenses to users in certain segments of the market. But the notion that music creators will be better off if publishers collect the writers' share of performance royalties is questionable, at best. What is certain is that widespread direct licensing by major publishers will have a chaotic impact on the music marketplace and a devastating and irreversible effect on almost all music creators and independent publishers.

If major publishers withdraw from the PROs the right to license certain market segments, the affected music users will suddenly be forced to negotiate with individual publishers, each demanding higher rates for the music they claim to control. The resulting market confusion and lack of rate certainty will create a logistical nightmare. Moreover, whether or not these publishers actually have the right to direct license all works in their catalog is subject to dispute; for instance, no work written or co-written by a member of an overseas PRO such as PRS, GEMA or SACEM can be included in such a direct performance license. That includes the songs of The Beatles, The Rolling Stones, Adele, and tens of thousands of other songwriters and composers.

What's more, most songwriter agreements covered by U.S. law stipulate and guarantee that the writer's share of performance royalties will be collected and paid directly to the writer by the PRO of their choice. But publishers are now claiming that general clauses covering exploitation of a writer's work permit them to withdraw from the PROs ***all*** rights in that work. This is not only an extraordinary attempt to shift these rights from PROs to publishers, it's not necessarily true. (And the assertion that general exploitation clauses permit direct licensing is bound to inspire legal challenges from skeptical or experienced writers, creating even greater turmoil.)

The situation for composers of music for film and television is perhaps even more dire. Virtually all agreements for the composition of music for audio-visual works are based on "Work For Hire" laws, which grant the benefits of authorship to the corporate entity hiring the composer. In a tradition developed over decades, such agreements almost always grant back to the composer the right to collect the writer's share of performance royalties, usually with the stipulation that the composer shall be entitled to receive "the writer's share of performance royalties paid by the Performing Rights Organization to which the writer may belong." However, these contracts rarely contain provisions for the payment of the writer's share to the composer in the event of a direct performance license, and no mechanism for the composer to audit or claim his/her share. This places in jeopardy the future income of thousands of film and television composers.

We urge the Department to consider the plight of collaborators who are not affiliated with the direct-licensing publisher, or those in collaborations in which one writer's share is directly licensed and the other's share remains at a PRO. How will a PRO-affiliated writer be paid in instances when the licensee pays all royalties from a song to the publisher issuing a direct license? What rights does a PRO-affiliated writer have to audit a publisher with whom they have no legal agreement? With no transparency and no legal recourse, thousands of music creators will simply be out of luck.

But perhaps most troubling is that publishers who choose to license directly will enjoy "enhanced revenue opportunities" that may fall outside the scope of traditional writer agreements. Administrative fees, technology fees, signing bonuses, equity stakes, and huge cash advances could fill the pockets of corporate owners, stockholders, and music executives, but not those of music creators, whose work makes all this revenue possible. These direct licensing deals are private and confidential; there is no way for a writer or

their auditor to ever know if they are being paid fairly, or not, even if they have full audit rights in their agreements.

The elimination of the inherent protections and security which the PROs have provided to music creators since the 1940's cannot be consistent with the intent of the framers of the Constitution, the intent of Congress in crafting the Copyright Law, or the Department of Justice in negotiating the Consent Decrees. We urge the Department to carefully consider the effects of widespread direct licensing of performance rights on music creators.

The Industry Needs Time to Develop Standards for Direct Performance Licenses

The music industry, having spent the last 100 years relying on ASCAP and BMI to license, collect and distribute fees for public performance is completely unprepared to handle the significant increase in direct licensing that is likely to result from a change in the Consent Decree allowing for partial withdrawals. Music creators, in particular, will be severely disadvantaged, and left without recourse because, in the vast majority of cases, their agreements with publishers do not contemplate a world of direct performance licenses.

We believe music creators and their publishers need time to develop a set of industry standards that would provide a degree of transparency in direct performance deals, one that is completely absent from most writer agreements and foreign to traditional industry practices. Such standards might embody the following concepts:

1. Every writer whose work is included in a direct performance license issued by anyone other than a recognized PRO shall be given prompt notice of the issuance of such license by the licensor, whether that writer is directly affiliated with the licensor or not;

2. Such notice shall include complete disclosure by the licensor of all contractual terms and payments, including cash advances, signing bonuses, technology fees, administration fees, and any and all royalties paid to the licensor by the licensee. If the license includes rights other than those of public performance, the total amount paid for the license must be disclosed, with the portion paid for performance rights clearly defined;

3. Writers shall be entitled to their share of royalties received by publishers from direct performance licenses, as well as a contractually-stipulated share of all additional revenues received by publishers from direct performance licensees.

4. The distribution to writer of royalties and revenues resulting from any direct performance license or direct performance relationship between a publisher and a licensee must be made by the PRO to which the writer is a member or affiliate;

5. Any writer whose work is included in any direct performance license must be

given the full power and authority to audit the books and records of the entity issuing the license, whether the writer has a direct contractual relationship with the entity or not.

Perhaps the Department could consider in any revision of the Consent Decrees a gradual phase-in of the right for partial withdrawals, subject to the development of standards that would provide minimal protection for music creators.

ASCAP and BMI Should Both Be Permitted To License Additional Rights

The Department asks if the Consent Decrees should be modified to permit rights holders to grant to ASCAP and BMI rights in addition to those of public performance.

As noted, above, while BMI's Decree permits it to license other rights in addition to those of public performance, ASCAP is prohibited from doing so. Since many licensees are now seeking to obtain multiple rights from one source, the restriction on ASCAP not only creates a government-sanctioned competitive advantage for BMI, but prevents licensees from enjoying the market efficiency that could be gained if both PROs were able to offer multiple rights.

Conflicts Between PROs and Licensees Should Be Subject to Arbitration, Not Rate Court

The Department asks if the rate-making function currently performed by the rate court should be changed to a system of mandatory arbitration. The answer is, “Yes.”

For many years, the rate court established by the Consent Decrees has provided a forum of last-resort for finding common ground between the fees sought by the PROs and those sought by music licensees. Discovery was limited to financial records; almost all other relevant information about licensees was either known or well-understood. Jurists stayed close to the intent of the Consent Decrees, understanding that they were intended to, as much as possible, simulate the actions of a free market; they were never intended to establish a floor or ceiling for license rates.

But in the rapidly developing digital world, the usefulness and appropriateness of a rate court structure for resolving disputes between the PROs and the new breed of digital music entrepreneurs has become anachronistic. The digital world moves so quickly that businesses can be established and gain a market foothold in weeks, not years. Consumers who are plugged-in to this environment expect, and quickly embrace, new market ideas, especially if they offer quicker and greater access to the music they love.

New market entrants often have vast financial and legal resources with which to fend off legal challenges and reduce or eliminate obstacles in their path, and they have wielded the rate court as a weapon against PROs. Royalties paid to copyright owners are a

favorite target of these new businesses, and recent cases brought in rate court have demonstrated that the enormously expensive, complex, time-consuming, single-jurist system is unable to successfully address the realities of the digital music world.

While some new applicants seek to stymie the application process and delay the payment of fees, other licensees (i.e. DMX), with the unwitting cooperation of some publishers, have engaged in outright conspiracies to devalue performance rights. For reasons many observers are unable to fathom, the rate court has seemed reluctant to constrain these licensees (*Is it fear of the oft-invoked accusation that they are stifling innovation?*), giving unusually wide discretion to applicants. As a result, license fees for performance of music are now below those that would be negotiated in a free market. Licensees are understandably delighted with, and oppose any change in, the current Consent Decrees, while music creators and their publishing agents are unfairly disadvantaged.

We urge the Department to eliminate the rate court and replace it with mandatory arbitration to resolve disputes between the PROs and licensees. Licensees should not be considered "licensed" without a minimum interim payment, and provisions should be instituted to expedite arbitration decisions within 120 days.

In Conclusion

The Council of Music Creators hopes that the review by the Department of Justice of the outmoded consent decrees that govern the affairs of the American PROs will result in changes that will help songwriters, composers, and publishers achieve fair value for our work, preserve voluntary collective licensing for future generations, help stabilize the music marketplace, and guarantee music lovers unparalleled access to the repertoire they love. Although these unusual, perhaps unique, agreements have become outmoded and unresponsive to profound market and technological changes, they have stood—and can be transformed to stand—as a source of stability and transparency for those who create the work on which an entire industry and an important cultural tradition is based. By so doing, the Department will help preserve and protect the long-term interests of all who benefit from the creation of music.