August 6, 2014

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

Dear Sir:

Re: Comments of olé Media Management on the Review of the ASCAP and BMI Consent Decrees

olé Media Management (**"olé"**) appreciates the opportunity to contribute to this timely and important review of the Consent Decrees that govern the operations of the American Society of Composers, Authors and Publishers (**"ASCAP"**) and Broadcast Music, Inc. (**"BMI"**).

I. ABOUT OLÉ

Founded in 2004, olé has operations in Toronto, Nashville, New York, and Los Angeles. Our team of more than 60 experienced industry professionals is focused on acquisitions, creative development, and worldwide administration. With a catalogue of over 45,000 songs, as well as 60,000 hours of film and television music and a production music library of around 150,000 tracks, olé is widely recognized as the world's fastest-growing rights management company. Our copyright holdings include iconic songs by the likes of Rush, Timbaland, Blacktop, and others, as well as the catalogues of leading content producers including Sony Pictures Entertainment, WGBH, Cookie Jar, Miramax, and more.

Although olé boasts the infrastructure and reach of a major music publisher, we remain committed to continuing to deliver the personal touch, speed, creativity, and caring of an independent. We invest consistently in the creative development of our more than 60 staff songwriters, legacy writers, and composers, as well as the cultivation of our catalogues and those of our clients. Our expertise in copyright administration and sub-publishing has helped us conclude worldwide publishing administration agreements with some of the world's leading songwriters, publishers, and film and television producers. We are committed to transparent client reporting practices and leading-edge

technological solutions, including best-in-class online account portals and proprietary, real-time revenue tracking and analytics.

II. COMMENTS

As one of the world's largest independent music publishers and a member of numerous performing rights organizations (**"PROs"**) around the world, including both ASCAP and BMI, olé is deeply committed to the ideals of collective licensing. The U.S. Supreme Court has described the benefits of collective licensing as including, for users,[1] "unplanned, rapid and indemnified access to any and all of [a PRO's] repertory of compositions," and, for owners, "a reliable method of collecting for the use of their copyrights," given the difficulties inherent in attempting to license thousands of users individually.[2] Like most rightsholders, olé continues to believe that, in principle, the collective licensing of performing rights remains the best and most efficient way to ensure that both businesses and consumers are able to access and use the music they want, when they want it.

However, collective licensing is only viable where fair value is given for value received. olé believes that the Consent Decrees have become serious impediments to the attainment of fair compensation for music creators, particularly in relation to new media services. While new technologies have transformed the way people listen to music, the Consent Decrees have kept the collective licensing of musical works firmly rooted in the economics of another time. Today, listeners enjoy more music than ever before, through channels that did not exist and could not have been envisioned when the Consent Decrees were first entered, and the services who facilitate that listening profit handsomely from it. They do so, however, at the expense of the songwriters who create that music, and the music publishers who invest in its creation, whose revenues continue to diminish.

In other words, the Consent Decrees do not reflect the market dynamics of the music industry as it exists today. As a consequence, and especially in light of the "all-or-nothing" approach to collective licensing mandated by recent decisions of the ASCAP and BMI rate courts, a growing number of significant rightsholders are giving serious consideration to disaffiliating entirely from ASCAP and

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[1] Although "users" is often employed to describe commercial entities whose businesses involve the distribution or dissemination of copyright material, that terminology is somewhat misleading. In reality, these entities are *consumers* of that material who, like any other consumer, are obliged to pay for what they consume.

[2] *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) at 20.

266 King Street West., Suite 500, Toronto, ON M5V1H8 www.majorlyindie.com
v. 416•850•1163 | toll free 866•559•6825 | majorlyindie@olemm.com

BMI. This is a development that puts the entire U.S. collective licensing system at risk, to the detriment of rightsholders, users, and consumers alike. If this outcome is to be avoided, and an appropriate competitive balance restored, the Consent Decrees should be eliminated, or at least revised substantially to respond to the new realities of an industry that has changed dramatically since they were entered.

1. The Consent Decrees Create Inefficiency and Stack the Odds Against Fair Compensation for Rightsholders

A number of aspects of the Consent Decrees, in their current forms, combine to stack the odds against the attainment of fair compensation for rightsholders. Among other things:

1. ***Interim Licensing Provisions Are Abused.*** According to ASCAP and BMI, prospective licensees often abuse the provisions of the Consent Decrees that permit them to access each PRO's entire repertory of each immediately upon making a written license application.[3] Rather than acting quickly to finalize the rates payable under the licenses they seek, they proceed to operate their businesses without paying any royalties whatsoever, often waiting for the PRO either to move for the imposition of an interim fee or to commence a rate court proceeding. In some cases, music services have gone out of business without ever paying a dime to ASCAP, BMI, or the rightsholders they represent.

   In other words, an unintended consequence of these provisions is to allow services to do business for months or years at a time without paying royalties for the music they use. This flies in the face of market economy principles: in effect, the Consent Decrees require rightsholders to allow prospective licensees a free ride, permitting those services to use the rightsholders' valuable intellectual property, sometimes indefinitely, without paying for it. Unlike most every other business, these services are allowed to gain a foothold in the market while deferring (and at times escaping altogether) what would otherwise be one of the key costs of doing so. In some cases, services are able to build significant equity for their shareholders in the interim. Songwriters and music publishers, on the other hand, are

[3] See, for example, the submissions of ASCAP (http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/ASCAP_MLS_2014.pdf) and BMI (http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/BMI_MLS_2014.pdf), both dated May 23, 2014, to the Music Licensing Study now being conducted by the United States Copyright Office

deprived of a reasonable return on the extensive investments that they have already made in the creation of music. In effect, this constitutes a forced subsidy by rightsholders to the services – but without the risk-adjusted return on capital (i.e., equity participation) that market forces would normally predict in such a situation.

2. ***The Rate Court Process is Broken.*** Apart from being expensive and time-consuming, the rate court process mandated by the Consent Decrees – with two federal judges, acting separately, effectively responsible for setting rates that bind an entire industry – appears increasingly disconnected from the realities of the music business. In a recent proceeding, for example, the ASCAP rate court discarded evidence of freely-negotiated agreements between Pandora and several major music publishers, opting instead to base its decision largely on an ASCAP form license that had been rejected by those publishers as below fair market value in Pandora's case.[4] The result, at least in the case of webcasting services, is the perpetuation of a startling and unjustified 12 to 1 ratio between the royalties paid for the streaming of sound recordings, on one hand, and musical works, on the other[5] – a situation that the rate courts consider themselves constrained by section 114(i) of the *Copyright Act*[6] to ignore.

   There can be no reasonable economic explanation for this disparity, especially since, without a song to be recorded, a sound recording could not exist. By contrast, where market forces are allowed to determine the relative compensation for musical works and sound recordings, as is the case in the market for synchronization licenses for film and television, the result is almost always equal compensation for the two.[7] Yet, because the ASCAP and BMI rate courts

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[4] *In re Pandora Media, Inc.*, No. 12 Civ. 8035, 2014 WL 1088101 (S.D.N.Y. March 18, 2014).

[5] By Pandora's own account, as set out in its most recent 10-K filing to the U.S. Securities and Exchange Commission, it paid 4% of its total revenue for the public performance of musical works for the 11-month period ended December 31, 2013. By contrast, it paid 48% of its total revenue for the public performance of sound recordings for the same period. See Pandora Media, Inc. 10-K Annual Report 2014, at pp. 23 and 24. Retrieved from Pandora website http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTMyOTgxfENoaWxkSUQ9MjIwNjU5fFR5cGU9MQ==&t=1.

[6] 17 U.S.C. § 114(i).

[7] The same is often true even in a regulated context. The Copyright Board of Canada, unconstrained by any provision comparable to section 114(i) of the U.S. legislation, has consistently adopted a 1 to 1 ratio between equivalent rights in musical works and sound recordings when setting royalties for both. For examples of this approach in relation to the right to communicate to the public by telecommunication, see: Decision of the Board, *NRCC Tariff 1.A – Commercial Radio, 1998-2002*, August 13, 1999; Decision of the Board, *NRCC Tariff 1.C –*

have held that rightsholders are not permitted to withdraw some but not all of their rights in order to license new media services directly, rightsholders who wish to be represented by ASCAP or BMI for *any* purpose currently have no choice but to accept this unfair and unreasonable outcome.

Simply put, the rate court process is not yielding outcomes that would be observed in a competitive marketplace. The process is neither efficient nor effective. It must be changed.

3. ***"Through-to-the-Audience" Licenses Are Inappropriate for New Media Services.*** The requirement that ASCAP and BMI issue "through-to-the-audience" licenses to new media services leads almost inevitably to royalties that fail to capture the fair market value of the music they use. The structure of a license is often as important as its financial terms. In this case, while "through-to-the-audience" licensing may make sense in the case of conventional broadcasters, it is completely inappropriate for new media services whose business models rely extensively on various forms of downstream distribution and sharing – including online retransmission and the embedding of content on third-party websites – that are opaque to rightsholders, and therefore difficult to track or price, even where they generate substantial revenue through advertising and other means. The result is that "through-to-the-audience" licenses often end up undervaluing music, depriving rightsholders of fair compensation.

4. ***Partial Grants of Rights Are Essential.*** As a result of these difficulties, a number of music publishers have concluded that they are unlikely ever to secure fair compensation from streaming and other new media services through the existing collective licensing regime. With the involvement and consent of ASCAP and BMI, some of those publishers have moved to

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CBC Radio, 1998-2002, September 29, 2000; Decision of the Board, *SOCAN/NRCC – Pay Audio Services, 1997-2002*, March 15, 2002; Decision of the Board, *Satellite Radio Services: SOCAN (2005-2009), NRCC (2007-2010), and CMRRA-SODRAC Inc. (2006-2009)*, April 8, 2009); and Decision of the Board, *Re:Sound Tariff 9 –Non-Interactive and Semi-Interactive Webcasts* (2009-2012), July 25, 2014. The 1 to 1 ratio has been reaffirmed whenever these tariffs have been recertified in subsequent decisions of the Board. It has also been applied to the reproduction right: see Decision of the Board, *Commercial Radio: SOCAN (2008-2010), Re:Sound (2008-2011), CMRRA-SODRAC Inc. (2008-2012), AVLA-SOPROQ (2008-2011), and ArtistI (2009-2011)*, July 9, 2010. (All decisions available online at http://www.cb-cda.gc.ca/decisions/music-musique-e.html.) Although olé does not necessarily endorse the rates determined by the Board in all cases, we believe that the consistent application of a 1 to 1 ratio appropriately reflects the relative value of musical works and sound recordings.

withdraw from these PROs the right to license their works to new media services, while remaining affiliated for the purpose of licensing to radio stations, television broadcasters, and other traditional licensees. According to published reports, publishers who withdrew their new media rights were able to negotiate more satisfactory license agreements with Pandora and Apple – further proof that the Consent Decrees result in below-market compensation.

However, the ASCAP and BMI rate courts have now held that the Consent Decrees preclude publishers from withdrawing some, but not all, of their rights; they must either license their catalogues through these PROs for all purposes or not at all.[8] This leaves publishers in the invidious position of either withdrawing entirely from ASCAP and BMI, thus depriving both their songwriters and their licensees of the benefits and efficiencies of collective administration, or consenting to the licensing of their catalogues to well-heeled new media services on terms that are clearly below fair market value.

It is difficult to see how any of this promotes a competitive licensing environment for music. Instead, songwriters and music publishers face a world in which government regulation artificially depresses the value of music, leads to an impossibly lopsided disparity between the price of musical works and the price of sound recordings as used by exactly the same services, and permits those services to use and profit from music without paying for it, sometimes indefinitely, even as the creators of that music struggle to make ends meet. Not surprisingly, the inability to realize competitive returns reduces the incentive of songwriters to create new works and of music publishers to invest in that creativity.

2. The Consent Decrees Should Be Eliminated, or Substantially Modified, to Promote Compensation and Efficiency – Including Fair Compensation for Creators

A competitive and efficient licensing system for performing rights would yield consistently fair and reasonable results for both rightsholders and users. At least in relation to new media services, the existing regime does not appear capable of achieving that goal. Indeed, if major rightsholders are forced to withdraw from ASCAP and BMI in order to pursue truly fair compensation, the entire system may soon find itself on the verge of collapse, leading to decreased efficiencies, increased transaction

[8] *In re Petition of Pandora Media, Inc.*, No. 12 Civ. 8035 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc. v. Pandora Media Inc.*, No. 13 Civ. 4037 (S.D.N.Y. December 19, 2013).

costs, and a particularly negative effect on the many smaller players who lack the resources to license directly. Indeed, even if ASCAP and BMI were to survive the withdrawal of their largest members, they would be left in a substantially weakened state, further compromising their ability to secure fair compensation for the members who remain.

In olé's view, the Consent Decrees have outlived their usefulness and should be eliminated entirely. It is no longer clear that either ASCAP or BMI has sufficient market power to justify regulation of this type, particularly in light of increased (and still increasing) concentration in the broadcasting, live events, and new media industries and the continued growth of powerful new media licensees like Apple and Google. In other words, the Consent Decrees are no longer necessary to protect current or prospective licensees from any real or perceived imbalance of power. Free-market negotiations, with litigation treated as a last resort rather than a virtual certainty, would be a far better and more efficient way to achieve competitive market outcomes.

Alternatively, if the Department concludes that the Consent Decrees remain necessary or desirable for certain purposes, they should be modified to permit both the PROs and their clients to exercise the necessary flexibility in responding to a rapidly-changing market for music. Constructive modifications might include:

1. Expressly permitting songwriters and music publishers to license their performing rights through ASCAP and BMI for some, but not all, purposes, and leaving it up to the PROs and their members to determine how these partial grants of rights are structured. It seems clear that, under the current system, songwriters and music publishers are unlikely to realize fair market rates for the use of their songs by new media services. They should be entitled to choose which rights, and which services, they license through ASCAP and BMI and which they license directly. Permitting them to do so would be consistent with the inherent divisibility of copyright and would actually *enhance* competition by allowing free-market negotiations between buyers and sellers with roughly equal market power.

2. Requiring prospective licensees to pay reasonable interim royalties, effective the moment they begin performing music to listeners in the U.S., on a basis determined by reference to prevailing industry standards or, where applicable, to their own licensing histories with the applicable PROs. License applicants should no longer be entitled to access the entire

repertories of ASCAP and BMI for free, even on an interim basis, nor should these PROs be forced to institute expensive motions in rate court just to establish interim rates.

3. Replacing the rate court process with a system of expedited arbitration, with a summary procedure for setting interim rates in the case of dispute. Consideration should also be given to a "loser pays" system with cost consequences for parties whose rate proposals are substantially out of step with the rates ultimately determined by the arbitrator. Other procedural enhancements might be explored to ensure efficiency and discipline all parties to put their best feet forward in negotiation rather than either favoring litigation or viewing it as inevitable.

4. Eliminating the requirement for "through-to-the-audience" licensing in the case of new media services, whose business models differ very substantially from the conventional broadcasters and other licensees for whose benefit this requirement was intended. ASCAP and BMI should be free to license each actual user of their members' intellectual property, not forced to anticipate downstream uses that are usually unknown and unknowable at the licensing stage.

5. Introducing sunset provisions that would terminate the Consent Decrees after no longer than 10 years or, at minimum, require their substantive review at regular five-year intervals in light of then-current market conditions.

Absent the complete elimination of the Consent Decrees, these changes, if coupled with the enactment of the proposed *Songwriter Equity Act* and careful consideration in the rate-setting process of relevant benchmarks including the rates paid for the use of sound recordings, might have the desired effect of promoting competition while enabling songwriters and music publishers to realize fair compensation for the use of their works. They would enhance the efficiency of the collective licensing process while preventing abuse of power by licensees.

IV. CONCLUSION

While the Consent Decrees may have been useful regulatory tools when they were enacted, they no longer reflect the market dynamics of the music industry. Indeed, they limit, rather than promote, free and fair competition in music licensing. If they are not eliminated entirely, the Consent Decrees

should be revised very substantially to permit music licensing practices to evolve with the evolving demands of the marketplace. Otherwise, the inability of rightsholders to realize competitive returns on their investments of time, money, and creativity may leave them with little choice but to abandon collective licensing, despite its many well-documented benefits for creators and users alike, or even to exit the music business entirely.

olé commends the Department of Justice on its well-timed initiative to examine this critical issue and thanks the Department for the opportunity to contribute. We hope that our comments prove useful in this important endeavor and would be very pleased to provide further input should the Department so desire. Please do not hesitate to contact me directly with any questions.

Yours truly,

Robert J. Ott
Chairman & CEO

266 King Street West., Suite 500, Toronto, ON M5V1H8 www.majorlyindie.com
v. 416•850•1163 | toll free 866•559•6825 | majorlyindie@olemm.com