



# WINOGRADSKY/SOBEL

GLOBAL MEDIA SOLUTIONS

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

Re: ASCAP AND BMI CONSENT DECREES

Ladies and Gentlemen:

I am an attorney in the Los Angeles area who represents songwriters, composers for motion pictures and television, and music publishers. I am writing with regard to the captioned matter and wish to offer my comments and opinions regarding the Consent Decrees under review and the possible ramifications of either amending them or abolishing them. My clients are members of all 3 of the performing rights organizations, ASCAP, BMI and SESAC (collectively, the "PROs"), so I believe that I am able to offer some perspective on the current state of licensing of public performance rights. And even though SESAC is not currently subject to a Consent Decree, there are actions being taken to impose on upon them, so any comments below would apply to them if that action is taken.

## INTRODUCTION

The current climate has come about due to what are perceived as inequities in the way that the rates paid to the PROs by digital services is mandated by Rate Courts under the Department of Justice Consent Decrees. Record companies, i.e., the other half of the music rights holder community, are free to negotiate without such rules or restrictions, resulting in substantially higher rates paid for master recordings than for musical composition. This difference in the ability to negotiate significantly hampers competition in the marketplace and does not seem to contribute to a fair method for determining the business practices of the PROs.

## TRUST IN THE PROs

With the PROs representing writers and publishers in the United States for 100 years, there is an enormous amount of trust in the PROs by their members. Currently, in most circumstances, the PROs collect 100% of the performance royalties and distribute them to writers and publisher in equal shares. With writers and publishers being paid equally, this relationship is free of the natural mistrust that exists between those who collect the money and those who receive it, as in the case between record company/artists and publishers/writers.

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Many of the writers with whom I have spoken worry that, if the publishers withdraw from the PROs and directly license performing rights and collect 100% of the income, there could be issues of fair and accurate accountings to the writers. And, as it is widely known that some of the major music companies have been given equity positions in some of the new digital companies, there is a fear that the deals negotiated by these music companies with the digital services will not be at fair market value due to what is perceived as a conflict of interests. ASCAP and BMI, as non-profit organizations, would not be subject to the same concerns.

In addition, the PROs make direct payments to writers, without regard to whether the writer's account is recouped from any advances that a publisher might have previously paid. If performance royalties went to the publisher, it is conceivable that they would use the writer's share of these royalties to pay off unrecouped balances, contrary to custom and practice for many years.

Lastly, the PROs have the diagnostic tools and research methods for determining what music is being performed and how much should be paid for each performance, as they have been doing just that for many years. If publishers decide to license their works independently of the PROs, they will have to build the infrastructure to process all this data and make these distributions, something the PROs are already doing.

#### DISPARITY IN RATES BETWEEN PUBLISHERS AND RECORD COMPANIES

Based upon both public reports and statements personally reviewed on behalf of my clients, there is a huge disparity in the rates paid to publishers and record companies for the same music from the same services. Spotify claims that 70% of their income goes to music content providers. Assuming this is true, only 10.5% goes to publisher, with the remainder going to labels. Under rates set by the Rate Court, publishers receive a total of 4.3% of Pandora's income, while labels receive 50-60%. In a recent statement received from Amazon Cloud, labels go approximately 55% of Amazon's income while publishers got 12.5%.

This inequity is what has caused the PROs and their members to request major modification or elimination of the Consent Decrees and why several major publishers have tried to withdraw their digital rights from the PROs, only to be prevented from doing so by the Rate Courts.

#### THE ABILITY TO FREELY NEGOTIATE

One of the main problems of the current Consent Decrees is a restriction on the ability of the PROs to negotiate in a "free market" arena. In most business transactions, the buyer and seller negotiate until there is either a satisfactory deal to be struck between them or the deal falls apart. As I understand it, in negotiations between the PROs and their potential clients, if no agreement can be reached, the parties go to Rate Court for a determination of rates and fees to be paid by the music users to the PROs.

In the recent cases involving digital radio service Pandora (*United States v. ASCAP*, 41 Civ. 1935 {S.D.N.Y.} and *United States v. BMI*, 64 Civ. 3787, {S.D.N.Y.}), the parties were unable to reach agreement on the rates Pandora was to pay for public performance of music on their service. The PROs wanted an increase from the previous rates set by the Rate Court which expired in 2011 (a total of 4.3% of Pandora's gross receipts, payable 1.85% to ASCAP, 1.85% to BMI and the remainder to SESAC) and Pandora wanted a decrease.



Based on published news reports, Sony/ATV Music, in an attempt to withdraw certain digital rights from the PROs (to be discussed in more detail below) has previously negotiated a rate of 5% with Pandora, an increase of approximately 20% from the rates set by the Rate Court. This would appear to provide evidence that a party not subject to the Rate Court and able to freely negotiate could obtain a better deal than that set by the Rate Court. It was this freely negotiated rate that reinforced to the PROs the idea that the rate previously set was below market value and should be increased. Pandora, of course, disagreed.

(In an interesting and perhaps ironic footnote, Pandora's VP of Legal Affairs, Christopher Harrison, was also head of Legal Affairs for DMX, a music service that used freely negotiated direct licenses with publishers to support their contention that the rates paid by DMX several years ago to the PROs was too high, a position supported by the Rate Court, who reduced the rates.)

Instead of enhancing competition, the Consent Decrees are reducing competition by eliminating free market negotiations. In doing so, parties that should be working together to support new developments in digital technology and delivery systems of music to the public are instead spending millions of dollars fighting each other. I fail to see how this benefits anyone, companies or members of the public.

#### PARTIAL WITHDRAWAL OF RIGHTS

Currently, the agreements between music publishers and the PROs are non-exclusive, meaning that the publishers have the right to negotiate directly with potential licensees. Usually, this is at the request of the licensee, such as the case with ESPN, who typically negotiates performance rights concurrently with synchronization rights.

By allowing publishers to partially withdraw some of the rights from the PROs, those publishers would have the ability to negotiate at arms length with the digital services, a practice, which, if successful, could be a financial benefit to writers and publishers. Also, if a Rate Court is looking to a free marketplace to determine a fair rate for the PROs to charge, these deals could be used as benchmarks for such rates.

#### CHAOS IN LICENSING IN ALL MEDIA IF MAJOR PUBS ARE FORCED TO TOTALLY WITHDRAW

Forcing publishers to withdraw ALL of their rights from the PROs would be, in my opinion, a disaster for all parties, as both content owners and users are not prepared to conduct negotiations with each individual party wishing to grant or license performing rights. This applies not just in the digital space but in all businesses where music is used, such as TV and radio broadcasters, restaurants over a certain size, night clubs and concert halls, retail outlets and shopping malls as well as schools, museums and libraries. One of the advantages the PROs offer is the "blanket license" concept, whereby a user can acquire rights to the entire catalog administered by a PRO under a single license, without having to negotiate song by song, publisher by publisher.



## SHOULD THE PROs BE ABLE TO LICENSE RIGHTS IN ADDITION TO PUBLIC PERFORMANCE?

There is already a provision in the Copyright Act (Section 115) that provides for a compulsory mechanical license for phonorecords, with a set procedure and set rate under this provision. This is what the Harry Fox Agency already does, although they do not have the authority to negotiate for lower than the statutory rate without consent of the actual publisher. . I see no reason why the PROs cannot also issue compulsory licenses or negotiated licenses that comply with the provisions of Section 115.

With one exception, I would, however, draw the line at synchronization licensing of any kind, and not allow the PROs to participate in that activity, as that process requires an approval by the copyright owner based on the fee and proposed usage of the composition, items that are extremely subjective and not easily contained in any kind of compulsory license or statutory rate. The exception would be user generated content on a "YouTube" type service where it might be possible to offer some kind of blanket license at minimal costs to the party uploading the content.

## CONCLUSION

The current music rights landscape is a mess, with content owners fighting amongst themselves as well as with the digital and terrestrial services. Too much time, energy and money I spent trying to incrementally change a system is dire need of a major overhaul. Hopefully, the DOJ's review of the Consent Decrees will reveal this in a manner that will allow for meaningful change and a brighter future for music creators and copyright owners.

Thank you for the opportunity to contribute to this dialog. If there is any further information I can provide please feel free to contact me.

Very truly yours,

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