



THE RECORDING ACADEMY®

GRAMMYS ON THE HILL®
ADVOCACY & INDUSTRY RELATIONS

August 6, 2014

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

Re: Department of Justice Review of ASCAP and BMI Consent Decrees

COMMENTS OF THE NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES

The National Academy of Recording Arts & Sciences (“The Recording Academy”) appreciates the opportunity to submit these comments to the Department of Justice on behalf of the creative music professionals it represents. The Recording Academy is a trade association for music creators whose voting membership and board leadership consists of individual music professionals with creative and technical credits on commercially released recordings. Its members primarily fall into three categories: 1) the songwriters and composers who create the musical works, 2) the vocalists and musicians who perform the works, and 3) the producers and engineers who create the overall sound of the recordings. There are no company or institutional members. Accordingly, The Academy is the only organization that advocates for all individual music creators: songwriters, performers and studio professionals.

The individual Recording Academy members joining this filing are successful songwriters with combined sales of millions of recordings of their compositions. By joining these comments, they wish to ensure that a vibrant marketplace will exist into the future, allowing the next generation of songwriters to be able to earn a living from their craft.

Darrell Brown is a producer, arranger, and main co-writer for the 2013 LeAnn Rimes album, *Spitfire*. He co-wrote the hits “You’ll Think of Me” and “Raining On Sunday” performed by Keith Urban, among other tracks.

Sue Ennis is a nationally recognized songwriter, composer, and educator. She has written over 70 songs for platinum-selling rock band Heart.

Sean Garrett is a four-time GRAMMY nominee responsible for a series of chart-topping compositions, most notably Usher's "Yeah!", which ranks second on the Billboard Hot 100 Songs of the Decade for 2000–2009. He has also written songs recorded by Ciara, Nicki Minaj, Britney Spears, and Beyoncé.

GRAMMY nominee Lukasz Gottwald, known as "Dr. Luke," was ASCAP's Pop Music Awards Songwriter of the Year (2010 and 2011). He has written and produced hit songs recorded by Katy Perry, Ke\$ha, Rihanna, Miley Cyrus, and many others.

Harvey Mason, Jr. is a producer/songwriter who has written songs recorded by Jennifer Hudson, Mary J. Blige, Jordin Sparks, Toni Braxton, and others.

Greg Wells is a Grammy-nominated producer, mixer, songwriter and multi-instrumentalist who has written songs recorded by Adele, Katy Perry, One Direction, and others.

INTRODUCTION

The long-term viability of Performance Rights Organizations (PROs) is critically important to The Academy's songwriter members. Acting alone, an individual songwriter or composer lacks the leverage to negotiate fair licenses for his or her creative work. The individual also lacks the resources to collect the royalties for that work and to enforce the public performance right for that work. PROs provide an irreplaceable service to songwriters and composers through collective licensing that allow PROs to negotiate for royalties from licensees. PROs also have the infrastructure necessary to collect and distribute those royalties directly to the songwriter with transparency, and to monitor the use of the songwriter's work for possible infringement.

The individual songwriter or composer depends on the PROs to provide these services, but the rest of our membership, and the entire music ecosystem, rely on them as well. PROs provide marketplace efficiency and stability. Licensees enjoy the right to publicly perform virtually any musical composition by simply seeking licenses from three PROs. Even more importantly, songwriters and composers enjoy the transparency and direct payment offered by the PROs.

The music economy is changing rapidly, however, and the Consent Decrees have hampered the ability of ASCAP and BMI to respond to those changes in a way that provides fair value to their – and The Academy's – members. Consumers are driving a transition in the music economy from a "purchase-to-own" model based on physical products and digital downloads to a consumption model based on streaming. As streaming steadily becomes the dominant way that music is experienced, revenue from other types of public performances and from mechanical

licensing will inevitably shrink. Professional songwriters will only be able to make a secure living if they receive fair compensation for the public performance of their works by digital music services.

Unfortunately, recent rate court decisions made pursuant to the Consent Decrees have resulted in royalty rates for digital music services that are below fair market value. Large music publishers have signaled that they will withdraw completely from ASCAP and BMI so that they can pursue free market negotiations with digital services.¹ Such a drastic course of action would destabilize the two organizations and harm songwriters. Without the support of some of their largest members, the PROs may not be able to continue because the smaller catalogs carried by the PROs would generate significantly less revenue that is incommensurate with the cost of the services they provide. Market power would then shift to a handful of large music publishers, while the majority of individual songwriters would lose the protections and benefits of voluntary collective licensing that they enjoyed under the PROs. Moreover, the rest of music ecosystem would lose the efficiency, transparency and stability provided by the PROs. Thus the Consent Decrees, which are intended to protect fair competition in the marketplace, could instead cause harm to all stakeholders: songwriters, composers, licensees, and consumers.

Another recent development in the music economy is the shift in market power away from the PROs and to licensees. In particular, consolidation within the broadcast radio industry has concentrated station ownership to just a few major players in almost every geographic market. Not only has this consolidation strengthened the negotiating power of the major radio conglomerates, it has reduced opportunities for songwriters. Corporate radio has decreased the variety of genre formats in radio, and it has limited the amount of music played in the formats that remain to tightly controlled playlists.²

At a minimum, the Consent Decrees should be modified so that ASCAP and BMI can continue to serve their members and the market place. As the Department considers such modifications, two overarching principles should guide your deliberations. First, songwriters should have the ability to receive fair market value for the public performance of their work across all services. To the extent that PROs continue to be constrained from negotiating licenses in the free market, modifications to the Consent Decree should ensure that any alternative rate-setting process results in royalty rates that reflect what would have been established in competitive market negotiations. Second, songwriters, licensees, and consumers are all served best when licensing is done in the most efficient manner possible. Modifications to the Consent Decree should allow for a more efficient licensing process that can keep pace with, and respond to, the changing music marketplace while still ensuring that creators receive fair compensation

¹ See Ed Christman, *Sony/ATV's Martin Bandier Repeats Warning to ASCAP, BMI*, Billboard (July 11, 2014, 3:04 PM), <http://www.billboard.com/biz/articles/news/publishing/6157469/sonyatvs-martin-bandier-repeats-warning-to-ascap-bmi>.

² Hannah Karp, *Radio's Answer to Spotify? Less Variety*, Wall St. J. (Jan. 16, 2014, 2:16 PM), <http://online.wsj.com/news/articles/SB10001424052702303754404579313150485141672>.

for their work. With those principles established, The Recording Academy would like to comment on a few of the specific issues presented in the Department's solicitation.

Should the Consent Decrees be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others? If such partial or limited grants of licensing rights to ASCAP and BMI are allowed, should there be limits on how such grants are structured?

The Recording Academy supports allowing rights holders to grant limited or partial licensing rights to ASCAP and BMI. This modification is necessary to avoid the devastating consequences of major publishers completely withdrawing from the PROs. The rate court process currently results in royalty rates for digital (streaming) music services that do not reflect the fair market value of the rights being licensed. As discussed above, some major publishers are considering a complete withdrawal from ASCAP and BMI so that they can privately negotiate for higher rates with these services.

Allowing rights holders to retain the rights to their catalogs for certain licenses while granting their rights to ASCAP and BMI for others will help preserve the long-term viability of the PROs by eliminating the perverse incentive for publishers to leave them entirely. This arrangement would then also increase the number of market participants licensing to digital music services, thereby increasing competition. The resulting private market deals would also provide new, relevant evidence to the rate courts on the fair market value of the public performance rights.

If rights holders are allowed to provide limited grants to ASCAP and BMI, the Department should also consider the effect of those limited grants on the market power of the PROs. For example, the partial withdrawal of rights from a PRO for the purpose of licensing to digital music services would possibly weaken the market power of the PROs to an extent that the Consent Decrees are no longer relevant in that particular instance.

Should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration? What procedures should be considered to expedite resolution of fee disputes? When should the payment of interim fees begin and how should they be set?

The Recording Academy supports modifications to the Consent Decrees that would establish an expedited process for rate setting. Presently, any service that wants to use music from ASCAP or BMI can do so upon request, before any rate for the license is established. While the service is immediately able to use and profit from that music, the songwriters and composers receive no compensation until an agreement is reached between the PRO and the licensee. This is clearly unjust.

Songwriters deserve compensation as soon as their work is exploited. In the absence of free market negotiations that could provide immediate payment for licenses, an arbitration process should be considered as an alternative. The Academy believes that an arbitration process would streamline the rate-setting process in a manner that is faster, more cost-effective, and that produces results that are more reflective of the current marketplace when compared to the current rate court process. The rates set by arbitration could be used as the final rates or they could be used as “interim” rates. Either way, the arbitration process would provide greater fairness for songwriters.

Should the Consent Decrees be modified to permit rights holders to grant ASCAP and BMI rights in addition to “rights of public performance”?

The Recording Academy supports modifying the Consent Decrees to permit rights holders to grant ASCAP and BMI rights in addition to public performance rights. Voluntary, non-compulsory blanket licensing for all rights related to musical compositions would lead to efficiencies in licensing just as there are marketplace efficiencies from the blanket licensing regime for public performances. In most cases, licensees can currently gain the performance rights for nearly the entire repertoire of musical works through three agencies: ASCAP, BMI and SESAC. The PROs already possess the databases and procedures necessary to effectuate mass licensing and collection domestically (and internationally through affiliated foreign PROs). However, licensing of mechanical royalties is processed on a song-by-song basis that often requires a more complicated clearance process.

Modifying the Consent Decrees to allow for the bundling of all rights for musical compositions – public performance, mechanical, synchronization, and print reproduction – would result in a more efficient licensing process with more services and more works being available in the marketplace. In addition, this reform would also level the playing field between large publishers and small publishers. While large publishers have the ability to engage in this scale of blanket licensing independently, small and independent publishers would only be able to do so with the assistance of the PROs. As long as the rights for these royalties reflect fair market value, the increased marketplace activity would be beneficial to songwriters as well as to music consumers.

CONCLUSION

Songwriters and composers represent the foundation of the music marketplace. Before a song can be recorded, distributed, performed, and enjoyed by the public, a writer must first put pen to paper and create that song. A healthy and competitive marketplace for public performance rights is a marketplace where songwriters can make a viable living from their creative work. If they cannot, the entire marketplace will collapse. The PROs must be able to modernize so that they can continue to protect songwriters and secure fair market value for their

work. The Consent Decrees must be modified to allow the PROs to do so. Thank you for your consideration.

Respectfully submitted,

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