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**Department of Justice, Antitrust Division**

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**Review of Antitrust Consent Decrees for American Society of Composers, Authors and Publishers / Broadcast Music, Inc.**

**Public Comment on Consent Decree Review**

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**Electronic Submission**

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## ABOUT US

Future of Music Coalition (FMC)<sup>1</sup> is a not-for-profit collaboration between members of the music, technology, public policy and intellectual property communities. FMC seeks to educate the media, policymakers and the public about issues at the intersection of music, technology, policy and law while bringing together diverse voices in an effort to identify creative solutions to challenges in this space. FMC documents historic trends in the music industry, while highlighting emerging structures that may empower artists and establish a healthier music ecosystem.

As performing artists, composers, independent label owners, music publishers and advocates, FMC has paid close attention over the past fourteen years to developments in the technology space and the impact on music creators. We have examined legal, policy, and marketplace trends and have conducted original research<sup>2</sup> into how artist revenue streams have changed in response to these developments. We work closely with a highly engaged network of musicians, composers, music managers and arts advocates who possess a practical understanding of today's music ecosystem and how technology and the law shape outcomes for music access and creator compensation.

## INTRODUCTION

FMC is pleased to submit the following comments to the Department of Justice (DOJ) Antitrust Division regarding the agency's review of the Antitrust Consent Decrees for the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).<sup>3</sup> Moreover, FMC appreciates the opportunity to address the persistent issues songwriters and independent music publishers face under the Consent Decrees, particularly a lack of transparency

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<sup>1</sup> FUTURE OF MUSIC COALITION, <http://futureofmusic.org/> (last visited Aug. 4, 2014).

<sup>2</sup> *Artist Revenue Streams*, FUTURE OF MUSIC COALITION, <http://money.futureofmusic.org/> (last visited Aug. 4, 2014).

<sup>3</sup> *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) [hereinafter *ASCAP Consent Decree*]; *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) [hereinafter *BMI Consent Decree*].

and failure to balance interests in the licensing of musical works for public performance, as well as barriers of entry for independent songwriters, publishers, and music platforms.

FMC commends the DOJ for reviewing the Consent Decrees and also commends the agency's commitment to maintaining healthy competition within the licensing of musical works for public performance. Despite some differences with ASCAP, BMI, and the major consolidated music publishers, we are encouraged that many in this space have expressed their desire to nurture songwriters and expand transparency. We see the DOJ's review of the Antitrust Consent Decrees as an important opportunity to highlight issues with consolidation of the music industry, the need for fair compensation and stronger protections for songwriters, as well as the importance of ASCAP and BMI to a functional music industry that serves the needs of creators.

FMC's comments will address the specific questions raised by the DOJ in soliciting public comment for the review.

## **GENERAL COMMENTS FOR THE REVIEW OF THE ASCAP AND BMI ANTITRUST CONSENT DECREES**

### **QUESTION 1**

*Do the Consent Decrees continue to serve important **competitive purposes** today? Why or why not? Are there provisions that are no longer necessary to protect competition? Are there provisions that **are ineffective in protecting competition**?*

The Consent Decrees were originally enacted to promote competition in the music licensing space and continue to serve this function today. The Consent Decrees establish protections for songwriters that help ensure direct payments to artists and equitable 50/50 songwriter-publisher splits under the Performing Rights Organization (PRO) member agreements. Without the Consent Decrees, there is no safeguard that the direct payments or 50/50 splits will remain intact for songwriters, thereby jeopardizing an important revenue stream for many creators.

Additionally, the Consent Decrees create opportunities for emerging music platforms. Without the Consent Decrees, all forms of broadcasting—AM/FM or digital—would have been unlikely to have even gotten off the ground. The basic provisions outlined in the Consent Decrees have had a positive impact on the development of broadcast radio, the music industry and telecommunications in general. Today, Internet radio is the fastest growing segment of the music industry,<sup>4</sup> with new services coming to the space that can help grow the legitimate digital music marketplace while expanding revenue opportunities and allowing listeners to encounter more songs on an increasing array of platforms. Without the Consent Decrees, songwriters, noncommercial broadcasters, independent publishers and emerging services will face high barriers to entry and potentially endure anticompetitive behavior from the major publishers and their functionaries, as was the case in the pre-Consent Decree era. It is essential for not only the protection of songwriters and composers, but also for the health of the overall music industry, that there is an equitable, competitive, and transparent market for music licensing and collective rights management. The Consent Decrees have historically helped to establish and maintain this market.

#### The Consent Decrees were Originally Enacted to Address Significant Anticompetitive Practices

The Consent Decrees were originally enacted to address major antitrust issues in music licensing of the public performance rights in musical works. Despite the obvious benefits of increased licensing efficiency, PROs were found to have engaged in “significant anticompetitive practices” that went above and beyond what was “reasonably necessary” to achieve their business goals.<sup>5</sup>

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<sup>4</sup> Nathan Ingraham, *Pandora-Style Internet Radio Services are Growing Faster Than ‘On-Demand’ Options Like Spotify, Study Shows*, THE VERGE (Nov. 8, 2012, 1:06 PM) <http://www.theverge.com/2012/11/8/3618348/internet-radio-on-demand-music-growth-npd-survey> (citing that the total audience of those using Internet radio grew 27 percent compared to the prior year); *The NPD Group: Online Radio is the Fastest Growing Music Listening Option*, NPD GROUP, [https://www.npd.com/wps/portal/npd/us/news/press-releases/pr\\_120403/](https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120403/) (reporting in its annual study that increasing numbers of consumers are adopting online radio options for music consumption and discovery); Ben Sisario, *Music Data Firms to Collaborate on Internet Radio Platform*, THE NEW YORK TIMES (Jan. 29, 2014) [http://www.nytimes.com/2014/01/30/business/media/music-data-firms-to-collaborate-on-internet-radio-platform.html?\\_r=0](http://www.nytimes.com/2014/01/30/business/media/music-data-firms-to-collaborate-on-internet-radio-platform.html?_r=0) (noting that Internet radio, while dominated by Pandora, has become one of the fastest-growing categories of digital music).

<sup>5</sup> See Whitney Broussard, *The Promise and Peril of Collective Licensing*, 17 J. INTEL. PROP. L. 19, 27 (2009); U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY §4.2 (1995). See also Neville Miller, *The ASCAP-NAB Controversy: The Issues*, 11 AIR L. REV. 394, 399 (1940). In the 1930s, ASCAP instituted ‘sustaining’ fees that were to be paid in addition to the royalties already collected. As ASCAP was the only major source for licensing music, broadcasters agreed to pay a percentage of gross receipts for their broadcasting time, regardless if ASCAP music was played or not – what has now become

By 1935, the United States government was investigating ASCAP for violations of the Sherman Antitrust Act,<sup>6</sup> later resulting in the first Consent Decree between ASCAP and the U.S. government in 1941.<sup>7</sup> ASCAP's actions were already having a deleterious effect on the emerging broadcast radio market and, absent intervention, would have resulted in a stifled and stunted music industry.

The Consent Decrees were enacted to curb those behaviors while simultaneously preserving the efficiencies of collective licenses and promoting the public interest by curtailing unnecessarily restrictive and anticompetitive practices.<sup>8</sup> Under the PRO member agreements, songwriters are accorded a 50/50 percentage split and direct payments of royalties.<sup>9</sup> This has greatly benefited songwriters and provided them a vital revenue stream that is not subject to recapture by music publishers.<sup>10</sup> Additionally, the Consent Decrees enabled smaller broadcasters and later, webcasters, to enjoy a transparent and predictable licensing environment, thereby expanding and strengthening the music ecosystem and helping to create a music market that has been the envy of the world.<sup>11</sup>

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accepted practice as the blanket license. ASCAP found the 'per use' basis royalties, suggested by the broadcasters, as "uneconomical and unscientific to adopt."

<sup>6</sup> The Sherman Antitrust Act of 1890, 15 U.S.C §§ 1–7 (2004).

<sup>7</sup> *United States v. ASCAP 1940–1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. Mar. 4, 1941)*. See also Miller, *supra* note 5, at 401; Richard W. Ergo, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, 1 DUKE L.J. 258, 263 (1959) (noting that ASCAP feared the "possible disastrous consequences of a full hearing," and entered a "plea of *nolo contendere* to the criminal charges against it").

<sup>8</sup> See Broussard, *supra* note 5, at 27.

<sup>9</sup> See Don E. Tomilson, *Everything that Glitters is not Gold: Songwriter-Music Publisher Agreements and Disagreements*, 18 HASTINGS COMM. & ENT. L.J. 85, 123 (1995) (analyzing four different publisher-songwriter contracts and noting the 50/50 splits and direct payments to artists by PROs).

<sup>10</sup> See Eddie Schwartz, President, Songwriters Ass'n of Can., Remarks at the Future of Music Coalition Policy Summit: License to Thrive: Direct Licensing, Compulsories and Artist Compensation [hereinafter *Future of Music 2013 Policy Summit*] (Oct. 28, 2013) (*available at*: <http://www.youtube.com/watch?v=eiVUb-y0pQY>) (providing a personal anecdote that as a songwriter, when his music publisher cut his royalty payments completely during a dispute, the direct payments from PRO were his only source of income to support himself and his family).

<sup>11</sup> *Dominating the Music Industry*, BBC WORLDSERVICE, [http://www.bbc.co.uk/worldservice/specials/1042\\_globalmusic/page3.shtml](http://www.bbc.co.uk/worldservice/specials/1042_globalmusic/page3.shtml) (last visited Aug. 4, 2014) (noting that up to 90% of the global music market is accounted for by the "Big Five" major corporations - EMI Records, Sony, Vivendi Universal, AOL Time Warner and BMG – all headquartered in the United States, the largest of the world's music markets); *but see* LIGHTING UP NEW MARKETS: IFPI DIGITAL MUSIC REPORT 2014, (International Federation of the Phonographic Industry, 2014) (noting that while the U.S. is currently the world's largest digital market with growth at 3.4% in 2013, accounting for 60% of the entire U.S. market, the European music market experienced digital growth of 13.3%, signifying its first overall market increase since 2001).

## The Consent Decrees Continue to Serve Vital Competitive and Protective Purposes and Must be Preserved

Not only did the Consent Decrees historically serve vital competitive purposes, they continue to be very relevant today, perhaps even more so as the music industry has become highly consolidated to just a handful of major corporations on both the music publishing and label side.<sup>12</sup> Future of Music Coalition unambiguously supports rate increases for songwriter compensation, and has entertained the arguments of various parties to this proceeding. The National Music Publishers Association<sup>13</sup> (NMPA) suggests that movement away from the Consent Decrees and toward a “free” and/or fair market<sup>14</sup> would result in more competition and higher royalty payments for songwriters and publishers.<sup>15</sup> ASCAP has stated that the Consent Decrees “must be updated, if not eliminated ... [as they] exploit certain provisions to the detriment of the songwriters, composers and music publishers who depend on public performance royalties for their livelihoods.”<sup>16</sup> BMI has stated that the Consent Decrees should be reexamined, particularly with regard to their perpetual nature.<sup>17</sup> PROs and major publishers alike have stated that the industry has shifted and that the original reasons for the Consent Decrees as protections against anticompetitive behavior are no longer present. Furthermore, ASCAP and

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<sup>12</sup> See W. Jonathan Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 838 (2007) (noting that modern administration of music copyright is divided among four types of entities: the major music publishers (of which there are three), the Harry Fox Agency, the PROs (of which there are three) and the major recording companies (of which there are three)).

<sup>13</sup> NMPA, <https://www.nmpa.org/home/index.asp> (last visited Aug. 4, 2014).

<sup>14</sup> See *Music Licensing Under Title 17, Part One: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Hearing Part One*]. While the terms “fair market” and “free market” used interchangeably, distinctions were made during oral testimonies. The Subcommittee noted the interchanged use and Rep. Tom Marino (R-PA) requested additional written testimonies for stakeholder definitions to clarify use.

<sup>15</sup> See *Hearing Part One*, *supra* note 14, at 3 (statement of David Israelite, President & CEO of Nat’l Music Publishers Ass’n). Mr. Israelite also stated before the Subcommittee that YouTube is the largest music acquisition source on Earth and negotiations for synchronized licensing occurred on the “free market,” resulting in the complete licensing of content.

<sup>16</sup> ASCAP, Public Comment to Notice of Inquiry for Music Licensing Study, U.S. Copyright Office [hereinafter *ASCAP Comment*] 2–3 (May 23, 2014) [http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014\\_3/ASCAP\\_MLS\\_2014.pdf](http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/ASCAP_MLS_2014.pdf).

<sup>17</sup> BMI, Public Comment to Notice of Inquiry for Music Licensing Study, U.S. Copyright Office [hereinafter *BMI Comment*] 20 (May 23, 2014) [http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014\\_3/BMI\\_MLS\\_2014.pdf](http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/BMI_MLS_2014.pdf).

BMI note that these Consent Decrees are “World War II era” regulations that have no sunset provisions, unfairly hindering publishers, PROs, and ultimately songwriters.

Many of the arguments from the PROs and major publishers are simply not convincing. While it is true that the original ASCAP Consent Decree was enacted in 1941, there have been significant amendments and modifications to the *final judgment*, effectively making the governing ASCAP Consent Decree dated from 2001, not the “World War II era.” Additionally, the “Paramount Decrees”—antitrust regulation of the movie industry—is another example of long-term judicial supervision to ensure competitive and fair practices.<sup>18</sup> The latter antitrust regulation was enacted in the 1940s and continues to this day.

Furthermore, examination of PRO behavior *under* the Consent Decrees illustrates that a taking advantage of market power continued even with this regulation in place. From the late 1940s when ASCAP proposed an increase of up to 1500 percent for motion-picture theaters fees<sup>19</sup> to price disputes of blanket licensing between PROs and television stations in the 1950s and 1960s<sup>20</sup> to failure to disclose repertoires to professional association conventions held in hotels, thereby obtaining payment twice<sup>21</sup> to congressional intervention with the Fairness in Music Licensing Act<sup>22</sup> which provided relief for a food-service industry facing nearly 1,000 lawsuits annually from ASCAP and BMI to more recent demands of royalties from ringing phones<sup>23</sup> the

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<sup>18</sup> Richard A. Rosen et al., *Settlement Agreements in Commercial Disputes: Negotiating, Drafting, and Enforcement*, § 31.02 Settling a Government Antitrust Case, [B][3] Duration and Long-Term Supervision (2014).

<sup>19</sup> See Ergo, *supra* note 7, at 264. There was also issues regarding the ASCAP licensing practices – the PRO would reserve the performance rights in motion-picture music, later to be licenses to individual theater owners, and would only license to movie producers the synchronization rights. See also Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948) (issuing a “sweeping denunciation of ASCAP’s structures and activities . . . [finding that] almost all of Ascap’s activities in licensing motion picture theaters, involve a violation of the anti-trust laws”).

<sup>20</sup> See Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 357–358 (2001) (discussing that the prevalence of prerecorded soundtracks used by television networks caused tensions surrounding the blanket license).

<sup>21</sup> Jeffrey W. King, *Music Licensing at Trade Shows and Conventions: Who Pays the Band?* LICENSING JOURNAL (Nov.–Dec. 2007) at 10 (noting that ASCAP’s licenses with hotels, generally include provisions that specifically exclude music played at trade shows and conventions held the hotel).

<sup>22</sup> Fairness in Music Licensing Act of 1998, 112 Stat. 2827 (1998) (codified in 17 U.S.C. §§ 101, 110, 504, 512).

<sup>23</sup> See *In re Cellco Partnership*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009) (finding that a company’s transmission of a ringtone to a customer’s cellular telephone did not constitute a performance of musical work publicly and a customer playing a ringtone in public was exempt from liability for copyright infringement); see also *Should ASCAP Get Paid for Ringtones?*, Future of Music Coalition, (Jul. 9, 2009, 12:59 PM) <http://futureofmusic.org/blog/2009/07/09/should-ascap-get-paid-ringtones>.

PROs have steadily illustrated that potential and actual abuses are more common than the PROs would have regulators believe.

Moreover, recent litigation<sup>24</sup> and developments in free market music licensing negotiations<sup>25</sup> demonstrate how anticompetitive tendencies may continue to this day, offering insights into how PROs and major publishers might conduct business in the future if the Consent Decrees are weakened or eliminated. An analogous trend in the recording label side of music copyright is the equity shares record labels acquire in new music platforms. Concerned that services like YouTube popularized partly due to the use of copyrighted works and then sold for a hefty price with no financial returns for copyright owners, the major record labels set an agenda to capture as much revenue from a service before a single piece of music has been delivered or performed to users. These maneuvers have secured the major labels a reported 18% share in Spotify, along with massive cash advances for the use of catalog.<sup>26</sup> A major concern for artists is that this and other “unattributable” income hidden under non-disclosure agreements or elsewhere, will not make its way back to creators.<sup>27</sup> Additionally, with a vested interest in a particular platform,

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<sup>24</sup> See *Broadcast Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010) (denying BMI’s request to hold licensee to traditional blanket license, determining that the adjustable-fee blanket license is reasonable); *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010) (finding that adjustable-fee license proposed by THP Capstar (now known as DMX) would reflect music’s fair market value, whereas ASCAP’s traditional blanket license would not); *Radio Music License Committee, Inc. v. SESAC, Inc. et al.*, Civ. No. 12-CV-5807-CDJ, 2014 WL 2892391 (E.D. Pa June 26, 2014) (finding plaintiffs had made a prima facie case of a violation of Sherman Act sections 1 and 2, and noting that SESAC has 100% of the market power over the unique collection of works in their repertory); *In re Pandora Media, Inc.*, Civ. No. 8035(DLC), 41 Civ. 1395 (DLC), 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014) (describing significance of publishers’ refusal to provide Pandora with usable lists of their catalogs); *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177 (PAE), 2014 WL 812795 at \*36 (S.D.N.Y. Mar. 3, 2014) (finding that there was sufficient evidence upon which a jury could find SESAC took action to maintain and fortify its monopoly over licensing practices that eliminated all realistic competition with its blanket license).

<sup>25</sup> Ed Christman, *Apple’s iTunes Radio Cuts Deal with BMI*, BILLBOARD (June 13, 2013, 1:41 AM) <http://www.billboard.com/biz/articles/news/digital-and-mobile/1566546/apples-itunes-radio-cuts-deal-with-bmi> (discussing the trend of major music publishers withholding digital rights from PROs to cut market-rate deals with iTunes Radio); Ed Christman, *NMPA Inks Deal with Universal Music Group over VEVO, YouTube Videos*, Billboard (June 19, 2012, 11:32 AM) <http://www.billboard.com/biz/articles/news/publishing/1093134/nmpa-inks-deal-with-universal-music-group-over-vevo-youtube> (noting the UMG deal with NMPA over VEVO music videos, as publishers are now eager to tap into this important revenue stream, no longer considering music videos a promotion-only tool).

<sup>26</sup> Helienne Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*, THE GUARDIAN (Aug. 17, 2009, 10:00 AM) <http://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify>. “Merlin, who represent[s] a large portion of independent labels received 1%.”

<sup>27</sup> *Id.* See also Andy Gensler, *Rich Bengloff on A2IM Indie Week, YouTube Licensing: Alleges Majors’ Shady Streaming Terms*, Billboard (Jun. 17, 2014, 3:45 PM) <http://www.billboard.com/biz/articles/news/indies/6121566/rich-bengloff-on-a2im-indie-week-youtube-licensing-alleges-majors> (reporting Bengloff’s statements that labels engage in “digital streaming strategies” that are



there is incentive for labels to withhold music from services in which they do not have equity shares, stifling innovation and consumer choice in the legitimate digital marketplace.

The major music publishers have already been selling off catalogues to private equity firms and pension funds,<sup>28</sup> with no steady or transparent capital return to songwriters. While the NMPA argues that songwriters lose millions a year because of their inability to negotiate free market rates,<sup>29</sup> the truth is there is no guarantee that rates negotiated outside of the Consent Decrees will be paid to the songwriters directly or in a 50/50 split. So, while the PROs and major music publishers *may* see more revenue under these direct deals, without the Consent Decrees there is little assurance that songwriters and independent publishers would benefit. Absent oversight, transparency, and safeguards for songwriters, independent publishers and small enterprise, a move away from the Consent Decrees would only exacerbate ownership consolidation and route revenue away from creators.

#### Direct Deals by Consolidated Music Publishers are *de facto* Anticompetitive, Lacking in Transparency and Potentially Harmful for Songwriters

The past decade alone has seen tremendous concentration among major music publishers,<sup>30</sup> similar to that of major sound recording labels.<sup>31</sup> Eliminating or drastically altering the Consent Decrees would put incredible power in the hands of just a few companies. This would also

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anticompetitive and harmful to artists like keeping “per-stream” rates low (which go to artists), securing a “listener hour guarantee” (which goes to the label), and engaging in “digital breakage” which secures a minimum annual guarantee (which again goes to the label)).

<sup>28</sup> Yinka Adegoke, *Music Publishing’s Steady Cash Lures Investors*, Reuters (Apr. 23, 2009, 5:23 PM) <http://www.reuters.com/article/2009/04/23/us-publishing-analysis-idUSTRE53M6TK20090423>.

<sup>29</sup> David Israelite, *Our Best Bet for Screwing up Copyright Reform? More Government Intervention (Guest Post)*, BILLBOARD (Jul. 14, 2014, 12:10 PM) <http://www.billboard.com/biz/articles/news/publishing/6157555/our-best-bet-for-screwing-up-copyright-reform-more-government>.

<sup>30</sup> Ben Sisario, *Deals to Split EMI Spur Scrutiny and Criticism*, The New York Times (Feb 19, 2012) <http://www.nytimes.com/2012/02/20/business/media/emi-consolidation-with-sony-and-universal-prompts-scrutiny-and-opposition.html> (noting that the Federal Trade Commission has been investigating the major music publisher mergers, which include Universal’s \$1.9 billion bid for EMI, and Sony offering \$2.2 billion for EMI music publishing).

<sup>31</sup> See Ankur Srivastava, *The Anti-Competitive Music Industry and the Case for Compulsory Licensing in the Digital Distribution of Music*, 22 *TOURO L. REV.* 375, 386–387 (2006) (using the DOJ Herfindahl-Hirschman Index (HHI) to measure the competitiveness of a market, the author estimates that the concentrated music label industry (at the time five, now *further consolidated* to just three) potentially rated higher than 1445, placing it within the moderately to highly concentrated markets).

impact how ASCAP and BMI provide services to songwriter members. Smaller and emerging songwriters and independent publishers who do not have the leverage or clout to do direct deals would be at a disadvantage absent rules preventing anticompetitive behavior within the major publishing sector. Similarly, independent and smaller noncommercial broadcasters would also be negatively impacted, without the market clout to obtain licenses at comparable terms to with larger, consolidated interests. Noncommercial broadcasters contribute a great deal to the musical and cultural diversity in the American media space. In fact, it are these outlets that often play a role in bringing new music to the public, which can lead to more opportunities for composers and performers, while serving to promote a communications landscape rooted in localism, competition and diversity.<sup>32</sup> Without the blanket licenses made possible by the Consent Decrees, smaller broadcasters operating on AM/FM and/or Internet platforms may not be able to maintain their services, resulting in real public injury not limited to, but including, niche composers and songwriters.

Concerns regarding competitive disadvantages under radical modification or elimination of the Consent Decrees exports internationally. The 1950 ASCAP Consent Decree<sup>33</sup> was enacted to address ASCAP's participation in a "world-wide confederation of performing rights societies that engaged in global misconduct, including boycotts and agreements not to compete," which negatively impacted songwriters' ability to receive royalties for the foreign use of their work.<sup>34</sup> The Consent Decrees currently help to govern and promote competitive music licensing practices at home and abroad, ultimately safeguarding songwriter interests. If the Consent Decrees are severely weakened or eliminated, there is no guarantee that such safeguards will remain. Such an outcome would leave songwriters vulnerable to the whims of powerful multinational corporations whose interests may not always align with their own. Furthermore, with tremendous consolidation among owners of musical works, the major publishers would have the ability to tilt the scales for licensing in their favor globally. This is particularly troubling given NMPA's

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<sup>32</sup> See Press Release, CPB Media Room, Public Media Stations Announce Plans for New Music Discovery Video Platform (May 15, 2014) (*available at*: <http://www.cpb.org/pressroom/release.php?prn=1103>) (discussing that public radio stations are often the first stop for new artists and pioneering performers).

<sup>33</sup> *United States v. ASCAP*, 1950–1951 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

<sup>34</sup> Press Release, Department of Justice, Justice Department Asks Court to Modify 1950 ASCAP Settlement – Change Allows ASCAP's Members to Collect Royalties for Home Taped Music in Canada, France, and Germany (Jul. 30, 1997) (*available at*: [http://www.justice.gov/atr/public/press\\_releases/1997/1195.htm](http://www.justice.gov/atr/public/press_releases/1997/1195.htm)).

inexplicable resignation<sup>35</sup> from the International Confederation of Societies of Authors and Composers (CISAC),<sup>36</sup> an organization known for its work promoting professional rules and standards for collective societies, author and creator advocacy, and data collection initiatives.

The Consent Decrees help keep collective licensing in balance by preserving the efficiencies of PROs with the judicial oversight to ensure transparency and competition. Without them, the balance will tip back toward a stagnant, anticompetitive market that serves neither songwriters nor the public.

FMC supports strengthened PROs that can go to bat for songwriters in negotiations with services, and that function as neutral third parties in royalty collection and distribution. The elimination or radical overhaul of the existing Consent Decrees threaten to make the PROs mere administrative automatons for just three major publishers. This would create a potentially permanent—and global—imbalance in the licensing of musical works for public performance, and would undermine the interests of the songwriter members whom ASCAP and BMI are obligated to serve.

## **QUESTION 2**

*What, if any, **modifications** to the Consent Decrees **would enhance competition and efficiency**?*

FMC reserves support for Consent Decree modifications so long as they do not jeopardize safeguards for songwriters, such as the direct royalty payments by PROs and the 50/50 splits, and do not jeopardize competition or barriers of entry for independent songwriters, publishers, and small music platforms. Furthermore, all modifications to the Consent Decrees must promote transparency, especially in repertoire, licensing and royalty payments to songwriters.

Modifications must not weaken the PROs by making them mere administrative functionaries of the publishers; a truly competitive music licensing market requires that the PROs and music

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<sup>35</sup> See CISAC SOCIETIES CODES LISTING (CISAC) available at: file:///Users/jordanreth/Downloads/SG12-1020\_CISAC\_Societies\_Codes\_2014-07-10\_EN%20(1).pdf. Under “code #181” the NMPA is now listed as “resigned,” noting the trade group’s membership dates as 1973–2014.

<sup>36</sup> CISAC, <http://www.cisac.org/CisacPortal/security.do?method=beforeAuthenticate> (last visited Jul. 31, 2014).

publishers maintain a modicum of structural separation, even where there are shared incentives such as rate increases.

### Interim Licensing

At the recent round of music licensing hearings before Congress, BMI addressed the issue of “interim licensing.” Both ASCAP and BMI have the ability to negotiate interim fees under their respective Consent Decrees.<sup>37</sup> While FMC acknowledges that the addition of interim licensing may be an equitable solution to what the PROs have decried as an unfair loophole in the Consent Decrees,<sup>38</sup> any modification regarding interim licensing or fees must preserve direct payments to songwriters, the 50/50 splits, and promote greater transparency for the benefit of songwriters who require accurate royalty statements and services seeking clarity on what repertoire is available to perform.

FMC, however, also acknowledges that modification of the Consent Decrees to allow for interim licensing could shift the “holdout” problem, demotivating PROs to come to reasonable fee agreements. Combined with the proposals for mandatory arbitration,<sup>39</sup> interim licensing could potentially leave songwriters and end-users in a dead-zone without any recourse, stuck with payments under new interim licenses and lacking any bargaining power to arrive at reasonable licensing through an equitable or meaningful grievance mechanism.

### Substantial Transparency Reform

Under the Consent Decrees, ASCAP and BMI have struggled with transparency in internal and external matters. To its credit, ASCAP seems to recognize that greater transparency is essential

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<sup>37</sup> See *ASCAP Consent Decree*, *supra* note 3, at § IX(F); see *BMI Consent Decree*, *supra* note 3, at § XIV(B).

<sup>38</sup> See Joan M. McGivern, *A Performing Rights Organization Perspective: The Challenges of Enforcement in the Digital Environment*, 42 COLUM. J.L. & ARTS 631, 632 (2011) (“Once a music user has merely applied in writing for a license, which it can do with no money down, it is legally immunized from being sued by ASCAP’s members for infringement of the members’ works. How is it possible that music users are allowed to simply apply for a license, enjoy the benefits of a license, but then not be obliged to pay until they and ASCAP have agreed upon a fee for their usage? Why is ASCAP barred from exercising what is a copyright owners’ normal right to sue for infringement if usage and payment terms have not been agreed upon? The answer lies in ASCAP’s consent decree . . .”).

<sup>39</sup> See *infra* Question 6.

to a functional digital-age licensing environment.<sup>40</sup> However, since the 2001 Consent Decree, it is the ASCAP Board of Directors (not the DOJ or Consent Decree) that governs large portions of the PRO's functions, namely songwriter royalty distribution, music sampling and survey, and members' ability to petition ASCAP if a grievance arises.<sup>41</sup> We are not in a position to comment on the particulars of ASCAP's governance, but make note of the fact that many of the policies and provisions that most impact songwriter members are already under the express control of the PROs.

There must be transparency at *all* levels of music licensing to create a healthy and sustainable industry that nurtures songwriters, allowing PROs to continue their important collective licensing obligations on behalf of not only the major publishers, but also their songwriter members. Lastly, we believe that transparency under any licensing framework is essential to promote competition, diversity and to serve a public that benefits from the ability to hear music performed in a range of venues, including new and innovative delivery platforms.

### **QUESTION 3**

*Do differences between the two Consent Decrees adversely affect competition?*

FMC does not note any major differences between the two Consent Decrees that adversely impact competition for the performance licensing of musical works or our own organizational mission of advocating for artist compensation and access to potential audiences.

### **QUESTION 4**

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<sup>40</sup> Ed Christman, *ASCAP's 2013 Revenues, Distributions Rise In 2013*, BILLBOARD (Feb. 12, 2014, 10:55 AM) <http://www.billboard.com/biz/articles/news/publishing/5901249/ascaps-2013-revenues-distributions-rise-in-2013>.

<sup>41</sup> Mark Holden, *ASCAP Since AFJ2 – A Series of Unfortunate Events*, FILMMUSICMAG (May 22, 2005) <http://www.filmmusicmag.com/?p=529>. Typically, this would not be an issue, but the ASCAP Board of Directors has changed the requirements for the Board's membership, dispensing with 25 signatures required for ballot placement to over 1,250 as of 2008, changing the eligibility of Board members from any ASCAP member to those, like celebrities, who can gain the requisite signatures.

*How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?*

It is essential for the health of the music industry that PROs maintain accurate and transparent repertoires. Songwriters deserve to know the usage surrounding their works and how their royalty payments are calculated. Music platforms, broadcasters, and webcasters should be able to rely upon their PRO licenses and ability to access repertoire data when publicly performing musical works, to minimize the risk of copyright infringement and litigation.

Modifying the Consent Decrees to allow partial publisher withdraw of rights will only compound the issues surrounding repertoire transparency. As noted in the recent Pandora litigation, both ASCAP and major music publisher Sony refused to comply with Pandora's requests for repertoire lists.<sup>42</sup> The music platform was left to guess which works were still with the PRO, thereby risking litigation for possible copyright infringement or to not perform any music at all.

The lack of transparency issues surrounding the PROs and the major publishers was further underscored with the recent DOJ issuance of Civil Investigative Demands (CID) for documents to ASCAP, BMI, Sony/ATV Music Publishing and Universal Music Publishing Group to investigate anticompetitive "coordination" between the PROs and major consolidated publishers.<sup>43</sup> The Consent Decrees are vital to keep these interests under supervision, ensuring compliance with fair and competitive practices.

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<sup>42</sup> In re Pandora Media, Inc., Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2014 WL 1088101, at \*24 (S.D.N.Y. Mar. 14, 2014). The court notes that Sony had a repertoire list available since in negotiating its partial withdraw from ASCAP, a list was required to inform the PRO which works would be withdrawn. "Sony understood that it would lose an advantage in its negotiations with Pandora if it provided the list of works and deliberately chose not to do so." The publisher also refused to grant permission to ASCAP to release repertoire information to Pandora.

<sup>43</sup> Ed Christman, *Dept. of Justice Sends Doc Requests, Investigating UMPG, Sony/ATV, BMI, and ASCAP Over Possible 'Coordination.'*, BILLBOARD (Jul. 13, 2014, 11:51 AM) <http://www.billboard.com/biz/articles/news/publishing/6157513/dept-of-justice-sends-doc-requests-investigating-umpg-sonyatv>. See also ANTITRUST DIVISION MANUAL (Department of Justice, 5th ed. 2014) available at: <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf> (stating in chapter III that CIDs can be used to compel production of information and documents if voluntary requests . . . are judged to be inadequate or inappropriate for the Division's needs).

FMC applauds and promotes the direct payment of public performance royalties to songwriters and the 50/50 publisher-songwriter splits and we acknowledge the need for greater transparency regarding administrative fees, sampling decisions, and general song usage and points allocations. If direct negotiations and deals between the major consolidated music publishers and licensees become the trend, songwriters will suffer deteriorated access to audits, sampling and usage information and licensees will lack a true alternative to blanket licensing, facing infringement, litigation, and stigma without access to repertoire information.

## **QUESTION 5**

*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?*

ASCAP's concerns over potentially losing the performance repertoire for what was at the time one of the four largest music publishers (further consolidation has reduced the number to three as of 2014), led the PRO to amend its Compendium in 2010 to allow members to withdraw only the right to license works to "new media" users, including Internet radio.<sup>44</sup> While the large, consolidated publishers were generally enthusiastic about this development, songwriters and independent publishers expressed nervousness about the new arrangement.<sup>45</sup> Additionally, numerous smaller platforms, including local and non-commercial broadcasters should also be

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<sup>44</sup> See Digital Performance in Sound Recordings Act (DPSRA), 17 U.S.C. §§ 106, 114. New media users were the only users who needed to acquire both public performance licenses for musical compositions *and* sound recordings sue to the performance of the sound recording publicly via digital audio transmission.

<sup>45</sup> *In re Pandora Media*, at \*11 (noting that the Compendium modification "came in response to pressure from ASCAP's largest music publishers. These publishers were focused principally on the disparity between the enormous fees paid by Pandora to record companies for sound recording rights and the significantly lower amount it paid to the PROs for public performance rights to compositions. The modification was enacted despite significant concern about the impact of this change on ASCAP, its writers and its independent publishers").

concerned, given that they often lack the resources, experience and leverage to negotiate for the fair licensing of musical works.<sup>46</sup>

On September 17, 2013, the ASCAP rate court granted a motion for summary judgment brought by Pandora, holding that the membership modifications did “not affect the scope of the ASCAP repertory” for the term of Pandora’s final license.<sup>47</sup> The court’s reasoning focused on Decree construction, with an emphasis on provisions of AFJ2 that entitle applicants and licensees to perform “all of the works in the ASCAP repertory.”<sup>48</sup> The BMI rate court later came to a similar—though not identical—conclusion, holding that “BMI [could] no longer license [withdrawn works] to Pandora or *any other applicant*.”<sup>49</sup> Both ASCAP and BMI argue that this creates an “all or nothing” approach, essentially forcing music publishers to withdraw entire catalogue from the PROs to seek more profitable and efficient direct deals with end-users.<sup>50</sup> The rulings come from a federal court that has extensive expertise and experience with the PROs, music licensing, and the Consent Decrees. Their final judgments regarding the Consent Decrees should be given deference.

Partial or limited grants of the public performance right would completely disrupt the entire purpose of collective licensing, particularly the important efficiency, transparency, and equitable royalty distribution aspects that the Consent Decrees help preserve. Songwriters and end-users depend on the ability to efficiently license, perform and receive payments for the use of musical works. Without frameworks to promote this dynamic, there would be artificial limits placed on the growth of a legitimate digital music marketplace.

### Direct Deals are a Dangerous Step Away From Transparency and Fair Competition

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<sup>46</sup> See David Oxenford, Partner, Wilkinson Barker Knauer LLP, *Future of Music 2013 Policy Summit*, *supra* note 10, available at: <http://www.youtube.com/watch?v=eiVUb-y0pQY>.

<sup>47</sup> *In re Pandora Media, Inc.*, Nos. 12 Civ. 8035(DLC), 41 Civ. 1395 (DLC), 2013 WL 5211927, (S.D.N.Y. Sept. 17, 2013).

<sup>48</sup> *In re Pandora*, at \*4; see also *ASCAP Consent Decree*, §§ VI, IX(E).

<sup>49</sup> *Broadcast Music, Inc. v. Pandora Media, Inc.*, Nos. 13 Civ 4037(LLS), 64 Civ. 3787(LLS), 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013) (emphasis added).

<sup>50</sup> See *ASCAP Comment*, *supra* note 16, at 36; *BMI Comment*, *supra* note 17, at 8.



Unquestionably, songwriters and publishers deserve to have their work valued appropriately, but a balkanization of the marketplace is a real danger with direct deals. It is imperative that creators are fairly compensated; songwriters must not be compelled to trade leverage and transparency for the mere hope that the big consolidated music publishers will negotiate in the artists' interests. There are serious concerns regarding threats to transparency and industry-wide standards if major publishers are allowed to withdraw partial catalogue and directly negotiate. These deals will be arrived at privately and with no requirement for transparency. We see elsewhere in the music industry how direct deals frustrate transparency through non-disclosure agreements.<sup>51</sup> The adoption of such an approach in the licensing of musical works will erode the notion of industry-wide standards, creating an unpredictable and inequitable licensing environment—particularly for vulnerable platforms such as local and non-commercial broadcasters.

While the major consolidated music publishers may have a large enough market position to successfully negotiate with licensees, independent publishers will certainly not be in the same position and will be unable to compete in the new regime. If partial or limited granting of rights is allowed, independent publishers will likely be stuck with the weakened PROs under the altered Consent Decrees with substantially less ability to make their catalogues available as their multinational peers, ultimately harming the songwriters who publish with them.<sup>52</sup>

As previously stated, songwriters receive direct payments from PROs and 50/50 splits as part of their member agreements with ASCAP and BMI. The major consolidated publishers are not regulated by the antitrust Consent Decrees, which provide songwriters with essential protections and predictability in compensation. If the publishers are allowed to pull partial catalog or leave the PROs altogether, there is nothing guaranteeing the 50/50 writer splits or direct songwriter payments remain intact.

There is also a practical risk to songwriters under partial publisher withdraw of rights in that there are often numerous songwriters within a single musical composition. As The Music

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<sup>51</sup> See Schwartz, *supra* note 10.

<sup>52</sup> Casey Rae, *The Blanket "Problem": Balancing the Needs of Songwriters with New Forms of Radio*, BILLBOARD (Apr. 21, 2014, 12:59 PM) <http://www.billboard.com/biz/articles/news/radio/6062737/the-blanket-problem-balancing-the-needs-of-songwriters-with-new>.

Managers Forum<sup>53</sup> recently pointed out, if publishers are allowed to withdraw partial rights and directly license, a co-writer not under a contract with the withdrawing publisher and thereby not covered by the direct license is left in a highly vulnerable position.<sup>54</sup> This would be an unacceptable situation for songwriters, and runs counter to the objectives of collective licensing, in which multiple parties receive maximum benefit by pooling resources under mutually agreed-upon standards.

Allowing partial or limited grants of rights to PROs may achieve some of the benefits of collective licensing by sacrificing transparency and oversight, which is a fundamental component for encouraging competitive practices. The major consolidated publishers will benefit while songwriters, independent publishers and small music platforms that are not in a strong position to negotiate will be unfairly disadvantaged.

## **QUESTION 6**

*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 major publishers and PROs support moving the rate court rate-setting process to a mandatory arbitration process, but arbitration lacks the transparency that is so crucial to a viable music licensing system. Instituting a mandatory arbitration system could turn out to be a step away from transparency that may, in fact, exacerbate anticompetitive behavior.

Arbitration records and judgments are typically sealed or confidential,<sup>55</sup> thereby precluding public disclosure and future records for evidentiary or precedential purposes. This is absolutely the wrong direction for music licensing and runs counter to the purposes of transparency. Like

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<sup>53</sup> Music Managers Forum, <http://www.themmf.net/> (last visited Aug. 4, 2014).

<sup>54</sup> Ed Christman, *U.K. 's Music Managers Forum Criticizes Sony/ATV's Recent Posture*, BILLBOARD (Jul. 17, 2014, 7:22 PM) <http://www.billboard.com/biz/articles/news/publishing/6164943/uks-music-managers-forum-criticizes-sonyatvs-recent-posture>.

<sup>55</sup> See *Global Reinsurance Corp. – U.S. Branch v. Argonaut Insurance Co.*, Nos. 07 Civ. 8196(PKC), 07 Civ. 8350(PKC), 2008 WL 1805459, at \*1 (S.D.N.Y. Apr. 18, 2008) (“The federal policy in favor of arbitration is promoted by permitting one of the principle advantages of arbitration — confidentiality — to be achieved.”).

direct deals that often contain nondisclosure agreements, this lack of transparency would keep songwriters and artists at an arms-length distance from key information, denying them essential knowledge as to how their rates are negotiated and delineated.<sup>56</sup> This means that songwriters will once again be left in the dark at a time when all steps should be taken to increase artist awareness of how their compensation is structured.

Arguments that mandatory arbitration will greatly expedite the rate-setting process and provide greater efficiency and royalty payments to songwriters is misleading. Firstly, it is important to note that while mandatory arbitration agreements seek to create efficiencies and lower costs, it is usually the repeat litigants who reap the benefits,<sup>57</sup> and arbitration awards tend to favor corporations over individuals,<sup>58</sup> potentially leaving songwriters, independent publishers and small music platforms like non-commercial broadcasters vulnerable. Finally, arbitration as a derivative of contract law, allows the parties to have more flexibility and control over the proceedings by choosing the rules which will apply to the process, selecting the arbitrator(s), and deciding what evidence (if any) will be heard.<sup>59</sup> Parties with less bargaining power will be substantially disadvantaged in arbitration proceedings. In other words, Pandora and the major publishers will be fine. We have concerns that the same cannot be said for songwriters, independent music publishers and new market entrants under proposed arbitration mechanisms.

While mandatory arbitration has historically been beneficial for repeat litigants of equal bargaining power, it has not been so for litigants in unequal bargaining situations. There is much controversy surrounding consumer and employee arbitration agreements for precisely this reason.<sup>60</sup> This opens up concerns about independent publishers, songwriters and smaller music

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<sup>56</sup> See Schwartz, *supra* note 10.

<sup>57</sup> Alon Klement & Zvika Neeman, *Private Selection and Arbitration Neutrality*, 4 (2010) available at: <http://www.iscr.org.nz/f620,17689/Arbitration37.pdf> (noting that arbitrator bias is a significant handicap for the effectiveness of arbitration as a dispute resolution mechanism and that when one of the parties is a “repeat player,” the theory that the arbitrator will tend to decide in the repeat player’s favor is supported in empirical research).

<sup>58</sup> This is particularly so in employment and consumer arbitration. See *infra* note 52.

<sup>59</sup> Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, THE AM. BAR ASS’N 3, [http://www.americanbar.org/content/dam/aba/publications/dispute\\_resolution\\_magazine/March\\_2012\\_Sussman\\_Wilkinson\\_March\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf).

<sup>60</sup> See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1759 (2011) (Breyer, J., Ginsburg, J., Sotomayor, J., Kagan, J., dissenting opinion) (“When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that

platforms who have rate disputes with ASCAP or BMI. These parties may no longer be able to rely on the Consent Decree-mandated rate-setting mechanism and the public forum it offers through the federal courts. Rather, they will be relegated to a contract law-derived, confidential and nontransparent arbitration system, not sure what the licensing rates are and how they were arrived at. While we welcome all efforts to bring songwriter compensation in line with contemporary market realities, we are unable to endorse methods for doing so that compromise transparency and artist leverage.

## **QUESTION 7**

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

There is no doubt that lowering transaction costs by streamlining the music licensing process would be efficient and effective reform, but it should not be done at the expense of songwriters, independent publishers and to the detriment of transparency.

While bundling rights and licensing may be appealing, there is antitrust concern with regard to how such rights are assigned. Websites like Expedia, Kayak, or Travelocity that allow consumers to book flights, hotels, car rentals and a number of other travel-related activities, have been scrutinized for this reason. While the interests of “disparate travel licensors are centrally managed,” they are not combined under one entity.<sup>61</sup> It has been suggested that this approach provides the benefits of “one-stop shopping,” but avoids the concerns of collusion.<sup>62</sup> While there

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arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power.”). *See also*, Fair Arbitration Act of 2011, S. 1186, 112th Cong. (2011) (proposing legislation to establish fair procedures for arbitration clauses in contracts); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011) (proposing legislation to interpret the Federal Arbitration Act to pertain to commercial entities of generally similar sophistication and bargaining power).

<sup>61</sup> Brian R. Day, *Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse*, 18 TEX. INTELL. PROP. L.J. 195, 197–198 (2010).

<sup>62</sup> *Id.* at 198. *See also* William F. Adkinson, Jr. & Thomas M. Lenard, *Orbitz: An Antitrust Assessment*, 16 ANTITRUST 76, 76 (2002).

are numerous travel websites,<sup>63</sup> the PROs and music publishers are already highly concentrated. If the PROs are allowed to bundle multiple rights in their licensing process, the disparate rights to be licensed will be both centrally managed and combined within two entities with an established history of unwelcome practices.

There is also a question regarding *forced* bundling, in which PROs create strong incentives or obstacles that would essentially compel licensees into broadened licensing arrangements with the PROs. Not only is this anticompetitive, but potentially disastrous given the issues with repertoire transparency<sup>64</sup> and publisher consolidation.<sup>65</sup> Concerns have already been demonstrated through licensees attempting to gain a per-program or per-segment license rather than the blanket licenses preferred by the PROs. To be clear: FMC supports blanket licenses for reasons of efficiency, but we understand that further bundling—absent transparency and a la carte options—may cause additional headaches for songwriters and end-users alike unless such arrangements are matched by appropriate oversight.

Furthermore, what are the implications for the Harry Fox Agency<sup>66</sup> (HFA) and the compulsory license under §115?<sup>67</sup> While the HFA is the sole administrator of mechanical royalties,<sup>68</sup> its market share has not been considered a violation of antitrust laws perhaps in part due to its “statutorily prescribed and guaranteed ‘compulsory license’ mechanism.”<sup>69</sup> As the very first compulsory license for musical compositions, Congress enacted the mechanical licensing under the 1909 Copyright Act to prevent music publishing monopolies from “purposely stifling . . .

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<sup>63</sup> See Xander Kaplan et al., *Top 25 Travel Websites*, CNN (Oct. 3, 2007, 3:44 PM) <http://www.cnn.com/2007/TRAVEL/traveltips/10/03/travel.sites/index.html?iref=mpstoryview>.

<sup>64</sup> See *supra* Question 4.

<sup>65</sup> See *supra* Question 1.

<sup>66</sup> HFA, <https://www.harryfox.com/public/AboutHFA.jsp> (last visited Aug. 3, 2014). “In 1927, the National Music Publisher’s Association established HFA to act as an information source, clearinghouse and monitoring service for licensing musical copyrights.”

<sup>67</sup> 17 U.S.C. § 115. See also *ASCAP Comment*, *supra* note 16, at 30–31.

<sup>68</sup> HFA, <https://www.harryfox.com/public/FAQ.jsp#12> (last visited Aug. 3, 2014). A mechanical license grants the rights to reproduce and distribute copyrighted musical compositions (songs) on phonorecords (i.e. CDs, records, tapes, and certain digital configurations).

<sup>69</sup> See Michelle E. Arnold, *A Matter of (Anti)trust: The Harry Fox Agency, the Performance Rights Societies, and Antitrust Litigation*, 81 TEMP. L. REV. 1169, 1187–1188 (2008).

reproductions.”<sup>70</sup> While this is not a guarantee that HFA will grant a compulsory license, it does provide a meaningful alternative in the licensing of mechanical royalties.<sup>71</sup>

Modifying the Consent Decrees to allow PROs to bundle rights in music licensing must not disadvantage songwriters, independent publishers, and new market entrants under the guise of efficiency. That said, many in the music sector—including FMC—see benefits from streamlining music licensing, but any efforts to this end must be accompanied by increased transparency obligations and appropriate structural oversight. In other words, were such bundles to be allowed, they must operate within either an explicit legislative framework, or at the bare minimum, enforceable Consent Decree protocols.

## CONCLUSION

FMC concludes this submission by acknowledging the difficulties of updating music licensing frameworks to reflect contemporary market realities. PROs play a vital role in the efficient licensing of musical works and the distribution of songwriter royalties. FMC supports viable and effective performing rights organizations that can act as leverage for songwriters and independent publishers and that embody transparency. It may be possible to achieve a statutory outcome that will advance equitable artist compensation, competition, transparency and growth, but it certainly isn’t a guarantee—especially in the short-term. Therefore, we feel strongly that the existing Consent Decrees must remain in effect and any modifications *must* contain transparency obligations and preserve direct payments and 50/50 splits for songwriters. FMC appreciates the opportunity to be a part of this important process and offer our organization as a resource to further inquiries into music licensing, the Consent Decrees and the impact of copyright and technology on musicians and composers.

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<sup>70</sup> See Arnold, *supra* note 69, at 1172.

<sup>71</sup> *Id.*