August 6, 2014

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

RE: Request for Public Comments on U.S. Department of Justice Consent Decree Review

Thank you for this opportunity to submit my comments regarding the United States Department of Justice's review of the consent decrees governing the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). I am submitting this paper to urge that, as the Department considers revising the consent decrees, it keeps the goal of providing fair compensation for songwriters at the forefront of their minds.

I. Introduction

My name is Dina LaPolt and I am a transactional music attorney in West Hollywood, California, with the law firm of LaPolt Law, P.C. For more than 16 years, I have represented recording artists, songwriters, producers, actors, and other owners and controllers of intellectual property. In addition, I started in the entertainment industry as a musician and songwriter. Thus, I have built my practice from the music creator's perspective. I have also taught a course entitled "Legal and Practical Aspects of the Music Business" for the UCLA Extension Program since 2001, and I teach and lecture all over the United States, Canada, and Europe on issues that affect creators' rights. Protecting creators and representing their interests has always been my main focus and my passion. I frequently take part in legislative and advocacy efforts relating to issues that impact my clients and the broader music creator community. Further, I am well-qualified to discuss this subject because a majority of our music clients utilize ASCAP or BMI's services, thus the consent decrees constantly impact them.

I am submitting this paper to represent the songwriter's perspective on this issue. The interests of music creators, the lifeblood of the entertainment industry, must be at the forefront of our minds as we discuss potential changes to laws that affect their interests. Previously, I submitted substantially similar comments on the consent decrees in response to the U.S. Copyright Office's Music Licensing Study: Notice and Request for Public Comment.[1] I applaud the Department for

[1] Dina LaPolt, *Comments in Response to the U.S. Copyright Office Music Licensing Study: Notice and Request for Public Comment*, May 23, 2014, http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Dina_LaPolt_MLS_2014.pdf.

opening up this topic for discussion, as the consent decrees are in severe need of revision or elimination in order to ensure fair compensation for songwriters.

II. The Consent Decrees Governing Performing Rights Organizations Must Be Abolished or Heavily Modified to Reflect the Modern Licensing Landscape

It is essential that we revise the consent decrees in order to fairly compensate songwriters and preserve the benefits of collective licensing for songwriters, licensees, and consumers. Collective licensing by the two performing rights organizations ("PROs"), ASCAP and BMI, is very beneficial to all parties involved because it is a highly efficient and effective manner of managing songwriters' performance rights and distributing royalties. This is largely due to the fact that the PROs represent the majority of American songwriters, thus they operate on a massive scale with substantial resources. This keeps transactions costs low and, because the PROs are nonprofit organizations, results in higher royalty payments to their member songwriters.

However, we are to the point where major publishers, representing a substantial portion of the works administered by the PROs, are considering withdrawing from the PROs altogether if the consent decrees are not revised to give rightsholders the flexibility to exploit their works in the manner they see fit in the free market. This would directly result in less money for self-administered songwriters and independent publishers, who do not have the resources to withdraw from the PROs.[2] Meanwhile, performance rights licensing would become more fragmented and inconvenient for third parties, reducing efficiencies and increasing transactions costs of licensing these rights.

Songwriters are severely prejudiced by the antiquated consent decrees governing the PROs, resulting in below fair market rates and potentially risking the loss of the benefits of collective licensing. Allowing negotiations to take place in the free market would result in fair license rates that adequately compensate songwriters. Further, permitting limited grants of rights to the PROs would more effectively allow songwriters to manage their rights by directly negotiating with licensees when beneficial to do so. We must revise the consent decrees in order to allow the PROs to operate effectively for the benefit of everyone involved in performance rights licensing.

---

[2] Independent parties are almost always disadvantaged in the music industry because of their lower bargaining power. This is shown by the recent debates between independent record labels and YouTube. YouTube has been accused of bullying and strong-arming independent labels in rights negotiations relating to YouTube's new paid subscription service. *See* Lars Brandle, *Indies Blast YouTube's 'Unnecessary and Indefensible' Tactics as Streaming Service Readies*, BILLBOARD, May 23, 2014, http://www.billboard.com/biz/articles/news/digital-and-mobile/6099114/indies-blast-youtubes-unnecessary-indefensible-tactics; Ben Sisario, *Indie Music's Digital Drag*, N.Y. TIMES, Jun. 24, 2014, http://www.nytimes.com/2014/06/25/business/media/small-music-labels-see-youtube-battle-as-part-of-war-for-revenue.html?_r=1.

A. The Consent Decrees No Longer Serve Their Intended Purpose

The Department entered into consent decrees with the two PROs in 1941 due to antitrust concerns and to protect the songwriters whose rights were at stake. This made sense at the time, when performing rights licenses were required for a very limited range of media, most of the licenses granted by the PROs were for small, unsophisticated businesses, and ASCAP and BMI were the only two organizations administering these rights for popular music.

However, these rationales are no longer relevant. Nowadays, performing rights licenses are needed for a multitude of music consumption methods, from traditional broadcast to online streaming and other methods. Further, the PROs are dealing with a range of licensees from small businesses to huge, sophisticated, technologically-savvy organizations that certainly can negotiate for themselves. Meanwhile, competition has increased exponentially, from the independent, for-profit American PRO SESAC, Inc. to foreign PROs and many other administrators and organizations representing these types of licenses which are not governed by consent decrees.

Additionally, having separate rate courts for both ASCAP and BMI is creating even more confusion among songwriters and publishers. Nothing obligates the rate courts to reach similar results on rate-setting or other issues. This could lead to vastly different treatment of two songwriters of the exact same composition if those writers are affiliated with different PROs.

Most importantly, as explained by the following sections, it is clear that the consent decrees are harming the very songwriters they were designed to protect.

B. The Rate-Setting Process Must Be Modified

The compulsory rates set by the rate courts for licenses are severely lower than their true market value. For example, the compulsory royalty rates for streaming musical compositions are one twelfth of the royalty rates paid to record labels for the same exact uses.[3] The inadequacy of the consent decrees and rate court system is clearly illustrated by the recent rate court decision which ruled that Pandora must pay merely 1.85% of its annual revenue to ASCAP.[4] In 2013, the

[3] Ed Christman, *New Legislation Seeks to Modernize Copyright Act to Benefit Songwriters*, BILLBOARD, Feb. 25, 2014, http://www.billboard.com/biz/articles/news/publishing/5915717/new-legislation-seeks-to-modernize-copyright-act-to-benefit.

[4] Ed Christman, *Rate Court Judge Rules Pandora Will Pay ASCAP 1.85 Percent Annual Revenue*, THE HOLLYWOOD REPORTER, Mar. 17, 2014, http://www.hollywoodreporter.com/news/rate-court-judge-rules-pandora-689221.

service paid a total of 4.3% of its revenue to PROs[5] while paying 49% to record companies for the use of master recordings.[6]

It has become clear that rate courts are not the most effective way to set licensing rates. Rate courts are far too cumbersome, expensive, and antiquated, and cannot keep up with the pace set by the new digital marketplace.

For example, under their consent decrees, ASCAP and BMI must immediately grant a performance license to any person or organization who applies for one, even if the parties have not agreed on a rate and even if the user performs a substantial amount of music. If the parties cannot reach an agreement and must take the case to the rate court, proceedings often take more than a year, during which a PRO and its songwriters are not compensated for the licensee's use of the PRO's music. In fact, some licensees employ the rate court as a dilatory tactic to use performance licenses for a time without having to compensate the PROs.

As discussed below, the free negotiation would be much more effective at reaching fair rates for songwriters. If that is not feasible, an alternate solution would be to implement an expedited arbitration process in place of the rate courts. Arbitration would be significantly faster and less expensive than rate courts, benefitting both songwriters and consumers.

C. Free Negotiation Would Result in Fair Market Value Rates for Songwriters

When it comes to license fees, the most important consideration for songwriters is that we absolutely do not expand the reach of compulsory rate-setting. Compulsory rates gravely harm songwriters by taking away their power of approval, and are often grossly unfair and do not reflect the true market value of a use. The free marketplace is much more effective. It is quicker, more efficient, and more equitable. Simply allowing parties to freely negotiate, rather than tying them to a slow administrative process, reaches a more just result that reflects a licensed use's true market value.

This is shown by the licensing practices for synchronization licenses, the type of license needed to play music in a film, television show, or any other visual media. These uses customarily pay the same amount for the use of both the musical composition and the master recording. Without the hindrance of a compulsory rate-setting system, industry custom for these licenses recognizes that songwriters and recording artists are equally integral to music and deserve equal compensation.

---

[5] Hannah Karp, *Showdown for Pandora*, THE WALL STREET JOURNAL, Jan. 20, 2014, http://online.wsj.com/news/articles/SB10001424052702304027204579332454120275882.

[6] Ben Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*, THE NEW YORK TIMES, Feb. 13, 2014, http://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html.

It is time that we turn performance rights over to the free market as well so that our songwriters can obtain just compensation for their work. While an expedited arbitration process would make great strides towards obtaining fair licensing rates for songwriters, this is only a partial fix—free negotiation is the only way to obtain the full value of a license.

D. Limited Grants of Rights Should Be Permitted

Another issue with the consent decrees is that publishers must grant PROs the right to administer either all or none of their performance rights. This is becoming a bigger problem as evidenced by the huge disparity between payments to songwriters and recording artists from digital streaming services. As mentioned above, major publishers have started considering withdrawing their catalogues from the PROs because they feel they can negotiate better rates independently, outside the rate court system.

To address this concern, ASCAP and BMI granted their members a limited withdrawal right allowing publishers to independently license their works for digital streaming services while keeping the rest of their rights with the PROs. However, the rate courts have held that their consent decree require the PROs to maintain all-or-nothing licensing systems. As a result, it is very possible that publishers might withdraw entirely from the organizations. This hurts the other songwriters represented by the PROs, because the PROs' revenues decrease while their operating costs do not. Because ASCAP and BMI are nonprofit organizations, less revenue directly results in less payout for their member songwriters and composers.

The PROs should be able to accept partial grants of rights from rightsholders so that copyright owners can effectively manage their assets in the way they choose while still taking advantage of the efficiencies and benefits of collective licensing. If a publisher believes that direct negotiation with licensees would help it obtain a better value in one instance, it should not be forced to withdraw all of its rights from a PRO to pursue this option. This does not have to be an all-or-nothing scenario, and imposing this restriction does not serve anyone's best interest.

It just does not make sense to maintain the consent decrees governing ASCAP and BMI's licensing practices. The consent decrees, both over 70 years old, cannot possibly adequately address licensing issues in the modern licensing landscape. As stated by Paul Williams in his June 25, 2014 testimony before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet, the ASCAP consent decree has not been updated since 2001, *before* the iPod hit stores, an event that dramatically changed the music marketplace.[7] There is no

[7] Paul Williams, Statement to the House, Committee on the Judiciary, *Music Licensing Under Title 17 Part Two*, Hearing, Jun. 25, 2014.

expiration date on the consent decrees and no system in place to regularly review their terms. Maybe the best solution would be to eliminate the consent decrees entirely.

III. Any Efforts to Streamline Licensing Must Maintain the Music Creator's Right of Approval

Only once we address the critical issue of fair compensation for songwriters is it appropriate to consider secondary concerns such as facilitating licensing for third parties. On this issue, music creators' biggest concern is that we do not expand compulsory licensing. I am categorically opposed to any change to the licensing system that reduces the creator's right of approval. Any new licensing system must maintain this right.

The Department has asked whether the consent decrees should be modified to permit rights holders to grant ASCAP and BMI additional rights in addition to the right of public performance. In general, I am in favor of allowing creators to grant any organization the rights to administer any or all of their rights, so long as creators have the choice whether or not to participate. The key consideration is that creators voluntarily enter these arrangements, and are not forced into a compulsory licensing scheme. And importantly, creators must be able to grant third parties these rights on a platform-by-platform basis. For example, if a songwriter wants to use ASCAP or BMI to collect his or her performance royalties from radio, but prefers to independently negotiate with digital streaming services, the songwriter should be free to do so.

A voluntary intermediary system would be fine, as long as creators can elect to participate by their own choice and are not forced into the system. So long as such a system is non-compulsory, then facilitating these transactions could benefit all parties. But we must be careful that, if we streamline the licensing process for musical compositions, we do not open the door to further compulsory licensing.

For example, allowing the PROs to administer a wide range of rights cannot snowball into a scenario where creators lose more control over their work by, for example, losing the right to approve derivative works. As I explained in depth in a previous comment paper to the Department of Commerce Internet Policy Task Force, creators are deeply concerned with any potential uses of their work that would compromise the moral integrity of their music.[8] Thus, any streamlined licensing system must be narrowly tailored to prevent further expansion of any compulsory license-granting and to maintain the creator's right to freely negotiate rates and uses of their works.

---

[8] Dina LaPolt and Steven Tyler, *Public Comments on the Green Paper*, Feb. 10, 2014, http://www.uspto.gov/ip/global/copyrights/lapolt_and_tyler_comment_paper_02-10-14.pdf.

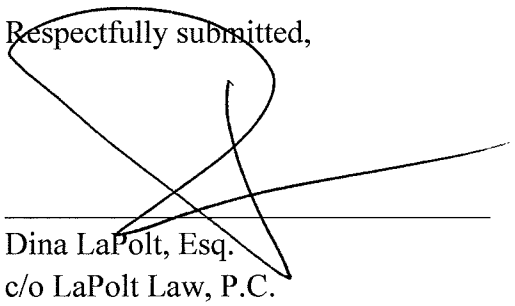
IV. Conclusion

While the consent decrees governing ASCAP and BMI were justified at their creation, it is clear that their provisions did not contemplate the new issues and challenges imposed by the digital age. It is time to substantially revise the decrees, or eliminate them entirely, to ensure that songwriters are fairly compensated for their works and can effectively manage their rights in the way they choose and to preserve the benefits of collective licensing for all parties.

Free negotiation is highly desirable over the current rate court system because it would ensure that songwriters can obtain the true value of their works when granting licenses. If this is not feasible, an expedited arbitration process could also be an effective second choice. Further, we should allow partial grants of rights to the PROs so that songwriters can directly negotiate with licensees when appropriate while still taking advantage of the benefits of PRO membership. Finally, PROs should be able to administer a wide range of rights in music so long as creators voluntarily opt-in to these arrangements, and we do not expand the scope of compulsory licensing.

Thank you for your time and consideration.

Respectfully submitted,



Dina LaPolt, Esq.
c/o LaPolt Law, P.C.
9000 Sunset Blvd., Suite 800
West Hollywood, CA 90069
(310) 858-0922