"Selective Withdrawal" of New Media Rights from ASCAP and BMI

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The National Music Publishers' Association ("NMPA") is pleased to submit these comments in response to the June 5, 2019 request for public comments by the Department of Justice ("DOJ") regarding its review of the consent decrees in United States v. American Society of Composers, Authors and Publishers ("ASCAP"), 41 Civ. 1395 (S.D.N.Y.) and United States v. Broadcast Music, Inc. ("BMI"), 64 Civ. 3787 (S.D.N.Y.). These comments focus on whether copyright owners should be permitted to "selectively withdraw" digital public performance rights from the repertories of ASCAP and BMI. Presently, copyright owners may not selectively withdraw from ASCAP or BMI in light of judicial decisions interpreting the language of the consent decrees. However, there is no antitrust enforcement-based reason supporting this prohibition, which harms songwriters and music publishers; amounts to an anti-free market regulation that is inconsistent with DOJ policy, antitrust law, and copyright law; and is not necessary to serve any interests of the consent decrees.

The NMPA is the principal trade association representing the U.S. music publishing industry. Its mission is to promote and advance the interests of music's creators, and its members include companies and individuals of all catalog and revenue sizes. The NMPA believes that free, unregulated music licensing markets ensure that copyright owners reap the fair value of their intellectual property rights and have economic incentives to write more music.[1] Free markets also guarantee consumers the widest variety of music options.

[1] *See* Federal Trade Commission and DOJ, *Excessive Prices* (Oct. 17, 2011) at ¶ 9, *available at* https://www.justice.gov/sites/default/files/atr/legacy/2014/05/30/278823.pdf ("[A] market pricing mechanism promotes the most efficient allocation of resources in a free market economy, and this same efficient allocation of resources is the bedrock of antitrust policy and enforcement in the U.S. . . .").

I. Summary of Argument.

To the extent the ASCAP and BMI consent decrees continue to exist, they should be modified to permit copyright owners to withdraw digital rights from the ASCAP and BMI repertories if they so choose. This modification, to which we refer herein as "selective withdrawal," would empower copyright owners to decide whether to license their works directly to digital service providers ("DSPs") or whether to continue to license to such music users through the performance rights organization ("PRO") system. Increased direct licensing between music publishers and DSPs would be efficient and procompetitive, not to mention fair to music publishers and songwriters. Today, owners of musical works are hamstrung in their ability to reap the market value of their intellectual property because DSPs can take advantage of regulatory consent decree provisions never meant for them. There is no legitimate antitrust enforcement-based reason to continue to regulate music publishers and songwriters in this manner.

Selective withdrawal is consistent both with the fact that the right of public performance is not regulated as a matter of copyright law, and with antitrust law principles, which generally favor direct licensing over collective licensing. By contrast, the prohibition on selective withdrawal is an unfair de facto regulation that, without any countervailing antitrust enforcement justification, constrains the ability of copyright owners to exercise their property rights vis-à-vis DSPs. DSPs are much larger and more powerful than the music licensees who were the intended beneficiaries of the ASCAP and BMI consent decrees. Furthermore, the music publishers and songwriters who are today regulated by the prohibition on selective withdrawal were never alleged to have violated antitrust laws in the first place.

Until the recent emergence of digital streaming as the dominant form of music consumption, ASCAP and BMI licensed performance rights primarily to a diffuse array of "traditional" businesses that play music for profit: radio and TV stations, and brick-and-mortar businesses like clubs, concert venues, bars, and restaurants.[2] In this traditional licensing context, the PRO blanket licensing system generates procompetitive benefits for both rightsholders and licensees. Without PRO blanket licensing, most music publishers and songwriters would find it virtually impossible to enforce their rights against these types of users, and many of the users, especially small businesses, would find it virtually impossible to obtain the licenses needed to play music lawfully. The consent decrees, which were put in place in 1941, were designed to enable ASCAP and BMI to continue to issue blanket licenses to traditional users while reducing what the DOJ saw as a threat of anticompetitive harm posed by collectives that possessed significant market power and bargaining leverage.

But the marketplace dynamics that led to the PRO blanket licensing system are not the same with respect to DSPs, and copyright owners therefore should be permitted to choose whether to license their digital performance rights through a PRO or whether instead to license them directly to users. In the last 5-10 years, the economic and technological landscape of the music marketplace has changed dramatically such that today, a very large number of public performances of musical works occur via a small handful of digital streaming services. The music distribution market today is dominated by companies that are exponentially larger than the music publishing industry as a whole,

[2] We refer to these businesses as "traditional" licensees to distinguish them from digital licensees.

including Google, Amazon, and Apple, each of which has the resources and the size to negotiate licenses directly with copyright owners and often does so. In unregulated musical copyright areas – such as, for example, relating to lyrics reproduction rights or synchronization – digital users routinely negotiate with copyright owners for full-catalog licenses without the involvement of a PRO-like middleman. It is only for public performance rights that, for purely historical reasons unrelated to present-day antitrust justifications, these same companies can take advantage of consent decree provisions and avoid having to negotiate in a free market. For instance, if one of these DSPs is unable to negotiate an ASCAP or BMI license at a price it deems favorable, it can bring ASCAP or BMI to "rate court," forcing songwriters and publishers to foot ASCAP's or BMI's litigation costs. This is not the case in other, unregulated areas.

The players in the concentrated DSP market do not need the ASCAP and BMI consent decrees to protect them from music publishers and songwriters. They should have no entitlement to purchase performance licenses from regulated licensing collectives, as opposed to from rightsholders directly in the free market. The right of public performance is not regulated by copyright law, and selective withdrawal would allow music publishers, who were never subject to antitrust enforcement actions, to exercise that right.

We are aware that ASCAP and BMI have proposed to the DOJ that their consent decrees should be amended in ways that are unrelated to selective withdrawal. We are studying the other changes requested by ASCAP and BMI and consulting with industry stakeholders on them. These comments argue only for selective withdrawal, which is a

separate issue that should be considered by the DOJ regardless of what other actions it may take in respect of the ASCAP and BMI consent decrees.

II. Background.

A. The public performance right.

Every recorded song begins with a musical composition, the copyright in which is owned by a songwriter and/or music publisher.[3] United States law grants the owner of such a copyright several exclusive rights, including the right to perform the song publicly.[4] To lawfully perform a song in public – that is, to stream it online or play it on the radio, on television, or in a business establishment – one must first obtain a license from the copyright owner(s).

Importantly, the right of public performance is not regulated for musical compositions. This stands in contrast with regulation of other aspects of musical copyrights, including the right to "mechanically" reproduce copyrighted musical works.[5] Any discussion of selective withdrawal must account for the fact that Congress knows

[3] 17 U.S.C. § 201.

[4] 17 U.S.C. § 106(4); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4 (1979) ("[s]ince 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit") ("*BMI v. CBS*").

[5] 17 U.S.C. § 115.

how to regulate copyright holders and has done so, but the right of music publishers and songwriters to publicly perform their music is not regulated.

B. Performing rights organizations.

For historical and practical reasons, the performance rights to most music performed in the United States are administered by PROs. PROs aggregate public performance rights in musical compositions and license them collectively to the thousands of users who want to play music in public. Songwriters typically join a carefully selected PRO early in their careers with the understanding that the PRO will license their interests in their songs, monitor usage to detect unauthorized performances, enforce rights, conduct surveys to estimate the frequency with which compositions are performed, and distribute payments.[6]

Collective licensing of public performance rights is not required by law. Rather, it developed as a voluntary solution to the inefficiencies and high transaction costs associated with licensing performance rights to the disparate array of traditional businesses that wish to use music.[7] By licensing works collectively, PROs expand the market for lawful musical performances and reduce transaction costs for both licensors and licensees. Without collective licensing, many copyright owners would have no

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[6] U.S. Copyright Office, *Views of the U.S. Copyright Office Concerning PRO Licensing of Jointly Owned Works* at 26 (Jan. 29, 2016), *available at* https://www.copyright.gov/policy/pro-licensing.pdf ("Songwriters and publishers have . . . indicat[ed] that they carefully choose the PRO with which they affiliate based on their perception of which organization will bring them the most benefit." (footnote omitted)).

[7] *BMI v. CBS*, 441 U.S. at 5 (ASCAP was formed "because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses").

serious prospect of licensing their works broadly in traditional contexts, and many users would have no realistic way to lawfully play music. As the Supreme Court stated in *BMI v. CBS*, "[a] middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided."[8] The DOJ has observed that, "[i]n the United States, non-dramatic performance rights are the only copyrights in musical compositions that are typically licensed collectively, rather than on an individual basis."[9]

C. ASCAP, BMI, and the consent decrees.

ASCAP and BMI, founded in the early 20th century to promote and protect copyright owners, are the largest PROs in the United States.[10] Today, each represents hundreds of thousands of songwriters and millions of copyrights. They compete with two other PROs, SESAC and Global Music Rights ("GMR"), for songwriter business.

More than 75 years ago, the DOJ sued ASCAP and BMI, alleging that their blanket licenses were anticompetitive restraints of trade.[11] At the time, the radio industry was in

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[8] *Id.* at 20; *see also ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 592 (2d Cir. 1990) (noting the "major benefit" of the blanket license); U.S. Copyright Office, *Copyright and the Music Marketplace* (Feb. 2015) at 170, *available at* https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf ("Throughout this study, the Office has heard consistent praise for the efficiencies of blanket licensing[.]").

[9] Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, No. 41-cv-1395, at 6 (Sept. 4, 2000).

[10] *See generally BMI v. CBS*, 441 U.S. at 4-5, 10-12 (describing history of ASCAP and BMI).

[11] *Id.*

its infancy, and broadcasters and other music users were believed to be small and lacking in bargaining power or the ability to negotiate directly with more powerful PROs. In 1941, the DOJ's enforcement actions were resolved via perpetual consent decrees.[12] The decrees, which were intended to prevent ASCAP and BMI from abusing their market power notwithstanding the significant procompetitive benefits of blanket licensing, are still in effect today. In their 78-year histories, each decree has been modified only twice. ASCAP's decree was last amended in 2001, and BMI's was last amended in 1994.[13] Because the decrees do not contain provisions providing for "sunset" over time or requiring regular review, there is no guarantee they will ever be changed, even though the music distribution and consumption marketplaces have changed drastically in the last 5-10 years (let alone since 1941).

By the terms of the consent decrees, ASCAP and BMI are required to provide a public performance license to anyone who requests one, and licensees may (and often do) begin using music before royalty rates are negotiated.[14] Although licensees may negotiate performance licenses directly with copyright owners in a free market, they normally take the more favorable, consent decree-regulated licenses from ASCAP and

[12] *Id.* at 11-12 & n.20 (discussing 1941 ASCAP and BMI consent decrees).

[13] *See* Second Amended Final Judgment, *United States v. ASCAP*, No. 41-cv-1395 (S.D.N.Y. June 11, 2001) ("AFJ2"); Final Judgment, *United States v. BMI*, No. 64-cv-3787 (S.D.N.Y. Nov. 18, 1994).

[14] *E.g.*, AFJ2 § VI (requirement that ASCAP "grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory"); § IX.E (while a license fee is being determined, "the music user shall have the right to perform any, some, or all of the works in the ASCAP repertory to which the application pertains").

BMI. If a user cannot negotiate a royalty rate with ASCAP or BMI, the decrees provide that the user may sue in United States District Court for a judicial determination of the license price.[15] When ASCAP or BMI is brought to "rate court," its songwriters and publisher members bear the costs. Prospective licensees can perform music while the proceedings are pending, and they need not set money aside for the use of music before a rate has been determined.[16]

D. Selective withdrawal is impermissible today.

Beginning in 2013, certain music publishers sought to selectively withdraw from ASCAP and BMI the right to license their compositions as "New Media Transmissions" to "New Media Services," while continuing to allow ASCAP and BMI to license such compositions to traditional public performance licensees. Broadly speaking, these publishers wanted to reclaim their right to license their works directly to digital distributors, while allowing ASCAP and BMI to retain the right to license to traditional users.[17]

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[15] *E.g.*, AFJ2 § IX. This is so even though courts routinely acknowledge that they are poorly equipped to make regulatory pricing determinations. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) ("Courts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" (citation omitted)); *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) ("How can the court determine this price without . . . acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? . . . . [A]ntitrust courts normally avoid direct price administration . . . .").

[16] *E.g.*, AFJ2 § IX.E.

[17] In April 2011, ASCAP amended its Compendium Rules to provide that "[a]ny ASCAP Member may modify the grant of rights made to ASCAP . . . by withdrawing from ASCAP the right to license the right of public performance of certain New [M]edia Transmissions." *See* ASCAP Compendium Rule 1.12.1 (2014), *available at* https://www.ascap.com/~/media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf. "New Media Transmissions" were defined as including, among other things, digital audio transmissions. *Id.* at Rule 1.12.9. BMI published a

In rate court proceedings later that year, the federal judges responsible for overseeing the ASCAP and BMI consent decrees were asked to decide whether the selective withdrawals were consistent with the consent decrees. Both judges answered that question in the negative.

With respect to ASCAP, Judge Cote ruled that "musical compositions remain in the ASCAP repertory so long as ASCAP retains any licensing rights for them."[18] Judge Cote therefore concluded that copyright owners' purported withdrawals of digital rights from ASCAP "d[id] not affect the scope of the ASCAP repertory" subject to licensing by digital services.[19] Selective withdrawals were ineffective as a matter of law, and ASCAP was required to license digital rights in all the works in its repertory to anyone requesting such a license.[20]

Judge Stanton interpreted the BMI consent decree to mean that when music publishers withdrew their digital rights, BMI could no longer "deal in or license those compositions to anyone."[21] Although the music publishers may have believed themselves

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"Digital Rights Withdrawal Addendum" that defines selective withdrawal in a similar manner.

[18] *Pandora Media, Inc. v. ASCAP*, No. 12-cv-8035, 2013 U.S. Dist. LEXIS 133133, at *20 (S.D.N.Y. Sept. 17, 2013) (internal quotation marks omitted) ("*Pandora v. ASCAP*").

[19] *Id.* at *35-36.

[20] *Id.*

[21] *BMI v. Pandora Media, Inc.*, No. 13-cv-4037, 2013 U.S. Dist. LEXIS 178414, at *11 (S.D.N.Y. Dec. 19, 2013)

to be selectively withdrawing digital rights, they in fact withdrew such compositions from BMI's repertory for all purposes.[22]

These decisions were based on principles of consent decree interpretation, not antitrust or copyright law, and the NMPA takes no position on whether Judges Cote and Stanton interpreted the decrees correctly. Regardless, as argued herein, prohibiting selective withdrawal is wrong and unfair as a matter of antitrust and copyright law and public policy, and the decrees should be modified to expressly permit selective withdrawal.

III. The consent decrees should be amended to permit selective withdrawal.

A. The prohibition on selective withdrawal improperly regulates copyright owners, who were never alleged to have violated antitrust law, while enlarging ASCAP and BMI.

The consent decrees' prohibition on selective withdrawal is a regulation on copyright owners themselves, which lacks any countervailing justification needed to address any anticompetitive threat posed by ASCAP and BMI. The prohibition hinders the ability of music publishers and songwriters to license their public performance rights in a free market and reap the fair value of such rights, but it does not stop or prevent anticompetitive practices by ASCAP and/or BMI. If anything, the prohibition on selective withdrawal enlarges ASCAP and BMI by expanding the scope of rights in their repertories.

Regulating copyright owners in this manner is improper and is inconsistent with the fact that antitrust law is an enforcement mechanism, not a regulatory one.[23] The

[22] *Id.* at *15.

[23] *See, e.g.*, Assistant Attorney General Makan Delrahim, Remarks at the Am. Bar Ass'n's Antitrust Fall Forum (Nov. 16, 2017), *available at* https://www.justice.gov/

antitrust lawsuits that led to the consent decrees were brought against ASCAP and BMI, not any individual music publisher or songwriter. Therefore, the consent decrees should serve, if anything, as a check on ASCAP and BMI, not as regulations on music publishers, songwriters, and others who were not alleged to have violated the antitrust laws. A consent decree is a contract between the parties to a lawsuit, but music publishers and songwriters were not defendants in the suits against ASCAP and BMI that gave rise to the decrees, they are not parties to the consent decrees, and they should not be regulated by those decrees.[24] To the NMPA's knowledge, the DOJ has never brought any antitrust enforcement action against any music publisher or songwriter relating to public performance rights licensing.

Because the prohibition on selective withdrawal is a regulation on music publishers and songwriters who were never alleged to have violated antitrust law, it is contrary to DOJ policy. The DOJ Antitrust Division Manual states that consent decrees are an appropriate means of resolving enforcement actions to the extent that they "(1) stop . . . illegal practices . . . , (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred."[25] The prohibition on selective withdrawal runs afoul of these guidelines. It does not curtail potential harm to competition

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opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar ("[A]ntitrust law is law enforcement, it's not regulation. At its best, it supports reducing regulation . . . ."); *Excessive Prices* at ¶ 9 ("market pricing . . . is the bedrock of antitrust policy and enforcement in the U.S.").

[24] *Pandora v. ASCAP* at *11 ("[c]onsent decrees 'reflect a contract between the parties (as well as a judicial pronouncement), and ordinary rules of contract interpretation are generally applicable'" (quoting *Doe v. Pataki*, 481 F.3d 69, 75 (2d Cir. 2007))).

[25] Department of Justice, *Antitrust Division Manual* at IV-50 (5th Ed.).

by ASCAP and BMI; it only serves to constrain the behavior of rightsholders who were not alleged to have committed "illegal practices" or other "violation[s]" in the first place. Selective withdrawal should be permitted for this reason alone.

B. Selective withdrawal encourages procompetitive direct licensing while preserving the core efficiencies of the PRO blanket licensing system.

Because of the prohibition on selective withdrawal, music publishers today face an unfair choice when it comes to licensing digital performance rights. On one hand, a copyright owner can withdraw a musical composition from ASCAP or BMI entirely and lose the ability to license such composition through the blanket licenses altogether. This option severely harms the copyright owner's ability to license to traditional licensees at all. On the other, a copyright owner can choose to license all performance rights through a PRO, in which case DSPs can take advantage of World War II-era consent decree provisions never intended for them, such as the provisions concerning rate court proceedings, which the DSPs can use to drain the resources of music publishers and songwriters to obtain better deal terms, all the while using music while such proceedings are pending.

As a practical matter, music publishers did not withdraw from ASCAP and BMI after the 2013 decisions prohibiting selective withdrawal, and it is not clear if they would do so if the prohibition were to continue. However, forcing music publishers into this unfair dilemma is inconsistent with both antitrust and copyright law, each of which favors selective withdrawal. Selective withdrawal both encourages direct licensing where it is efficient to do so (i.e., in the digital streaming market) and maintains the core benefit of the PRO system by continuing to allow ASCAP and BMI to provide performance licenses

to traditional music users, many of which would have no realistic way to play music lawfully without PRO blanket licenses.

1. Selective withdrawal encourages direct licensing of digital performance rights, which is procompetitive and efficient.

If rightsholders were permitted to selectively withdrawal digital rights from ASCAP and BMI, the NMPA believes that there would be an increase in direct licensing between music publishers and DSPs. Direct licensing of public performance rights is generally procompetitive. As the DOJ explained in 2010, "[d]irect licensing between rights holders and users establishes the most effective market-based constraint on BMI's pricing because it places an upper limit on the price that BMI can charge for the blanket license."[26] Today, the ASCAP and BMI decrees ensure that publishers can license directly precisely because direct licensing is a competitive check on the market power of ASCAP and BMI.[27]

Direct licensing between music publishers and DSPs would be efficient. The PRO system was set up in the early 20th century to provide a solution to the practical challenges posed by a licensee market comprised of many thousands of geographically disparate music users. But the DSP market bears no resemblance to that market, and no such practical challenges exist with respect to direct licensing.

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[26] *See* Memorandum of the United States on Decree Construction Issues, No. 1:08-cv-216, Dkt. No. 24, at 2 (S.D.N.Y. Apr. 13, 2010) *available at* https://www.justice.gov/atr/case-document/file/489856/download.

[27] *See, e.g.*, *CBS v. ASCAP*, 620 F.2d 930, 935-36 (2d Cir. 1980) ("[T]he opportunity to acquire a pool of rights does not restrain trade if an alternative opportunity to acquire individual rights is fully available."); *United States v. ASCAP (In re Salem Media of Cal., Inc.)*, 902 F. Supp. 411, 422 (S.D.N.Y. 1995) ("The availability of source or direct licensing has been recognized as a counterweight to ASCAP's bargaining power.").

Streaming dominates the music marketplace today, accounting for 75 percent of music industry revenues as reported by the Recording Industry Association of America.[28] The vast majority of music streamed in the United States is consumed via one of five very large companies – Apple, Amazon, Google/YouTube, Spotify, and Pandora – that individually and collectively dwarf not only every individual music publisher, but the music publishing and songwriting industries as a whole. By some estimates, these five DSPs account for more than 90 percent of music streamed in the United States today.[29] They bring in hundreds of billions in yearly revenue and have a combined market capitalization

[28] Recording Indus. Ass'n of Am., *Mid-Year 2018 RIAA Music Revenues Report*, *available at* https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report.pdf. Although the NMPA does not maintain data regarding the extent to which streaming accounts for music publishing revenues, the figure is likely less than 75 percent. *See* Ed Christman, *NMPA Announces 11.8% Member Revenue Growth to $3.3B at Annual Meeting* (June 12, 2019), *available at* https://www.billboard.com/articles/business/8515757/nmpa-member-revenue-growth-david-israelite-annual-meeting. The NMPA estimates that approximately 55 percent of music publishing revenues in 2018 were attributable to performance royalties, about 33 percent of which were attributable to digital sources. *Id.* However, streaming also generates non-performance royalties, including mechanical royalties.

[29] *2017 Streaming Price Bible! Spotify per Stream Rates Drop 9%, Apple Music Gains Marketshare of Both Plays and Overall Revenue*, The Trichordist (Jan. 15, 2018), *available at* https://thetrichordist.com/2018/01/15/2017-streaming-price-bible-spotify-per-stream-rates-drop-9-apple-music-gains-marketshare-of-both-plays-and-overall-revenue/; *see also* Russ Crupnick*, While World Awaits iPhone 8, Apple Music Gains Traction with iOS Users*, Music Watch (Sept. 6, 2017), *available at* https://www.musicwatchinc.com/blog/while-world-awaits-iphone-8-apple-music-gains-traction-with-ios-users/; *On the Rise: Steady Growth for Podcasts, Rapid Growth for Smart Speakers*, Edison Research (Mar. 8, 2018), *available at* https://www.edisonresearch.com/infinite-dial-2018/.

that exceeds $2 *trillion*.[30] By contrast, the *entire music publishing and songwriting industries* brought in revenues of $3.33 billion in 2018.[31]

There can be no serious dispute that, unlike the traditional public performance licensees that have been served for decades by ASCAP and BMI, the DSP market is highly concentrated, and each DSP has significant bargaining power and the resources to procure direct licenses from a broad range of rightsholders, as each does today in other unregulated areas. All in all, the drastic shift in market power as between music's creators and its licensees means that certain risks of anticompetitive harm that may have justified the consent decrees in 1941 are not present in 2018 with respect to DSPs, and that the equities squarely favor permitting rightsholders to selectively withdraw their digital rights.

PROs do not generate the same efficiencies with respect to enforcement and monitoring functions in the digital world. The collective enforcement and monitoring services performed by PROs are critical with respect to traditional licensees, as individual music publishers would have little prospect of enforcing their rights against the thousands of businesses across the United States that play music. With respect to digital performance rights, however, a music publisher can enforce its own rights simply by logging in and searching for uses of its works. In 2000, the DOJ foresaw technological developments that would improve the efficiency of direct performance rights licensing and

[30] In 2018, per their annual reports filed with the SEC, Apple's revenues exceeded $265 billion, Amazon's $232 billion, Google's $136 billion, and Spotify's $5 billion. These companies are presently valued at approximately $905 billion (Apple), $895 billion (Amazon), $820 billion (Google), and $28 billion (Spotify). Earlier this year Sirius XM completed its $3.5 billion acquisition of Pandora.

[31] This estimate is based on revenue figures reported to the NMPA by its members, which include every commercially significant music publisher in the United States. *See* Christman, *supra* n. 28.

obviate the need for collective licensing. In a statement that predated online streaming and the inception of Spotify, YouTube, and so forth, it wrote:

> Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of the justifications for collective licensing of performance rights by PROs.[32]

Technologies developed in the intervening 19 years do, in fact, permit rightsholders to engage in efficient, direct licensing with DSPs. The consent decrees should be tailored to reflect the current state of technology by removing the prohibition on selective withdrawal.

If there were any doubt that direct public performance licensing between music publishers and DSPs would be efficient, the fact that there exist today well-functioning, direct licensing marketplaces for other, unregulated aspects of copyrights removes it. Today, music publishers routinely license their unregulated rights – such as the rights to synchronize music with video, reproduce lyrics, and produce sheet music – to DSPs on a full-catalog basis, without the involvement of a PRO-like middleman.[33] To be certain, these include the same DSPs – Google/YouTube, Amazon, Apple, Spotify, and Pandora

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[32] Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *supra* note 9, at 9 n.10.

[33] *See, e.g.*, *Facebook and Sony/ATV Music Publishing Announce Licensing Agreement*, Variety (Jan. 8, 2018), *available at* https://variety.com/2018/biz/news/facebook-and-sony-atv-music-publishing-announce-licensing-agreement-1202656832/; Roy Trakin, *Rap Genius Signs Deal with Warner/Chappell*, The Hollywood Reporter (July 7, 2014), *available at* https://www.hollywoodreporter.com/news/rap-genius-signs-deal-warner-717005; Adi Robinson, *YouTube Signs Music Licensing Deal with BMG and Eight Other Publishers*, (Jun. 6, 2012), *available at* https://www.theverge.com/2012/6/6/3067636/youtube-music-licensing-deal-bmg.

– that take advantage of the consent decrees in securing rights from ASCAP and BMI in the performance rights space. In the experience of NMPA and its members, direct, free market licensing works well in markets for unregulated aspects of music copyrights and does not pose antitrust concerns. There is no reason to believe that free market licensing of the right of public performance for digital uses would be any different.

Similarly, in the market for recorded music, record labels negotiate licenses directly and in a free market with interactive streaming services. If antitrust consent decrees are not required to regulate the licensing of rights by record labels to DSPs, they likewise should not be required to regulate licensing between music publishers and DSPs. In the United States today, record companies and artists make exponentially more than music publishers and songwriters.[34] The NMPA believes that this disparity is caused by the burdensome regulations, including the prohibition on selective withdrawal, that music publishers and songwriters, but not recording companies and artists, face in the United States. The NMPA believes that if there is to be any disparity between artist pay and songwriter pay, that result should be dictated by the free market and not artificial regulations.

[34] About 12 cents of every dollar of Spotify's revenues go to music publishers and songwriters via mechanical and performance royalties, while about 59 cents go to sound recording owners. *See* Jordan Bromley, *How Does Music Streaming Generate Money?* (Oct. 12, 2016), *available at* https://www.manatt.com/Insights/News/2016/How-Does-Music-Streaming-Generate-Money. The breakdown is similar with respect to Apple Music, with about 14 cents going to music publishers and songwriters, and 58 cents going to sound recording owners. *Id.* In contrast with the music publishing industry, which, per NMPA data, brought in approximately $2.9 billion in revenue in 2017, the recorded music industry brought in $8.7 billion that year. *See* Joshua Friedlander, *News and Notes on 2017 RIAA Revenue Statistics*, http://www.riaa.com/wp-content/uploads/2018/03/RIAA-Year-End-2017-News-and-Notes.pdf.

Understandably, DSPs would like to be able to continue to rely on the consent decrees, presumably because they believe that free market negotiations will lead to higher prices for digital performance rights. But the prospect of prices negotiated in a free market that properly reflect supply and demand conditions is not a reason to retain the prohibition on selective withdrawal. The antitrust laws exist to protect free markets, not create artificial price controls or otherwise regulate them. As the previous Antitrust AAG, Bill Baer, said: "We don't use antitrust enforcement to regulate royalties. That notion of price controls interferes with free market competition and blunts incentives to innovate."[35] Indeed, the DOJ should approach the question of selective withdrawal from a law enforcement perspective. Unless there is reason to believe that the DOJ could obtain a judgment today that would, as a matter of antitrust law, force copyright owners to license their public performance rights to digital services via ASCAP and BMI – and the NMPA believes that there is none – the prohibition on selective withdrawal should be lifted.[36]

Similarly, the DOJ should reject arguments that the prohibition on selective withdrawal should remain in place because DSPs have built a reliance interest on the ASCAP and BMI consent decrees. The consent decrees were not and could not have

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[35] Assistant Attorney General William Baer, Reflections on the Role of Competition Agencies When Patents Become Essential, Remarks at the 19th Annual International Bar Association Competition Conference at 10 (Sept. 11, 2015), *available at* http://www.justice.gov/opa/file/782356/download.

[36] *See generally* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, William E. Kovacic: An Antitrust Tribute – Liber Amicorum (Vol. 1) (2013) (discussing "regulatory" consent decrees that "place the agency in the position of monitoring or supervising the firm's compliance with remedial obligations or imposing conditions that extend beyond what the agency would likely be able to obtain after successful litigation") *available at* https://www.law.gmu.edu/assets/files/publications/working_papers/1318AntitrustSettlements.pdf.

been written with DSPs in mind. The consent decrees came into existence in an entirely different music marketplace, and DSPs have existed for only small fraction of their history. Although DSPs today are able to take advantage of provisions from the analog radio era, this is purely a fortuity: it has nothing to do with present-day marketplace dynamics or a need for antitrust policing in the digital performance rights space, and is not a reason to leave the prohibition in place.

To the extent that a music publisher or songwriter wishes to selectively withdraw its digital rights and license such rights directly to DSPs, public policy, and antitrust law specifically, supports that course of action.[37] To be certain, copyright owners who do not wish to license directly should not be required to withdraw their digital rights from ASCAP and BMI. But regulations should not prohibit copyright owners' selective withdrawal and allow digital services to exploit the ASCAP and BMI consent decrees, which were developed in the context of an entirely different market, to further their own financial and competitive interests.

2. Selective withdrawal preserves the procompetitive benefits of blanket licensing.

Finally, selective withdrawal maintains the core procompetitive benefit of the PRO system: the collective licensing of public performance rights to traditional licensees. PROs came into existence to collectivize copyright licensing and enforcement functions

[37] Selective withdrawal does not mean that a copyright owner can discriminate between digital licensees. For example, a copyright owner could not withdraw its digital rights from ASCAP for purposes of licensing to Pandora, but not withdraw such rights with respect to Spotify. Selective withdrawal means the withdrawal of a class of rights, and that such rights would have to be licensed directly by any licensee seeking a license for such class.

so that rightsholders could reach a vast assortment of radio stations, clubs, bars, concert venues, and so forth while minimizing transaction costs. PRO blanket licensing remains an efficient way to license public performance rights to traditional licensees; selective withdrawal would not disturb ASCAP and BMI's continuing ability to serve what has been their core function since the early twentieth century, nor would it affect the ability of traditional businesses to procure ASCAP and BMI blanket licenses.

By contrast, if music publishers and songwriters were forced to withdraw their works outright from ASCAP and BMI to guarantee themselves the ability to license digital rights directly to DSPs, these benefits would be lost. Complete withdrawal from ASCAP and BMI would hurt music publishers and songwriters, who would no longer realistically be able to issue licenses to the full scope of traditional licensees. Further, complete withdrawal would also cause substantial harm to large numbers of traditional licensees who have relied on PRO blanket licensing for decades and would no longer be able to freely and lawfully play music without incurring substantial transaction costs.

IV. Conclusion.

We thank the DOJ for thoughtfully revisiting these issues, which are of great importance to the NMPA and its members. For the reasons stated herein, the DOJ should seek to modify the ASCAP and BMI consent decrees to permit selective withdrawal. We would welcome the opportunity to discuss these issues in greater depth in a follow-up meeting with you.

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