Public Comments of PACE Rights Management LLP
U.S. Department of Justice, Antitrust Division
Antitrust Consent Decree Review - ASCAP and BMI 2019

1. Background and Definitions.

a) About PACE Rights Management:

We are the global leaders in assisting Rightsholders (both songwriters/composers and music publishers) to Direct License their Live Public Performance Rights (as defined below) to Users (concert promoters, music venues, music festivals).

We have so far successfully assisted Rightsholders to Direct License their rights in 42 countries throughout the world.

We have template Mandates in place with the 7 largest music publishers in the world: Sony/ATV Music Publishing, Universal Music Publishing, Warner/Chappell Music, BMG Rights Management, Kobalt Music, Concord Music, Downtown Music Publishing.

No Live Public Performance Rights are owned by PACE or assigned or licensed to us, e.g., PACE itself does not license any rights to the Users of those rights; instead, PACE assists Rightsholders to license their rights to the Users of their rights. That assistance is provided at every step in the process, from end-to-end:

> Work registration audit → Withdraw (temporary removal of rights)/Terminate (permanent removal of rights) from the PRO → Licensing Users → Resolving any Withholding tax → Receiving License fees → Distributing fees & statements

b) Live Public Performance Rights:

Our business - and therefore this response - is solely concerned with the licensing of Live Public Performance Rights (LPPR's). LPPR's are one of the 12 'Utilization Categories'[1.] of public performance rights contained within a musical work.

The Users of such rights are Concert Promoters, Music Venues, and Music Festivals.

c) Direct Licensing:

Refers to the practice of a Rightsholder (songwriter/composer or music publisher) licensing its rights directly to the User of those rights, rather than licensing via the Performing Rights Organization (PRO) network.

Each Rightsholder has the right to license their rights irrespective of the decision of any other Rightsholder to do so or not. One musical work can frequently have between 5 - 8 different Rightsholders, each with a percentage share of the work. If certain Rightsholders of a work decide

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[1.] The 12 Utilisation Categories are:

1. Live public performance right.
2. Audio broadcasting right (other than the Online Right).
3. Public performing right of audio broadcast works.
4. Televising (audio-visual) broadcasting right (other than the Online Right) right.
5. Public performing right of televised works.
6. Right of public performance by means of the theatrical exhibition of a film.
7. Public performing right of mechanically reproduced (sound bearing copies) works.
8. Film synchronisation right.
9. Public performing right of works reproduced on video tape.
10. Online Right except for the Making Available Right.
11. Making Available Right.
12. Exploitation rights resulting from technical developments or future change in the law.

to Direct License their rights, but other do not, that can lead to 'fractional licensing', where different percentages of a work can be licensed by different entities. For live performances, that is very straight forward and easy to administer, as the number of works performed by at Artist is typically only around 6-25. As such, a simple spreadsheet can resolve any fractional licensing occurring at a concert.

There is a common misunderstanding that it is the Artist who Direct Licenses its rights; however, that is incorrect. The Concert Promoter/Music Venue/Festival will have an agreement with the Artist to perform; however, an Artist and Rightsholder are different entities. As a result, the Artist will not control - or potentially even be aware of - the decision by all the Rightsholders of the works being performed whether they will Direct License their respective rights. As such, an agreement with an Artist to perform is not a an agreement with the Rightsholders to license their rights.

d) Benefits of Direct Licensing for Rightsholders:

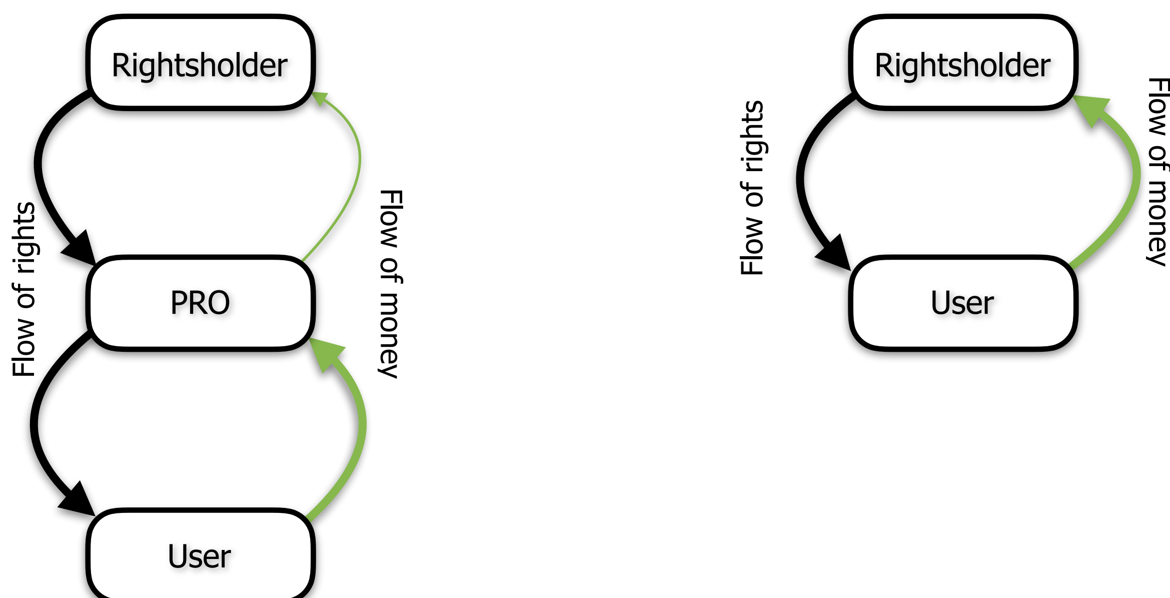
Increased income: As the rights are being licensed directly by the Rightsholder to the User, the Rightsholder does not suffer the deduction of various PRO Management fees from their rights income. Having less deductions means the Rightsholder can receive more of their own license fees.

Quicker receipt on income: With the rights being Direct Licensed, the Rightsholder can receive the license fee within a few hours or days of the performance, rather than the weeks, months or even years it can take through the PRO network.

Increased transparency: Typically, licensing through the current PRO network regime generally results in the Rightsholder's receiving comparatively opaque accounting for the usage of their Live Public Performance Rights and the license fees they are receiving for it. It can be very difficult to identify the relevant performance in the royalty accounting received, let alone understand whether the correct amount is being received, and what deductions have been made from it. In contrast, Direct Licensing enables the Rightsholder to receive completely transparent accounting. For example, PACE's accounting is the most transparent and granular in the world for live performances, enabling the Rightsholder to know to the cent the amount they have earned per work performed at each performance, and the calculation that supports the payment.

In summary, the benefits of Direct Licensing for Rightsholders are that they receive more of their licensing money, receive it more quickly and receive it more transparently.

Flow of rights & money:



e) ASCAP and BMI:

PACE interacts with the American Society of Composers, Authors, & Publishers (ASCAP) and Broadcast Music Inc. (BMI) and their Consent Decrees in two primary ways:

1) Assisting Member Rightsholders in serving their Notices of Direct Licensing upon ASCAP and BMI. This can be for both domestic and international performances.

2) Engaging with Users who are subject to agreements with ASCAP and BMI that require a license fee payment even when all (or the majority) of rights being performed are being Direct Licensed.

2. Obligation to License Rights.

a) Problems with the Underlying U.S. Licensing System:

The whole purpose of the copyright laws (Title 17 of the United States Code) is to protect the creators' creations from being used without their permission, and ensuring that the creators are appropriately remunerated for their talents and the time and effort it took to create their work. The purpose was not for Users to use the creativity of others for commercial or promotional reasons without restriction. It must be remembered that without creators, there is no business for Users to profit from. Without songwriters and composers there are no musical works, if there are no musical works for Artists to perform, there are no concerts, music venues or festivals, or any of the support or ancillary services for those performances, and or the revenue that they generate. The entire live music business is built on the creativity of the songwriters and composers.

Jurisdictions around the world recognize both the financial and cultural benefits from ensuring that creators are appropriately remunerated for their work, which enables them to continue creating and generating revenue. The licensing systems around the rest of the world have developed with the focus and priority of remunerating the creators.

Of the 50 or so countries around the world that we have successfully assisted or currently assisting Direct Licensing for Rightsholders, the existing licensing system in the United States for Live Public Performances Rights provides the least value for Rightsholders. The US is currently deciding that rewarding creatives for their work is not the priority.

A songwriter or composer's home market will be the one where their work was first used and generated revenue. The argument can be made that if writers were better rewarded in their home market, they would be more able to pursue their trade, hone their skill and art, increasing the probability that their work becomes more popular at home and abroad, resulting in greater wealth creation internationally, enabling more money to be repatriated to the US, and the resultant benefits to the US economy. An example of this is the United Kingdom, which punches well above its weight in terms of the per capita generation of music revenue.

b) The Current Consent Decrees Distort the Free Market:

One of the reasons Rightsholders are not being remunerated appropriately by the free market in the U.S. is the distorting effect of the Consent Decrees, which obligate the PRO's to license to any requesting User (Section IV in ASCAP's Consent Decree and Section IX(C) in BMI's). Instead, PRO's should have the freedom to decide to whom they license Rightsholders' rights, allowing the market to decide both the demand and supply. There is no logical rationale for forcing PRO's to supply Rightsholders' rights to a User? What other industry forces suppliers to supply their goods or services? If a retailer wanted to sell a product to the public, should the supplier be forced to sell it to the retailer (e.g., a bar wants to sell Budweiser, and Anheuser-Busch are forced to sell it to them when the bar requests it)? Similarly, if a company wanted to use a computer program to carry out their business, should the owner of the program be forced to supply them that program (e.g.,

Microsoft is forced to sell an operating system to all businesses that request it)? There is no objectively necessary business reason why PRO's should be forced to supply rights to Users on request, and under the antitrust laws a seller has the right to decide with whom it will deal, absent a very narrow exception that does not apply here – Live Public Performance Rights are not an essential facility.

It is in the interests of both PRO's and Rightsholders to have their rights generate income through usage. If a PRO were to refuse to license rights to a User, and a Rightsholder thought that unreasonable, the Rightsholder should have the freedom to withdraw/terminate their rights from the PRO, and either grant those rights to another PRO who would license those rights to the User, or Direct License them to the User. If the Rightsholder does not believe that the PRO is appropriately managing their rights, the Rightsholder should be able to remove the grant of rights from that PRO and the market will provide solutions for them to license their rights, thereby enabling free and open competition in the market.

If the PRO wishes to license their rights to the User, and the User wishes to obtain such a license to comply with the Copyright law, but both parties cannot reach an agreement, the rate court process for resolution of rate disputes, as recently reformed by the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA) should be retained. This mechanism allows the market to operate effectively and efficiently with regards to the demand and supply of rights, and provides an independent resolution process if the parties fail to reach agreement, but still wish to conclude a deal.

Additionally, the current terms of the Consent Decrees undermine a PRO's ability to comply with a Rightsholder's wishes to Direct License their rights to a User for a performance, and therefore removes that choice from the Rightsholder. If a PRO grants a license to a User - as the Consent Decree obligates them to do - that negates the ability of the Rightsholder to Direct License their rights and grant that license. Thus, the Consent Decrees are forcing PRO's to license to Users and therefore blocking Rightsholders from doing so. When combined with the adverse effects from the non-exclusive grant rights (as detailed below), the current form of the Consent Decrees works directly against the efficient and effective operation of the market. In summary, the current form of the Consent Decrees is adversely effecting competition by, in effect, removing the ability of Rightsholders to Direct License their Live Public Performance Rights, and reinforcing the oligopoly of the PRO's.

3. The Non-Exclusive Grant of Rights Also Distorts the Market.

The current grant of rights from Rightsholders to ASCAP and BMI is a non-exclusive grant. However, this creates issues for both the PRO's and Rightsholders and distorts the market. Rightsholders should have the freedom to choose whether to grant exclusive rights if they so wish, and the PRO's should have the freedom to receive exclusive rights if they so wish. There is no objectively necessary business reason for only a non-exclusive grant being permissible. Public Performance rights are Intellectual Property, and Rightsholders should have the freedom to dispose of their property as they see fit.

The argument that the ability of Rightsholders to Direct License their rights results from the non-exclusive grant to rights, and therefore it is this non-exclusive grant of rights that mitigates the PRO's monopoly power/oligopoly, is a fundamental misunderstanding of the market for two reasons:

1) The clients of the PRO's are the Rightsholders; however, by only receiving non-exclusive rights, this enables the PRO's to continue licensing those rights even if the Rightsholder wishes to Direct License them for a particular performance. The real world consequence is that the PRO's are able to work directly against the best interests of their clients - the Rightsholders - by in effect blocking the Direct License with their own license. The effect of a non-exclusive grant working in tandem with the Consent Decree forcing PRO's to license to Users (as detailed above), works

directly against the efficient and effective working of the market, by creating a false offering. While it may appear that a non-exclusive grant of rights enables Rightsholders to Direct License their rights, the reality can be the reverse, where the Rightsholder is in effect blocked from Direct Licensing their rights by the license granted by the PRO.

2) There are more effective and efficient ways to mitigate the PROs oligopoly than a non-exclusive grant of rights. Around the rest of the world, the grant of rights given by Rightsholders and received by PRO's is an exclusive grant. These other jurisdictions have understood the necessity to afford Rightsholders the right to selectively withdraw (a temporary removal) or terminate (a permanent removal) any of their various rights from the PRO network, and Direct License them if they so choose. This mechanism empowers the Rightsholder to decide how their rights are licensed and by whom, and be paid appropriately for their contribution to the market, while allowing the market to address the monopolization of the relevant PRO. If Rightsholders are given the right to withdraw or terminate their rights of their choice from the PRO's (and either grant those rights to another PRO or manage the rights themselves and Direct License them), then an exclusive grant of rights is actually beneficial for Rightsholders, by enabling the market to work more efficiently and effectively, and affords more freedom of choice to Rightsholders.

4. The Pandora Decisions Further Impede the Free Market.

While the 'all or nothing' interpretations of the availability of rights in the respective ASCAP and BMI repertoires in the two Pandora decisions[2.], may have been consistent with the Consent Decrees, they were fundamentally damaging to the efficient operation of the market and to effective competition within it. If the Department of Justice maintains some form of either the ASCAP or BMI Consent Decrees the parts of the Consent Decrees addressed in the two decisions, specifically Section IV (in ASCAP's Consent Decree) and Section IX(C) (in BMI's Consent Decree) should be terminated.

Around the rest of the world, each country has only a single PRO that operates as a pure monopoly within its market. The obvious consequence of such a market construction is a lack of choice for Rightsholders as to how they license their rights. The US has four PRO's (ASCAP, BMI, SESAC, GMR). While this provides choice for Users as to which rights they may want to use and license, the true market purpose for having multiple PRO's is to provide choice to Rightsholders as to how they want to license their rights, be remunerated for their contribution to the market, and therefore create competition. The main focus of the Department of Justice's review of the Consent Decrees should not be the effect on Users, but the effect of the Consent Decrees on the Rightsholders, who are the clients of the PRO's. The priority of this review and any resultant action should be to enable Rightsholders the freedom to choose how their rights are licensed and by whom. The 'all or nothing' effect of the Pandora decisions decreases the choice for Rightsholders and reinforces the monopolization by ASCAP and BMI.

The ways that rights from the different Utilization Categories are used by Users, licensed by PRO's and accounted to Rightsholders can be completely different between one category and another. For example, the way Radio Stations and Concert Promoters use their rights, is wholly different, as is the methodology for calculating the respective license fees, as is the way that Rightsholders are accounted to. Yet the current effect of the Consent Decrees, is to force Rightsholders to give all their rights in every category to a single PRO. It is frankly nonsensical that if a Rightsholder wishes to withdraw or terminate their Live Public Performance Rights from a PRO to Direct License them to Concert Promoters, that the PRO can no longer license their Audio Broadcasting Rights to Radio Stations.

A withdrawal or termination of Live Public Performance Rights, will have no effect on the ability of a PRO to license Audio Broadcasting Rights to a Radio Station, other than one created by the Consent Decrees. Such an effect distorts the market and has an adverse effect on the choice of

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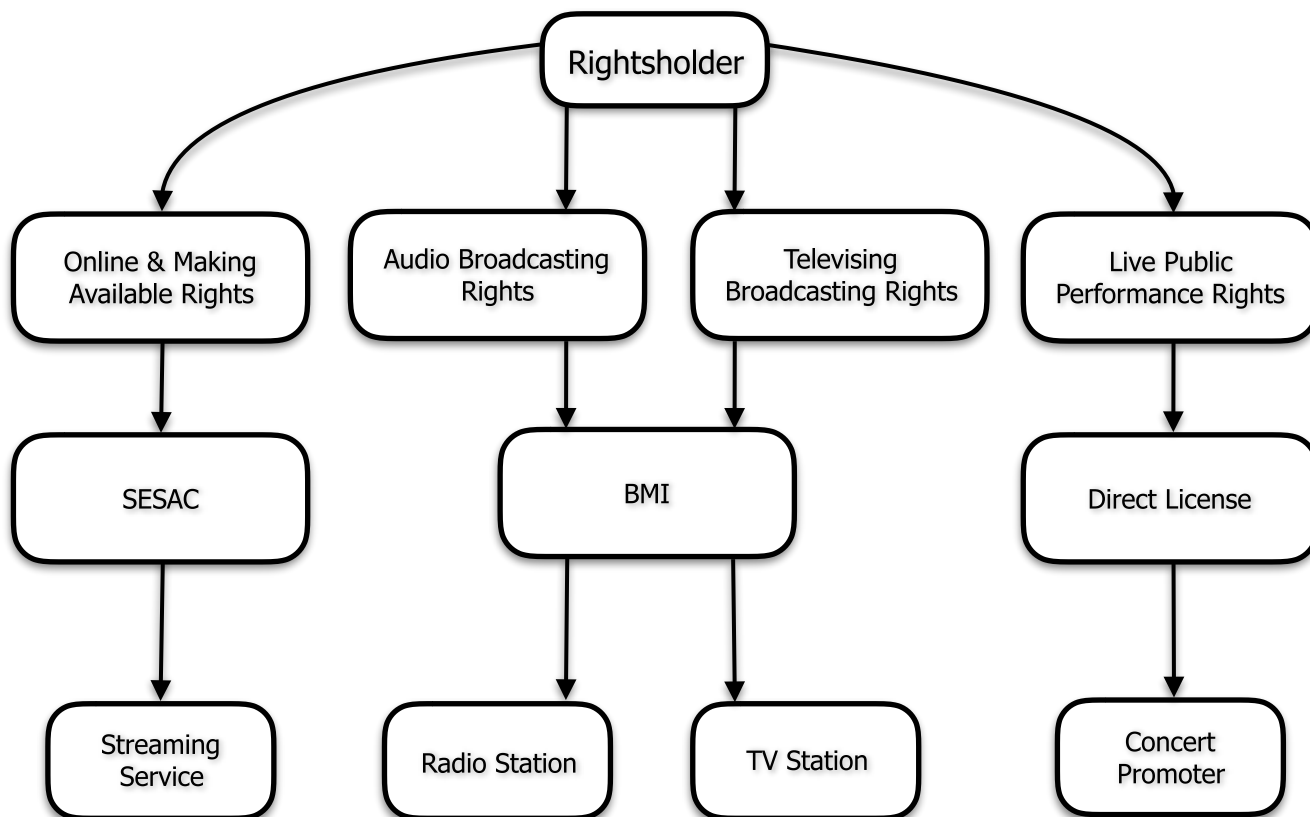
[2.] U.S.A. v. American Society Of Composers, Authors And Publishers (16-3565-cv) and U.S.A. v. Broadcast Music, Inc. (16-3830-cv)

Rightsholders. Rightsholders should have the freedom to decide how their rights are licensed and by whom, and the PRO's should be given the freedom to compete for such. For example, if a

Rightsholder decides that SESAC's offering for licensing Audio Broadcast Rights is more beneficial than those by ASCAP, SESAC or GMR, then the Rightsholder should be free to give their Audio Broadcasting Rights to SESAC. If that same Rightsholder decides that BMI's offering for licensing Online & Making Available Rights is more beneficial than those by ASCAP, SESAC or GMR, then that same Rightsholder should be fee to give their Online & Making Available Rights to BMI.

Example of enabling choice for Licensing by rights:



The ways that rights are used in the market has evolved beyond those that were current or envisioned in 1941, and have even evolved since the Consent Decrees were last amended in 1994 and 2001 respectively. The market no longer uses, licenses or accounts in musical compositions or musical works (the terms used in the Consent Decrees, and the effect those terms create), but in Utilization Categories of rights within musical works, and any regulatory structure around the market should reflect the realities of the market.

5. Variations Between the Consent Decrees Should be Eliminated.

The current form of the two Consent Decrees have variations between them, some of which can be subtle, resulting in differing interpretations and effect. It is in the interests of all stakeholders for the market to provide certainty and consistency in structure, thereby enabling parties to innovate in their offerings while allowing for comparisons to be more easily accessed, thereby creating more effective competition.

For example, the following two equivalent clauses in the respective Consent Decrees are different in form and possible interpretation and effect:

ASCAP -
*IV **Prohibited Conduct.** ASCAP is hereby enjoined and restrained from:*
(B) Limiting, restricting or interfering with the right of any member to issue, directly of through an agent other then a performing rights organization, non-exclusive licenses to music users for rights of public performance;

BMI -
IV.
Defendant is enjoined and restrained from:
(A) Failing to grant permission, on the written request of all writers and publishers of a musical composition including the copyright proprietor thereof, allowing such persons to issue to a music user making direct performances to the public a non-exclusive license permitting the making of specified performances of such musical composition by such music user directly to the public, provided that the defendant shall not be required to make payment with respect to performances so licensed.

ASCAP -
*VI. **Licensing.** ASCAP is hereby ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory;*

BMI -
IX.
(C) Defendant shall not, in connection with any offer to license by it the public performance of musical compositions by music users other then broadcasters, refuse to offer a license at a price or prices to be fixed by defendant with the consent of the copyright proprietor for the performance of such specific (i.e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

If the Department of Justice maintains some form for both ASCAP and BMI of the Consent Decrees, the terms of each decree should be harmonized. Any differences between those Consent Decrees could cause inefficiencies and inconstancies in the market and would adversely affect competition. As such we would urge that if some form of Consent Decree for both ASCAP and BMI is maintained, that they be identical.

6. Inherent Conflict.

There is an inherent conflict contained in the current Consent Decrees. They obligate the PROs both to enable Rightsholders to Direct License their rights, and to license those same rights:

ASCAP -
*IV **Prohibited Conduct.** ASCAP is hereby enjoined and restrained from:*
(B) Limiting, restricting or interfering with the right of any member to issue, directly of through an agent other then a performing rights organization, non-exclusive licenses to music users for rights of public performance;

*VI. **Licensing.** ASCAP is hereby ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory;*

BMI -
IV.
Defendant is enjoined and restrained from:
(A) Failing to grant permission, on the written request of all writers and publishers of a musical composition including the copyright proprietor thereof, allowing such persons to issue to a music user making direct performances to the public a non-exclusive license permitting the making of specified performances of such musical composition by such music user directly to the public, provided that the defendant shall not be required to make payment with respect to performances so licensed.

IX.
(C) Defendant shall not, in connection with any offer to license by it the public performance of musical compositions by music users other than broadcasters, refuse to offer a license at a price or prices to be fixed by defendant with the consent of the copyright proprietor for the performance of such specific (i.e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

If the Department of Justice maintains some form of Consent Decree, such conflicts should be eliminated, so as to ensure the efficient and effective operation of the market.

7. Current Live Public Performance Rights Licensing Structure.

a) Overview:

Of the 50 or so countries around the world in which have successfully assisted, or are currently assisting, Direct Licensing, the US licensing system for Live Public Performance Rights is by far the most inefficient and most opaque. It fails to deliver the desired outcomes for all stakeholders.

The majority of live performances in the US (in terms of license fees generated) are done under a per-program license, i.e,. a license fee for a concert purely based on the variables of that concert. The value of a right is based on the income that right generates. For Live Public Performance Rights the current metric for assessing the value of rights performed is the value that the public places on them through the sale of tickets that enable entrance to the venue where the rights are being performed. Basically how much the public are prepared to pay to experience the rights being performed. The current methodology used in most cases is the Tariff rate (normally a percentage amount) agreed between the Licensor and Licensee, that is then applied to the metric (ticket income), the result of which is the license fee:

Ticket income x Tariff % = License fee.

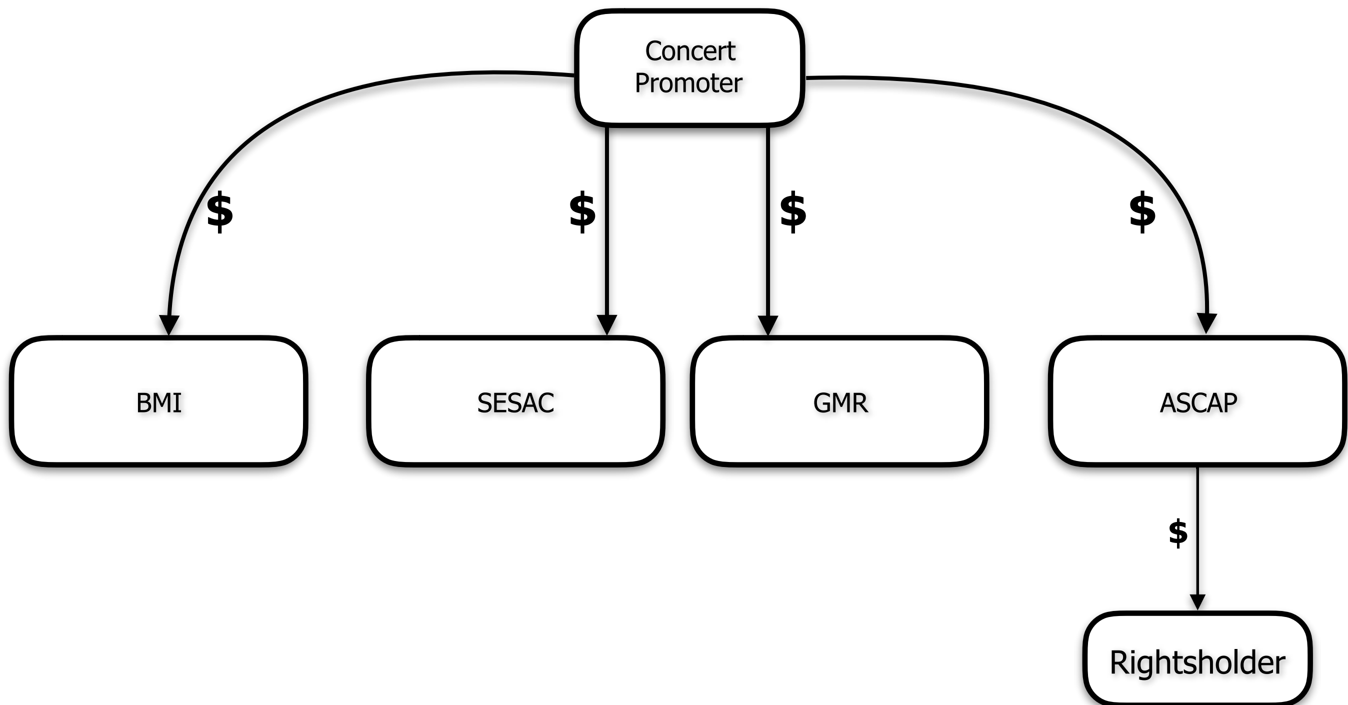
As the final ticket income will only be known after ticket sales have finished and the performance completed, the License fee for the rights for that concert can only be known after the event.

b) The Current Tariff Calculation Methodology Is Inaccurate and Opaque:

The Tariff calculation applied by the PRO's is applicable irrespective of the proportion of their rights that were performed, or even if any of their rights were performed. This results in a ludicrous situation where Users are being required to pay money by the PRO's, but are receiving no goods or services in return. For example, if no ASCAP/BMI rights were performed, then no license from ASCAP/BMI is required to comply with the Copyright law. If no rights are being licensed at that concert by ASCAP/BMI, then it is not a 'license fee' that's being required by them for the concert, it is just money being demanded while nothing is supplied in return.

To compound this issue, Rightsholders will only receive license fees from the PRO with which they contracted. With potentially four PRO's (ASCAP, BMI, SESAC, GMR) all having per-program licensing agreements in place with the User for a concert, and all of those agreements stipulating that payment should be made irrespective of the actual usage of rights, it can lead to a scenario where all the rights performed are held by one PRO, but payments are also made to the other three PRO's, and the Rightsholders of the rights performed will see none of the money paid to the other three PRO's, as they are not contracted with those other P. Therefore the vast majority of money being paid to the PRO's for a particular concert, is not reaching the Rightsholders of the rights that were actually performed at that concert. It is a ridiculous system, and quite literally money for nothing.

Flow of license fees when 100% of the rights performed are from ASCAP Rightsholders:



The current licensing system fails to deliver an accurate or transparent link between the actual rights used at a concert, the 'license fees' paid by the User for the concert, and the amount the Rightsholder receives for their rights being performed at the concert.

c) Adverse Impact on the Relevant Stakeholders:

Artists - Have money being deducted from their fee to pay for rights that are not being used, and are generally unaware if the figures being represented to them for the license fees are correct.

Users - Are paying fees for rights they are not licensing, and the majority of money they are paying for a concert is not going to the Rightsholders whose rights were used at that concert, and they maybe overpaying or underpaying for those rights.

Rightsholders - Are not receiving the vast majority of 'license fees' paid from a concert when their rights are performed at that concert, and are receiving opaque accounting from their PRO's.

PRO's - Are unaware of the actual value of their rights being performed, which can result in an overvaluing or undervaluing of their rights, while having an inefficient licensing systems that delivers opaque accounting to Rightsholders.

All stakeholders we've spoken with believe the current Live Public Performance Rights licensing system in the US does not achieve its intended purpose.

d) Modification of the Consent Decrees to the Current System:

If the current licensing system is maintained, the PRO's should be permitted only to license Live Public Performance Rights on an 'adjustable per-program license' basis, which enables a directly proportional reduction to the license fee that reflects the actual proportion of rights the PRO is licensing of the total rights performed. For example, if the PRO has 100% of the rights performed, the User pays 100% of the license fee to them. If the PRO has 50% or the rights performed, the User pays 50% of the license fee to them, and so on.

e) New System:

What would be a far more effective and efficient resolution would to be to overhaul the whole licensing system for Live Public Performance Rights in the US. Specifically, the licensing system should be replaced with a national Tariff rate that applies regardless of who is licensing. This will give Artists, Users and Rightsholders certainty and transparency. The PRO's and Direct Licensing entities would then license their rights directly proportionally to the proportion of rights they control of those performed. For example, if the national rate was 1.5%, and ASCAP had 100% of the rights performed, then ASCAP would receive 100% of the 1.5%, and the other PRO's would receive 0%. If ASCAP had 50%, and BMI had 50% of the rights performed, then they would each receive 0.75%.

This would lead to a far more transparent, efficient and effective licensing system to the benefit of all stakeholders. The relevant tools and technologies already exist to implement this system, and it would be simple, quick and cost effective to do so. Competition would be maintained between the PRO's as they compete for business from Rightsholders with offering the lowest management fees, fastest distribution of license fees, and greatest transparency of accounting.

The Department of Justice should address and consider the reality of the Live Public Performance Rights licensing system in the US as part of its evaluation of whether the Consent Decrees should be terminated or modified.

8. Conclusion.

If the Consent Decrees are not outright terminated, they should be modified as follows:

1) The PRO's should not be obligated to license their rights to any requesting User. The market should be allowed to decide both the demand and the supply.

2) Each Rightsholder should be able to decide the form of their grant of rights to the PRO's (either exclusive or non-exclusive), and conversely, PRO's should be able to decide what form of grant of rights they will accept.

3) Rightsholders should be permitted to grant to a PRO the rights (as opposed to musical compositions or musical works) of their choice, or withdraw or terminate their rights of their choice from a PRO, without it having a negative impact on the licensing and accounting of any other rights they have granted to the PRO.

4) If the Consent Decrees are going to be continued in some form for both ASCAP and BMI, then the form of both Consent Decrees should be identical and all variations should be eliminated.

5) When licensing Live Public Performance Rights, the PRO's should only be permitted to license those rights on an 'adjustable per-program license' basis, which enables a directly proportional reduction to the license fee that reflects the actual proportion of rights the PRO is licensing of the total rights performed.