

Comments by Peermusic
Submitted in Response to US Justice Department Antitrust Division
Request for Comments on Review of ASCAP and BMI Consent Decrees

Peermusic welcomes the opportunity to provide further comments, in supplementation of those submitted in 2014, in response to the request for comments by the Department of Justice concerning review of the ASCAP and BMI Consent Decrees. Specifically, we are eager to express our support for modification of the Consent Decrees in light of the particular threats to Peermusic's ability to compete as an independent publisher increasingly dependent on public performance revenues in today's predominantly digital market,

I. Background

Peermusic is the trade name for a group of music publishing designees under common family ownership since the company's establishment in 1928. Peermusic holds extensive catalogues in a variety of genres and continues to cultivate new songwriters across the creative spectrum. As one of few independent publishers remaining in the United States with the global resources to offer songwriters a competitive alternative to the major music publishers, we have a compelling interest in revisions to the Consent Decrees that will permit us to compete fairly in the market.

II. Public Performance Rights Are Critical to Independent Publishers

Peermusic has traditionally relied upon a diverse set of revenue streams arising from the recognition by U.S. law that the copyright in a musical composition is composed of a bundle of rights: the right to make copies in phonorecord form, to prepare derivative works, and to perform

a musical work publicly, among others. The ability to negotiate with diverse licensees, parsing and combining these rights in licenses in the marketplace, historically enabled Peermusic to ensure steady streams of income, both to career songwriters and to performing songwriters whose revenues from non-publishing sources were inherently unpredictable and volatile.

The statutory division of rights also allowed music publishers to license each branch of the bundle separately and – critically – allowed smaller independent publishers to aggregate certain licenses through collective societies and agents; in particular, the collective performance rights societies (“PROs”) ASCAP and BMI to represent the right of public performance. As our fellow copyright owners and representatives have described separately in detail, the PROs emerged as an efficient answer to the daunting transactional costs of traditional licensing across the United States. Remaining elements of the bundle not licensed on a mass-user basis and not subject to government oversight or regulation – the “synchronization” right to create derivative audiovisual works, for example – remained with Peermusic to negotiate freely.

The diversification of revenue streams – and the critical assistance of the PROs in establishing, maintaining, and policing certain of those streams – allowed Peermusic to mitigate the ups and downs of music income for its songwriters, and to devote resources to authors and composers with a long view toward individual creative development and the advancement of the craft of songwriting. Multiple sources of revenue also allowed Peermusic to continue to invest in future songwriters, on the assumption that structural or temporary weaknesses in any particular source of revenue could be counterbalanced by the remaining sources. Unfortunately, the devastating effect of digital piracy beginning in the early 2000s radically undermined the core revenue stream of mechanical royalties. Further, interactive streaming technologies now provide a near-total consumer substitution for the former practice of purchasing and collecting

phonorecord copies. As a result, the diversity of predictable music revenues has diminished in absolute terms.

As a result of both of these phenomena – piracy and the substitution of streams for sales – public performance royalties now bear a significantly greater share of the burden of supporting the songwriters of today and tomorrow. As a result, we are also seeing a corresponding increase in the impact of Consent Decree restrictions on Peermusic’s ability to continue to compete as an independent publisher. The negative impact arises from a number of features of the Decrees, in particular the recent judicial interpretations holding that the BMI and ASCAP Consent Decrees prohibit the selective withdrawal of digital performing rights by a copyright owner absent full withdrawal of such owner’s catalogue from the PRO’s repertoire.

Peermusic views the outcome of the review of the Consent Decrees, and review of the prohibition on selective withdrawal in particular, as critical to its future ability to support and service its songwriters, clients, and the listening public. As we have noted before, we must protect and preserve what is working for independent publishers in the current PRO licensing system, we must work to fix what is not functioning, and we must modify the system to adapt to a new and rapidly evolving marketplace.

III. Selective Withdrawal Should Be Permitted

The current “all-in or all-out” judicial interpretation of the Consent Decrees is particularly harmful to Peermusic, given its status as an independent music publisher large enough to render direct negotiations an efficient choice in the licensing of digital public performance rights. However, regardless of the efficiency of direct licensing from a business perspective, the ultimate say is not ours. While licensees are free to elect to negotiate directly

with Peermusic to secure public performance rights in our catalogue, the choice remains entirely one-sided as long as we wish to remain a member or affiliate of the PROs. At any point a licensee can opt to withdraw from direct negotiations and seek a license from the PRO, including tactical litigation if the PRO terms do not satisfy the potential licensee. Not only does this threat impose an artificial ceiling on rates in direct negotiations, but when the threat is carried out, the licensee is free to use the entire Peermusic catalogue without any compelling requirement to make any payments in the interim. If Peermusic is to be able to tell its songwriters that it is getting their music to the public quickly, efficiently, and at competitive rates, it must be able to elect to negotiate digital licenses directly.

The prohibition on selective withdrawal of digital public performance rights hinders our ability to compete in the market. The major music companies arguably have the ability to apply leverage on the sound recording side (where negotiations are not skewed by the de facto regulations imposed by the Consent Decrees) to require DSPs to negotiate direct licenses with respect to the public performance right, giving our competitors the effective ability to selectively withdraw these rights. Their ability to retain the services of the PROs for traditional licensing is not affected, and in fact they may continue to engage the PROs to administer the withdrawn rights on more favorable terms than those available to the independent music publishers not approached by the DSPs for direct licenses.

Further, if the major publishers are able to work around the prohibition on selective withdrawal in ways that the independent publishers cannot, it is likely that those publishers remaining under the “all-in or all-out” relationship with the PROs will be forced to bear a greater proportion of the administrative costs of the PROs. Our increased share of costs would likely

lead in practice to lower per-stream rates to our writers, in many cases for the performance of the same work co-authored by a songwriter affiliated with a major publisher.

Not only should selective withdrawal be permitted, but the Consent Decrees should protect copyright owners' ability to do so to the same extent they currently protect the licensee's ability to negotiate directly. It should be clear that the PROs cannot refuse to license a copyright owner's repertoire in the traditional general licensing market as a result of that copyright owner's withdrawal of digital public performance rights. Otherwise the PROs will retain the ability to impose the same "all-in or all-out" rule we believe the DOJ should eliminate as a result of its current review of the Consent Decrees.

IV. Reform of PRO Rate-Setting Procedures

We are pleased that the Music Modernization Act included much-needed reforms to the rate-setting procedures applicable to BMI and ASCAP. Accordingly, our prior concerns relating to the application of market rates and the benefits of mandatory arbitration have in principle been largely superseded. We would, however, like to take this opportunity to restate our concern over the ability of music users that resort to the rate courts to use the Peermusic repertoire before any rates are set. These users are entitled to build a consumer base, establish market position, develop their products, and monetize Peermusic's songs directly and indirectly without payment. In some cases it will be years before we can account to our songwriters for these uses. In cases where a startup service using unpaid content fails during litigation, or an "exit" from the company seems a more profitable route for its founders, Peermusic's songwriters will never be paid for the use of their works. Independent publishers cannot afford to, and should not be required to, subsidize content-dependent businesses simply because those business choose to

litigate over rates. The Consent Decrees should provide for the establishment of interim rates, and to require the payment of these rates by licensees using content during the pendency of any rate proceedings.

V. Conclusion

The independent music publisher is the patron of the undiscovered songwriter, the advocate of active authors and composers, and a crucial conduit linking these artists and their lives' work to the public. While all music publishers serve these valuable roles to varying degrees, the independent music publisher is uniquely positioned to cultivate innovative talent that has yet to capture the attention of major music corporations, to support the pure vocation of songwriting for those that do not survive on performing or recording revenues, to focus on niche markets and musical styles, and to continue to re-introduce the classics of the American songbook to new generations.

However, radical changes in the ways music is distributed and consumed, and the inability of the legal and regulatory structure to keep pace with these changes, have combined to threaten the continuing viability of the independent music publisher in the United States. Particularly for the independent music publisher, the cumulative effects of music piracy and the substitution of streams for sales have brought into critical focus the limitations of the Consent Decrees on the licensing of public performance rights.

While Peermusic must continue to rely on the PROs to ensure that a large proportion of music users have access to our catalogue, we must have the ability to require direct negotiations in respect of digital public performance licensing if doing so will most efficiently lead to fair rates for the use of our compositions.

Peermusic once again expresses its support to the Department of Justice in its decision to review the ASCAP and BMI Consent Decrees, and we thank you for the opportunity to submit these comments.