

August 6, 2014

Mr. John R. Reed, Chief  
Litigation III Section, Antitrust Division  
U.S. Department of Justice  
450 5<sup>th</sup> Street NW, Suite 4000  
Washington DC, 20001

RE: Review of ASCAP and BMI Consent Decrees

Dear Mr. Reed,

On behalf of the Information Technology and Innovation Foundation (ITIF), we are pleased to submit these comments in response to the U.S. Department of Justice's (DOJ) request for public comment concerning the review of the operation and effectiveness of the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc.'s (BMI) Consent Decrees.<sup>1</sup>

ITIF is a nonprofit, non-partisan public policy think tank committed to articulating and advancing a pro-productivity, pro-innovation, and pro-technology public policy agenda internationally, in Washington, and in the states. Through its research, policy proposals, and commentary, ITIF is working to advance and support public policies that boost innovation, e-transformation, and productivity.

The purpose of copyright law is to establish a system that encourages the creation and dissemination of new works by providing authors with an incentive to create those works.<sup>2</sup> There are many types of music services that provide consumers with access to the songs they love. From terrestrial radio to online subscription music services, each platform is governed by different rules that determine which types of royalties must be paid and how prices change from service to service. While policymakers created the U.S. music licensing system to provide fair compensation for artists, songwriters, and composers and to foster innovation, the current system often fails to do either.<sup>3</sup> DOJ should use the review of ASCAP and BMI's consent decrees to begin the process of modernizing the way music copyrights are licensed in the digital age, keeping an eye on innovation, competition, transparency, and fairness. The Performance Rights Organizations (PROs), such as ASCAP and BMI, are mired in a slow, complex system that fails to create competitive rates for compulsory licenses. While

<sup>1</sup> "American Society of Composers, Authors and Publishers/Broadcast Music, Inc.," *U.S. Department of Justice*, accessed July 29, 2014, <http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html>.

<sup>2</sup> Solo, Alex, "The Role of Copyright in an Age of Online Music Distribution," *19 Media & Arts Law Review*, 169 (2014): 169, <http://ssrn.com/abstract=2462006>.

<sup>3</sup> Daniel Castro, "A Fair and Competitive Royalty System for Music Services," *Information Technology and Innovation Foundation*, November 2012, 1, <http://www2.itif.org/2012-music-royalties.pdf>.

the onus to fix many of these issues ultimately resides in the halls of Congress, DOJ can sow the seed of change by pushing the PROs to adopt several directives as part of these consent decrees. DOJ requested comment on whether these consent decrees still serve an important purpose today. ITIF believes these consent decrees are still important to protect competition, because in their absence, the bulk music licensing world of the PROs is free to pursue monopolistic pricing. However, the DOJ can take steps to improve the consent decrees and to align them with technological breakthroughs and innovations of the digital age.

Specifically, the DOJ should do the following:

1. Add needed transparency into market negotiations by encouraging the PROs to create an open database of performance licensing rights;
2. Allow copyright holders to temporarily withdraw their rights to specify and negotiate for separate compulsory royalty rates for different types of music services;
3. Simplify the system by allowing PROs to negotiate for multiple rights, including mechanical rights and synchronization rights on behalf of copyright holders; and
4. Push for faster resolutions in rate disputes.

These recommendations are only the first steps to addressing flaws in the U.S. copyright system that have failed to keep pace with advances in technology. As noted earlier, some of the needed changes will require Congressional action. To put our comments to the DOJ in context, we have attached a summary of our recommendations to Congress in which we argue why Congress should uniformly apply the performance copyright for sound recordings to all broadcasts; create an open database for all licensing rights, not just performance rights, to ease adoption and promote innovation; and modify the compulsory license to permanently allow separate royalty rates for all types of copyright licensing. These steps will help modernize the music licensing system for the digital era, make it more technology-neutral, and enable future innovation.

## Background

The fundamental principle of all U.S. copyright law is found under the property clause of the U.S. Constitution, which authorizes Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries.”<sup>4</sup> As technologies have changed, so has the need to address technological challenges in copyrighted materials, whether they are broadcast with an analog signal from a terrestrial radio tower or transmitted digitally to a mobile device. As music technology has proliferated and created new mediums for consumption, it has in

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<sup>4</sup> U.S. Constitution, art. 1, sec. 8.

turn increased music availability, enlarged listenership, and created a more diverse listening experience.<sup>5</sup> This is all good for copyright holders—recording artists, composers, authors, publishers, and songwriters—as well as listeners alike. Now as the DOJ is conducting a review of the ASCAP and BMI consent decrees, there is potential to address the challenges faced by both copyright holders and licensees in the digital era.

### ASCAP, BMI and their Consent Decrees

In 1941, ASCAP settled a lawsuit brought by the DOJ with a consent decree that prohibited ASCAP from receiving exclusive grants of rights from its members and requiring it to charge similar license fees to music users who are “similarly situated.”<sup>6</sup> This decree allows ASCAP to license public performance rights for compositions, the rights to play an artist’s music in a public place, or transmit it to the public via a medium, such as radio, television or the Internet.<sup>7</sup> That same year, BMI also received a similar consent decree.<sup>8</sup> These decrees were created under Section 1 of the Sherman Act, 15 U.S.C. § 1, to address competitive concerns that PROs acquired excessive market power through the accumulation of public performance rights held by their member songwriters and music publishers.<sup>9</sup> Both consent decrees have been modified—ASCAP’s was last modified in 2001, and BMI’s was modified in 1994—before the dawn of the iTunes era.<sup>10</sup> These decrees require the PROs to negotiate a reasonable license fee or seek such a determination from a “rate court” each time negotiations break down between the PROs and potential licensees.<sup>11</sup> These disputes over PRO licensing are seen before special rate courts in the Southern District of New York.<sup>12</sup> If ASCAP and a music service are

<sup>5</sup> Radio Increases Year-Over-Year Reach By More Than 700,000, according to December 2013 Radar Report,” *Nielsen*, December 2, 2013, <http://www.nielsen.com/content/corporate/us/en/press-room/2013/radio-increases-year-over-year-reach-by-more-than-700-000-according-to-december-2013-radar-report.html>.

<sup>6</sup> “United States of America v. American Society of Composers Authors and Publishers,” *U.S. District Court Southern District of New York*, Civ. Action No. 41-1395, accessed July 31, 2014, <http://www.ascap.com/-/media/files/pdf/members/governing-documents/ascapafj2.pdf>.

<sup>7</sup> “Do I Need an ASCAP License?” *the American Society of Composers, Authors and Publishers*, accessed June 31, 2014, <http://www.ascap.com/licensing/licensingfaq.aspx#general>.

<sup>8</sup> “United States of America v. Broadcast Music, INC. and RKO General, INC.,” *U.S. District Court Southern District of New York*, Civ. Action No. 64-Civ-3787, accessed July 31, 2014, <http://www.tunecore.com/blog/wp-content/uploads/2011/09/BMI-Consent-decree.pdf>.

<sup>9</sup> Sherman Antitrust Act, July 2, 1890, and “United States of America v. American Society of Composers Authors and Publishers.”

<sup>10</sup> “Antitrust Consent Decree Review,” *U.S. Department of Justice*, accessed August 1, 2014, <http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html>, and “iPod + iTunes Timeline,” *Apple*, accessed August 1, 2014, <https://www.apple.com/pr/products/ipodhistory/>.

<sup>11</sup> “United States of America v. American Society of Composers Authors and Publishers,” and “United States of America v. Broadcast Music, INC. and RKO General, INC.”

<sup>12</sup> “ASCAP Rate Court Invalidates Music Publishers’ Withdrawal of Digital Music Performing Rights from the ASCAP Repertory,” *Arent Fox*, September 20, 2013, <http://www.arentfox.com/newsroom/alerts/ascap-rate-court-invalidates-music-publishers%E2%80%99-withdrawal-digital-music-performing#.U9qPnvldWS>.

unable to agree on reasonable prices within 60 days of ASCAP receiving a request for a license (or 60 days after ASCAP requests additional information), then the potential licensee can retroactively ask the rate court to determine the rate.<sup>13</sup> The burden is then placed on ASCAP to prove the rates it set are reasonable. BMI is placed under similar constraints with its consent decree.<sup>14</sup>

Limited by their consent decrees, ASCAP and BMI only control the performing rights licensing of their members. These organizations streamline the process by which these authors and publishers negotiate licenses, track public performances, and receive royalties.<sup>15</sup> By offering blanket licensing for the public performance rights in their catalog, the PROs can easily accommodate mass licensing for radio, television, or Internet services. The composition performance rights of individual songs can be licensed directly from the publishers.<sup>16</sup> Other varieties of licensing are controlled by separate entities. Synchronization licensing, which allows the licensee to play music in tandem with video, is handled by music publishers, such as those represented by the National Music Publishers' Association.<sup>17</sup> Mechanical licensing, which allows the licensee to make copies of the work, is enforced through a third party organization, such as the Harry Fox Agency.<sup>18</sup> Sound recording rights are typically operated through the record label or recording artist.<sup>19</sup> These rights will be explained in more detail below.

### Copyright Act

According to the Copyright Act of 1976, when an author composes a song there are two separate copyrightable works: a music composition and a sound recording.<sup>20</sup> The music composition is the arrangement of notes and lyrics that make up the song. The sound recording is the recording of the performance by the artist. An example of this subtle distinction can be found in the song "Smooth Criminal" by Michael Jackson, in which there are two separate copyrightable materials: one owned by Michael Jackson for creating the song, and one owned by his record company for the original recording of the song.<sup>21</sup> Now

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<sup>13</sup> "United States of America v. American Society of Composers Authors and Publishers."

<sup>14</sup> "United States of America v. Broadcast Music, INC. and RKO General, INC."

<sup>15</sup> "About ASCAP," *the American Society of Composers, Authors and Publishers*, accessed June 31, 2014, <http://www.ascap.com/about/>.

<sup>16</sup> "FAQ's," *the National Music Publishers' Association*, accessed August 5, 2014, <http://www.nmpa.org/legal/faq.asp#faq8>

<sup>17</sup> "Music Publishing 101," *the National Music Publishers' Association*, accessed August 1, 2014, <http://www.nmpa.org/legal/music101.asp>.

<sup>18</sup> "Mechanical Licensing," *Harry Fox Agency*, accessed August 1, 2014, <http://www.harryfox.com/public/MechanicalLicenseslic.jsp>, and *ibid*.

<sup>19</sup> Solo, Alex, "The Role of Copyright in an Age of Online Music Distribution," 169.

<sup>20</sup> Copyright Act of 1976, October 19, 1976.

<sup>21</sup> Robert J. Williams, Jr., "Public Performance Royalty-Rate Disparity: Should Congress Pamper Pandora's Pandering?" *48 New Eng. L. Rev.*, 371 (2013): 375, <http://newengrev.com/current-issue/williams-public-performance-royalty-rate-disparity/>.

take the same song “Smooth Criminal” as covered by another band, Alien Ant Farm. The copyrights in this instance are different; the composition rights are still owned by Michael Jackson for creating the original song, but the sound recording is now owned by Alien Air Farm’s recording company. Each of these copyrights uses different licenses. Holders of musical composition copyrights can grant performance licenses for anytime their work is performed publically, synchronization licenses for adding their music to video and mechanical licenses for the distribution and reproduction of their work.<sup>22</sup> Sound recording rights holders, typically record labels or recording artists, can grant licenses to those who wish to reproduce and distribute the sound recording.<sup>23</sup>

### Copyrights in the Digital Age

The digital era has ushered in a variety of online music distribution models that require different types of licenses. One type is central downloads, such as iTunes, which allow users to directly download copyrighted material from a centralized source.<sup>24</sup> Another type is streaming services, which can be divided into two subcategories: interactive and non-interactive. Non-interactive streaming services, such as Pandora, allow a user to listen to a pre-programmed series of recordings, giving the user little to no control over the specific recordings they hear.<sup>25</sup> Interactive steaming services, like Spotify, allow users to select specific recordings.<sup>26</sup>

While terrestrial radio and television broadcasters only must acquire performance licenses from the PROs, digital transmission are subject to different processes. The Digital Performance Right in Sound Recordings Act of 1995 (DPRA), further amended by the Digital Millennium Copyright Act of 1998 (DMCA), established that digital and Internet companies pay additional royalties to the owner of a sound recording.<sup>27</sup> Non-interactive streaming services, like Internet radio, must acquire public performance rights for the composition and public performance rights for the sound recording.<sup>28</sup> Similarly, interactive services must acquire both public performance rights, mechanical rights, and sound recording rights. But these services like Spotify operate in a grey area and are subject to negotiations for sound recording rights directly with the record companies.<sup>29</sup> DRPA established a type of copyrighted work called “public by means of a digital audio transmission,” which exempts satellite radio and digital cable radio from paying royalties to the owners of sound recordings.<sup>30</sup> Therefore, copyright licenses for digital streaming companies (like Pandora) and

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<sup>22</sup> Solo, Alex, “The Role of Copyright in an Age of Online Music Distribution,” 173.

<sup>23</sup> Ibid, 169.

<sup>24</sup> Ibid, 177.

<sup>25</sup> Ibid, 178.

<sup>26</sup> Ibid.

<sup>27</sup> Robert J. Williams, Jr., “Public Performance Royalty-Rate Disparity: Should Congress Pamper Pandora’s Pandering?” 374.

<sup>28</sup> Solo, Alex, “The Role of Copyright in an Age of Online Music Distribution,” 184.

<sup>29</sup> Ibid.

<sup>30</sup> Robert J. Williams, Jr., “Public Performance Royalty-Rate Disparity: Should Congress Pamper Pandora’s Pandering?” 377.

terrestrial radio stations that are streamed online (like IHeartRadio) have significantly different costs and their payment structures do not affect each other in rate setting.<sup>31</sup> In contrast with terrestrial radio stations which do not pay for sound recording rights, the DMCA requires digital broadcasters to purchase this type of licensing.

The Copyright Act of 1976 also created the Copyright Royalty Board (CRB), the permanent legal body responsible for setting and adjusting the rates of these statutory licenses for sound recordings and distributing royalties from royalty pools that the Library of Congress administers.<sup>32</sup> Comprised of three Copyright Royalty Judges, the CRB adjusts the rates for compulsory sound recording licenses. It has oversight over any rate agreed upon by voluntary negotiations between recording labels and licensees.<sup>33</sup> In 2003, CRB appointed SoundExchange, an independent, nonprofit organization created by the Recording Industry Association of America (RIAA), to be the sole collector and distributor of sound recording performance royalties established by the CRB.<sup>34</sup> SoundExchange currently represents over 100,000 registered recording artists and rights holder accounts, 16,000 of which have been registered since 2013.<sup>35</sup>

### **DOJ Should Increase Transparency and Efficiency by Creating an Open Database for All Performance Rights Licensing for Composition Copyrights**

There are several constraints on music services as they navigate the current music copyright licensing structure. ASCAP and BMI each use a different external digital catalog for music services to search for their member's music rights. An online music service could use any of these online catalogs to see which organization holds a license for any specific artist.<sup>36</sup> While ASCAP, BMI, and Society of Composers, Authors and Music Publishers of Canada (SOCAN), recently announced a joint venture called "MusicMark" to harmonize the song information in their repertoires and simplify how songwriters and composers register their works, there are actions the DOJ can take to improve access, transparency, and fairness in not only the

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<sup>31</sup> Geoff Duncan, "Why is Thom Yorke Pulling His Music from Spotify? In a Word: Royalties," *Digital Trends*, July 15, 2013, <http://www.digitaltrends.com/music/how-do-music-royalties-work-and-why-does-everyone-complain/#!bqO6Q0>.

<sup>32</sup> Robert J. Williams, Jr., "Public Performance Royalty-Rate Disparity: Should Congress Pamper Pandora's Pandering?" 380.

<sup>33</sup> Ibid.

<sup>34</sup> "Licensing 101," *Sound Exchange*, accessed August 1, 2014, <http://www.soundexchange.com/service-provider/licensing-101/>.

<sup>35</sup> "Our Work," *Sound Exchange*, accessed August 1, 2014, <http://www.soundexchange.com/about/our-work/>.

<sup>36</sup> "BMI Search," *Broadcast Music Inc.*, accessed August 1, 2014, <http://www.bmi.com/search>, and "ACE Search," *the American Society of Composers, Authors and Publishers*, accessed August 1, <https://www.ascap.com/home/ace-title-search/index.aspx>.



PRO catalogs, but also in free market negotiations.<sup>37</sup> Specifically, the DOJ should encourage ASCAP and BMI to implement either a single database for both repositories or implement interoperable databases that can share a single search and licensing capability. By simplifying this labyrinthine licensing system, the DOJ will be able to reduce transaction fees, foster innovation, and increase transparency and fairness in negotiations.

The DOJ should encourage ASCAP, BMI and other PROs to create an open database for all public performance rights, starting first with the PROs subject to consent decrees and gradually incorporating other licensing organizations. With a one-stop-shop database, potential licensees would be free to find and pick what licenses they wish to purchase, and third-party developers could build applications on top of the PRO's databases to facilitate music licensing. No longer would companies be forced to purchase blanket licenses for all three PROs out of fear of accidental infringement.<sup>38</sup> Currently, the different PRO catalogs make their catalogs available to the public and do a good job of showing whether another PRO holds the license that a company is looking for. As an example, if a webcaster searched for "Taylor Swift" on ASCAP's database, it would tell them that licenses for this artist's compositions are held by BMI.<sup>39</sup> However, the webcaster could not then purchase the license from that website; instead they would have to seek out the license on BMI's online repertory. Additionally, if the webcaster searched for the song "22" by Taylor Swift on ASCAP's database, he or she would not be supplied with any further information about the song other than its rights holder (BMI).<sup>40</sup> By incorporating all music rights holdings into a single open database, webcasters, terrestrial radio and television broadcasters, and other potential licensees would be able to see all information relevant to licensing a song. This information could include, but not be limited to: which PRO holds the performance rights, who wrote the song, who composed the song, who published it, who holds the sound recording rights, what firm represents the mechanical and synchronization rights, and how much each license costs to obtain. Licensees could then purchase these rights on a micro or macro scale, choosing a single song or a blanket license.

This open database would promote fairness in negotiations by increasing transparency. Imagine a situation in which a digital music streaming service had access to the catalogs of two publishers through ASCAP. If one of those publishers was in rate negotiations with the music service, and refused to provide a complete song catalog, the music service would not know which songs belonged to which publisher. This service would then be forced to shut down its service or risk large infringement fees. This hypothetical situation could give side

<sup>37</sup> "ASCAP, BMI and SOCAN Collaborate on MusicMark," *the American Society of Composers, Authors and Publishers*, April 2, 2014, <http://www.ascap.com/playback/2014/04/action/ascap-bmi-socan-musicmark-collaboration.aspx>.

<sup>38</sup> Daniel Horowitz, "Congress Should Consider Reality Over Rhetoric in Copyright Reform," *Roll Call*, July 2, 2014, <http://www.rollcall.com/news/Congress-Should-Consider-Reality-Over-Rhetoric-in-Copyright-Reform-234416-1.html?pg=1&dczone=opinion>.

<sup>39</sup> "ACE Search," *the American Society of Composers, Authors and Publishers*, accessed August 1, <https://www.ascap.com/home/ace-title-search/index.aspx>.

<sup>40</sup> Ibid.

negotiations excessive leverage and force rate court proceedings. In this way, a transparent database will promote fairness in market negotiations between PROs, songwriters, composers, publishers, and licensees.

A comprehensive licensing database would also provide a platform for future innovation in the music industry. The last few years have seen unprecedented growth in the digital market, with digital music content seeing new levels of experimentation and innovation. From iTunes to iHeartRadio to Spotify, consumers have more choices when it comes to their listening habits than ever before. With the proliferation of mobile devices, businesses like Spotify have brought streaming music capabilities directly to consumers' hands.<sup>41</sup> Companies are able to experiment with different business models and technologies to deliver music directly to consumers' mobile devices, computers, and cars. This has resulted in different price points and a higher degree of competition.<sup>42</sup> This is a success story that an open electronic database for performance licenses will augment and improve. By popularizing the information in the PROs' catalogues, the DOJ will reduce the barrier to entry for licensing fees.

### DOJ Should Allow Copyright Owners to Determine Royalty Rates

The current system fails to produce competitive rates for compulsory licenses. In the absence of a competitive market, PROs were free to pursue monopolistic pricing, which led to the ASCAP and BMI consent decrees. In the current system, PROs are allowed to negotiate with music services for rates on bulk compulsory licenses. If those negotiations fail, a rate court steps in to settle the dispute. A compulsory license provides all entities that follow a set of conditions the right to use a copyrighted work.<sup>43</sup> For instance, Pandora may broadcast music if it pays the royalty fee and meets the terms of the compulsory license. However, this system assigns a single rate for every song on the license, devaluing some songs to the benefit of others. Instead of allowing free market negotiations, the government imposes a single royalty rate for all music. This made sense in a pre-digital age where managing so many different rates was not feasible. This rationale for a single rate no longer makes sense and the DOJ should move to implement a dynamic, market-driven rate-setting system for the PROs' bulk rates and individual publisher's rates with the comprehensive licensing database, as discussed above, at its center.

As ITIF argued in previous comments to the National Telecommunication and Information Administration (NTIA), if a popular band can charge more for concert tickets than an unpopular one, so too should

<sup>41</sup> "About Us," *Spotify*, accessed August 1, 2014, <https://www.spotify.com/us/about-us/contact/>.

<sup>42</sup> Robert Atkinson, Daniel Castro, and Michelle Wein, "ITIF Comments on Copyright Policy, Creativity, and Innovation in the Internet Economy," *the Information Technology and Innovation Foundation*, November 13, 2013, <http://www.itif.org/publications/itif-comments-copyright-policy-creativity-and-innovation-internet-economy-0>.

<sup>43</sup> Robert J. Williams, Jr., "Public Performance Royalty-Rate Disparity: Should Congress Pamper Pandora's Pandering?" 377.



songwriters be able to license their music at different rates.<sup>44</sup> Not all copyrights are created equal in a free market, and the DOJ has been artificially inflating certain licenses at the expense of others by setting a single rate. The previously discussed electronic database of licenses would allow copyright owners to set different licensing rates. These copyright owners, often represented by the publishers, could then specify separate royalty rates for different music services, both by type—terrestrial, digital, satellite, and cable—and by status—commercial and non-commercial. As ITIF has previously argued, competition and rates in this new system could be evaluated on three levels: inter-platform competition (terrestrial radio vs. Internet radio), intra-platform competition (Pandora vs. Slacker Radio), and inter-music competition (Jay-Z vs. Taylor Swift).<sup>45</sup> To limit a music service’s potential liability for broadcasting a song, some type of safeguard should be implemented, such as a maximum royalty rate.<sup>46</sup> The PROs could also license their bulk catalogs, and the pricing data from individual licenses would help generate a more accurate market indicator of appropriate rates. Copyright owners who do not want to charge royalties would not need to specify a rate, and could allow their music to be consumed for free. Copyright owners could charge different rates for performance licenses on different platforms, and owners could also choose to charge non-profit organizations, like college radio stations or NPR, seeking licenses lower rates.

DOJ is also seeking comment on whether to allow members of ASCAP and BMI to partially withdraw licensing for the purposes of rate negotiation. Any concerns DOJ may have with independent negotiations would be made moot by our previous recommendations. By creating an open database for performance licensing and allowing copyright owners to determine royalty rates, DOJ will address many concerns with partial-withdrawal of licensing rights from the PROs by encouraging a competitive market for compulsory licensing. In early 2014, Pandora got into a dispute over pricing with Sony, who temporarily withdrew part of its performance rights from ASCAP to negotiate for a higher rate.<sup>47</sup> In this case, a side deal would be encouraged under the new system. The negotiations would abide by additional transparency requirements, and each business would be able to negotiate freely. Pandora would benefit from the compulsory licensing structure and Sony would benefit from setting its rates. As previously noted, transparency during the negotiations could have resolved the dispute organically.

### **ASCAP and BMI Should be Allowed to License Multiple Rights**

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<sup>44</sup> Robert Atkinson, Daniel Castro, and Michelle Wein, “ITIF Comments on Copyright Policy, Creativity, and Innovation in the Internet Economy.”

<sup>45</sup> Daniel Castro, “A Fair and Competitive Royalty System for Music Services,” 8.

<sup>46</sup> Daniel Castro, “A Fair and Competitive Royalty System for Music Services,” 2-3.

<sup>47</sup> Hannah Karp, “Justice Department Investigates Possible Pricing Coordination in Music Publishing,” *Wall Street Journal*, July 14, 2014, <http://online.wsj.com/articles/justice-department-investigates-possible-pricing-coordination-in-music-publishing-1405384088>.

The DOJ should also use the review of these consent decrees to abolish the restriction on PROs regarding the leasing of multiple types of composition rights from its members other than performance rights. As discussed earlier, a musical composition copyright guarantees public performance rights, mechanical rights, and synchronization rights which may be held by separate entities.<sup>48</sup> ASCAP and BMI are limited by their consent decrees to only licensing public performing rights. By opening up compulsory licensing to competition and increased transparency, as detailed above, this restriction will no longer be necessary. If a unified database was incorporated where copyright holders set competitive prices, bulk rights would need not to be set by four separate entities. By allowing PROs to license mechanical, synchronization and synchronization rights, the DOJ will further simplify the complex process of music rights licensing. Many threats of excessive market power can be addressed through the use of rate setting safeguards for all rights in a composition copyright, as previously discussed. Additional threats of excessive market power are mitigated by the transparency requirements and the presence of a rate court to set rates when negotiations dissolve. By combining these rights into a single system, copyright holders will be better able to bulk these rights together for packaged licensing. This simplification of the process will also reduce transaction fees by lowering the number of middlemen involved. This in turn will allow songwriters and composers to get better royalty compensation for their rights. The current system creates a web of one-off deals, licensing confusion, and unnecessary transaction fees. By allowing PROs to license additional rights to music services, DOJ can streamline the process and create a system that makes all parties involved better off.

### DOJ Should Push for Faster Resolution of Disputes

In testimony before the Senate, ASCAP President and Chairman of the Board Paul Williams contended that the rate courts are slow to change rates, and any case that ASCAP brings before a rate court is a long, arduous and expensive process.<sup>49</sup> Until the court arrives at a decision, music services can use the compulsory license without paying ASCAP. This allows licensees to use the music and defer payment to ASCAP, sometimes even beyond the original expiration date of the license being litigated.<sup>50</sup> Court fees involved with these disputes are also expensive for all parties involved, and while these disagreements used to be rare, they have increased in the digital age.<sup>51</sup> Many critics of this system, including BMI, seek arbitration as a solution to this costly and slow conflict resolution method.<sup>52</sup> In his testimony, Williams advocates for the rates set by the court to be based on real market competition, citing cases where the rate court assigned a rate far below similar market

<sup>48</sup> Solo, Alex, “The Role of Copyright in an Age of Online Music Distribution,” 173.

<sup>49</sup> Paul Williams, “Music Licensing Under Title 17–Part Two,” *American Society of Composers, Authors and Publishers*, before U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Courts, Intellectual Property and the Internet, June 25, 2014.

<sup>50</sup> Paul Williams, “Music Licensing Under Title 17–Part Two.”

<sup>51</sup> Ibid.

<sup>52</sup> Leslie Stimson, “Music Licensing: No Unity in Sight,” *Radio World*, July 16, 2014, <http://www.radioworld.com/article/music-licensing-no-unity-in-sight/271318>.

negotiations.<sup>53</sup> Still others have argued that the rate courts should preclude certain pricing considerations when setting these rates.<sup>54</sup> Out of all the debate over the issue of setting rates, one thing is clear: a drawn-out process creates uncertainty for all parties involved. This is damaging to the licensee as much as it is damaging to ASCAP or BMI, because it stunts investment, increases transaction costs and harms innovation. To that end, DOJ should consider either arbitration or creating a means by which rate courts can expedite their decisions. Rate courts should also be made to meet more frequently. Faster resolution of disputes and expedient rate-setting will allow these mediators the flexibility to adjust to the fast-moving music industry.

## Conclusion

By creating a market-driven rate system and a transparent music licensing database for the PROs, the DOJ can usher in a wave of innovation into the digital music world. The steps outlined in these comments will add much needed reform to the music copyright world, encouraging fairness, transparency, competition, and innovation. The copyright system as it is today was created because we did not have the technological know-how to streamline the system and still get the authors, composers and songwriters their due compensation. In today's digital world we have the capabilities to "have our cake and eat it too." DOJ should use the review of these consent decrees to expedite the reform process for digital copyright licensing. By adopting these policies, the DOJ will promote innovation, consumer choice, and simplicity into a needlessly burdensome process.

Sincerely,

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Information Technology and Innovation Foundation

Enclosures

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<sup>53</sup> Paul Williams, "Music Licensing Under Title 17–Part Two."

<sup>54</sup> Daniel Horowitz, "Congress Should Consider Reality Over Rhetoric in Copyright Reform."

## Additional Recommendations: Congress should Begin the Transition to a More Competitive, Open Music Copyright System

As part of its review on the Copyright Act in the digital age, Congress should ultimately create a system where copyright owners can set competitive prices for their recordings and get compensated fairly regardless of the technology used to broadcast the music.<sup>55</sup> If the DOJ follows the recommendations outlined in these comments, Congress should look to its consent decree as a first step to begin moving regulation of these types of musical licenses in that direction. By leveling the playing field for different technologies, Congress and the DOJ can promote innovation and competition across platforms.

For innovation to foster within the music community as a whole, the process used to set rates for performance copyrights should be uniformly applied to all types of broadcasts. The current system is not technology-neutral, discriminating against non-terrestrial music services by imposing a performance license on sound recording rights for all non-terrestrial radio broadcasts. As noted in the background section of these comments, although Internet radio and terrestrial radio are competing technologies, Internet radio is forced to pay for additional royalties on sound recordings that terrestrial radio is not subject to pay. This is not platform neutral, and disproportionately harms the digital economy. Congress and the Administration should promote technology neutral policies to ensure a fair and competitive market for all forms of musical broadcasts. The system discriminates against online licensees, especially Internet radio, but it also results in unfair compensation to copyright holders. In an ideal world, everyone would pay for these royalties and no one would be exempt.

After granting the same performance copyright for all broadcast technologies, Congress should also modify the statutory license to allow copyright owners to specify separate royalty rates for sound recordings. This policy would codify the open, competitive copyright licensing market discussed earlier in these comments. Beyond that, Congress should mandate that all copyright licensing for musical works be encompassed in this open market, including performance rights for sound recordings, mechanical rights, synchronization rights, and performance rights for compositions. To simplify this process, Congress should mandate that the Library of Congress partner with SoundExchange or another similar entity to create an electronic database for all sound recordings, or a series of electronic databases with a similar searchable capacity. This database should allow copyright owners to specify separate royalty rates for different music services and create competition between platforms, within platforms, and between copyrights holders.

These changes would increase fairness and competitiveness criteria while preserving the benefits of compulsory licenses. Reforming the royalty rate system would make all platforms subject to the same types of

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<sup>55</sup> “House Copyright Review Timeline” *Future of Music Coalition*, July 20, 2014, <http://www.futureofmusic.org/article/article/house-copyright-review-timeline>.

royalties and process for setting their rates. Additionally, a codified national database of sound recording licenses with corresponding performance royalties would allow copyright holders to set music royalty fees at competitive market rates. Music services could make decisions on what to play based on demand and the publishing rate of particular songs. These companies would no longer be subject to blanket licenses or a royalty fee that values all music equally. Copyright owners could adjust fees to meet their needs—promotional, fiscal, or otherwise. They could also offer discounted rates or open access to non-commercial broadcasters, like NPR. By implementing this policy, Congress will give consumers more listening options and copyright owners fairer compensation for their works.

These policies will also facilitate licensing abroad. Many countries have weak intellectual property laws or poor enforcement, which result in reluctance among copyright owner to license their content overseas.<sup>56</sup> In countries like China, music piracy is still rampant despite nationwide anti-piracy campaigns and recent highly publicized take-downs.<sup>57</sup> The U.S. government should work with other countries to bring their domestic copyright protection and enforcement mechanisms up to international standards, and educate foreign leaders about the positive effects that these policies generate, such as fair compensation for copyright owners, better services for consumers, and the development of innovative new businesses.

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<sup>56</sup> “Google’s Chinese Music Experiment,” *Forbes*, April 1, 2009, <http://www.forbes.com/2009/04/01/google-music-china-business-media-google.html>.

<sup>57</sup> Michael Schlesinger, “International Intellectual Property Alliance 2013 Special 201 Report on Copyright Protection and Enforcement,” *International Intellectual Property Alliance*, September 20, 2013, [http://www.iipa.com/pdf/2013\\_Sep20\\_China\\_WTO\\_Compliance.pdf](http://www.iipa.com/pdf/2013_Sep20_China_WTO_Compliance.pdf).