



**Executive Summary of Testimony of Chris Harrison**  
**Vice President, Business Affairs, Pandora Media Inc.**  
**Before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet**  
**June 25, 2014**

Changes to the Copyright Act must be advanced with the interests of the primary beneficiary of copyright firmly in mind: the hundreds of millions of Americans who listen to, delight in, and benefit from their legal consumption of music through services like Pandora Radio.

Pandora believes that the Judiciary Committee's music licensing review should be guided by three important principles:

1. **Balance Must Be Restored to the Music Ecosystem to Include All Stakeholders:** Music licensing laws have historically favored the interests of big copyright owners and made only small allowances for other stakeholders, including music users, in the music community. However, technology companies have made tremendous investments of intellectual property and capital to positively transform the music landscape to provide new options for consumers. Non-interactive Internet radio has quickly become a significant platform of legal music consumption. Seventy-seven million Americans (nearly 1 in 3 Americans over the age of 13) tuned into Pandora last month and listened for an average of more than 22 hours. Every month, Pandora performs more than 1.5 million songs by more than 100,000 recording artists, 80% of whom would not be discovered otherwise. The value of this intellectual property contributed by innovators must be considered as Congress shapes music policy.
2. **Statutory Blanket Licenses Enable Broad Participation in the Music Marketplace and Must be Preserved:** While Pandora believes that there are important improvements that can be made to the music licensing process, the existing statutory blanket licensing structures for non-interactive Internet radio services such as Pandora are largely achieving copyright's primary goal. In this world of fragmented and opaque copyright ownership, statutory blanket licensing is an efficient means for digital music services to license the millions of copyrights owned by tens of thousands of copyright owners that are necessary to offer a compelling service to consumers. In addition to ease of licensing, statutory blanket licenses, as practiced by ASCAP and BMI and required of SoundExchange, provide extremely valuable transparency into the royalty payments of songwriters and recording artists. They also allow songwriters and recording artists to participate directly in the receipt of royalties. This current system must be preserved to ensure that new legal services can enter the marketplace, musicians and songwriters are paid, and consumers are given many options in music and music services.

- 3. The Music Ecosystem Must Be Protected from Anticompetitive Music Licensing Behavior:** The collective licensing of copyrights owned by different copyright owners creates the very real market power problems from which anticompetitive behaviors can emerge. In addition, the highly concentrated music industry enables one or two companies to determine which innovating services survive and which die, often in situations where these companies have a direct financial interest in a service. The recent experiences of Pandora and other music licensees reflect anticompetitive behavior of various music publishers and the performing rights societies for which continued government intervention is required. It is the consent decrees in the case of ASCAP and BMI and the statutory provisions of Sections 112 and 114 in the case of record labels that protect music users from the potential abuse of market power created by collective licensing. These protections must remain.

Finally, just as statutory blanket licenses provide much needed transparency for songwriters and recording artists, in order to foster more transparency for music users such as Pandora, we recommend the creation of a single database of record, hosted by the Copyright Office, that would house all relevant music copyright ownership information. Participation in such a database need not be mandatory, but Congress could create the proper incentives for robust participation. By enabling services to quickly ascertain who owns which rights to a work, a single database of record would also enable services to identify, on a catalog-by-catalog basis, the owners of the songs they perform, which would encourage true competition among copyright owners for distribution on digital platforms. While the transparency provided by such a database would mitigate the anticompetitive behavior Pandora recently experienced, it would not alleviate such behavior entirely, reaffirming the need for the protection of statutory blanket licensing structures.



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**Introduction**

Thank you, Mr. Chairman and ranking Member Nadler. Pandora appreciates this opportunity to testify at this important hearing. Pandora applauds Chairman Goodlatte and this Committee for your leadership in initiating a comprehensive review of the current Copyright Act. The subcommittee's hearings of June 10<sup>th</sup> and today are particularly important as they bring focus to the many thorny issues related to how copyright law impacts the licensing of music. Music is a vital part of our vibrant culture that enriches our lives and connects us to places, times and people; Pandora is proud of the constructive role we play in the music ecosystem.

Pandora is confident that members of this Committee, as well as the full House and Senate, will bear in mind that any changes to the Copyright Act that impact the licensing of music must be advanced with the interests of the primary intended beneficiaries of copyright firmly in mind: the hundreds of millions of Americans who listen to, delight in, and benefit from their *legal* consumption of music.<sup>1</sup> Pandora supports any efforts to make the current system work better and smarter, so long as such efforts adhere to the following foundational principles:

1. The interests of all stakeholders in the music ecosystem must be balanced,  
not just the interests of big copyright owners;

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<sup>1</sup> Both the intent of Congress behind the Copyright Act and decades of jurisprudence from U.S. Courts of Appeals and our Supreme Court instruct that copyright is intended to "stimulate activity and progress in the arts *for the intellectual enrichment of the public.*" *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990)) (emphasis added); see also H.R. Rep. No. 2222, 60th Cong., 2d Sess. (Report on the Copyright Act of 1909) (noting that copyright exists "primarily for the benefit of the public.").

2. Statutory blanket licenses enable broad participation in the music marketplace and must be preserved; and
3. The music ecosystem must be protected from anticompetitive licensing behavior.

While Pandora believes that there are important improvements that can be made to the music licensing process, the existing statutory blanket licensing structures<sup>2</sup> for non-interactive Internet radio services such as Pandora are largely achieving copyright's primary goal.

#### Pandora Is Radio

Although delivered over the Internet and not the airwaves, Pandora is radio. Advertising supported, free-to-the-listener radio like Pandora has been a critical part of the cultural fabric of America for nearly 100 years. In establishing nonsubscription services in the DMCA, Congress recognized that advertising supported radio is a democratizing force, enabling shared cultural expression across the entire socioeconomic spectrum. Radio is also the preferred mode of music consumption; research shows that 80% of time spent listening to music is a "lean back" radio experience, in which the listener selects the style or genre of music and the radio service selects which songs to play.

Although it is the newest form of radio, non-interactive Internet radio has quickly become a significant platform of legal music consumption. Seventy-seven million Americans (nearly 1 in 3 Americans over the age of 13) tuned into Pandora last month and listened for an average of more than 22 hours. Every month, Pandora performs more than 1.5 million songs by more than 100,000 recording artists, 80% of whom were not played on terrestrial radio.

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<sup>2</sup> For ease of reference, we refer to both statutory licensing of sound recordings under Sec. 114 and blanket licensing under the ASCAP and BMI consent decrees as "statutory blanket licensing."

In addition to exposing this wide variety of artists to tens of millions of listeners, Pandora also contributes hundreds of millions of dollars to a new royalty stream that did not exist twenty years ago. Today, Pandora pays more than \$1,500 in total royalties per 1 million performances on our service. In the language of terrestrial radio, 1 million performances on Pandora is equivalent to 21 performances on 102.7 KIIS FM in Los Angeles or just 16 performances on 100.3 WHTZ FM in New York. Just nine years after launching, Pandora is on track later this summer to pass the milestone of \$1 billion in total royalties paid.

### Pandora's Technology

The public's embrace of Pandora is the result of a massive investment in its unique intellectual property. Tim Westergren, Pandora's founder, had the idea that all music could be categorized against a single taxonomy, and created the most powerful tool for discovering music: the Music Genome Project. Fourteen years later, Pandora's music analysts, most of whom have degrees in music composition or music theory, have devoted as much as 333,000 hours - the equivalent of 38 years - listening to and cataloging the musicological traits of each song in the Genome across as many as 450 different characteristics. The result of this process is that each song in Pandora's Music Genome Project exists as a single point in a multi-dimensional space at the intersection of all of that song's characteristics or "genes." Pandora then uses as many as 50 proprietary mathematical algorithms to determine how geometrically "close" one song is to another. It is Pandora's creation of, and investment in, its intellectual property that enables a listening experience that empowers tens of millions of listeners to discover new music that they love.

Non-interactive Internet radio, however, is not just about discovering new music; it's also about being able to experience music that is culturally relevant regardless of whether a local broadcaster operates a station in a particular format. Pandora routinely receives emails from listeners like Chris who

tuned into Pandora after his local jazz station changed formats or Jen who listens to Christian Rock on Pandora because no local station carries that genre.

#### Pandora's Investments in Monetization

To help generate our 120-plus percent average annual revenue growth over the last three years, Pandora has invested more than \$440 million in resources and initiatives to monetize our tens of millions of monthly listeners. Pandora now employs more than 800 people (and growing) in sales and sales support operations across the country, including salespeople selling in 37 local advertising markets, going head-to-head with terrestrial radio for local advertising dollars. Pandora's investment in monetization has produced remarkable results, both in magnitude and in the pace of growth. For example, Pandora is behind only Facebook and Google in revenue generation from mobile advertising sales, with \$366 million in mobile advertising revenue last year, representing a growth rate of approximately 1,200% in just three years.

#### **Is Licensing Reform Needed?**

As this Committee considers changes in music licensing regimes, Pandora hopes that the Committee will appreciate the salutary aspects of our current system that encourages innovation through simplified licensing procedures, protects music users from the anticompetitive behavior of big copyright owners, and assures that artists actually receive their fair share of the hundreds of millions of dollars in royalties that services like Pandora pay each year. In order to understand the need to maintain but improve upon the status quo, we must consider the current music licensing environment.

#### The Music Industry Is Too Concentrated

Our music industry is a highly concentrated one, in which major record labels do not really compete against one another for distribution on digital platforms<sup>3</sup> but attempt to use their market

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<sup>3</sup> "Because each Major currently controls recorded music necessary for these streaming services, the music is more complementary than substitutable in this context, leading to limited direct competition between Universal and EMI."

power to decide which services win and lose,<sup>4</sup> in many instances because that major record label has a direct financial interest in a digital music service.<sup>5</sup> Unfortunately, the loudest voices in the debate about music licensing are these big copyright owners who assert that what is good for them is good for all.<sup>6</sup>

### Copyright Ownership Is Too Fragmented

While the music industry is highly concentrated, copyright ownership is extremely fragmented. For example, the 2013 Grammy winner for best song, “We Are Young” recorded by fun,<sup>7</sup> has four different songwriters and seven different music publishers.<sup>8</sup> Although the Copyright Act provides that a co-author may grant a non-exclusive license to a joint work such as “We Are Young,” the custom and practice in the music industry has developed such that each co-owner will only license its proportionate share in the underlying work.<sup>9</sup> Therefore, absent the availability of a statutory blanket license, the more than 1.5 million tracks that Pandora plays in a given month may implicate separate licensing negotiations with tens of thousands of individual copyright owners.

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Statement of FTC Bureau of Competition Director Richard A. Feinstein, *In the Matter of Vivendi, S.A. and EMI Recorded Music*, September 21, 2012.

<sup>4</sup> “Power is the ability to stop new services. Power is the ability to create new services. That’s power.” Billboard Power 100: Lucian Grainge Q&A, by Bill Werde, February 07, 2013 8:55 PM EST <http://www.billboard.com/biz/articles/1538532/billboard-power-100-lucian-grainge-qa>; See Paul Resnikoff, “Sony/ATV ‘Now Has the Power to Shut Pandora Down...’” Digital Music News, Jan. 17, 2013, *available at* <http://www.digitalmusicnews.com/permalink/2013/20130117pandora> (quoting publishing sources as saying, “The 25 percent bump is going to get higher after the first year deal,” “They aren’t squeezing Pandora now, but they will,” and “Sony now has the power to shut Pandora down, that’s your negotiating power”); Paul Resnikoff, “Universal Music Publishing ‘Now Has the Power to Shut Pandora Down...’” Digital Music News, Feb. 5, 2013, *available at* <http://www.digitalmusicnews.com/permalink/2013/20130205umppg> (quoting source saying, “I said it to you on Sony/ATV and it’s the same with Universal. They can shut Pandora down if they want to. So that’s your negotiating power.”).

<sup>5</sup> Universal Has A Big Stake In Beats That’s Worth Nearly \$500 Million, by Peter Lauria posted on May 8, 2014, at 6:11 p.m (Universal Music’s investment in Beats, recently sold to Apple, may yield \$500 million) <http://www.buzzfeed.com/peterlauria/universal-music-will-make-nearly-500-million-on-apples-beats>; The Major Labels Are Trying to Sell Spotify for \$10 Billion, Sources Say, by Paul Resnikoff Wednesday, June 11, 2014 (Major labels own a 20% stake in Spotify) <http://www.digitalmusicnews.com/permalink/2014/06/11/major-labels-trying-sell-spotify-10-billion-sources-say>.

<sup>6</sup> Two foreign-owned multinationals now dominate music publishing and recorded music; e.g., the so-called “Majors.” Sony Corporation, headquartered in Japan, controls the largest music publishing catalog along with the second largest record label. Vivendi, headquartered in France, through its Universal Music Group subsidiary, controls the second largest music publishing catalog and the largest record label. While music publishers complain about the disparity of royalties they receive compared to record labels for performances on Pandora, in many cases Pandora is paying same company for both performance rights.

<sup>7</sup> The band’s name is stylized as *fun*.

<sup>8</sup> The songwriters are Jack Antonoff, Jeff Bhasker, Andrew Dost, and Nathaniel Ruess and the music publishers are Bearvon Music, FBR Music, Rough Art, W B Music Corp., Shira Lee Lawrence Music, Sony/ATV Songs, and Way Above Music.

<sup>9</sup> 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 6.10[A][2] (2013).

### Copyright Ownership Information Is Too Opaque

There is no authoritative database of copyright ownership information to which a service such as Pandora could turn if it had to license directly these millions of copyrights owned by tens of thousands of copyright owners. Those databases that are available (e.g., ASCAP, BMI and some music publishers maintain online databases that can be searched on a title-by-title basis) often contain conflicting information. For example, the ASCAP database indicates that Universal Music Publishing owns the composition for the song “Somebody that I Used to Know” co-written and recorded by Gotye; however a search of the Universal Music Publishing website results in no matches for the title “Somebody that I Used to Know” or songs recorded by Gotye.<sup>10</sup>

### Statutory Blanket Licenses Are Necessary to Alleviate Concentration, Fragmentation and Opacity

In a concentrated industry with fragmented and opaque copyright ownership, statutory blanket licensing can be an efficient means for digital music services to license the millions of copyrights owned by tens of thousands of copyright owners that are necessary to offer a compelling service to consumers.<sup>11</sup> As the Future of Music Coalition recently stated, “The incredible growth of Internet radio, for example, would have been inconceivable had fledgling webcasters been compelled to negotiate with all of the music publishers individually. Without an easier way to obtain permission to play songs, Internet radio might never have happened.”<sup>12</sup>

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<sup>10</sup> The Universal Music Publishing website contains the following disclaimer: “UMPG makes no warranties or representations whatsoever with respect to its accuracy.”

<sup>11</sup> “Collective licensing has enormous benefits for the music market and consumers. It provides broadcasters and services with a one stop license for the world’s repertoire under compulsory statutory licenses with rate setting by the Copyright Royalty Board. ... The non-interactive compulsory statutory licensing regime ensures equity and fairness for all copyright owners and allows greater music service marketplace access resulting in greater consumer choice.” American Association of Independent Music (“A2IM”) President Rich Bengloff’s letter to the Federal Trade Commission Chairwoman Edith Ramirez and Director Bureau of Competition Deborah L. Feinstein regarding Google/YouTube Notice-Independent music labels and their artists’ content to be blocked on the YouTube music website (June 4, 2014) available at ([http://www.a2im.org/downloads/FTC\\_Letter\\_June\\_4\\_2014.pdf](http://www.a2im.org/downloads/FTC_Letter_June_4_2014.pdf))

<sup>12</sup> The Blanket ‘Problem’: Balancing the Needs of Songwriters with New Forms of Radio (Guest Post), By Casey Rae, April 21, 2014 12:59 PM EDT available at (<http://www.billboard.com/biz/articles/news/radio/6062737/the-blanket-problem-balancing-the-needs-of-songwriters-with-new>)



### 1. *Statutory Blanket Licenses Provide Transparency for Songwriters and Recording Artists*

In addition to ease of licensing, statutory blanket licenses, as practiced by ASCAP and BMI and required of SoundExchange, provide extremely valuable transparency into the royalty payments of songwriters and recording artists.<sup>13</sup> For example, in her opinion in Pandora's rate proceeding with ASCAP, Southern District of New York Judge Denise Cote described how "Songwriters, and at least some independent music publishers, were concerned about the damage that might be wrought from ... the partial withdrawal of rights from ASCAP" because "Songwriters were concerned about the loss of transparency."<sup>14</sup> In almost every case under a statutory blanket license, a songwriter or recording artist can determine the royalty rate applicable to a particular performance to ensure that payments received accurately reflect royalties earned.<sup>15</sup>

### 2. *Statutory Blanket Licenses Provide Direct Payment of Royalties to Songwriters and Recording Artists*

Not only do statutory blanket licenses provide transparency of how royalty payments are calculated, they allow songwriters and recording artists to participate directly in the receipt of royalties. Under the Section 114 license, recording artists are directly paid by SoundExchange for performances of

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<sup>13</sup> "Direct deals on the publishing side also raise concerns about transparency. Outside of the framework made possible by oversight, what guarantees do songwriters and composers have that their share will be fairly apportioned?" Comments of Future of Music Coalition in Response to the Copyright Office's Music Licensing Study, Docket No. 2014-3, May 16, 2014 at 16; "The trend toward direct licensing to copyright users by music publishers of performing rights in musical compositions is one that is causing grave concern to the music creator community because of the utter lack of transparency in the direct licensing process." Comments of Songwriters Guild of America, Inc., U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014 ("Comments of Songwriters Guild") at 7; "The statutory licenses are also transparent." Comments of SoundExchange, Inc., U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014 at 4.

<sup>14</sup> Songwriters "were concerned as well that the publishers would not manage with as much care the difficult task of properly accounting for the distribution of fees to multiple rights holders, and might even retain for themselves certain monies, such as advances, in which writers believed they were entitled to share." *In re Petition of Pandora Media Inc.*, 12 civ 8035-DJC (SDNY March 18, 2014) (hereinafter "*In re Pandora*") at p. 97).

<sup>15</sup> For example, the rate that Pandora pays for the public performance of sound recordings is part of the Federal Register and is prominently displays on SoundExchange's website.

their music on services such as Pandora.<sup>16</sup> Likewise, ASCAP and BMI directly pay songwriters their share of the royalties collected.<sup>17</sup> These direct payments are important because they bypass the traditional royalty accounting whereby royalties flow through a record label or music publisher, where unrecouped advances are deducted and a much smaller percentage of the royalty collected—if any—is passed through.

### 3. *Anticompetitive Behavior Must Be Constrained*

Collectively licensing an aggregation of copyrights owned by different copyright owners, however, creates the very real market power problems from which anticompetitive behaviors can emerge.<sup>18</sup> It is the consent decrees in the case of ASCAP and BMI and the statutory provisions of Sections 112 and 114 in the case of record labels that protect music users from the potential abuse of market power created by collective licensing. Notwithstanding recent calls to do away with consent decrees because, for example, they were last modified before the advent of the iPod, the same joint selling agency among horizontal competitors that gave rise to the anticompetitive behavior that the government felt needed to be constrained in the 1940s still exists today. In fact, it is ironic that it was the reactions of ASCAP and big music publishers to the advent of terrestrial radio, when ASCAP attempted to increase royalty rates by 375%, that caused the government to sue ASCAP for engaging in an “unlawful combination and conspiracy in restraint of ... commerce in radio broadcasting.”<sup>19</sup> Today, ASCAP, BMI and the major publishers appear to be saying that the consent decrees that resulted from this prior anticompetitive behavior against terrestrial radio broadcasters needs to be amended so that they can repeat this same anticompetitive behavior against Internet radio services.

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<sup>16</sup> “An important feature of the Section 114 statutory license is that artists directly and immediately participate in the royalty stream.” Comments of SoundExchange, Inc., U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014 at 3.

<sup>17</sup> “This system has ... provided music creators with the crucial assurance that an important source of revenue will be paid directly to them by the PRO.” Comments of Songwriters Guild, p 7.

<sup>18</sup> As the U.S. Copyright Office recently concluded, “there is a significant risk that the collective may exploit its market power by charging supra-competitive rates or discriminating against potential licensees” U.S. Copyright Office *STELA § 302 Report* 95-96 (August 29, 2011).

<sup>19</sup> Original Complaint filed by the Department of Justice in U.S. v. ASCAP, 41 civ. 1395 (SDNY February 26, 1941).

The recent experiences of Pandora and other music licensees reflect the very real and continued anticompetitive behavior of various music publishers and the performing rights societies for which continued government intervention is required. SESAC, the one performance rights society in the U.S. that does not operate under a consent decree or statutory license, is currently being sued in two separate antitrust lawsuits. In one case, federal District Court Judge Engelmayer found that the “evidence would ... comfortably sustain a finding that SESAC ... engaged in an overall anticompetitive course of conduct designed to eliminate meaningful competition to its blanket license.”<sup>20</sup> In the other case, federal District Court Judge Jones found that the Radio Music License Committee was likely to prevail on the merits of its antitrust case because, in part, SESAC was deliberately concealing the contents of its repertoire to effectively stifle competition to its direct license.<sup>21</sup>

#### Pandora’s Recent Experience with Anticompetitive Behavior by Major Music Publishers

As this Committee is no doubt aware, over the last two years major music publishers, allegedly motivated by a perceived inequity between the amount of royalties Pandora pays to record labels and the amount publishers collect, sought to withdraw from ASCAP and BMI the right to license digital music services such as Pandora. When the major music publishers purportedly withdrew their digital rights from ASCAP and BMI in 2012 and 2013, they were supposedly operating in the “free market,” the expected benefits about which you have heard so much from the publishers themselves. When given the chance to compete, however, the major publishers and ASCAP choose not to. Instead, they quickly reverted back to exactly the type of anticompetitive behavior the consent decrees are meant to mitigate. As Judge Cote concluded, “the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying [the ASCAP consent decree].”<sup>22</sup>

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<sup>20</sup> Meredith Corp. v. SESAC LLC, 9 civ 9177-PAE (SDNY March 3, 2014).

<sup>21</sup> Radio Music License Comm., Inc. v. SESAC, Inc., 12 civ 5807-CDJ (ED Pa. February 20, 2014).

<sup>22</sup> *In re Pandora* at p. 97.

Judge Cote’s 136 page opinion is replete with the details of this coordinated and anticompetitive behavior. For example, the major publishers and ASCAP refused to provide Pandora with the list of repertoire purportedly being withdrawn,<sup>23</sup> thereby depriving Pandora of the ability to exercise self-help and take down content it could not or did not want to license.<sup>24</sup> The major publishers “each exercised their considerable market power to extract supra-competitive prices” from Pandora.<sup>25</sup> The major publishers “interfered” with Pandora’s negotiations with ASCAP at the end of 2012, preventing ASCAP from signing a deal Pandora believed it had reached with ASCAP management.<sup>26</sup> A major publisher even used the press to leak the confidential terms of their agreements with Pandora.<sup>27</sup> In sum, “ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified.”<sup>28</sup>

#### Statutory Blanket License Rate-Setting Process Can Be Improved

While Pandora believes that because of its procompetitive benefits statutory blanket licensing should remain a central feature of licensing non-interactive Internet radio, there are steps that Congress can take to improve the efficiency of determining the reasonable fees for statutory blanket licenses and mitigate against the kind of continued anticompetitive behavior Pandora recently experienced.

During Pandora’s rate setting proceeding with ASCAP, Judge Cote welcomed thoughts from all interested parties “about ways that the litigation could be conducted in a more cost-effective way” and

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<sup>23</sup> “Pandora also asked ASCAP for the list of Sony works in ASCAP’s repertoire. It would have taken ASCAP about a day to respond to Pandora’s request with an accurate list of the Sony works. But, ASCAP, like Sony, stonewalled Pandora and refused to provide the list.” *In re Pandora*, p. 67.

<sup>24</sup> “Without that list, Pandora’s options were stark. It could shut down its service, infringe Sony’s rights, or execute an agreement with Sony on Sony’s terms.” *In re Pandora*, p. 98.

<sup>25</sup> *In re Pandora* p. 97.

<sup>26</sup> “They also interfered with the ASCAP-Pandora license negotiations at the end of 2012. UMPG pressured ASCAP to reject the Pandora license ASCAP’s executives had negotiated, and Sony threatened to sue ASCAP if it entered into a license with Pandora.” *Id.*

<sup>27</sup> “[D]espite executing a confidentiality agreement with Pandora, Sony made sure that UMPG learned of all of the critical terms of the Sony-Pandora license. And LoFrumento admitted at trial that ASCAP expected to learn the terms of any direct license that any music publisher negotiated with Pandora in much the same way.” *In re Pandora*, p. 98.

<sup>28</sup> *In re Pandora* pp. 98-9.

asked “to talk ... with ASCAP and the right set of music users” about ways to “set up some streamlined procedures for appropriate discovery.” Judge Cote indicated that a revision to the consent decree would not be required to implement these types of cost-saving efficiencies. Instead of rushing into a decree modification process, ASCAP and BMI should engage with music users around process changes to which all parties could agree.

Several respondents to the Copyright Office’s recent notice of inquiry regarding music licensing commented on the expense and burden of the current Copyright Royalty Board (“CRB”) rate-setting proceedings.<sup>29</sup> The current process involves a bifurcated proceeding during the first phase of which the parties submit their written direct cases, including their rate proposals and all testimony and evidence they intend to introduce at the hearing, without the benefit of any discovery from other participants. Because the record labels, which share information with their representative SoundExchange, have access to all of the direct licenses that typically serve as benchmarks in these proceedings, but individual licensee-participants only have access to direct deals into which they have entered, if any, the current procedure significantly favors the copyright owner participants. Recently, Pandora and the National Association of Broadcasters attempted to ameliorate this problem by filing motions for the issuance of subpoenas with the CRB in connection with the current rate-setting for non-interactive webcasting, commonly referred to as Web IV.<sup>30</sup> The CRB, however, denied these motions.

The common themes among these respondents are (1) the need for the application of the federal rules of civil procedure and federal rules of evidence to apply to CRB proceedings, (2) the establishment of a unitary proceeding with ample time for discovery and presentation of evidence, and

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<sup>29</sup> See, e.g., Comments of Sirius XM Radio Inc., pp. 15-17; Comments of the National Association of Broadcasters, pp. 19-22 (noting that the “current CRB procedural rules applicable to rate cases have resulted in proceedings that are at least as, if not more, expensive than analogous litigation in the federal ASCAP and BMI rate courts, but also provide less complete evidentiary records and therefore less satisfactory results”); Comments of Music Choice, pp. 29 – 32, and Comments of Digital Media Association, pp. 37 – 39 (noting that “CRB rate proceedings are actually more expensive (or certainly no less expensive) than federal court proceedings before the ASCAP and BMI rate courts, but they are far less efficient.”).

<sup>30</sup> In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings, Docket No.14-CRB-0001-WR (2016-2020).

3) the application of the so-called 801(b) standard. Even the Recording Industry Association of America recognizes that the application of the 801(b) standard can result in rates that reflect fair market value.<sup>31</sup>

#### A Database of Record Would Mitigate Anticompetitive Behavior

Just as statutory blanket licenses provide much needed transparency for songwriters and recording artists, in order to foster more transparency for music users such as Pandora, we recommend the creation of a single database of record, hosted by the Copyright Office, that would house all relevant music copyright ownership information.<sup>32</sup> Participation in such a database need not be mandatory, but Congress could create the proper incentives for robust participation. For example, just as Chapter 4 of the Copyright Act prevents a copyright owner from seeking statutory damages unless the work at issue is registered, Congress could include a further requirement that entitlement to statutory damages was contingent on registering and keeping accurate copyright ownership on this database. Because this database would be the database of record, copyright owners would only have to enter their ownership information a single time, reducing the current situation where information is often entered and reentered across multiple databases. A single reliable and fully searchable database of record, coupled with ineligibility of statutory damages for works not in the database, would prevent copyright owners from holding services such as Pandora ‘hostage’ during negotiations, threatening massive copyright infringement penalties while refusing to disclose their repertoire.<sup>33</sup> By enabling services to quickly ascertain who owns which rights to a work, a single database of record would also enable services to identify, on a catalog-by-catalog basis, the owners of the songs it performs, which would encourage real competition among copyright owners for distribution on digital platforms. While the transparency

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<sup>31</sup> See Comments of the Recording Industry Association of America, U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014, p. 25. In the context of Section 115 licenses, in over 35 years that the 801(b) standard has applied, there have been only two litigated proceedings. Compare this record of compromise to the history of the application of the so-called “willing-buyer, willing-seller” standard. Each of the webcasting rate-setting proceedings have been fully litigated, including appeals, and, on at least two occasions, Congress felt compelled to intervene.

<sup>32</sup> “Identifying and locating the co-authors of each of millions of copyrighted musical works is a daunting task that is hampered significantly by, among other things, the lack of a modern and publicly searchable database identifying the current owners of musical works and the contact information for such copyright owners.” Comments of Spotify USA Inc., U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014 at 4.

<sup>33</sup> One cannot search the ASCAP or BMI databases by publisher and receive a list of all works owned by that single publisher.

provided by such a database would mitigate the anticompetitive behavior Pandora recently experienced, it would not alleviate such behavior entirely, reaffirming the need for the protection of statutory blanket licensing structures.

Thank you again for your leadership on this issue and the opportunity to testify. I look forward to answering your questions.