

**Written Statement of Michael O’Neill before the
Subcommittee on Courts, Intellectual Property, and the Internet
of the U.S. House of Representatives Committee on the Judiciary
Hearing on Music Licensing Under Title 17, Part One
June 10, 2014**

Mr. Chairman, thank you for the opportunity to present testimony before the Subcommittee on Courts, Intellectual Property, and the Internet (the “Subcommittee”) of the U.S. House of Representatives Committee on the Judiciary (the “Committee”) on the important subject of music licensing. I would also like to thank the Ranking Minority Member and the other members of the Subcommittee.¹

My name is Michael O’Neill. I am Chief Executive Officer of Broadcast Music, Inc. (“BMI”), one of the world’s leading music performing right organizations (“PROs”). Mr. Chairman, America’s copyright laws provide a firm legal foundation to support a vibrant community of creative songwriters, composers and music publishers whose works fuel a robust and vibrant entertainment industry. After giving some brief background information about BMI’s mission and the benefits of collective licensing, my testimony will address three areas of music licensing in the current digital environment: (1) modernizing the BMI consent decree to enable BMI to meet the needs of the digital marketplace; (2) the need for the Songwriter Equity Act to achieve fair market value royalties for performances and mechanical licenses; and (3) updating the public performing right for the digital age, including confirming the applicability of

¹ Neither I nor BMI have received any funds, grants, contracts (or subcontracts) from any federal agency or proceeding of any kind during this fiscal year or the preceding two fiscal years that would have any relevancy to this hearing or my testimony.

the “making available” right recognized in the WIPO Copyright Treaty (“WCT”) (to which the United States is a signatory).

I. BMI and Collective Licensing.

BMI is celebrating its 75th anniversary this year. Since its incorporation in 1939, BMI’s traditional role has been to license on a non-exclusive basis one of the six exclusive copyright rights identified by Congress in the U.S. Copyright Act: the right to publicly perform musical works. Public performances of musical works occur on radio, television, cable, satellite and the Internet as well as at concert halls, sports arenas, restaurants, hotels, retail stores and universities, to name a few of the many categories of BMI licensees. BMI licenses its music repertoire literally wherever music is performed or communicated to the public. BMI operates on a non-profit-making basis, distributing all income (less overhead and reasonable reserves) to its affiliated songwriters and publishers.

BMI is proud to represent the public performing rights to more than 8.5 million musical works, and over 600,000 songwriters, composers and publishers, more than any other PRO. BMI also represents the works of thousands of foreign composers and songwriters when their works are publicly performed in the United States. BMI’s repertoire includes works from outstanding creators in every style and genre of musical composition. BMI provides benefits to music creators and users alike. BMI also provides viable competition and choice for America’s songwriters in the licensing of the public performing right in their musical works.

For its licensed music users, BMI offers an easy and friction-free solution for clearing the public performing rights to its works through the mechanism of a blanket license for one modest annual license fee. BMI’s core competency is as a trusted third party in licensing the public performing right of musical creators to a broad range of entities that incorporate music into their products or services. To be successful in this mission, we have developed an understanding of

and appreciation for the business models and programming needs of the hundreds of thousands of businesses across the nation that provide our creators' music to the public. BMI's blanket licensing has been endorsed over the decades by virtually all parties across the copyright licensing spectrum and, over the past four decades, has been embraced by Congress as a model for statutory licensing and applauded by the Registers of Copyright in several reports presented to Congress and this Committee.

BMI also plays an extremely active role in the international copyright arena, serving on many committees and in leadership capacities in CISAC, the International Confederation of Societies of Authors and Composers. BMI has over 90 reciprocal licensing agreements with foreign PROs that give users outside the United States access to perform the BMI catalog and give users within the United States instant access to a global catalog of music. In an increasingly international economy fueled by the rapid expansion of the Internet, BMI's structure and long history of cooperation with international content owners is all the more relevant and compelling.

Since the dawn of the Internet, BMI has seen opportunity both for the digital businesses using BMI-represented music as part of their offerings, and for the songwriters, composers and music publishers we represent. In many ways, digital media has democratized the entertainment industry – knocking down economic and technological barriers and creating opportunity for more creators. We believe that technology and artistic creativity are symbiotic, not antagonistic. Today, we can each walk around with access to literally millions of songs from all genres through a device that fits neatly in our shirt or coat pockets. Tomorrow, as the market continues to innovate, it will become even easier for consumers to take greater control of their content – what they see or listen to, as well as how and where and when they do it.

For 75 years, BMI has served as a bridge between the business and creative communities as new opportunities to build commercial enterprises and generate revenue from music content have emerged. BMI's roster of licensees is a "who's who" of the global digital media. From Rhapsody to Spotify, Netflix to Hulu, and YouTube to Apple, we have a strong track record of crafting commercial relationships that work for business and our writers and publishers. Through these innovative licenses, we have successfully addressed new business and content models, from ad-supported to subscription services, long-form programming to on-demand and crowd-sourced playlists. We respect the exciting innovations that our digital licensees are bringing to market. We ask in return that the services recognize the value of music and creativity in the marketplace when standards and rules are established and when royalty fees are negotiated.

Despite our impressive track record of growth, BMI, like any organization, must continue to evolve to address the needs of its customers and the marketplace. What follows are achievable suggestions of what is needed for BMI to continue to fulfill its mission of serving its affiliates and promoting the growth of music.

II. The BMI Consent Decree Must Be Modernized to Meet the Marketplace Needs of the Digital Age.

BMI's business operations are governed by a nearly 50-year-old consent decree that was written at a time when television was an adolescent industry, analog broadcasting was the norm, and most popular music was on AM radio stations and could only be purchased by fans in small mom-and-pop record stores. Needless to say, the world is a vastly different place in the early 21st century. The BMI decree is in dire need of important repair and modernizing in order for BMI to continue to bridge the needs of music users and owners.

BMI has been in discussions with the United States Department of Justice (“DOJ”), as well as music users and the music publishing industry, about ways to modernize its decree to meet the needs of the current and future marketplace. We see the need to loosen or eliminate archaic restrictions that keep necessary, in-demand products from the marketplace, or that result in fees that are not market-based, or that create an obstacle course that jeopardizes the ability of small, independent publishers (and the songwriters who have contracted with these publishers) to continue to compete with their larger publisher competitors, thereby injuring the public. I will address four areas of proposed decree reform.

A. Digital Rights Withdrawal Should Be Permitted under the BMI Decree.

Concerned that the PROs were being paid license fees that were not market-based for many digital music services, several larger publishers decided in the last few years to withdraw from BMI and the American Society of Authors, Composers and Publishers (“ASCAP”) the right to license their catalogs for certain defined digital uses and instead to license those uses directly in the unregulated marketplace. Unlike many traditional media music users, it appears that there are a small number of very large digital music services that those publishers believe they can license themselves without the intermediary of BMI. Those publishers apparently believe that, if their digital rights are negotiated away from the confines of the consent decrees’ compulsory license regime, they can achieve rates that more accurately reflect fair market value.

BMI believes that its consent decree permits partial withdrawal of rights (*i.e.*, permitting publishers to designate BMI to license some license categories but not others).² However, in separate decisions in 2013, both the BMI and ASCAP rate courts determined that the PROs’

² For example, as part of BMI’s standard publisher affiliation agreements all publishers have for decades withheld the right to license “grand” performing rights from BMI because the market for musical theater is one that they can easily license themselves and for greater value.

consent decrees do not allow their publishers to choose to have their works licensed by BMI (or ASCAP) for certain uses while retaining their rights to license PRO customers for other uses.

The BMI rate court held that a publisher must use BMI for *all* public performing rights purposes or *none*, thus putting publishers in the position of having to leave PROs entirely if they wish to retain any licensing right exclusively for themselves.

These decisions present publishers with a dilemma: “all in” or “all out.” If forced into an all-or-nothing choice, publishers could be compelled to turn their backs on the efficiencies and value that BMI brings to wide swaths of the music licensing market in order to explore market opportunities for digital music rights.³ This threatens the entire licensing ecosystem that BMI services, including the songwriters, the hundreds of thousands of music users who depend on blanket licenses to comply with the copyright law, and the international web of reciprocal license agreements. Thus, in our discussions with the DOJ we are seeking to clarify our consent decree with the DOJ to provide for partial withdrawal of rights under some reasonable structural guidelines.

B. BMI Should Be Able to License Multiple Rights.

In today’s world, multiple rights – for example, performing rights, mechanical rights, lyric display, publication and reproduction rights, and synchronization rights – are often necessary in order to disseminate music. Currently, users must negotiate these complementary rights with multiple parties in circumstances where the ability to negotiate all of them with a single party would be more efficient. As the Commerce Department Internet Policy Task Force

³ For example, if a publisher withdrew from BMI, it would either have to incur the costs of licensing, monitoring, and collecting royalties from tens of thousands of restaurants and many thousands of broadcasters, or forgo licensing them and the royalties to which it would otherwise be entitled.

recently noted, the current disaggregated system is inefficient, and bundled licensing could spur innovation.

While the BMI consent decree does not prohibit the licensing of multiple rights, ASCAP's consent decree does. However, in Europe, where collective music rights organizations handle both performance and mechanical rights, it is a common practice for PROs to offer "one-stop shop" licensing for multiple rights in musical works. Yet despite the demands of the marketplace for bundled rights solutions, BMI and ASCAP do not generally license mechanical rights or synchronization rights, either separately or as a complement to their blanket licensing of public performing rights for digital music services.⁴

For over 10 years, digital music services have complained about the difficulty of licensing mechanical rights under Section 115. The Section 115 compulsory license is a work-specific license, whereas digital music services need access to a large volume of works to launch competitive music offerings online. These services have called for a blanket license under Section 115 as well as the ability to bundle the various music publishing rights they need through "one-stop shops." PROs ought to have no restrictions on the product lines they can offer to users who need all rights.

This clarification of the BMI decree is especially critical if some publishers elect to withdraw their digital rights from BMI. If partial rights withdrawal were permitted under the BMI consent decrees, we expect that some larger publishers would take the opportunity to license – and bundle – rights to certain music users outside of BMI's licensing mechanism. However, most publishers – including especially smaller and independent publishers – would

⁴ BMI has included limited sync licenses to the broadcast television networks as part of its longstanding blanket license agreements.

likely opt to remain with BMI, as they may lack the resources necessary to explore such licensing opportunities or may simply prefer to avail themselves of the value provided by BMI.

It is therefore critical that the BMI consent decree make clear that these smaller and independent publishers – through BMI – are able to bundle digital rights in the same way as their larger competitors do. In this way, smaller publishers will be able to offer the same licensing products as large publishers, and digital music services will have access to all the rights they need from BMI affiliates on a one-stop basis.

In addition, under changes to the copyright law enacted effective in 1978 and just now becoming operational, songwriters who gave their rights to publishers in or after 1978 can recapture their copyrights after 35 years. This will create an ever-growing universe of songwriters who will become, essentially, their own publishers, and, just like the small and independent publishers, will need the resources of the PROs to fully exploit their works and compete with the larger publishers who offer bundled rights products outside of the PROs.

Maintaining BMI's role as a trusted digital licensing representative for independent music publishers and songwriters also would ensure the continued diversity and competition in the music publishing sector, which has seen consolidation in recent years. PROs should be explicitly authorized to handle reproduction and distribution rights required by digital services, either separately or as a part of bundled rights offerings. Such capabilities will also bring the United States into greater harmony with global PROs.

C. The BMI Rate Court Should Be Replaced or Streamlined.

Under the BMI consent decree, a licensee has an automatic right to a blanket license to use any, some, or all of BMI's music upon written request for a license. If BMI and the licensee cannot reach an agreement on reasonable fees through negotiations, either party can petition the designated judge in the United States District Court for the Southern District of New York to

determine those fees (referred to as the BMI “rate court”). When a fee dispute is before the BMI rate court, the parties to the rate proceeding frequently cite prior PRO licenses and other marketplace deals to serve as benchmarks in order to aid the rate court in setting reasonable license fee rates for the applicant music user.

While this rate court structure may have served a purpose in the traditional, stable broadcast marketplace, the process is ill-suited to the rapidly evolving digital licensing world. In short, the BMI rate court (and the parallel ASCAP rate court) federal litigation process has become unwieldy, expensive and slow, and it has produced what we believe are below-market rates that are not responsive to changes in the value of repertoire.

We believe that replacing the current rate court with arbitration in New York under the American Arbitration Association rules would be a faster, less expensive, and a more market-responsive mechanism for all parties to obtain fair, market-value rate decisions. Congress already enacted legislation to provide an expedited litigation structure for individual proprietors in Section 513 of the Copyright Act. This can perhaps be a template for a streamlined process, (albeit with replacing federal rate courts in the various federal circuits with arbitrations). We do not believe that moving BMI to compulsory licensing before the Copyright Royalty Board (“CRB”) would be a solution to this problem, as it would replace one expensive, slow system with another.

Under the current BMI consent decree, any business that wants to use our music just has to send BMI a letter asking to do so. If businesses can get instant access to our music, it is only fair that they pay us *something* from the moment they use the music, even if it may take a while to come to a final agreement on terms. Under the current decree, if the parties cannot agree on an “interim” fee, BMI must bring a motion in the BMI rate court – again, slow and expensive –

to have the court set the rate. For an interim fee to be paid from the outset would require a change in the consent decree to become a reality.

D. The BMI Decree Should Be Periodically Reviewed or Sunset.

In addition to these reform ideas, BMI also believes that the DOJ should re-examine the basis for a perpetual consent decree governing and restricting the rights of music content owners. In this regard, we should move toward a sunset of the current decree in its entirety if its existence can no longer be justified overall, or partial deregulation in any digital market in which BMI may lack the market power that was the predicate for its original regulation.

The substantive provisions of BMI's current consent decree were negotiated and entered into in 1966, with the lone change since then being the addition of the compulsory license/rate court mechanism in 1994. This nearly 50-year span is several generations in human years, but measured in digital years, it is eons removed from the current marketplace. The current BMI consent decree assumes that BMI has significant market power that needs to be curbed, but those assumptions are questionable now that digital technology has exploded in the past two decades. The Internet's worldwide reach, combined with increasing computing power and decreasing storage costs, now affords both owners and music users far greater tools and capabilities to identify, monitor and license music use than was the case a half century ago. There are many rights licensing agencies and services competing to meet the rights clearance needs in an unregulated market.

However, even if regulation still has some place in the modern era, a likely future is one in which one or many major publishers may partially withdraw their digital rights from BMI (in the event that partial grants are permitted or recognized by the courts to be available under the decree), or large publishers may have left the PROs entirely. In any market sector in which this occurs, BMI would lack the market power presupposed as a basis for its consent decree

restrictions. Why then should BMI continue to be regulated for those licensees? In short, the competitive landscape has changed so substantially that the DOJ should reexamine the justifications for the decrees and seek termination if they are no longer found to be warranted by original assumptions.

If record labels and major publishers can license in the unregulated marketplace, PROs should also be able to compete on the same playing field so that legions of smaller songwriters and publishers will not be disadvantaged. Competition from the collective body of smaller songwriters and publishers will benefit the public welfare. At a minimum, the decree should be subjected to mandatory periodic review, perhaps every five years, and terminated at a stipulated point in the future.⁵

As you may be aware, the DOJ has in the last week called for public comment on whether the PROs' consent decrees are fulfilling their purposes. We look forward to this process and are optimistic that DOJ will agree that the time has come to bring the consent decrees into the modern age in order to address the current needs of the marketplace.

III. The Songwriter Equity Act Should Be Enacted.

BMI has joined with ASCAP, SESAC, Inc., the National Music Publishers' Association and the National Academy of Recording Arts and Sciences in support of the Songwriter Equity Act ("SEA"). The SEA is a modest bill which would help songwriters and publishers obtain fair market value royalties for public performance and mechanical licensing of digital services.⁶ The

⁵ On March 28, 2014, the DOJ streamlined its review process for considering modifications and terminations. See Antitrust Division Manual (5th ed., March 2014), available at <http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf> (last visited, Apr. 14, 2014).

⁶ BMI is very pleased that this joint effort culminated in the introduction of the Songwriter Equity Act of 2014 (H.R. 4079) ("SEA") on February 26, 2014 by Rep. Doug Collins (R-GA), joined by original cosponsor Rep. Marsha Blackburn (R-TN).

SEA contains an amendment to Section 114(i) that could serve to reduce the current inequitable disparity between the low public performing rights fees paid by Internet music webcasters (such as Pandora) to songwriters and publishers for the public performance of musical works, and the far higher, fair market value fees paid by these same Internet music services to recording artists and record labels for the public performance of sound recordings.

The goal of the SEA, insofar as it relates to PROs, is simple: it removes the prohibition against the PRO rate courts' consideration of the fair market value rates set by the CRB as benchmarks. The bill, by removing the evidentiary prohibition, establishes a process that permits the rate courts to consider all relevant benchmark deals (including the CRB rates). The statutory fix would not only apply in a rate court but also in arbitration of rates if the BMI decree is amended as we propose herein.

While we believe this may lead to a more reasonably comparative valuation for music compositions, the bill is silent on the appropriate rate, and leaves all aspects of rate determination to the rate court; it does *not* mandate rate increases for the PROs or digital music services, nor does it even require the rate courts to give *any* weight whatsoever to sound recording rates. Rather, by modifying Section 114(i) in this way, Congress would afford rate courts the ability to address the rates for musical works based on a more complete examination of marketplace factors.

The reason we seek passage of this bill is because we believe that a PRO rate court, given all relevant benchmarks, would set rates that would reduce the current disparity. There is a roughly 12-to-1 disparity in the license fees paid to SoundExchange by large digital music services like Pandora compared to the license fees paid to songwriters and PROs by those same services. While ASCAP's rate court recently announced a blanket license rate of 1.85% of

Pandora's net revenues to be paid to ASCAP (for its approximate 45% share of music performances), the same licensee is paying approximately 50% of its revenues for sound recording performing rights to SoundExchange.⁷ BMI has its own rate proceeding pending against Pandora and we are seeking a reasonable rate increase.

There is no basis in law or economics for the current disparity. We believe that one of the causes for this disparity is the language in Section 114(i). Indeed, this section was cited by the ASCAP rate court decision as expressly forbidding the court from even *considering* as benchmarks the fair market value rates paid or set by the CRB for sound recording performance rights.

Indeed, this gap in the value of sound recording and musical work copyrights is out of sync with global music licensing norms. Internationally, performance rights in sound recordings are considered "neighboring" rights that are not the same as "authorship" rights under copyright. Rights of authorship vested in such creative works as musical compositions are viewed as having equal or greater value since they represent the foundational creative elements upon which other intellectual property is derived. This approach recognizes the undeniable truth that there can be no sound recording without an underlying musical composition.⁸

⁷ License rates for "non-interactive webcasting" of sound recordings are subject to a statutory license. In the absence of a voluntary negotiation, they can be set by the CRB under Section 114 using a standard that reflects. This standard is referred to as the "willing buyer/willing seller" standard. Voluntarily-negotiated interactive licenses have been considered as benchmarks in CRB proceedings. Digital music services like Pandora are thus required to pay license fees to SoundExchange for the right to stream the sound recordings containing the underlying musical works at a fair market value. These fees are in addition to separate license fees to the PROs and/or music publishers for the right to stream the musical works contained in the sound recordings.

⁸ The SEA also seeks to shift the rate standard for mechanical royalties from a hodgepodge, multi-factor test to a market-based willing buyer/willing seller standard. We fully support this goal of the bill.

IV. The Public Performing Right Should Be Updated for the Digital Age, Recognizing the “Making Available” Right in the WIPO Copyright Treaty.

In the digital era, the future of content distribution is customized programming.

Consumers want their programming on any device and available at any time. They will no longer accept having to be in front of their television sets at an appointed time to watch their favorite programming.

The worldwide copyright organization, WIPO, recognized in the WCT that the number of individuals who receive a particular content transmission simultaneously is not important. Rather, the WCT acknowledged that content will be consumed individually as a result of it being made available for consumption and therefore recognized that its “making available” right covers interactive, one-to-one transmissions commonly made by Internet and mobile services. In addition, the “making available” right in both the public performing right and public distribution rights includes liability for the “mere offering” to transmit works, without the need to demonstrate that a transmission to a particular listener took place.

To be clear, BMI believes that the current U.S. public performing right already includes the full scope of wired and wireless transmissions, as well as the full scope of interactivity, and that the “making available” right is an inherent part of current copyright law.

However, two recent court decisions have concluded that at least some individually-accessed content is *not* protected by the public performance right, suggesting that Congress should explicitly clarify that the concepts embodied in the “making available” right are applicable to public performances. Specifically, the Second Circuit’s *Cartoon Network* and

Aereo decisions have called into question whether the public performing right even applies to certain kinds of interactive transmissions.⁹

Together, these decisions have curtailed the public performing right, by declaring that one-to-one transmissions of a copyrighted work to individual members of the public are “private” (*i.e.*, outside the scope of the public performing right, and the reach of copyright law) if they are made from so-called “private locker copies.” This technology-based loophole is at odds with the wide application of the performing right to one-to-one, on-demand (or interactive) transmissions. Recognizing the importance of this issue, the U.S. Supreme Court granted certiorari in the *Aereo* case (and heard oral argument on the matter on April 22, 2014). BMI submitted an amicus brief as part of a music industry coalition and we are optimistic that the high court will reverse the Second Circuit’s decision.

The future of commercial music content delivery lies with highly-customized and individualized content streaming offered by cloud music services, and many of these services are already claiming to make “private” performances, in reliance on *Cartoon Network*. I would like to emphasize that cloud computing services will not be threatened by a robust public performing right. Content rights should be licensed and the marketplace will respond to the legitimate needs of cloud locker services. By contrast, if these court decisions remain the law of the land, or are not cured by legislation, we face the potential for a growing range of uses of copyrighted content that will not compensate the content’s creators. Together, these decisions threaten to eviscerate the value of creativity through a technological gaming of the system, enabling engineers to configure a performance as “not public” in order to avoid paying for the use of such content.

⁹ See *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008); *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), cert. granted, *ABC v. Aereo, Inc.*, 187 L. Ed. 2d 702 (U.S. 2014).

BMI therefore believes that the “mere offering” of performances for transmission is applicable to both the public performing right and the distribution right.

In light of these recent developments, we believe that the U.S. public performing right should be clarified or confirmed to include the full scope of the “making available” right.¹⁰

Conclusion

Music always starts with a song, and without songwriters, there would be no music. If music licensing reform is to reach fruition, protecting the economic interests of songwriters should be a paramount concern of Congress. The laws of the United States, enacted pursuant to an express constitutional clause, are rooted in a fundamental principle that authors should be incentivized to create. PROs are key players, as they present efficient marketplace licensing solutions that deliver performing rights to users and performing right royalties to songwriters and publishers.

We believe the keys to a continuing, vibrant music rights landscape are: (1) modernizing the consent decrees to permit partial rights withdrawal, enabling BMI and ASCAP to handle the licensing of mechanical and synchronization rights to digital music services, and streamlining and otherwise modifying the rate-setting mechanism; (2) enacting the SEA to enable rate courts (and any successor arbitration panels) and the CRB to establish fair market value rates for performance and mechanical licenses; and (3) if necessary, legislatively correcting the judicial decisions limiting the public performing right by clarifying that all interactive, on-demand transmissions to the public are public performances. These goals are achievable and will promote creativity and a robust music marketplace.

¹⁰ On April 4, 2014, BMI joined ASCAP, SESAC, Inc. the National Music Publishers’ Association and The Songwriters’ Guild of America in submitting a response to the U.S. Copyright Office’s Notice of Inquiry regarding its study on the Right of Making Available. *See* Joint Comments of American Society of Composers, Authors and Publishers, Broadcast Music, Inc., The Songwriters’ Guild of America, SESAC, Inc., and the National Music Publishers’ Association, Study on Right of Making Available, Docket No. 2014-2 (Apr. 4, 2014).

Mr. Chairman, BMI looks forward to working with you, your staff, and other Members of the Subcommittee. Under your leadership and that of the Ranking Member, BMI will continue to work closely with all sectors of the music industry in order to develop music licensing reform solutions. We are grateful to the Subcommittee for the effectiveness of the Copyright Act, which permits BMI to function, and songwriters, composers and publishers to be compensated – not only to make a living but to create small businesses in a free enterprise system. Thank you for your many years of strong leadership on these issues which has had such a beneficial impact on the livelihoods of the hundreds of thousands of individuals we represent.