



CALinnovates

April 7, 2016,

William J. Baer
Assistant Attorney General for the Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Via Email

Dear Assistant Attorney General Baer:

CALinnovates urges the Department of Justice to refrain from amending the consent decrees regulating certain conduct of the two dominant Performance Rights Organizations (PROs), The American Society Of Composers, Authors and Publishers (ASCAP); and Broadcast Music, Inc. (BMI). The consent decrees continue to serve a critical role in restraining the PROs from colluding with music publishers and others to exercise market power over the licensing of public performance rights in musical works. The decrees have withstood the test of time, continue to serve important pro-competitive purposes by helping restrain price fixing and collusion among competitors, and do not require modification.

The consent decrees have enabled incredible innovation in the digital music space. Services like Apple Music, Pandora, Spotify and others were able to launch, in part, because they could obtain licenses to publicly perform millions of copyrighted musical works on fair and reasonable terms. As a result of these new services, songwriters and music publishers have seen tremendous growth in performance income at a time when overall recorded music industry revenues have declined. In 2014, global digital music revenues were almost \$7 billion, up 60% from 2009, according to the International Federation of the Phonographic Industry's latest numbers. Now is not the time to

change the rules in a way that will limit future innovation, competition and consumer choice.

The Risk of Consent Decree Modifications

Certain segments of the music industry are pushing for the consent decrees to be revised to account for alleged price restraints imposed by the federal judges overseeing the consent decrees and to account for declines in mechanical royalty income as a result of consumers moving to subscribing to music services rather than purchasing music to own. But the rate court judges have gotten it right in establishing royalty rates for the blanket licenses offered by ASCAP and BMI. Each of those organizations now collects more than \$1 billion in performance income! And to the extent changes in consumer behavior is causing consumers to purchase access to music rather than purchasing the music itself, is not a basis for amending the consent decrees to give competitors more power to fix prices and harm competition and the future growth and vitality of the music industry.

Modifications Will Have a Much Greater Harmful Impact on New and Niche Internet Music Services

The recent, substantial increase in royalty rates by the Copyright Royalty Board for the public performance of sound recordings is already having deleterious effect on small webcasters and the diversity of views they offer to the public. With the expiration of the rates adopted pursuant to the Webcaster Settlement Acts of 2008 and 2009, many small webcasters will be forced to either shut down or pay substantially higher royalties for the use of sound recordings. Any changes to the consent decrees could potentially magnify the problem by causing an increase in the public performance of musical works. That would be the final nail in the coffin for many small webcasters.

While the rate increase was generally considered reasonable for the handful of larger statutory webcasters (and there are really only a few remaining in operation), it was enough to drive several smaller players out of business. Live365 was a much-loved Internet radio platform that let users create their own stations. Following the rate hike announced by the CRB, [Live365 announced that it would be shutting down and it terminated all activities earlier this year.](#)

Similarly, GotRadio, a streaming service from web entrepreneur Val Starr, has also shut down most of its music rooms to American listeners because of royalty costs. On the front page of the site is a letter [that](#) reads:

“Due to absurdly high royalty rates, we have been forced to block many of our popular streams in the United States. For streams that are not blocked in the U.S., please visit our U.S. Sanctioned room. We also have unfortunately decommissioned some of our channels. We are hoping and praying that a more reasonable royalty rate will be settled on and if so we will be able to offer up our streams again to the U.S. public.”

Local streaming companies that often specialize in niche music have also been suffering. New York based Pulse 87, an electronic dance music site, and SmoothJazzChicago have both gone dark.

On the ad-supported side, the increased CRB-royalty rate gave Apple an excuse to leave the free-to-the-listener radio space. Now the only free music Apple offers is on Beats 1, a curated radio station. This immediately puts the majority of Apple’s music out of the reach of many listeners. Higher royalties necessarily lead to deadened competition. This creates a chilling effect on consumer choice and pricing.

And when prices rise and consumer choice dwindles, piracy rears its head. As it becomes too expensive or burdensome for ordinary listeners to access the music they want to hear, more people will turn to piracy, which will start to overtake the legitimate companies that are currently paying out billions in royalties. This not only hurts innovative digital streaming companies, it also hurts artists and the entire music ecosystem.

Any modifications to the consent decrees that allow for publishers to extract higher fees and payments from digital services will greatly harm consumers and the innovation economy.

The Dangers of Partial Withdrawal

The Department of Justice is seriously considering allowing publishers to partially withdraw their catalogues from the PROs for certain digital licensing purposes. The largest publishers have argued that they should be allowed to negotiate their own deals with streaming companies instead of being forced to abide by the blanket license aspect of the decrees.

There is no question that allowing partial withdrawals would increase royalties. We’ve already seen how damaging partial withdrawals can be through Pandora’s battle with Sony/ATV Music Publishing. In 2012, Sony/ATV decided to withdraw the “new music” (or digital) rights to its vast catalog from ASCAP. Concerned about the implications,

Pandora asked Sony/ATV for a list of songs that it could pull from its service in the event the two parties weren't able to agree on a new rate. Sony/ATV refused to provide such a list and would not let ASCAP supply a list either. Pandora was put in the untenable position of either having to accept Sony/ATV's licensing demands, shutting down entirely, or risk paying copyright infringement damages of as much as \$150,000 per work infringed if it continued to publicly perform works owned or controlled by Sony/ATV.

Pandora ended up paying Sony royalties that are 25% above the going rate. Sony then allegedly leaked the details of its "confidential" license agreement to the press. This meant that Sony/ATV's competitor Universal Music Publishing Group, which also had a seat on ASCAP's governing board alongside Sony/ATV, started its own partial withdrawal process, Pandora was in a weakened negotiating position and essentially had to pay UMPG the same rate it was paying Sony/ATV.

The rate court ultimately found that Sony/ATV and UMPG's actions were not allowed under ASCAP's consent decree, but by then it was too late as the new rates were already in place.

Despite what some in the industry may believe, streaming is not yet a profitable endeavor for the tech companies building these platforms. Most streaming companies are already paying out 50% or more of their revenue in royalty payments. Growth becomes even more challenging with even less to invest in innovation, marketing, or quality of service improvements.

The partial withdrawal issue is compounded by the fact that outside of the money going to ASCAP and BMI, there are other royalty streams that need to be negotiated in order for a company to be able to use a song. Those deals are negotiated independently and the rates under those deals are unlikely to decrease in the near future, calling into question the ability of streaming companies to survive unless they are owned by larger companies that can afford to lose money on streaming indefinitely.

Changing the Consent Decrees Will Limit Consumer Choice and Reduce Access to Niche Music

The blanket license is a boon for new and niche artists. When a platform like Pandora or Spotify takes a blanket license, it not only has rights to songs from the likes of Rihanna and Justin Bieber, but also artists like jazz singer Zora McFarlane and Christian rock band Elevation Worship. This provides listeners with maximum choice and gives smaller acts a chance to be discovered through music preference algorithms and search

functions, as well as the dedicated programming efforts of music enthusiasts who operate streaming companies.

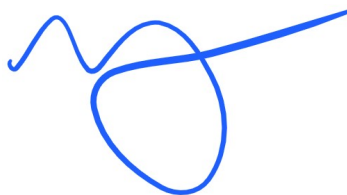
If streaming companies suddenly have to negotiate rights with every partial owner of a song, they are going to focus their spending on the acts they know for sure listeners want to hear. That means more Top 40 and less of everything else, including jazz, country, and folk music. This leads to diminished consumer options, less opportunity for listeners to find new acts, and fewer opportunities for songwriters and bands. Discovery is one of the most vibrant aspects of streaming music, and limiting that ability will only end up hurting musicians and small players while enriching the labels that time and time again have shown they do not always have artists' best interest at heart.

Conclusion

While it is understandable that after 70 years, and in the face of quickly evolving new technologies, the Department of Justice would want to review the consent decrees,

CALinnovates believes the Department should reject modifications or amendments to the consent decrees as any changes would be extremely risky to competition and consumer choice in this marketplace. We urge the DOJ to remember the good that the decrees have done for the music industry. Without the blanket licenses and the ease of access that are a result of the decrees, the streaming industry likely never would have come about. That means that at best, labels would be struggling to find ways to get songs to people online, and at worst, piracy would be a much bigger problem. Thanks to the consent decrees, the music industry is finally back on an upward trajectory. Stopping this momentum by modifying the consent decrees will harm the entire ecosystem of innovators, listeners and content creators.

Sincerely,



Mike Montgomery
Executive Director

cc: Renata Hesse
Ethan Glass
Leslie Overton