Via Electronic Mail (ASCAP-BMI-decree-review@usdoj.gov)

August 6, 2014

John R. Read, Esq.
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street, NW, Suite 4000
Washington, DC 20001

Re: *ASCAP/BMI Antitrust Consent Decree Review*

Dear Mr. Read:

On behalf of the Computer & Communications Industry Association ("CCIA"),[1] we write in response to the Justice Department's ("DOJ") inquiry in relation to its review of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") consent decrees.[2]

I. Introduction

As the Department of Commerce recently observed, "[m]usic licensing is particularly complex."[3] CCIA's members benefit from policies that simplify music licensing, including the certainty and reduction in transaction costs provided by the existence of performance rights organizations ("PROs"). When properly administered, PROs permit content distributors and other licensees, including online services, to provide consumers with access to thousands of musical and audiovisual works under a single license. Small service providers in particular lack the resources to negotiate all of these rights separately, and thus benefit from the present collective licensing system. This reduction in transaction costs benefits not just services, but their users, who avoid having these costs passed along to them. The trade-off for these reduced

[1] CCIA is a 501(c)(6) trade association representing the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 600,000 workers and generate annual revenues in excess of $465 billion. A list of CCIA members is available at http://www.ccianet.org/members.

[2] Available at http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.

[3] Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity and Innovation in the Digital Economy* (July 2013), *available at* http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf, at 81.

transaction costs, however, is consolidated market power: ASCAP and BMI collectively hold the performance rights for approximately 90 percent of all American compositions.[4] These compositions permeate not only musical services, but also audiovisual works, and in many cases cannot be readily identified. Licenses from ASCAP and BMI are therefore nearly essential to any firm, large or small, wanting to broadcast, webcast, stream, or play music publicly.[5]

Penalties for failing to secure these licenses can be extremely costly. Statutory damages under the Copyright Act can be severe. 17 U.S.C. § 504(c) allows a plaintiff to elect a statutory award, which may be up to $150,000 per work infringed, regardless of the actual injury suffered.[6] Scholarly research and investor surveys demonstrate that uncertainty, when combined with existing statutory damages provisions, materially affects investment in online services.[7]

As a result, weakening the consent decrees would create the possibility of competitive misconduct, and risks stifling innovation. Although the consent decrees remain a crucial component of the music landscape, they should also be modernized in various ways, including by increasing transparency and oversight. Even now, under the current consent decrees, credible concerns have been raised regarding anticompetitive behavior involving PROs and certain publishers. Therefore, modernization of the consent decrees should include strengthening those instruments to ensure that the practices which initially gave rise to them cannot recur.

II. Do the Consent Decrees continue to serve important competitive purposes today? Why or why not? Are there provisions that are no longer necessary to protect competition? Are there provisions that are ineffective in protecting competition?

The consent decrees continue to serve important competitive purposes today. The same underlying market power and distribution problems that existed in music licensing in the 20th

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[4] *U.S. considers updating music licensing accords with ASCAP, BMI*, REUTERS, June 4, 2014, *at* http://www.reuters.com/article/2014/06/04/us-usa-copyright-doj-idUSKBN0EF07H20140604.

[5] Many regard licenses from SESAC as being similarly obligatory, although the for-profit PRO is not governed by a Justice Department consent decree.

[6] *Columbia Pictures Tel., Inc. v. Krypton Broad., Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001) (plaintiff may elect statutory damages "regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant's profits.").

[7] Michael Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 944 (2012), *available at* http://wisconsinlawreview.org/wp-content/files/2-Carrier.pdf. One interview subject told Carrier, "Any VC [venture capitalist] I would go to – the first thing they would say is: Music business? You're crazy." *Id*. at 916-17. *See also* Matthew Le Merle *et al*., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study*, BOOZ ALLEN & CO. (2011), *available at* http://www.booz.com/media/file/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf.

century still persist in 2014. As the Division noted when soliciting public comment, the consent decrees were put into effect due to "the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers." As valuable as they are in reducing transactions costs, the PROs' licensing practices are "inherently anti-competitive," demonstrating their "disproportionate power over the market for music rights." *United States v. Broad. Music, Inc.*, 426 F.3d 91, 93, 96 (2d Cir. 2005); *United States v. ASCAP*, 627 F.3d 64, 76 (2d Cir. 2010). These underlying conditions remain unchanged. As Judge Denise Cote ruled in March, there is not—and never has been—a fair, competitive market for music performance rights.[8] This is because the ASCAP and BMI repertories do not substitute for one another; a music service that needs a blanket license to program a compelling playlist typically must secure licenses for both of them (and, indeed, may require a license from SESAC as well). If a service lacks what users are looking for, it will not succeed in the market.

In the face of this extraordinary leverage, the existing mechanisms to protect competition appear insufficient to curtail misconduct. Within the last year, four different federal district court judges found evidence of the same anticompetitive conduct that gave rise to the content decrees more than seven decades ago. In December 2013, Judge Louis Stanton found that music publishers had secretly coordinated with BMI: "BMI cannot combine with [music publishers] by holding in its repertory compositions that come with an invitation to a boycott attached."[9] In the last few months, two district court judges found sufficient evidence that SESAC, which does not presently operate under a consent decree, engaged in monopolistic behavior and violations of the Sherman Antitrust Act.[10] And in her most recent decision in a rate court case involving Pandora and ASCAP, Judge Cote found that the evidence "revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying AFJ2."[11]

[8] *In re Petition of Pandora Media, Inc.*, 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014).

[9] *Broadcast Music, Inc. v. Pandora Media, Inc.*, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013), at *5.

[10] *Radio Music License Committee, Inc. v. SESAC, Inc.*, 2014 WL 2892391 (E.D. Pa. June 26, 2014); *Meredith Corp. v. SESAC LLC*, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014).

[11] *In re Petition of Pandora Media, Inc.*, *supra* note 8, at *35.

III. What, if any, modifications to the Consent Decrees would enhance competition and efficiency?

Modifications and expansions of the transparency requirements in the consent decrees are warranted. Marketplace transparency regarding (a) what works a PRO controls, (b) the identity of the publishers of those works, and (c) publishers' respective ownership shares, as well as additional oversight of the licensing process, will help mitigate harms to competition.

A) Modernizing and harmonizing repertory disclosure

Normally, ambiguities about the boundaries of a property for sale will diminish the objective value of that asset in the marketplace. All else equal, the price of an asset will be lower if there exists some risk that it is encumbered by a lien. The value of land will be lower if potential buyers know that one of the boundaries is indeterminate and disputed. Most of all, if multiple putative owners lay claim to the same parcel, few would want to buy it. Intellectual property is often different, however. With inherently higher transaction costs,[12] IP scholars have frequently observed that the uncertainty and fuzzy boundaries of government-granted rights to exclude can be used offensively.[13]

Thus, uncertainty and opacity surrounding the scope of a PRO's repertory is not a drawback to the PRO. Because ambiguities regarding what works the PRO administers have the effect of increasing the risk of infringement for an entity that elects *not* to take a license, a PRO has the perverse economic incentive to obfuscate what rights it offers.

PROs should not simultaneously be empowered to control a large and economically significant swath of cultural works, and at the same time be permitted to obscure the boundaries of that dominion. Due to the vagaries of the current consent decrees, however, this remains

[12] American Bar Ass'n, *Intellectual Property & Antitrust Handbook* (April 2007) at 131 ("Transactions costs of licensing intellectual property are likely to be greater than transactions costs involving use of real property. Because most intellectual property lacks a physical locus, it is often hard to define the boundaries of what exactly is being transferred in a license. Intellectual property often has 'fuzzy boundaries' not found in real property, since the quality of some issued patents is poor and the true validity and extent of poetry rights conferred by a patent may sometimes only be ascertained through lengthy and expensive legal proceedings.").

[13] Peter S. Menell, *Intellectual Property and the Law of Land*, 30 REG. 64, 65 (Winter 2008), *available at* https://www.law.berkeley.edu/files/v30n4-8.pdf (describing "the fuzzy boundaries surrounding many patents (compare the metes and bounds of a real property deed to the ambiguous phrasing of many software patent claims)"); *see also* Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (October 2003), *available at* http://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf; Mark A. Lemley, *Ignoring Patents*, 2008 MICH. ST. L. REV. 19 (2008), *available at* http://www.ftc.gov/sites/default/files/documents/public_events/evolving-ip-marketplace/mlemley_ip.pdf.

possible and has direct negative effects on competition. Judge Cote's opinion in the *Pandora* litigation illustrates some of these harms. In particular, Judge Cote highlighted coordinated behavior between Sony and ASCAP in order to deny Pandora access to information regarding their repertory, which the Court found demonstrably reduced Pandora's ability to negotiate: "Sony decided quite deliberately to withhold from Pandora the information Pandora needed to strengthen its hand in its negotiations with Sony. . . . Not surprisingly, given its own refusal to share the list with Pandora, Sony did not give ASCAP permission to provide the list. As a result, neither Sony nor ASCAP provided the list of works to Pandora."[14]

The fact that PROs and their members benefit from obfuscating what PROs may license demonstrates the lack of a functional competitive marketplace, and illustrates the need for consent decree obligations regarding what works PROs administer, and who holds the rights to those works. DOJ anticipated this problem, and as a result ASCAP's amended consent decree language requires not only that ASCAP maintain a public list of works, but also enable access to a current, machine-readable version of that database. *See* AFJ2 § X(B)(2).

While ASCAP does provide information about its repertory via the ACE Repertory on its website, it "makes no representations as to its accuracy" and "specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the ACE Database, or for any omission in the ACE Database."[15] ASCAP provides the same unverified information on a CD-ROM, upon receiving a written request and $5.00 check by U.S. Mail.[16] To assess whether a prospective licensee could determine from this disc what works ASCAP controlled, CCIA's counsel mailed such a request and payment to ASCAP. (Two attempts to request the disc by telephone proved unsuccessful.) Roughly one week later, ASCAP sent a disc current only to March 2013 – 10 months beyond the "semi-annual" update contemplated in the consent decree.[17] In addition to being 16 months out of date, the disc only permits a prospective licensee to query the outdated database for a

[14] *In re Petition of Pandora Media, Inc.*, *supra* note 8, at *24.

[15] ASCAP, *About ACE*, *available at* http://www.ascap.com/ace-title-search/about.aspx (last visited Aug. 6, 2014).

[16] *See ASCAP Keeps You in Tune With the Copyright Law*, *available at* http://www.ascap.com/~/media/files/pdf/licensing/general/brochures/ascap_keeps_you_in_tune_with_the_copyright_law.pdf (last accessed Aug. 6, 2014).

[17] *See* AFJ2 § X(B)(2) (requiring update of machine-readable copies "semi-annually"). Unhelpfully, the CD-ROM's (Windows-only) End-User Licensing Agreement (EULA) cautions that it "could include technical or other inaccuracies or typographical errors."

particular work or artist; a licensee is unable to learn from it precisely which 8.5 million songs ASCAP purports to control.[18]

In short, the disc – like ASCAP's website – only enables a prospective licensee to determine when it should pay ASCAP, but frustrates any effort to ascertain how to *avoid* paying ASCAP by not playing ASCAP music. In many cases a licensee will not be interested in knowing whether a PRO controls public performance rights for one particular work, but instead needs to know all works controlled by that PRO. It is entirely reasonable for a licensee to demand to know *what exactly* it may perform upon signing a license with a PRO, and what it *cannot perform* should the licensee decline to such a license. A buyer should know what is being bought.[19] ASCAP's consent decree contains no such requirement. BMI's consent decree provides even less transparency, lacking even the requirement to enable electronic queries of individual tracks.[20]

The consent decrees should therefore be modified to compel each covered PRO to maintain online, open and accurate catalogues that comprehensively articulate all songs the PRO administers, the rights-holder of each of those songs, and the rights-holder's respective ownership share.[21] PROs' obligation should not be merely to inform a prospective licensee "if any work identified by title and writer is in [their] repertory," *see* ASCAP AFJ2 § X(A)(1), but rather to inform that licensee of "all works, identified by title, writer, copyright holder(s), and rights-holders' respective shares, in the repertory." Rights ownership information should be updated in a timely manner, in digital, machine-readable formats. Potential licensees should be able to obtain online electronic files detailing the current contents of the PRO's repertory; in an Internet era, it is not reasonable to satisfy a public inspection requirement by compelling a prospective licensee to travel in person to view records on-site, during business hours.

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[18] Ally Schweitzer, *ASCAP To St. Stephen's Church: Pay Up*, WAMU, June 11, 2014, *at* http://bandwidth.wamu.org/ascap-to-st-stephens-church-pay-up/.

[19] As long as PROs do not fully disclose what is included in a license, they should not be heard to complain that rates courts undervalue their repertories.

[20] Thus, a Colorado bar owner licensed only with ASCAP and SESAC could not necessarily limit her establishment's playlist to exclude BMI music, as the decree does not mandate this information be made available online. *See* Ned Hunter, *Colorado Springs bar owner fined $21,000 over karaoke*, THE GAZETTE, Apr. 21, 2014, *at* http://gazette.com/colorado-springs-bar-owner-fined-21000-over-karaoke/article/1518541.

[21] Covered PROs could be compelled to ensure this data is operationally useful by identifying compositions using commonly accepted standards in the industry for identifying musical works, such as International Standard Recording Codes (ISRCs) and International Standard Work Codes (ISWCs). *See* Department of Commerce Internet Policy Task Force, *Copyright Policy*, *supra* note 3, at 97 (discussing standards).

Notably, ASCAP's consent decree hinges the PRO's ability to litigate upon disclosure: it may "not institute or threaten to institute . . . any suit or proceeding against any music user for copyright infringement relating to the right of nondramatic public performance of any work in the ASCAP repertory that is not, at the time of the alleged infringement, identified on the public electronic list. . . ." *See* AFJ2 § X(D). Extending this obligation across all PROs, in connection with an obligation to make all repertory information available online, will contribute substantially toward addressing potential misconduct.

B) Non-discrimination principles

While PROs may have certain obligations with respect to non-discrimination,[22] these terms are not sufficiently robust to impose meaningful obligations, including non-discrimination among different types of users who are engaged in similar uses. As noted in the *Pandora* litigation, ASCAP in particular has attempted to single out "new media" users, regardless of the distinguishing characteristics of the actual use.[23]

The consent decrees' non-discrimination provisions should also limit PROs' abilities to demand business information from services that is unrelated to the use of musical compositions. If all revenue information is "fair game" when assessing royalty rates (as opposed to revenues related to use of the licensed works), this has the effect of discriminating against licensees who provide multiple services, in favor of licensees who only provide musical services.[24]

C) Rate court provisions

The ASCAP and BMI consent decree provisions regarding the rate court[25] can be modernized in various ways. For example, BMI's consent decree provides for arbitration of contracts, but does not appear to address arbitration with parties not under contract.[26] ASCAP's consent decree makes no mention of arbitration. Licensees should always be able to enjoy the

[22] *See* AFJ2 §§ IV(C), IV(F), VIII(A); BMI AFJ § VIII(A).

[23] *In re Petition of Pandora Media, Inc.*, *supra* note 8, at *10 (noting that "ASCAP . . . raised the rate for new media licenses, reflecting a judgment that those services made more intensive use of music than broadcast radio. Second, it made a distinction between interactive and non-interactive new media services. It did not, however, make any distinction between programmed and customized internet music services.").

[24] *Cf. LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F. 3d 51, 67 (Fed. Cir. 2012) ("Where small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product.").

[25] *See* ASCAP AFJ2 §§ IX, XIV; *see* BMI AFJ §§ XIII-XIV.

[26] *See* BMI AFJ §§ V(A), VII(C).

full benefits of federal procedure, discovery, and evidence, particularly given that the consent decrees aim to mitigate the dangers of collusion in violation of federal law. However, if an existing *or prospective* licensee were willing to submit to binding mandatory arbitration (thereby alleviating the burden on federal courts), the PROs' consent decrees should permit this.

Separately, the consent decrees should also be updated to ensure that licensing disagreements do not drag on indefinitely. The Copyright Act presently ensures a degree of certainty by limiting civil copyright actions to those which have accrued within the preceding three years. *See* 17 U.S.C. § 507(b).[27] The consent decrees should similarly reflect Congress's policy judgment on this matter.

IV. Do differences between the two Consent Decrees adversely affect competition?

PROs should be subject to symmetrical obligations. As noted above in III.A, the provisions in BMI's consent decree regarding disclosure of its catalogue are not symmetrical to those of ASCAP. These provisions should be harmonized across all PROs.

Another salient distinction between how PROs are currently overseen by antitrust authorities is that SESAC, the next-largest PRO after ASCAP and BMI, is not governed by a consent decree at all. Two courts have now pointed to credible evidence of potential misconduct by SESAC; these findings suggest that SESAC's absence from oversight also adversely affects competition.[28] While SESAC only controls performance rights for a small percentage of American compositions, the current structure of the music licensing industry gives that small percentage disproportionate leverage. Sirius XM, in a response to the Copyright Office's recent music licensing inquiry, explained its experiences with SESAC's lack of transparency and the resultant harms:

> In prior negotiations with Sirius XM, SESAC has demanded oversized fees unsupported by the scant information available regarding its catalogue, and always with the implicit threat of infringement liability. At the same time, it has refused to identify its catalogue of musical works, meaning that Sirius XM cannot (as it could with a single copyright holder) simply remove the tracks at issue from its service. This combination of concentrated ownership and either an

[27] This has been interpreted generously, insofar as a plaintiff can wait to bring suit indefinitely, and still recover for damages in the preceding three years. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014).

[28] *See supra* note 10.

unwillingness or inability to be transparent as to what works are actually in the repertory creates a completely untenable situation.[29]

V. How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?

As discussed above in Part III.A, it is difficult to acquire the contents of ASCAP and BMI's repertory and ownership share information in any format, let alone in a useful format. Obligations regarding real-time, online repertory transparency, coupled with limitations on the ability to sue in the absence of such disclosure, should be a central feature of consent decree revisions.

VI. Should the Consent Decrees be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others? If such partial or limited grants of licensing rights to ASCAP and BMI are allowed, should there be limits on how such grants are structured?

Because the demands of the marketplace effectively compel many licensees to negotiate with all PROs, licensee-specific withdrawal of rights may be tantamount to forbidding that licensee from operating in the marketplace. Insofar as a PRO under decree operates as a supervised cartel, a licensor that partially withdraws from a PRO with respect to some licensees, works, or uses, but not others receives the benefits of coordinated action in the marketplace without submitting to the obligations that DOJ has attached to the privilege of coordination. As described in Judge Cote's opinion,[30] Sony's attempts to withdraw so-called "digital" rights[31] from ASCAP, while refusing to reveal which songs that withdrawal affected, meant that it could prevent ASCAP from licensing to one user – and use its "partial withdrawal" to drive an above-market fee – while still obtaining the transaction costs savings of coordination vis-à-vis other

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[29] *In the Matter of Music Licensing Study: Notice and Request for Public Comment*, Copyright Office, Docket No. 2014-3, Comments of Sirius XM Radio, Inc., May 23, 2014, *available at* http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Sirius_XM_%20Radio_Inc_MLS_2014.pdf, at 6. *Cf. In re Petition of Pandora Media, Inc.*, *supra* note 8, at *39.

[30] *In re Petition of Pandora Media, Inc.*, *supra* note 8, at *24.

[31] Notably, there is no so-called "digital" right under Section 106; Congress provided a public performance right. 17 U.S.C. § 106(4). That the public performance may occur via a digital medium does not change the fact that §106(4) is what is being licensed.

users. Accordingly, while a rights-holder should not be compelled to license through a PRO, it must also not be permitted to selectively benefit from coordinated action in the marketplace where it chooses. This "all-in or all-out" obligation should apply equally to uses (*i.e.*, "digital") and works (*i.e.*, works in the publishers' portfolios).

VII. Should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration? What procedures should be considered to expedite resolution of fee disputes? When should the payment of interim fees begin and how should they be set?

As noted above in Section III.B, licensees who so elect should at least have the *option* to move to mandatory arbitration and reduce the burden on the federal judiciary. As noted above in Section III.C, aligning the consent decrees with the Copyright Act's statute of limitations would help to ensure that fee disputes are resolved within a reasonable timeframe.

VIII. Should the Consent Decrees be modified to permit rights holders to grant ASCAP and BMI rights in addition to "rights of public performance"?

Any expansion of the already substantial power market of PROs should be accompanied by a corresponding expansion of oversight and transparency obligations in the consent decree. With more rights to license, a PRO's negotiating leverage and market power expand substantially. While it may increase efficiency to allow PROs to control and license other exclusive rights besides public performance rights, such licensing should only occur on an all-in or all-out basis. Just as partial withdrawal of so-called "digital" rights could be used to exploit the current PRO arrangement with certain services, a licensor could obtain the benefits of coordinated action without the accompanying oversight by licensing one right through the PRO and another independently.

The experience in Europe offers an instructive example of what happens when collecting societies are empowered with broader mandates and less oversight. A 2012 impact assessment issued in a European Commission review of collective rights management stated that "the ability of CS [collecting societies] to efficiently deliver their services is increasingly being questioned, leading to a loss of trust and confidence in their services. The issue is often raised by national parliaments, the European Parliament and national competition authorities. It is the subject of

complaints from rightholders and users."[32] It also observed that European societies could sit on undistributed sums for years; as of 2010, "major societies had accumulated €3.6 billions worth of liabilities to rightholders."[33]

A survey of collective licensing organizations in more than 30 countries found that "many unfortunately share the characteristic of serving their own interests at the expense of artists and the public," and that there was "a long history of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, CROs [collective rights organizations] have often aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system."[34]

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In conclusion, CCIA urges DOJ to uphold and expand the consent decrees, including as described herein.

Respectfully submitted,

Glenn Manishin
Partner
Troutman Sanders LLP
401 9th Street NW
Washington, DC 20004
(202) 274-2890

Matt Schruers
VP, Law & Policy
Ali Sternburg
Public Policy & Regulatory Counsel
Computer & Communications
Industry Association
900 17th Street NW, 11th Floor
Washington, D.C. 20006
(202) 783-0070

[32] Impact Assessment accompanying Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing, July 11, 2012, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0204&from=EN.

[33] *Id.* at 19-20 (Box 6; "Overall, between 5 and 10% of collections are not distributed to rightholders for as many as three years after they were collected – a delay which is significant"; delays in distribution may be to "giv[e] an impression of low operating expenses").

[34] Jonathan Band & Brandon Butler, *Some Cautionary Tales about Collective Licensing*, 21 MICH. ST. INT'L L. REV. 687, 689-90 (2013), *available at* http://msuilr.org/wp-content/uploads/2013/12/516973-Michigan-State-Jnl-of-Intl-Law-21.3_R2-2.pdf.