Internet Association

March 10, 2015

The Honorable Mike Lee
Chairman
Subcommittee on Antitrust, Competition, and Consumer Rights
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Amy Klobuchar
Ranking Member
Subcommittee on Antitrust, Competition, and Consumer Rights
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Lee and Klobuchar:

The Internet Association is the unified voice of the Internet economy, representing the interests of leading Internet companies[1] and their global community of users. It is dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users.[2] As with any new and disruptive technology, the early days of the Internet challenged existing music distribution and performance models. No doubt, the Internet caused some business models to wane. And given the advocacy of some special interest groups in Washington, DC, the subcommittee would be forgiven if it thought that was the end of the story. Today's marketplace, however, has demonstrated that the Internet has ushered in a new era of creative, new music distribution models, resulted in obscure artists being discovered by the public even while record labels ignored them, and caused an incredible explosion in technological innovation. Even during the Internet's early years, it spurred a new and innovative means of radio transmission. Over the past two decades, not only has Internet radio evolved, but it has also spurred streaming services such as those offered by Internet Association members, including Amazon, Google, Pandora and Yahoo.

Today's hearing is important. The Internet Association submits this testimony first because several of our member companies license music under the terms of the DOJ consent decrees. As such, they are concerned that any changes made to the decrees accurately reflect the marketplace realities of music licensing as well as the important role played by the Internet in services that rely heavily on the licensing of performance rights for music.

[1] The Internet Association's members include Airbnb, Amazon.com, AOL, auction.com, eBay, Etsy, Expedia, Facebook, Gilt, Google, Groupon, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, Practice Fusion, Rackspace, reddit, salesforce.com, Sidecar, SurveyMonkey, TripAdvisor, Twitter, Yahoo, Yelp, Uber and Zynga.
[2] The Internet Association respectfully submits that this letter be entered into the record for today's hearing on the Department of Justice (DOJ) ASCAP and BMI music licensing consent decrees.

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Second, while not all of our members provide music services, they all are concerned that digital content delivery via the Internet in general be afforded fair and equal treatment by any government agency, including the DOJ.

In its 2014 request for public comments, the DOJ asked whether the ASCAP and BMI consent decrees continue to serve important competitive purposes today. We believe that the answer to this question is unambiguously "yes." In fact, there are good reasons why the consent decrees serve to promote competition *even more* so today than when they were first entered into in 1941. The underlying need for the consent decrees - the market power of the PROs - is not and never will be temporary in nature since it is inherent in the licensing structure they have chosen to establish. Furthermore, this market power has proven to be persistent: today ASCAP and BMI jointly retain the performance rights for about 90% of all American compositions. Similarly, the market presence of the major publishers has only increased since the 1940s, to the point where UMPG and Sony/ATV now control over 50% of the U.S. music publishing market.

Although market shares are not a perfect proxy for market power, there is recent and direct evidence that both the PROs and the major publishers are willing to use their dominant market positions in ways detrimental to competition and to consumers. This direct evidence is, of course, the record evidence in the Pandora rate court case decided last year.[3] In her opinion in that case, Judge Cote sets out in remarkable detail how ASCAP, Sony/ATV, and UMPG together acted to facilitate partial withdrawals from ASCAP solely for the purpose of implementing anticompetitive royalty rate increases to Pandora. There is no evidence that the partial withdrawals were used to serve a procompetitive, welfare-enhancing purpose: the publishers and ASCAP did not use the withdrawals to compete for share with one another; and there is no evidence that the withdrawals were used to lower transaction costs. As a matter of fact, the Pandora record evidence showed that the publishers reached agreements with ASCAP after their withdrawal allowing ASCAP to continue to administer the collection and distribution of any royalties collected.

The argument advanced by the PROs and their record label allies that the DOJ music consent decrees should sunset or be modified to allow for partial withdrawals simply because they are old is not analytically sound. While it is true that many markets do change over time, necessitating the need for fresh thinking about consent decrees, this is demonstrably not the case here. The PROs' persistent market power combined with the ease with which the PROs will seemingly coordinate with the major publishers rather than compete with them, strongly suggest that the consents should remain intact.

The DOJ will make an important decision regarding the consent decrees in the coming months. It will decide whether to agree with the PROs and the publishers to allow partial withdrawals under the consent decrees, or whether it will side with innovation and consumers and refuse to allow them.

If the DOJ decides against partial withdrawals, any legal challenge to that decision will face a high burden of proof. Under the current case law, a court would look to "equitable considerations" in determining whether to modify the consent decree, and a challenge to this decision would have to show either (1) "that the basic purposes of the consent decree [] – the elimination of monopoly and unduly

[3] *In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2014 U.S. Dist. LEXIS 36914 (S.D.N.Y. Mar. 14, 2014).

restrictive practices – have been achieved"[4], or (2) that "time and experience demonstrate that the decree is not properly adapted to accomplishing its purposes."[5] It is far from clear that ASCAP and BMI could meet the standards of *Eastman Kodak*, particularly in light of recent dealings with Pandora.

If, on the other hand, the DOJ does *not* oppose a modification to a consent decree allowing partial withdrawals, a petition to modify faces a much lower burden of proof, "so long as the resulting array of rights and obligations is within the zone of settlements consonant with the public interest today."[6] The Internet Association believes that even under this lower standard, the consent decrees should not be modified to allow partial withdrawals. Permitting partial withdrawals and the possible removal of "new media" services (which some might see as code for "the Internet") from the traditional PRO-licensing process could promote anticompetitive conduct and greater discriminatory practices by legacy music incumbents against new and innovative services.

Although the Internet Association opposes modifying the consent decrees to allow for partial withdrawals, there is one significant pro-competitive modification we wish to highlight for the subcommittee. This improvement is increased transparency around music licensing negotiations. It is no secret that the Internet has since its inception served to lower search and transaction costs for consumers across many markets, saving consumers time and money on a daily basis. We support efforts to bring similar efficiencies to the music licensing process. The Internet Association therefore calls for a public, searchable database containing a complete and comprehensive list of works in both the PROs' and publishers' repertoires. The technology exists to do this today, and we encourage the DOJ to mandate this improvement so that the information asymmetries in this market can be corrected and parties, including our member companies, can negotiate on a level playing field.

We look forward to hearing the discussion at the subcommittee's hearing today, and to working with you and your staff on any issues of concern for Internet companies.

Respectfully submitted,

Abigail Slater
VP Legal and Regulatory Policy
The Internet Association

[4] "*United States v. Eastman Kodak Co.*, 63 F.3d 95, 101 (2d Cir. 1995).
[5] *Id.* at 102.
[6] *United States v. Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990).