

**Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC**

In the Matter of)	
)	
)	
Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III))	Docket No. 16-CRB-0003-PR (2018-2022)
)	
)	

JOINT PETITION TO PARTICIPATE

Broadcast Music, Inc. (“BMI”) and the American Society of Composers, Authors and Publishers (“ASCAP”) hereby submit this joint Petition to Participate in the above-captioned proceeding pursuant to 37 C.F.R. § 351.1(b)(1)(i) and in accordance with the Notice of the Copyright Royalty Judges (the “Judges”) announcing the commencement of a proceeding to determine reasonable rates and terms for making and distributing phonorecords during the five-year period 2018-2022 (the “Proceeding”), issued on December 29, 2015. *See* 81 Fed. Reg. 255 (January 5, 2016).

BMI and ASCAP are each a music performing rights society, as defined in Section 101 of the Copyright Act, that together represent hundreds of thousands of composer, lyricist, songwriter and publisher members and affiliates with repertoires of millions of copyrighted musical works. On behalf of their members and affiliates, BMI and ASCAP license the public performance rights under Section 106(4) of the Copyright Act to a wide range of users, including television and radio broadcasters, cable operators, satellite carriers, and Internet and other digital services. BMI and ASCAP are also each affiliated with more than 90 foreign performing right

organizations around the world and license the repertoires of those organizations in the United States.

BMI and ASCAP maintain a significant interest in this proceeding for two reasons. First, both BMI and ASCAP anticipate that they will license mechanical rights during the period that is the subject of the Proceeding. While BMI has not traditionally licensed mechanical rights, BMI is seeking modification of the consent decree under which it has operated since 1966 to permit the licensing of mechanical rights.¹ ASCAP is also seeking a modification of its consent decree, in place since 1941 and under which it is expressly prohibited from licensing mechanical rights.² The consent decrees are currently under review by the Antitrust Division of the U.S. Department of Justice in a public proceeding.³ A large number of entities have filed public comments supporting the licensing of mechanical rights by ASCAP and BMI.⁴ The Copyright Office has

¹ See Final Judgment in *United States v. Broad. Music, Inc.*, Civil No. 64-Civ-3787 (S.D.N.Y. Nov. 18, 1994), Section IV(B), available at <http://www.justice.gov/atr/case-document/file/489866/download>.

² See Second Amended Final Judgment in *United States v. American Soc’y of Composers, Authors and Publishers*, Civ. Action No. 41-1395 (WCC) (S.D.N.Y. June 11, 2001), Section IV(A), available at <http://www.justice.gov/atr/case-document/file/485966/download>.

³ See U.S. Department of Justice, Antitrust Division, *Antitrust Consent Decree Review – ASCAP and BMI 2014*, available at <http://www.justice.gov/atr/ascap-bmi-decree-review>; and *Antitrust Consent Decree Review – ASCAP and BMI 2015*, available at <http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015>.

⁴ See Comments of Digital Media Association, U.S. Department of Justice, Antitrust Division, In the Matter of Review of ASCAP and BMI Consent Decrees at 29, available at <http://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307972.pdf>. See also Comments of the Recording Industry Association of America, Inc., U.S. Copyright Office, In the Matter of Music Licensing Study, Docket No. 2014-03 (September 12, 2014) at 16-17, available at http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/extension_comments/Recording_Industry_Association_America_Inc_RIAA.pdf; Comments of Spotify USA Inc., United States Copyright Office, Notice of Inquiry: Music Licensing Study, Docket No. 2014-03 (May 23, 2014), at 5, 10, available at

(continued...)

also on multiple occasions supported the amendment of the consent decrees to permit mechanical licensing.⁵ Such amendments would explicitly permit BMI and ASCAP to offer mechanical licensing along with their traditional licensing of public performing rights,⁶ with any mechanical rights license being governed by Section 115 of the Copyright Act. The bundling of these two rights would reflect the licensing needs and demands of the Twenty-First Century digital music marketplace.⁷ The Antitrust Division's announcement regarding modification of BMI's and ASCAP's consent decrees is expected during the period in which the Judges will establish rates for the mechanical rights that are the subject of the statutory license in Section 115 for the period 2018-2022.

Second, irrespective of the consent decree modifications, prior proceedings to determine rates and terms for the Section 115 statutory license (as discussed in final determinations and set forth in current regulations (*see* 37 C.F.R. § 385.12)) have had significant implications on the interests of BMI and ASCAP. The current mechanical fee formula for on-demand streaming, an activity that requires both mechanical and performance licenses, expressly incorporates a

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http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Spotify_USA_Inc_MLS_2014.pdf.

⁵ See U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (February 2015) at 103-04, 161, available at <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>. See also *Music Licensing Reform: Hearing Before the Subcom. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 1st Sess. (2005) (statement of Marybeth Peters, Register of Copyrights), available at <http://copyright.gov/docs/regstat062105.html>.

⁶ Such a right would place ASCAP and BMI on equal footing with unregulated performing rights organizations that today possess the right to offer bundled licenses.

⁷ See Public Comments of Broadcast Music, Inc., U.S. Department of Justice, Antitrust Division, Review of Consent Decree in United States v. Broadcast Music, Inc. (August 6, 2014) at 16-19, available at http://www.bmi.com/pdfs/advocacy/bmi_public_comments_to_doj.pdf.

deduction for performing rights payments as one of its elements. The rate does not set the performing right rate. However, the manner in which those payments are included in the formula has impacted the licensing of performing rights.⁸ Specifically, under the formula the amount of mechanical fees payable depends directly on the payments made for performance rights. This formula has encouraged interactive streaming services to attempt to limit their payments for those performance rights under their licenses with BMI and ASCAP, and this can serve to suppress overall royalty fees for composition rights which include the statutorily-set mechanical rights fee.⁹

Moreover, with the anticipated growth in licensing interactive digital music services on a global scale, we expect that this proceeding will necessarily involve issues and evidence directly related to the licensing of public performance rights, which are integrally connected with mechanical rights for such services.

Consequently, BMI and ASCAP have a “significant interest” in determining rates and terms for making and distributing phonorecords in this Proceeding pursuant to 17 U.S.C. § 803 (b)(2)(C).

BMI and ASCAP therefore jointly petition to participate in the above-captioned Proceeding to determine reasonable rates and terms for making and distributing phonorecords for


⁸ See Final Rule, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Docket No. 2006-3 CRB DPRA (74 Fed. Reg. 4510) (January 26, 2009); Final Rule, Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, Docket No. 2011-3 CRB Phonorecords II) (78 Fed. Reg. 2013) (November 13, 2013); *see also* 37 C.F.R. § 385.12 (providing the methodology for calculating royalty payments for interactive streaming and limited downloads, which in part addresses the amount of royalties paid for the public performance of musical works).

⁹ Indeed, music users, in their negotiations with BMI and ASCAP, often mention as a substantive factor pertinent to setting reasonable rates and terms for public performance licenses the fees payable under Section 115.


the period 2018-2022.¹⁰ Pursuant to 37 CFR § 351.1(b)(4), enclosed is a check in the amount of \$150.00 for the requisite filing fee.

Respectfully submitted,

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¹⁰ In the event that modifications of BMI's and ASCAP's consent decrees do not explicitly allow the licensing of the mechanical right under Section 115, BMI and ASCAP each reserve the right to withdraw its participation in this proceeding at that time.