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

Broadcast Music, Inc. (BMI) submits these public comments in response to the solicitation of public comments by the Antitrust Division of the U.S. Department of Justice (Department) as part of its current review of the consent decrees in *United States v. Broadcast Music, Inc.* and *United States v. American Society of Composers, Authors and Publishers*.[1]

INTRODUCTION

The 1966 BMI consent decree, last amended 20 years ago, is outdated and in need of comprehensive reform. It reflects legal theories that have been rejected in modern antitrust cases and commentary, and predates subsequent court decisions that have repeatedly found that BMI's non-exclusive blanket licensing of performance rights in its repertoire does not violate the antitrust laws. The BMI decree also fails to account for the vast changes in the technology and markets for the public performance of music in which BMI operates.

The digital revolution in information processing and communications has completely transformed the way music performances are heard by the public and equally changed the way in which information *about* music performances is collected and processed. In particular, the rise of Internet streaming as a principal way the public hears performances of music has created market needs that are now not being met because of inefficient and anticompetitive restrictions in the BMI consent decree that serve no sound purpose today.

---

1. As a party to the decree in *United States v. BMI*, BMI stands on unique legal ground, not shared by any other members of the public, concerning the decree in that case. *See, e.g.*, *United States v. Am. Soc. of Composers, Authors and Publishers*, 341 F.2d 1003, 1007 (2d Cir. 1965) (non-party to decree lacks standing to move in antitrust action against defendant). In submitting these comments, BMI reserves all of its rights as co-equal party to the decree with the Department.

There is an urgent need for action now. BMI agrees with the Register of Copyrights' recent testimony characterizing music licensing as "broken,"[2] and certain aspects of the BMI consent decree have contributed to that breakdown. The decree creates rigidities and restrictions in the way BMI must operate that undermine BMI's efficiency as a resource for both music users and music copyright owners in the digital world. The existing rate court mechanism has proven too slow, too expensive, and too legalistic to keep up with the speed of change in real-world markets today. The need is so dire that, rather than press for comprehensive reform at this point, in these public comments BMI urges the Department to prioritize particular changes that address these immediate needs.

BMI strongly urges the Department to support modifications of the decree that would expressly (i) "permit . . . BMI to license [its] performance rights to some music users" even if the music owners withhold the right to issue licenses to other users, (ii) "permit rights holders to grant . . . BMI rights in addition to 'rights of public performance,'" so that BMI can offer one-stop shopping to digital music platforms, allowing clearance of any and all necessary mechanical and synch rights as well as performance rights, and (iii) change "the rate-making function currently performed by the rate court . . . to a system of mandatory arbitration" to provide a quicker, less expensive, and more commercially-oriented process for dealing with pricing disputes.[3]

BMI has repeatedly called for reforms to its decree. Most recently it has made its views known in testimony in the House of Representatives and in comments in response to the Notice

---

2. *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (testimony of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80067/html/CHRG-113hhrg80067.htm (last visited Aug. 6, 2014).

3. *See* Antitrust Div., U.S. Dep't of Justice, *Antitrust Division Opens Review of ASCAP and BMI Consent Decrees*, *available at* http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Aug. 6, 2014).

of Inquiry published by the U.S. Copyright Office and participation in roundtables sponsored by the Copyright Office.[4]

BMI welcomes the consent decree review that the Department has initiated, pledges to work together with the Department to implement the procompetitive changes that so urgently must be made, and hopes that it can reach agreement on consensual modifications to the decree to be implemented in the next few months so that commerce in music performance rights can flourish again.

BACKGROUND

Historical and Legal Perspective

BMI was organized in 1939 to serve as an alternative source of music to ASCAP. At that time ASCAP was locked in a bitter price dispute with the radio industry that kept a large share of all popular music off the air throughout the United States for more than half a year. ASCAP was the subject of an investigation by the Department because, among other things, it obtained exclusive rights from its members, who were thereby prevented from competing with each other.[5] BMI's entry into the market was without question strongly procompetitive. According to the Department itself, the original 1941 BMI consent decree was understood to be a "friendly"

---

4. *See Music Licensing Under Title 17 Part One: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Michael O'Neill), http://judiciary.house.gov/_cache/files/5394fa46-9650-4ea9-a168-89043ca17270/oneill-bmi-music-licensing-testimony.pdf (last visited Aug. 6, 2014); Comments in Response to the March 17, 2014 Notice of Inquiry, *Broadcast Music, Inc.'s Comments on Copyright Office Music Licensing Study*, Docket No. 2014-03 (May 23, 2014), *available at* http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/BMI_MLS_2014.pdf (last visited Aug. 6, 2014); Music Licensing Public Roundtable, Library of Congress Copyright Office 47-51 (New York, NY Jun. 23-24 2014) (comments of Michael G. Steinberg, Broadcast Music, Inc.).

5. *See United States v. ASCAP*, 1940-1943 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941); *see also Columbia Broad. Sys., Inc. v. Am. Soc. of Composers, Authors & Publishers*, 620 F.2d 930, 933 (2d Cir. 1980) (describing the evolution of ASCAP's licensing practices).

counterpart to the decree that ended the Department's investigation of ASCAP.[6] The 1941 BMI decree did not impose any sort of compulsory licensing or price limitation on what BMI could charge.

When the ASCAP consent decree was substantially amended in 1950 to add a compulsory licensing and rate-court regime, no such thing was imposed—or sought to be imposed—on BMI.

In 1964, the Department sued BMI at the urging of ASCAP.[7] The gravamen of the complaint in that case was that BMI was illegally acting to *lower* prices for music performances. By 1966, the Department conceded internally that it had no proof to support its legal theory.[8] The current BMI consent decree settled that litigation but provided almost none of the relief sought in that complaint. Aside from certain modifications including broadening the decree to include the broadcasting medium of television and adding a prohibition on BMI acting as a music publisher or record company, the decree mainly took up the provisions of the "friendly" 1941 decree (which was vacated). It did not contain a compulsory licensing or price regulation provision, despite the rapid growth in the size and popularity of the BMI repertoire in the 1950s and 1960s due to BMI's receptivity to the creators of rhythm and blues, country and western music, and rock and roll.

Between 1969 and 1991, BMI fought and won four plenary antitrust suits brought by music users who were unhappy with the fees BMI wished to charge and the structure of the

---

6. Memorandum from Hugh P. Morrison, Jr., General Litigation Section to Donald F. Turner, Assistant Attorney General, Antitrust Division, *United States v. Broadcast Music, Inc., et al. 64 Civ. 3787 (S.D.N.Y.)* (Nov. 22, 1966) at 1 ("The suit is often considered to be a 'friendly' suit, since these events occurred during ASCAP's heyday, and the Department supposedly did everything possible to insure BMI's success against the monopolistic ASCAP.").

7. *See id.* at 2.

8. *See id.* at 5.

licenses it offered.[9] Music users as small as the Triple Nickel Saloon and as large as CBS (referred to by the court in that case as the "giant of the world in the use of music rights") challenged BMI under the Sherman Act, and courts in three circuits and the Supreme Court all ultimately ruled in favor of BMI, finding efficiencies created by collective licensing. Among other holdings, the Second Circuit held that BMI and ASCAP's blanket licenses did not restrain trade "at all" because "copyright proprietors would wait at CBS' door" if offered the opportunity to have their music played on national television.[10] In another Second Circuit case four years later, Judge Winter observed in a concurrence that, given BMI's (and ASCAP's) non-exclusive contracts with composers and publishers, it could not be in violation of the antitrust laws.[11]

The 1994 amendment to the BMI consent decree added the compulsory license and rate court mechanisms—at the instance of BMI and not the Department. BMI wanted to add this provision to channel pricing disputes into a forum where they could be dealt with substantively, with the hope that this would prove quicker and less expensive than the antitrust cases that cable television networks and others had been using as a form of fee-negotiation-by-other-means.[12] In

---

9. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979), *remanded to sub nom. Columbia Broad. Sys., Inc. v. Am. Soc. of Composers, Authors & Publishers*, 620 F.2d 930 (2d Cir. 1980); *Buffalo Broadcasting Co. v. Am. Soc. of Composers, Authors & Publishers*, 744 F.2d 917 (2d Cir. 1984); *Nat'l Cable Television Ass'n v. Broad. Music, Inc.*, 772 F. Supp. 641 (D.D.C. 1991); *Broad. Music, Inc. v. Moor-Law, Inc.*, 484 F. Supp. 357 (D. Del. 1980). .

10. *Columbia Broad. Sys., Inc.*, 620 F.2d at 935, 938.

11. *Buffalo Broadcasting Co.*, 744 F.2d at 934.

12. Many countries have governmental bodies, such as the Copyright Board of Canada, to set performing rights rates, by statute. In the United States, the Copyright Royalty Board sets fees for performances of musical works by noncommercial public broadcasters, but for commercial performances Congress gives the copyright owner the right to charge whatever a willing buyer is prepared to pay. Importantly, Congress gave record labels the exclusive right to license public performance of sound recordings to interactive digital music services, and where SoundExchange collects compulsory license fees for *non*-interactive performances, its rates have been informed by marketplace benchmarks negotiated by labels in the free, unregulated market. *See, e.g.*, *In the Matter of Digital Performance in Sound Recordings and Ephemeral Recordings*, Docket No. 2009-1 CRB Webcasting III, at 41 (January 5, 2011) ("[W]e accept the interactive benchmark as suggesting an increase in royalty rates for non-interactive webcasting over or by the end of the period 2011-2015 . . . [and we have]

the late 1980s and early 1990s, organized groups of music users with bargaining power at least equal to BMI's, such as the Television Music License Committee, the Radio Music License Committee, and the National Cable Television Association all insisted, in the course of finally reaching license agreements with BMI, that BMI agree to seek a decree modification to provide for a rate court.[13] At first, the Department balked and suggested that instead of using the federal district court as a fee arbiter, BMI and its customers could agree to private arbitration (a proposal we return to later in these comments). Concerned that the existing ASCAP rate court would be regarded as a more legitimate forum than private arbitration, BMI pressed for a rate court mechanism identical to (but separate from) ASCAP's, and the Department acquiesced.

In sum, the courts have repeatedly found that BMI creates efficiencies, lowers costs, and increases output by allowing commerce to flow—and music to be enjoyed—where substitutes would not. The rate court provision in the decree was inserted as a dispute resolution provision, and not to prevent the recurrence of any supposed misconduct by copyright owners or BMI.

There Have Been Vast Technological and Market Changes

It is black letter law that when conditions that previously justified an injunction—including one entered on consent—have changed, the injunction too should be modified or vacated. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992). Recognizing that few markets in our dynamic economy remain in stasis for very long, the Department has in

---

identified the $0.0036 rate as the upper boundary for a zone of reasonableness for potential marketplace benchmarks . . . .") , *available at* http://www.loc.gov/crb/proceedings/2009-1/docs/final-determination-rates-terms.pdf (last visited Aug. 6, 2014).

13. *See* Memorandum of User Community Constituents in Response to Motion of Broad. Music, Inc. to Modify Consent Decree, *United States v. Broad. Music Inc.*, 1994 WL 16189515 (S.D.N.Y. Nov. 4, 1994).

recent decades incorporated this proposition into its own practices, making it routine that antitrust consent decrees automatically terminate after not more than 10 years.[14]

It is beyond dispute that the technological, economic, and market conditions that defined BMI's business back in 1994—not to mention 1966 and 1941—have since changed in revolutionary ways. Whatever the factual premises of the decree in those earlier times, current conditions bear them little resemblance.

First, the emergence of the digital age has revolutionized the entertainment world in general and the music world in particular. BMI's business has been transformed by the digital revolution in at least two different dimensions: (i) the ability to gather and use information about music and performances of music and (ii) the way in which performances of music reach the public.

The radical lowering of costs to gather, store, and manipulate information has made it possible for new firms to enter the music licensing field. Firms such as Google, Music Reports, Inc. and Amazon have built large databases concerning music usage and ownership in recent years. Any suggestion that entry barriers make it impossible to compete with BMI is simply incorrect.

The rise of the Internet has also profoundly transformed the way the public hears and consumes performances of music. The proliferation of digital outlets has, among other things, greatly increased the number of firms making public performances at any given time. It has also increased the number of public performances exponentially.[15] The sheer number of copyrighted

---

14. Antitrust Div., U.S. Dep't of Justice, *Antitrust Division Manual*, III-146 (5th ed. 2014), *available at* http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf#page=146 (last visited Aug. 6, 2014).

15. For instance, "[l]istener hours for Pandora during the month of May 2014 were 1.73 billion, an increase of 28% from 1.35 billion during the same period last year." Press Release, Pandora, *Pandora Announces May 2014 Audience Metrics* (June 4, 2014), *available at* http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-

songs publicly performed on any given day has increased dramatically due to the much deeper playlists possible in the digital space as compared to terrestrial radio. In addition, the instant availability to the public of the widest possible choice of recorded music by means of streaming technology—at the expense of a great and accelerating drop-off in the sale of recordings (hard copies and downloads)—has made public performances of the kind licensed by BMI the most important source of compensation for songwriters and composers.

The technology of the Internet has also brought together several parts of the copyright bundle of rights that formerly applied to separate uses of music. Traditionally, public performers of music only needed performing rights licenses under section 106(4) of the Copyright Act, and did not also need permission to make and distribute reproductions of the musical works under sections 106(1), 106(3), and 115. Similarly, performers of music did not need display rights under section 106(5) because they did not transmit graphic copies of the lyrics. Various forms of webcasting have changed that, and so music users now need to acquire licenses not only to the performance rights that BMI has always licensed but also these additional rights—rights that BMI has not heretofore offered for license and that ASCAP's consent decree forbids it from licensing.[16] As a result, the PROs have not offered a one-stop shopping experience to address the licensing needs of this rising class of music users, placing their affiliated smaller publishers at a competitive disadvantage to those who have the resources to offer bundled rights.

---

newsArticle&ID=1937243&highlight (last visited Aug. 6, 2014). Likewise, "over 6 billion hours of video are watched each month on YouTube" (YouTube, Statistics, https://www.youtube.com/yt/press/statistics.html (last visited Aug. 6, 2014)) and YouTube's "Music" channel is its most popular, with over 86 million subscribers. *See* https://www.youtube.com/channel/UC-9-kyTW8ZkZNDHQJ6FgpwQ (last visited Aug. 6, 2014). Pandora's and YouTube's individualized offerings result in separately calculable performances for each listener or viewer.

16. In particular, conditional downloads are often offered in combination with interactive streams by subscription services.

Second, the advent of the Internet in combination with many other developments has changed dramatically the markets in which BMI operates. For instance, since 1994, the broadcast television and radio industries have consolidated substantially; likewise the cable television and satellite radio industries. The Internet has given rise to various platforms for the performance of music, including by new giants such as Apple, Amazon, and Google that are among the most powerful firms in our economy. Some of those firms, unlike older media companies, have compiled their own databases to assist in complying with their copyright obligations for their large-scale uses of music and audiovisual works. In addition, a slew of firms have entered the business of aggregating content for Internet platforms.

The musical works market has also seen enormous change. The music publishing business has seen some consolidation including the effective merger of the EMI Music Publishing catalogs with those of Sony/ATV Music Publishing, yet there remain thousands of active independent publishers—including many small firms who publish the works of major songwriters and composers. A variety of firms have entered the business of assisting publishers and songwriters in making their music available on the Internet, such as Tunecore, CD Baby, Ingrooves, and The Orchard. Since 1994, SESAC, the third American PRO, has been transformed from an afterthought into a for-profit entrepreneurial force; a 75% interest in SESAC was sold at the beginning of 2013 to private equity fund Rizvi Transverse Management for a reported price of approximately $600 million.[17]

Also in 2013, Madison Square Garden Co. invested $125 million to become a 50% shareholder of Azoff MSG Entertainment, a new venture with the stated purpose of representing

---

17. Anupreeta Das, *Music Rights Company SESAC Sells Majority Stake*, Deal Journal, Wall St. J. (Jan. 2, 2013 6:14 PM), *available at* http://blogs.wsj.com/deals/2013/01/02/music-rights-company-sesac-sells-majority-stake/ (last visited Aug. 6, 2014).

the rights of songwriters "a different way" as a rival to BMI and ASCAP.[18] In late July 2014, Billboard Magazine described the venture's Global Music Rights division as a "boutique performance rights organization."[19]

Likewise, the Harry Fox Agency, which previously dealt in processing mechanical rights payments from record labels for music publishers, has been rebranded as "hfa" and become deeply involved in licensing bundled rights needed for digital uses through its Slingshot offshoot, acting as an agent for Google in clearing mechanical and synchronization rights. It describes itself today as "the nation's leading provider of rights management, licensing and royalty services for the music industry."[20]

It is fair to say that the competitive landscape in which BMI finds itself bears little resemblance to the markets it faced in 1994 when the compulsory license and rate court provisions were added to the decree, and none whatsoever to the conditions that prevailed when the main provisions of the decree went into force.

---

18. Hannah Karp, *MSG, Azoff Unveil New Entertainment Venture*, Wall St. J., Sept. 4, 2013, *available at* http://online.wsj.com/news/articles/SB10001424127887323893004579055590298180458 (last visited Aug. 6, 2014).

19. *See* Ed Christman, Gail Mitchell and Andrew Hampp, *Pharrell to Leave ASCAP for Irving and Grimmet's Global Music Rights*, Billboard, July 25, 2014, *available at* http://www.billboard.com/articles/business/6188942/pharrell-to-leave-ascap-for-irving-and-grimmets-global-music-rights (last visited Aug. 6, 2014).

20. *See, e.g.*, Press Release, Harry Fox Agency, *HFA Licensing Services Support the 55th Annual GRAMMY Awards* (Feb. 6, 2013), *available at* https://www.harryfox.com/public/userfiles/file/PressReleases/GRAMMY_PR_Final.pdf (last visited Aug. 6, 2014).

BMI'S IMMEDIATE REQUESTS

As a result of these seismic changes to the music rights landscape, BMI believes its consent decree is ripe for a comprehensive review and modification, if not termination. That said, there are urgent marketplace needs that must be addressed on an expedited basis. For this reason, BMI advocates three immediate modifications, which we now describe.

1. The BMI Consent Decree Should Be Modified Expressly to Permit Partial Withdrawal of Digital Rights.

In recent years, several large music publishers have determined that it is in their best economic interests to withdraw certain digital licensing rights from PROs and instead to license those uses directly to digital music providers. Those publishers approached BMI to request such "partial withdrawal," and one of them informed BMI that it had also approached the Department for guidance.

As an accommodation, and in a competitive response to ASCAP's prior determination to provide such an accommodation, BMI agreed to allow the publishers to withdraw their digital rights while remaining affiliated with BMI, subject to detailed guidelines BMI developed to ensure that the process would be both orderly for BMI and fair to BMI licensees. However, in a 2013 decision involving digital music service Pandora, BMI's rate court held that under the BMI consent decree, a publisher must use BMI for *all* public performing rights purposes or *none*, stating that "the BMI Consent Decree requires that all compositions in the BMI repertoire be offered to all applicants," but "[i]f BMI cannot offer those compositions to New Media applicants, their availability does not meet the standards of the BMI Consent Decree, and they cannot be held in BMI's repertoire. Since they are not in BMI's repertoire, BMI cannot deal in or license those compositions to anyone." *Broad. Music, Inc. v. Pandora Media, Inc.*, 13 CIV. 4037 (LLS), 2013 WL 6697788, at *3-4 (S.D.N.Y. Dec. 19, 2013). Earlier in the year, ASCAP's

rate court issued a similar decision putting publishers in the position of having to leave ASCAP entirely if they wished to retain any licensing right exclusively for themselves.

Four significant publishers seeking partial withdrawal have reached short-term "suspension" agreements with BMI, allowing their works to be licensed by BMI for all purposes, including digital platforms, through no later than the end of 2014. But they have stated that they are reluctantly working on plans to withdraw their works from the BMI repertoire altogether if the BMI consent decree is not modified to allow for partial withdrawal.[21] For the reasons set forth below, putting publishers to this "all in" or "all out" choice is bad policy under both copyright law and antitrust principles, and would be potentially catastrophic for smaller publishers and songwriters who depend on BMI for their livelihood, and for BMI's hundreds of thousands of customers who depend on BMI to fulfill their copyright obligations.

BMI urges the Department to prioritize amendment of the BMI consent decree to allow publishers to withdraw defined digital rights from the BMI repertoire, while allowing BMI to license all other music uses. Copyright law provides copyright owners the fundamental right to withhold their works from the public, as a means of obtaining fair market value in the free market. *See, e.g.*, *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) ("[N]othing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work. . . . .The limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use."). Obviously, publishers can forego joining BMI altogether, which would allow

---

21. *See, e.g.*, Ben Sisario, *Sony Threatens to Bypass Licensers in Royalties Battle*, N.Y. Times, July 11, 2014, at B2, *available at* http://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html?_r=0 (last visited Aug. 6, 2014).

them to negotiate directly in the marketplace and hold out for market-based license rates unconstrained by the BMI rate court; but publishers should not have to forego entirely the efficiencies of BMI as the cost of engaging in these direct negotiations.

The withdrawing music publishers apparently believe that they have the capacity to negotiate digital direct licenses efficiently, but the growing interest in rights withdrawal also reflects publisher dissatisfaction with the current rate-setting process. Although BMI's decree requires the rate court to set blanket license rates approximating prices that would be negotiated by a willing buyer and willing seller in a free market negotiation,[22] recent PRO rate court decisions have set what many publishers reportedly consider below-market rates. Though others may disagree, the salient point is that these publishers have lost confidence in the efficacy of the rate court process to determine fair market value. That loss of confidence is driving publishers to move away from BMI and other PROs in order to license digital uses directly.

The rate court's mandate of "all in" or "all out" limits the flexibility of publishers, their representatives, and licensees to determine the most efficient way to license a music service. The mandate effectively prohibits multiple distribution channels for performing rights, even though the use of diverse channels of distribution is a common, efficiency-promoting feature of our economy.[23] It is the worst of both worlds.

---

22. *United States v. Broad. Music, Inc.*, 426 F.3d 91, 95 (2d Cir. 2005) ("The rate court is responsible for establishing the fair market value of the music rights, in other words, the price that a willing buyer and a willing seller would agree on in an arm's length transaction.") (internal quotation marks omitted).

23. Recently, an FTC publication criticized state and local regulations restricting auto manufacturer Tesla from direct-to-consumer sales rather than sales through independent dealers, noting that "[s]uch blanket bans are an anomaly in the broader economy, where most manufacturers compete to respond to consumer needs by choosing from among direct sales to consumers, reliance on independent dealers, or some combination of the two." Andy Gavil, Debbie Feinstein, and Marty Gaynor, Federal Trade Commission, *Who Decides How Consumers Should Shop?*, Competition Matters, (Apr. 24, 2014, 11:00 AM), *available at* http://www.ftc.gov/news-events/blogs/competition-matters/2014/04/who-decides-how-consumers-should-shop (last visited Aug. 6, 2014).

"All in" favors, even forces, collective licensing, instead of allowing individual publishers the opportunity to experiment with direct licensing in the free market. This squarely contradicts the fundamental premise of the BMI consent decree and the procompetitive goals of antitrust law. Under the decree, BMI undertakes collective licensing, but provisions are made for direct licensing as a competitive alternative. The only reason there *is* a consent decree is that BMI undertakes collective licensing, instead of publishers licensing their catalogs individually. For the consent decree to be read to restrict publishers from licensing in the free market simply stands the rationale for the decree on its head.

On the other hand, if publishers are forced to go "all out," the market loses all the efficiencies that BMI's blanket license provides for the many categories of traditional music users. Because publishers lack BMI's expertise and infrastructure to monitor and distribute performance rights royalties, there is reason for concern that "all out" publishers would be unable or unwilling to spend the time or resources licensing smaller users or general licensing categories, such as restaurants, hotels, clubs, and concert halls. Such users, through no fault of their own, would be forced to choose between two equally problematic options: operating under a dark cloud of infringement, or reconfiguring their entire use of music to avoid infringement. Either scenario would unnecessarily disrupt these establishments' accustomed freedom to lawfully perform whatever music they wish with PRO licenses in hand.

The district court's holding that publishers must be "all in" or "all out" imposes a regime that is at odds with the Second Circuit's key ruling that the BMI blanket license did not restrain trade precisely because a direct license remained available to users. *Columbia Broad. Sys., Inc. v Am. Soc. of Composers, Authors & Publishers*, 620 F.2d 930, 936 ("[I]f copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to

deal with them, the blanket license is not a restraint of trade."). In the absence of any antitrust holding against BMI under the Rule of Reason with respect to its blanket license, there is simply no basis to prohibit partial withdrawal.[24]

In fact, partial withdrawal would serve only procompetitive purposes. First, it retains the efficiencies that BMI and its blanket license provide for traditional music users, and for publishers and songwriters who choose not to withdraw even partially.[25] Second, it would empower publishers to engage in direct licensing for digital music uses outside the shadow of the rate court without disrupting their ability to use BMI to license for non-digital uses. In this sense, partial withdrawal allows rates for digital users to be set more by market forces and less by a finder of fact,[26] without sacrificing the efficiencies associated with BMI. Third, the direct licenses resulting from partial withdrawal will provide improved benchmarks for any finder of fact, since they will not be negotiated in the shadow of the rate court or arbitration.[27]

---

24. To the extent that digital music users oppose dealing with publishers in free market negotiations, there is hypocrisy in that position. Users cannot both claim that BMI is a monopoly extracting supracompetitive prices on the one hand, and seek to avoid negotiating directly with publishers on the other. Insofar as these users are arguing that BMI must be regulated by the consent decree, it follows that those same users should be eager to deal with publishers individually.

25. If permitted, the proposed digital rights withdrawal would not impact any of BMI's licensing activities that fall outside certain objective thresholds in terms of users and/or revenue, to be determined periodically by BMI. Specifically, under its current proposal, BMI would continue to license digital media services with less than $1.25 million in annual revenues and/or with less than 10 million tuning hours per month. In addition, digital rights withdrawal does not affect BMI's right to license performances by traditional broadcast (radio and television), cable and satellite providers, and their related digital transmissions, nor does it affect BMI's general licensing customers such as restaurants, hotels, clubs, and concert halls..

26. This is equally true to the extent arbitration should replace rate court. *See* pages 19-22, *infra*.

27. Earlier this year, the European Parliament and the Council of the European Union expressly encouraged partial grants and withdrawals of rights in its "Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market", which provides that "[r]ightholders shall have the right to terminate the authorisation to manage rights, categories of rights or types of works and other subject-matter granted by them to a collective management organisation *or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice* . . . ." Council Directive 14/26, 2014 O.J. (L. 84) at Art. V, ¶ 4 (emphasis added), *available at* http://www.wipo.int/edocs/lexdocs/laws/en/eu/eu193en.pdf (last visited Aug. 6, 2014).

Conversely, an exodus of large publishers from PROs would vastly increase the proportion of royalties devoted to costs of administration instead of compensating songwriters and composers. The cost of BMI's operations would have to be borne by a much-diminished royalty flow. That result can only harm the thousands of non-withdrawing (primarily smaller and independent) publishers and songwriters who depend upon the PROs to locate and enter into agreements with the many thousands of music users throughout the country, enter into reciprocal agreements with PROs throughout the world, collect royalties, count performances, match the royalties to the performances, and provide an equitable, transparent distribution of royalties to both writers and publishers. For these publishers and songwriters, BMI provides a suite of vital services that they cannot replicate easily or efficiently.

If these many publishers could not rely on a robust BMI, they would find it much harder, if not impossible, to compete with larger publishers for songwriters and composers. This in turn would create incentives for greater consolidation and fewer publisher options for songwriters and composers.

2. The Licensing of Additional Rights, Such As Mechanical, Synch, and Lyric Rights, Should Be Permitted Expressly Under the BMI Consent Decree.

Historically, BMI has licensed only performing rights and, to a very limited extent, those synchronization rights needed to facilitate broadcasts.[28] But multiple rights — performing rights, mechanical rights, lyric display, distribution and reproduction rights, and synchronization rights — are often necessary in order to disseminate music on the Internet. BMI should therefore be permitted (at the option of the publisher) to license other copyright rights in musical compositions to music users (at the option of the music user), either as part of a single offering

28. BMI also administers digital audio recording tape ("DART") royalties awarded by the Copyright Royalty Board pursuant to 17 U.S.C. § 1001 *et seq*. for its songwriters and publishers who so collect.

bundled with the right of public performance or à la carte. The BMI consent decree — unlike the ASCAP decree (*see United States v. Am. Soc. Composers & Publishers*, 2001-2 Trade Cas. ¶ 73,474 (S.D.N.Y. 2001) at Section IV(A)) — does not contain a provision limiting the rights that BMI can license. However, to the extent any uncertainty exists, the BMI decree should be modified to recognize, explicitly, BMI's ability to license other rights.

The advent of digital music, in particular, has created an industry-wide demand for bundling of rights. For years, digital music services have complained about the difficulty of licensing mechanical rights under Section 115. These services have called for a blanket license under Section 115, as well as the ability to obtain multiple types of rights to a musical composition from a single source, that is, a one-stop shop for music licensing.

Indeed, one of the reasons that some large publishers seek to withdraw from the PROs is, reportedly, their desire to offer bundled rights directly to users. However, smaller, non-withdrawing publishers likewise stand to gain from the efficiencies created by a BMI one-stop shop offering, and will need these tools in order to compete on an equal footing with larger publishers. Therefore, bundling of multiple rights should be expanded to all licensees under the BMI consent decree.

Various arms of the Government have long recognized the inefficiencies of the current, disaggregated process. Over nine years ago, Register of Copyrights Marybeth Peters noted that "it seems inefficient to require a licensee to seek out two separate licenses from two separate sources in order to compensate the same copyright owners for the right to engage in a single transmission of a single work."[29] More recently, Register Maria Pallante testified before

---

29. *Music Licensing Reform: Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. of the Judiciary*, 109th Cong. (2005) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), *available at* http://www.copyright.gov/docs/regstat062105.html (last visited Aug. 6, 2014).

Congress that "[m]usic licensing is so complicated and broken that if we get that right, I will be very optimistic about getting the entire [copyright] statute right."[30] In its 2013 report on digital copyright policy, the Commerce Department Internet Policy Task Force noted — citing to the ASCAP consent decree – the problem that "antitrust law constrains the PROs from licensing the mechanical rights for works in their repertoire" and agreed that bundling of reproduction rights with performing rights to create a one-stop shop solution was desirable, concluding that "collective licensing, implemented in a manner that respects competition, can spur rather than impede the development of new business models for the enjoyment of music online."[31]

Allowing bundling of rights will have clearly procompetitive effects. Large, withdrawing publishers were already meeting the demands of users and achieving these efficiencies by bundling mechanical and performance rights. By entering the market for reproduction rights licensing, BMI would be introducing additional competition and consumer choice into a market currently relying primarily on the Harry Fox Agency, which is already bundling rights, or in-house efforts by publishers themselves.[32] This increased competition, in turn, would incentivize service and product innovation in digital music. Indeed, in other countries where PROs routinely bundle these rights together, the efficiencies of bundling are readily apparent. Finally, because

---

30. *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80067/html/CHRG-113hhrg80067.htm (last visited Aug. 6, 2014).

31. Internet Policy Task Force, U.S. Dep't of Commerce, *Copyright Policy, Creativity, and Innovation in the Digital Economy* 81-82, 85 (July 2013), *available at* http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf (last visited Aug. 6, 2014).

32. Just last week, micro-licensing service Rumblefish, Inc. announced its acquisition by SESAC, describing it as "a key element of SESAC's pursuit of a broader vision within music licensing across multiple rights categories and license-types." *See* Press Release, Rumblefish, *SESAC Acquires Leading Music Tech and Micro-Licensing Firm Rumblefish, Provides Growth Round of Funding* (July 31, 2014), *available at* http://rumblefish.com/sesac_acquires_rumblefish/ (last visited Aug. 6, 2014).

BMI's proposal would be wholly optional for both publishers and users, there is no basis for antitrust concerns.

There is no rational basis for the current regulatory rigidity prohibiting bundling by PROs. BMI is simply requesting a clear mandate to offer a service that its market counterparties—both publishers and users—are seeking.

3. The Rate Court and Compulsory Licensing Should Be Reformed.

The procedures put into place for fee dispute resolution under the BMI consent decree in 1994 fail to facilitate prompt payment of reasonable license fees to BMI and, ultimately, to its affiliated songwriters, composers, and publishers. Under the BMI decree, upon written request for a license, a licensee has an automatic right to a blanket license to use any, some, or all of BMI's music. This allows licensees the opportunity to obtain performing rights licenses by simply sending a letter availing themselves of the rate court process—in good faith or otherwise. However, where the parties cannot agree on an interim fee, the road for BMI to obtain an order setting interim fees for this instant access to repertoire can be long and expensive. Rate court proceedings often result in delayed, undervalued, or altogether unpaid license fees to BMI, while licensees enjoy immediate, unhindered access to BMI's repertoire.

BMI has great respect for its rate court judge, Hon. Louis L. Stanton, Jr., who has presided ably and impartially over the many challenging cases before BMI's rate court over the past 20 years. However, the rate court process itself has proven ill-suited to the task of determining a fair market rate quickly and accurately. This has been particularly true in recent years with the emergence of digital music.

First, a rate court case is extremely expensive for both BMI and users. In the last five years alone, BMI has spent millions in legal fees and expenses on rate court proceedings, on top

of thousands of hours of BMI personnel assisting in these efforts. Because of these costs, and the impact of such costs on the royalties BMI can distribute to its affiliates, it would be impractical for BMI to resort to rate court whenever needed. As a result, many music users are able to perform BMI music for years without paying BMI, and it is not unheard-of for a user to go out of business before paying even a dime to BMI for its use of music.

When rate proceedings are commenced, the process is unacceptably slow—each case entails one or two years of pre-trial discovery and motion practice and further years of appellate review. The extensive pre-trial discovery permitted under the Federal Rules of Civil Procedure has been the main cause of expense and delay in rate court proceedings. Even with the supervision of an able judge who is wary of lawyers' proclivity to use whatever discovery tools are available, a typical case involves massive document production, numerous fact witness depositions, subpoenas of non-parties, and rafts of industry and economic experts. Despite its comprehensive nature, such discovery has done little or nothing to further the goal of the rate court–setting a reasonable license fee for the license the user has requested.

The rate court's determination of fair market rates has been based primarily on past court decisions, or prior agreements by BMI and ASCAP that are themselves the products of previous court decisions. Even to the extent direct licenses can be used as benchmarks, those rates have been negotiated in the shadow of the rate court and thus do not represent a true test of the market. Such a backward-looking approach does not reflect the dynamic forces at work in the entertainment and media markets, and does not allow rates to keep pace with the changes to those markets.

There are additional problems with the current rate court mechanism. As noted above, under the current decree, if parties to a rate court proceeding cannot agree on an interim fee, BMI

must bring a motion in the BMI rate court—with up to four months of discovery, motion practice, and other maneuvering – to have the court set the interim rate. Only then are the parties at the starting line for the actual final rate setting process; they have to start all over to litigate their final license rate.

At the same time, BMI has had to respond to open-ended "rate court letters" from new media users seeking an automatic license to protect them from infringement for any uses that might require one, without describing what uses they intend to engage in and without limitation on how they might wish to use the music. This ill-defined "application" makes it difficult for BMI to comply with its consent decree obligation to provide a quote for such uses. Moreover, some letters take the position that the users require no license whatsoever, and accordingly will not negotiate over interim or final fees, while enjoying the protection and benefits that the application's mandatory access to the repertoire affords. Given the costs and time-consuming nature of rate court, it is not cost-effective for BMI to litigate with all such letter writers.

The BMI consent decree should be modified to replace fee-setting in the district court with mandatory arbitration. Arbitration offers multiple efficiencies, and can be tailored to the unique features of the performing rights marketplace while meeting the needs of BMI and music users. Under BMI's proposed arbitration framework, rate disputes would be fast-tracked with limited discovery, presentations unbound by the formal rules of evidence, and a shorter, mandatory timeframe. Rather than relying heavily on past court decisions and past agreements as the primary guide in setting rates, arbitrators would be directed to apply a fair market value (*i.e.*, willing buyer, willing seller) rate-setting standard and would be encouraged to look at current market conditions and to consider any rates agreed to in the free market, including direct

licenses by publishers with the same or similarly-situated music users, in addition to previous decisions of the rate courts, Copyright Royalty Board, or other arbitral tribunals.

Arbitration is clearly suited for performing license rate disputes, having been endorsed previously by the Department of Justice and Federal Trade Commission in a number of analogous circumstances.[33]

If businesses can obtain instant, licensed access to BMI's music, it is only fair that they pay some license fee from the moment they use the music, even if it may take longer to come to a final agreement or decision on terms. The BMI consent decree should therefore also be modified to impose an automatic interim license fee for every applicant. Music users whose previous BMI licenses have expired should be required to continue paying license fees at the rates and times contained in their previous licenses. New music users should be required to make interim payments in advance at rates BMI has been charging other similarly-situated licensees. The decree should also be modified to (a) require applicants to be clear and specific regarding all intended uses of the BMI repertoire sufficient to mark clearly which performances are or are not licensed and compensable and (b) prohibit applications where the applicant contends that no license is required.

---

33. *See, e.g., United States v. Comcast Corp.*, 808 F. Supp. 2d 145 (D.D.C. 2011); *United States v. Google Inc. & ITA Software, Inc.*, Case No. 1:11-cv-00688-RLW (D.D.C. Oct. 5, 2011); *In re Motorola Mobility LLC, & Google Inc.*, C-4410, 2013 WL 3944149 (F.T.C. July 23, 2013).

BMI'S DEFERRED REQUESTS

BMI believes that other changes to the Decree are warranted, either now or in the near future. In the interest of expediting the three changes outlined above, BMI is prepared to defer them. Nevertheless, BMI thinks it worthwhile to mention some of them now.

1. Current Line-of-Business Restrictions on BMI Are Unjustified.

Although BMI has no present intention to act as a music publisher or record label, it should not be prohibited under the consent decree from doing so in the future. Should BMI identify an efficiency to be achieved through expanding its business into these fields, the consent decree's existing line-of-business restrictions would serve only anticompetitive purposes.

The consent decree's current bans on BMI's right to act as a music publisher or record label were put into place in 1966, and are out-of-date remnants of the Government's concerns in the 1960s to protect ASCAP and its publisher-members from the broadcaster-owned BMI. Those concerns have long since disappeared. The possibility of any substantial market foreclosure by BMI's entry into music publishing or recording is unrealistic. Moreover, vertical antitrust theories have fundamentally evolved in the 50 years since this provision was entered. The current decree provision is anticompetitive and should be eliminated.

2. Upon Partial or Total Withdrawal by Large Publishers, BMI License Terms Should Be Deregulated

BMI anticipates withdrawal by multiple large publishers in the coming months, whether such withdrawal will be partial and limited to certain digital performances under a modified BMI consent decree, or total, in the form of termination of affiliation, in the absence of such modification. In either scenario, however, BMI will lose a significant portion of its performing rights licensing market share, and with such diminution the justification for antitrust regulation

of BMI will be likewise diminished. At a certain point, the basis for regulated rates and terms would no longer exist, at least vis-à-vis music uses as to which a substantial share of repertoire has been withdrawn from BMI.

With respect to digital rights, significant publisher withdrawal is a real possibility. Those publishers will be able to negotiate in free-market rate negotiations with music users, and therefore hold a distinct advantage over BMI. Such a state of affairs would prevent BMI—and critically, by proxy, all the independent and smaller publishers who choose to remain affiliated with BMI—from competing on a level playing field with these withdrawing or terminating publishers. They will be at a competitive disadvantage in attracting and holding songwriters and composers unless they can negotiate for the use of their catalogs in the same manner as the withdrawn or terminating publishers.[34]

Under these circumstances, BMI should be deregulated. Ideally, the Department would agree in advance to automatic deregulation if specified, objective criteria were met, so there would be no lag time in BMI's ability to stay competitive in a world of withdrawn or partially withdrawn publishers. But if no such advance conditional deregulation is possible, BMI would look for prompt Department action if, as, and when publishers do withdraw in whole or in part.

3. The Consent Decree Should Be Vacated Unless a Continued Need for Regulation Is Shown.

The BMI consent decree is a creature of equity and should only stay in effect so long as the facts and law justify it. As noted, the Department itself recognizes that markets inevitably

34. Viewed another way, BMI questions the justification for regulation in light of the strong functional similarity between the regulated PROs and unregulated major publishers, both of which aggregate and administer copyright rights on behalf of numerous individual copyright holders.

change and, for that reason, has adopted the practice of having all new antitrust consent decrees expire in 10 or fewer years.[35]

Given the benign history of the BMI decree and the origin of its rate court regime, BMI's repeated court victories under the Rule of Reason, the vast changes in the law and market conditions since it was adopted, and the dynamic forces now at work in the music market, BMI questions whether such a decree would be entered today. In particular, the compulsory licensing provision of Section XIV stands at odds with the exclusive right to make public performances — and hence the right to charge market rates – that has been granted to songwriters by Congress.

BMI believes it is in the public interest for the Department to reconsider the need for the Consent Decree at least every five years with the goal of vacating it at an appropriate time.

OTHER COMMENTS IN RESPONSE TO THE GOVERNMENT'S REQUEST FOR PUBLIC COMMENTS

1. Regulatory Parity with ASCAP Is Not Itself a Sufficient Basis to Regulate BMI.

Although differences between the BMI and ASCAP consent decrees can at times create complications in the regulatory or legal process, BMI would oppose any effort to regulate BMI solely in order to conform its consent decree to ASCAP's. As detailed above, BMI — along with its consent decree — has a distinct history. Of course, BMI's and ASCAP's current efforts to modernize their respective consent decrees overlap significantly, in response to the fundamental changes resulting from digital music that affect all PROs equally. To that end, BMI has no objection to substantively identical modifications of the BMI and ASCAP consent decree.

---

35. Antitrust Div., U.S. Dep't of Justice, *Antitrust Division Manual*, III-146 (5th ed. 2014), *available at* http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf#page=146 (last visited Aug. 6, 2014).

However, BMI does object to any modification that further restricts BMI only for the purpose of parity with ASCAP or to any delay in the modifications it seeks due to issues unique to ASCAP.

2. The Network "Through-to-the-Audience" Licensing Provision Should Not Be Extended to the Internet.

Unlike the ASCAP decree, the BMI consent decree contains no provision requiring it to grant a "through-to-the-audience" license with respect to Internet-based music performances. BMI's decree only addresses traditional networks, and stations on those networks. This should remain the case, as any such requirement would be impracticable and overly rigid, and fail to fairly compensate publishers and songwriters for actual use. Unlike in traditional media with a single, vertical chain of distribution, distribution of content on the Internet follows multiple paths including widgets, framing, and links, rather than a one-way path downstream. Moreover, it is common on the Internet for revenue generated downstream not to be recognized or shared upstream. As a result, Internet-based music companies are changing their business models rapidly, but in some instances users may be unable to identify use of their content downstream. BMI should not be *required* to attempt to value all subsequent platforms in negotiating a license agreement with the particular firm in the distribution chain that chooses to apply for a license. Rather, BMI should be permitted to use its business judgment to determine which performing firms in the digital space should be licensed and the scope of their licenses.

3. Transparency of Ownership Records Should Be Balanced Against BMI's Right to Proprietary Business Information.

In the Department's request for public comments, it asked about the "transparency" to the public of the current BMI repertoire.

The impending partial or total withdrawal by some publishers will necessitate that BMI provide both withdrawing publishers and digital users reasonable access to certain information

regarding the withdrawn repertoire, and BMI is willing to do so. At the same time, one of BMI's principal assets is the information infrastructure that BMI has built and continues to develop. For this reason, BMI would support transparency procedures that allow publishers and users access to necessary information, while protecting BMI's proprietary business interests. BMI has long been open to making its repertoire available to the public.

CONCLUSION

The BMI consent decree must be amended in the ways we propose if it is to serve the Sherman Act's procompetitive goals. As things now stand, the decree has contributed to a "broken" market for music licensing. BMI pledges to work in good faith with the Department to repair that market for the benefit of songwriters and composers, publishers, the licensees who perform BMI music, and the listening public.

Comments by the National Music Publishers' Association
Submitted in Response to US Justice Department
Antitrust Division Solicitation of Public Comments
Regarding Review of the ASCAP and BMI Consent Decrees

The National Music Publishers' Association ("NMPA") submits these comments on behalf of its music publisher members and their songwriter partners, who create and license the vast majority of songs enjoyed in the U.S. everyday. We applaud the Justice Department ("DOJ") for undertaking a serious review of the ASCAP and BMI antitrust consent decrees.[1] NMPA believes the consent decrees have become a significant impediment to a well-functioning market for licensing the performances of musical works, resulting in inefficient licensing and failing to provide fair market-based compensation for songwriters and music publishers. The consent decrees impose an inherently inflexible court-administered rate-setting process that is unresponsive to market forces and fails to serve the legitimate interests of any stakeholder, including the consumers of music. In addition, pursuant to recent court decisions, individual publishers are prohibited from electing to negotiate new media rights directly without forfeiting their right to engage in any collective licensing at all, creating a licensing ecosystem that is unacceptable.

The music industry today is not the same as when the consent decrees were entered into in 1941, before the Internet, before satellite radio, and before digital streaming. Advances in digital technology have dramatically changed the way music is consumed. And, today, licensees include powerful and highly sophisticated digital distribution companies like iTunes, Google's YouTube, Spotify and Pandora, all of which possess significant power vis-à-vis the creators of music. The decrees must be substantially modified to reflect these realities, so that consumers

[1] *See* Final Judgments entered in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y) and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y), as amended.

can continue to have access to a wide variety of legal options for enjoying music across multiple platforms and devices and permit music creators to be fairly compensated for the use of their property, talent, and effort.

NMPA makes three primary recommendations for modernizing these decades-old decrees, to remove the confusion, uncertainty, and inequity that plague music performance rights licensing in the United States today.

1. ***Allow publishers to elect to negotiate directly digital distribution rights.*** The decrees should be modified to allow individual publishers to withdraw selectively rights from any performance right organization ("PRO") in order to engage in direct, bilateral negotiation. The purpose of the decrees was to regulate the collective licensing of music when BMI and ASCAP licensed almost all music in the marketplace, not to prevent copyright owners from engaging in individual licensing, which is presumptively legal, and by promoting competition, achieves one of the overarching objectives of antitrust law. Just as licensees currently have the right to elect bilateral negotiations, so should individual publishers.

2. ***Allow the decrees to sunset or provide for automatic periodic assessment of their continued necessity.*** Current DOJ policy rejects the concept of perpetual decrees, particularly in rapidly evolving industries such as music distribution. Consistent with that policy, and reflective of recent changes that have increased competition in the licensing of performance rights, these decrees should provide for a definite sunset or, at least, automatic periodic assessment of their continued justification based on the structure of the licensing market.

3. ***Improve the rate-setting process.*** As long as the decrees continue to exist, they must be more efficient, fair, and market-responsive. For example, users should be required to pay for music they use during negotiations and any rate court proceedings. Rates should be determined through a more expedited and predictable procedure, such as arbitration, rather than through an expensive and time-consuming proceeding in federal court. And, any arbitration or judicial proceeding should be required to take into account market-negotiated rates as benchmarks.

NMPA believes these changes are essential to a more efficient and fair system of licensing music. They would help to restore a market-based mechanism for determining the fair

value of creative works and give songwriters and publishers needed flexibility in responding to evolving consumer demand.

Background

1. NMPA

NMPA is the largest music publishing trade association in the United States and the voice of music publishers and their songwriter partners. Its mission is to protect, promote, and advance the interests of music's creators.

Based on the breadth and diversity of its membership, NMPA is uniquely suited to address issues confronted by songwriters and publishers under the ASCAP and BMI decrees. NMPA represents songwriters and publishers of all catalogue and revenue sizes, from large international companies to small independent businesses and even individuals. Although NMPA's member songwriters and publishers are not parties to the consent decrees, they are perhaps most greatly impacted and burdened by the constraints imposed by the decrees.

2. Performance Rights, the Role of the PROs, and The Original Purpose of the ASCAP and BMI Consent Decrees

Every recorded song begins with a musical composition, which is created and owned by the songwriter and/or music publisher.[2] Copyright law grants several types of rights for musical compositions, and these rights are typically licensed by publishers to music users. Music publishers issue different types of licenses for the use of the copyrighted works they own and/or control, including performance licenses (for radio, live venue, online streaming, etc.), mechanical licenses (for the reproduction of works on CDs, digital downloads, on-demand radio,

[2] There is also a sound recording right owned by the recording artist and/or a record label.

etc), synchronization licenses (for music used in television, film, YouTube, etc.), and folio licenses (music published in written form and lyrics).

Like most copyright licensing markets, the market for performance rights licenses is a free market, unconstrained by statute or regulation. Absent the ASCAP and BMI consent decrees, the market for these licenses would function much like any other, with supply, demand, and price determined by natural market forces.

For historical reasons, the performance rights to most compositions performed in the United States are administered today by a "performance rights organization," or a PRO, such as BMI or ASCAP. Performance rights have been licensed collectively for the benefit of both rights-holders and music users. PROs provide valuable administrative and copyright enforcement services that individual rights holders may, as a practical matter, be unable to duplicate easily. They also provide a single source where music users can obtain rights to substantial repertories, providing them with a simple and efficient means of licensing most music performed in the United States. A PRO typically pools the performance rights for its members' compositions, issues users a blanket license to perform these compositions, monitors usage to detect unauthorized performances and enforce rights, conducts surveys to estimate the frequency with which various compositions are performed, and distributes payments to its members.

DOJ and the courts have recognized the procompetitive benefits offered by PRO licensing. However, the consent decrees were not intended to prohibit or penalize direct, ex-decree bilateral licensing. In fact, the consent decrees, which prohibit the PROs from obtaining exclusive rights to license members' compositions, were designed to ensure that such direct licensing could occur, in order to inhibit ASCAP and BMI's perceived exercise of market power.

3. The Consent Decrees Now Distort Competition

Today there is neither an effective free market for the licensing of performance rights, nor any way for one to exist, unless and until the consent decrees are modified. Although the consent decrees were imposed to protect against anticompetitive behavior, they are now used to distort and manipulate the market for the benefit of a handful of powerful digital distribution companies that are the gatekeepers between music's creators and those who want to enjoy that music.

These large technology companies have been able to use the consent decree provisions to further their own financial and competitive interests. For that reason they apparently oppose consent decree reform that would increase competition, transparency, and flexibility that would allow copyright owners to negotiate in a fair and unfettered market place. It should be clear that these digital distribution companies do not speak on behalf of artists, songwriters or music users, but on behalf of large corporate interests that are concerned about the impact of a competitive and open market on their bottom lines.

NMPA cannot predict what rates ultimately would prevail in bilateral, free market negotiations. But it believes that opposition by digital services to such negotiations is motivated by a desire to continue to benefit from an effectively compulsory below-market license.

NMPA understands that digital distribution services pursuing certain business models may believe they can maximize profits only by paying what amounts to a below-market rate. But the antitrust laws are not designed to pick winners and losers or to support any specific business model. Rather, antitrust law is designed to let the market decide which business models it favors. A contrived and restrictive licensing system that produces below-market rates,

artificially bolsters faulty business models, and harms consumer welfare is not reflective of a free market and is not a legitimate goal of antitrust enforcement.

4. The Current Rate-Setting Process is Not Market-Responsive

The licensing and rate-setting processes provided for in the consent decrees heavily burden songwriters and publishers and benefit the large technology companies and digital services that seek performance licenses. ASCAP and BMI must grant a license to all the musical works in their repertories upon request, even where there is no agreed-to royalty rate for such use. An applicant that requests a license from ASCAP and BMI is not compelled to, and for its own strategic reasons, typically does not, provide any information that would allow for setting of an interim rate for users to pay for songs used during the negotiation of a royalty rate. This allows users such as digital music services to use legally all of the music in the PRO's repertory, while either delaying payment or not paying anything to ASCAP and BMI for their respective songwriters and publishers for that use. And, if a royalty rate cannot be negotiated, as is frequently the case, ASCAP and BMI must engage in lengthy and costly rate court proceedings, the costs of which are borne by their songwriter and publisher members through administrative fees.

Rate court proceedings, moreover, are poorly suited to determining an appropriate market royalty rate. DOJ itself in numerous situations has recognized the undesirability of substituting regulation for market-pricing and the difficulty for a court in performing that function, even in situations where relevant benchmarks are available.[3]

[3] *See* Federal Trade Commission and Dep't of Justice, *Excessive Price*, Response to OECD Working Party No. 2 on Competition and Regulation 1-2 (Oct. 17, 2011) at 4 ("Th[e] market pricing mechanism promotes the most efficient allocation of resources in a free market economy, and this same efficient allocation of resources is the bedrock of antitrust policy and enforcement in the U.S. . . ."). *See also Pacific Bell Telephone v. Linkline Comm.*, 129 S.Ct. 1109, 1121 (2009) ("Courts are ill suited 'to act as (continued…)

Proposed Modifications to the Consent Decrees

Music industry stakeholders and consumers alike generally agree that the market for performance rights licenses should encourage innovation by allowing new legal music services to enter the market; it should provide consumers with a wide variety of music options; and the creators of music should be adequately compensated. To achieve these commonly accepted goals, the ASCAP and BMI consent decrees should be modified in at least the following three ways.

Modification #1: Selective Withdrawal of Rights

Voluntary collective licensing through the PROs developed as a market-based solution to a problem, to address the inefficiencies and high transaction costs associated with licensing performance rights to thousands of dispersed music users that inhibited the broad legal use of music. But such collective licensing is unnecessary where licensing transactions do not involve the same high transaction costs, as when publishers negotiate directly with large, centralized music users like online streaming services.

As they are currently interpreted, the consent decrees unreasonably *force* publishers to license the performance rights for *all* of their works collectively, binding individual publishers to ASCAP and BMI for all purposes even as the process for engaging in the direct licensing of rights to some music users is made more efficient. Thus tied to ASCAP and BMI for the

---

central planners, identifying the proper price, quantity, and other terms of dealing.'"); *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) ("How is a judge . . . to determine a 'fair price'? Is it the price charged by other suppliers . . . ? Is it the price that competition 'would have set' . . . ? How can a court determine this price without . . . acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years?. . . We do not say that these questions are unanswerable, but we have said enough to show why antitrust courts normally avoid direct price administration. . . .").

licensing of performance rights, individual publishers lack the flexibility to change the way they license their works in order to respond to changes in digital technology.

In the current digital market, speed and the ability to license multiple rights are key. Currently, publishers are restricted in their ability to choose when to negotiate directly with music users and bundle performance rights licenses with other types of licenses, such as mechanical reproduction rights, that may be necessary to operate a successful online music service. Licensees alone have the right to decide when to directly negotiate a performance license with publishers, and can further decide to abandon direct negotiations and license through ASCAP or BMI if they determine the terms to be more favorable. Publishers are also hampered where they desire to negotiate directly global rights for the new digital music market that operates and competes on a worldwide scale. But the consent decrees limit the ability of publishers to respond to these demands.

Hamstrung by the consent decrees, both the PROs and publishers are forced to react slowly and inefficiently to what has become a fast-moving and dynamic market environment. Ultimately, these inefficiencies negatively affect consumers by slowing the rate at which consumers are able to access music content on new platforms.

Changes in the technological landscape of the music industry have driven corresponding changes to the consent decrees in the past. For example, when the ASCAP consent decree was last modified in 2000, changes in technology were among the principal reasons given by the Justice Department in support of modification.[4] The rise of online music services led to a clarification that "through-to-the-audience" licenses were available to users that transmitted

[4] *See* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civil Action No. 41-1395, at 18 (S.D.N.Y. Sept. 4, 2000), *available at* http://www.justice.gov/atr/cases/f6300/6395.pdf.

music over the Internet. Since 2000, the number, sophistication, and industry importance of these online music services have exploded, resulting in wholesale changes in the way music is consumed and distributed. Just as the evolution of technology required a decree modification in 2000, the more sweeping changes since then require additional modifications today.

The consent decrees should be modified to allow individual publishers to elect to withdraw certain rights for direct, bilateral negotiation. Banning direct, bilateral negotiation and forcing publishers to license collectively for all purposes is inconsistent with the original objective of the consent decrees, sound antitrust policy, and the principle of free markets. In fact, publishers already engage in direct, bilateral market negotiations with digital services and other licensees for a number of licensed rights, including synchronization and lyrics. Only the market for performance rights is constrained by the consent decrees.

Even small publishers, with adequate technology, can efficiently engage in direct licensing with some music users. Doing so would potentially reduce administrative fees and would allow them to bundle performance rights licenses with other types of licenses and enter into unique deals with certain users that benefits both parties and consumers of music. There is no justification from prohibiting any publisher from engaging in such negotiations.[5]

[5] Recent arguments by certain large technology companies that allowing direct negotiation by individual publishers could be anticompetitive are based on a false assumption that users lack access to information about what catalogues of musical works are owned by particular publishers. In fact, however, today both ASCAP and BMI provide great transparency and access to such information to both licensees and to their songwriter and music publisher members. The PROs publish databases of musical works and their owners for reference by licensees and additional information about licensees and usage for composers and publishers. And, both Universal Music Publishing Group and Sony/ATV recently announced that their entire song database will be made even more easily accessible to music licensees. *See* Ed Christman, *UMPG to Make Entire Database Easier for Licensees*, BILLBOARD (June 27, 2014), *available at* http://www.billboard.com/biz/articles/news/publishing/6140985/umpg-to-make-entire-database-easier-for-licensees; *see also* Ed Christman, *Sony/ATV Makes Organized Catalog Available Online*, BILLBOARD (July 16, 2014*), available at* http://www.billboard.com/biz/articles/news/publishing/6157855/sonyatv-
(continued…)

Modification #2: Periodic Review of the Consent Decrees

The Justice Department has very recently stated its position that "legacy" consent decrees, "except in limited circumstances, are presumptively no longer in the public interest."[6] In its manual, the Antitrust Division states that modification or termination may be appropriate when a decree "is or has become anticompetitive or otherwise undesirable. . . . Decree provisions that were perfectly sensible when entered can become inappropriate over time."[7]

The ASCAP and BMI consent decrees were designed to constrain the PROs' exercise of market power through collective action at a time when two PROs effectively controlled the licensing of most music. However, recent developments, including the introduction of a fourth performing rights organization, Global Music Rights, are changing the structure of the performance rights market.[8] Moreover, publishers currently have the right to withdraw entirely from the PROs, and through modification of the consent decrees NMPA hopes they will gain the right to withdraw partially rights and license works directly to consumers. With an additional, unregulated performance rights organization entering the market and acquiring valuable music catalogues[9], and the potential for partial or complete withdrawals by publishers from ASCAP

---

makes-organized-catalog-available-online. Unfounded concerns about transparency should not be used to prevent free market negotiations outside the PROs.

[6] *See* Press Release, Department of Justice, *Antitrust Division Announces New Streamlined Procedure for Parties to Modify or Terminate Old Settlements and Litigated Judgments* (Mar. 28, 2014), *available at* http://www.justice.gov/opa/pr/2014/March/14-at-321.html.

[7] *Antitrust Division Manual*, Department of Justice, at III-146 (5th ed. 2013).

[8] *See* Ed Christman and Ray Waddell, *Irving Azoff's Next Frontiers? Publishing and Blue-Chip Marketing*, BILLBOARD (April 18, 2014) available at http://www.billboard.com/biz/articles/news/publishing/6062521/irving-azoffs-next-frontiers-publishing-and-blue-chip-marketing. SESAC has been operating as an unregulated performing rights organization since 1930.

[9] *See*, Ed Christman, *Pharrell to Leave ASCAP for Irving and Grimmet's Global Music Rights*, BILLBOARD (July 25, 2014) available at http://www.billboard.com/articles/business/6188942/pharrell-to-leave-ascap-for-irving-and-grimmets-global-music-rights.

and BMI, ASCAP and BMI may cease to exercise potentially anticompetitive market power, eliminating the justification for the consent decrees.[10] Increased competition to ASCAP and BMI from other PROs and music publishers themselves would preclude ASCAP and BMI from being able to exercise market power, and the concerns giving rise to the consent decrees would no longer exist. It would make no sense and be inequitable to subject songwriters and publishers using ASCAP and BMI to license performance rights to their works to the limitations and burdens of the consent decrees.

Although NMPA understands that the long history of the consent decrees could itself give rise to concern about the impact of change, at least two factors mitigate against such concern. First is the intolerable uncertainty that has resulted from recent interpretations of the decree and the potential incentives they create for some of the largest publishers to withdraw completely from the PROs notwithstanding the disruptive effect this could have in the market. Second is the fact that partial withdrawal is most likely with respect to digital rights, for which the market is not yet established.

Since the consent decrees were first put into place, and even since the ASCAP decree was last modified in 2000, the marketplace for performance rights licensing has changed considerably. Music users, historically envisioned as small and lacking in bargaining power or the ability to negotiate directly with songwriters and publishers, have been increasingly replaced with large, sophisticated digital music distributors, each of which is capable of engaging in direct,

[10] The United States acknowledged this very fact when it supported the entry of the modified ASCAP consent decree in 2000. *See supra* note 1, at 9 n.10 ("Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of the justifications for collective licensing of performance rights by PROs.").

bilateral licensing with publishers without the need for the consent decrees. Because of the uncertainty surrounding the future of the industry and the speed with which the competitive landscape is changing, the consent decrees should be modified to provide for a DOJ review to ascertain whether the PROs continue to exercise the same market power that initially gave rise to the consent decrees.

One need not look far to find a fully functioning market in which organizations aggregate and license creative works without market power. With no market power, these organizations do not raise the competitive concerns that originally motivated the consent decrees. In fact, many independent record labels use aggregators or global rights management companies that license and distribute content and enforce rights on their behalf. For example, Merlin represents over 20,000 independent labels and distributors accounting for ten percent of the U.S. music market,[11] demonstrating that an organization without substantial market power can aggregate and license creative works without posing an anticompetitive threat. If a significant number of publishers decide to withdraw certain categories of works from ASCAP and BMI, they will be no different, and the continued need for the onerous conditions imposed by the consent decrees with respect to those categories should be reevaluated.

[11] Glenn Peoples, Pandora Signs First Direct Label Deal With Merlin, BILLBOARD (August 6, 2014), *available at* http://www.billboard.com/biz/articles/news/digital-and-mobile/6207066/pandora-signs-first-direct-label-deal-with-merlin?utm_source=twitter. As a further example, The Orchard licenses nearly a third of all the music for sale in Apple's iTunes Store. *See* Derek Sylvan, *Early Digital Bet Now a Sweet Song*, THE WALL STREET JOURNAL (May 13, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887324244304578473030110212430.

Modification #3: Rate-Setting Reform

The ASCAP and BMI consent decrees' current procedure for setting license rates has proven to be slow, expensive, and inaccurate, and often results in songwriters and publishers going entirely uncompensated or being forced to accept unfair, below-market rates for the use of their creative works. The cumbersome process dictated by the consent decrees should be modified in three principal ways. First, the consent decrees should require music users to pay license fees whenever they perform a copyrighted work, including during the period before an interim or final rate is set. Second, the rate court mechanism should be replaced by binding arbitration, which would result in a rate-setting process that would be faster, less expensive, and more predictable. Third, any rate-setting process should attempt to approximate the fair market value of the requested license through the required consideration of evidence of rates set under direct agreements in the free market.

Interim Payment of License Fees — The consent decrees currently provide no recourse for songwriters or publishers to receive compensation for the performance of their works before an interim rate is set. A music user need only apply to ASCAP or BMI for a license to begin immediately using all of the musical works in the PRO repertory, but the publisher and songwriter of those works has no power under the consent decrees to ask the court to set an interim rate—only the music user or the PRO can do that. And, as explained above, licensees often strategically refuse to provide the information that would enable the PRO to set an interim rate. Furthermore, there is no automatic escrow provision, which puts songwriters and publishers at risk that they may never be compensated for the use of their works. Without this sort of provision, licensees are not required to set money aside for the use of publisher and songwriter compositions during the period before an interim rate has been set in a market where

some services, especially digital music services, go out of business before ever making a single payment to the PRO.

The decrees should be modified so that, upon application to ASCAP or BMI for a license, the applicant would receive a license and may begin performing the works covered by the license, provided it begins paying to the PRO an interim rate. Similar provisions have been included in other antitrust consent decrees, such as the decree entered upon the merger of Thomson and West Publishing in 1997.[12] That decree also required the issuance of a license upon request, but set automatic default rates to ensure that the copyright holder would be paid by the licensee. The addition of such a provision in the BMI and ASCAP decrees would clarify the confusion introduced by the courts overseeing the consent decrees regarding interim licenses, ensure that users could immediately begin performing a licensed work upon application to a PRO, and guarantee that songwriters and publishers are compensated for the use of their musical works.

Arbitration — The consent decrees currently require that either the PROs themselves or music users initiate rate court proceedings if negotiations over license rates break down. Songwriters and publishers who own the works being licensed have no independent ability to determine when or if a rate court proceeding should be initiated, although they shoulder the cost of each proceeding. The rate court proceedings often result in full federal civil trial and appeal, complete with the extensive discovery prescribed by the Federal Rules of Civil Procedure, resulting in situations where songwriters and publishers wait years to receive full payment (or any payment at all) for use of their copyrighted creative works. Further, rate court proceedings

[12] *See* Final Judgment, *United States et al. v. The Thomson Corp. & West Publishing Co.*, No. 96-1415 (D.D.C. Mar. 7, 1997).

are often incredibly expensive and time-consuming for all parties, lasting for years and costing millions of dollars.[13]

The decrees should be modified to provide for rate-setting through binding arbitration. Rate-setting would be faster, possibly less expensive, and more predictable through the implementation of well-defined rules and guidelines to focus and govern the process. These rules can limit and simplify discovery, evidentiary procedures, and motions practice to reduce time and costs, and the timeline from start to finish could be greatly accelerated. Moreover, arbitration can provide the ability to select an arbitrator with music industry expertise. And, the decrees should further prescribe a time by which arbitration must commence if a rate has not been agreed to by the parties, encouraging both sides to finalize a rate through negotiation. Where negotiations fail to produce agreement on a rate, the arbitration proceeding would simplify and expedite the process and make it less expensive. In an industry that is so rapidly changing, the greater flexibility afforded by arbitration is a necessity.[14]

Consideration of Rates Negotiated in the Free Market: The current practice under the consent decrees arbitrarily places the burden of proof on the PRO to show why its proposed rates are reasonable rather than requiring the rate court to consider evidence introduced of fair market rates. While the current rate-setting proceedings can often produce below-market rates that are drastically out of line with the rates produced between parties directly negotiating in the free

[13] *See In re MobiTV, Inc.*, 712 F.Supp.2d 206 (S.D.N.Y. 2010) (lasting twenty-four months); *In re THP Capstar Acquisition Corp*., 756 F.Supp.2d 516 (S.D.N.Y. 2010) (lasting forty-nine months).

[14]Similar arbitration provisions have been included in several recent analogous consent decrees, including the NBCU-Comcast consent decree, which provides for commercial arbitration if an online video distributor cannot reach a negotiated agreement with Comcast. *See* Modified Final Judgment, *United States et al. v. Comcast Corp. et al.*, No. 11-cv-00106 (D.D.C. Sept. 1, 2011). Under this consent decree, an aggrieved party can petition DOJ for permission to submit their dispute to arbitration under the American Arbitration Association's Commercial Arbitration Rules and Expedited Procedures. A similar procedure could be adopted for determining fair market rates for PRO licenses.

market[15], arbitrators or arbitration panels should be required to consider and apply evidence of free market negotiated rates and terms in order to approximate the fair market value of a license and to take into account dynamic market conditions. The objective of the rate-setting process should be to reflect the value of what would be negotiated in a free market. This process will ensure songwriters and publishers are paid quickly and fairly for use of their songs, at rates that reflect market valuation. It will further ensure that songwriters and publishers who remain in ASCAP and BMI, either by choice or by necessity are not competitively disadvantaged by a rate-setting process that fails to consider the true, fair market value of their creative works.

Conclusion

Music publishers are united with other industry stakeholders and consumers in their desire to create a marketplace for music rights licensing that encourages innovation, provides consumers with numerous options for enjoying musical works, and ensures that publishers and songwriters are fairly compensated for their creative contributions. The ASCAP and BMI consent decrees perhaps provided sensible safeguards at some point in their history, but they have since been overtaken by a rapid evolution in digital music technology and consumer preferences.

To restore efficiency, flexibility, and responsiveness to this market, NMPA and its membership respectfully recommend that the consent decrees be modified in three ways: to allow for the partial withdrawal of certain rights from ASCAP and BMI, to be periodically

[15] For example, while direct bilateral negotiations in the free market between publishers and iTunes radio resulted in a 10% royalty rate for publishers, the rate-setting process in In re Pandora Media resulted in a significantly lower rate of 5.1%. *See* Ed Christman, *Publishers to Get Bigger Payday from Apple Thanks to Direct Licensing*, BILLBOARD (June 5, 2013), available at http://www.billboard.com/biz/articles/news/digital-and-mobile/1565762/publishers-to-get-bigger-payday-from-apple-thanks-to.

reviewed to determine whether ASCAP and BMI continue to possess market power, and to reform the rate-setting process by providing for interim license rates and binding arbitration. If these changes are adopted, the music industry will be better able to meet the demands of a dynamic marketplace with speed and innovation that will ultimately benefit consumers.

ANTITRUST CONSENT DECREE REVIEW - ASCAP AND BMI 2015

Antitrust Division Requests Comments
on PRO Licensing of Jointly Owned Works

The U.S. Department of Justice, Antitrust Division, is currently undertaking a review to examine the operation and effectiveness of the Final Judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) ("Consent Decrees"). The Antitrust Division previously solicited public comments regarding several potential modifications to the Consent Decrees (http://www.justice.gov/atr/ascap-bmi-decree-review). In the course of this process, industry stakeholders recommended additional modifications regarding ASCAP's and BMI's licensing practices related to jointly owned works. Such proposals also have implications for proposed Consent Decree modifications to provide for "partial withdrawal" or "partial grants of rights." Careful consideration of these issues is essential. Accordingly, the Antitrust Division invites interested persons, including songwriters and composers, publishers, licensees, and service providers, to provide the Division with information or comments relevant to the questions described below.

ASCAP's and BMI's licensing practices suggest that each organization has historically provided licenses entitling users to play all works in their repertories, whether partially or fully owned. For example:

- The organizations' licenses grant users the rights to play works, not interests in works. For example, BMI's model license for bars and restaurants promises "[a]ccess to more than 7.5 million musical works" and grants to the user "a non-exclusive license to publicly perform . . . all of the musical works of which BMI controls the rights to grant public performance licenses during the Term." Similarly, ASCAP's Business Blanket License grants the right to perform "non-dramatic renditions of the separate musical compositions now or hereafter during the term of this Agreement in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights."

- ASCAP and BMI often describe their products in ways that would be inconsistent with a license that provided something other than the right to play all works represented in their repertories. For example, in its submission to the Antitrust Division in response to the 2014 request for comments, ASCAP explained: "Licensees are, through a single license with a single entity, authorized to perform any or all of the millions of songs in ASCAP's repertory (including additional songs that enter the repertory during the term of the license and countless foreign works). Without ASCAP and other PROs, music users that perform more than a handful of musical works would face the prohibitive expense of countless negotiations with a multitude of copyright owners." In its own submission, BMI noted that "[u]nder the BMI decree, upon written request for a license, a licensee has an automatic right to use any, some, or all of BMI's music."

- The Consent Decrees themselves describe ASCAP's and BMI's licenses as conveying the rights to play all works in each organization's repertory. The ASCAP decree requires ASCAP to "grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory . . . ." The BMI decree describes BMI's licenses as providing access to "those compositions, the right of public performance of which [BMI] has or hereafter shall have the right to license or sublicense." The Second Circuit's 2015 *Pandora* decision states that ASCAP is "required to license its entire repertory to all eligible users."

Notwithstanding this, the historical practice by which ASCAP and BMI have made and accepted payments has been based on the fractional interest each copyright owner holds in works. Moreover, ASCAP and BMI pay only their own members, and do not "account" to members of other performing rights organizations. These practices cause some rightsholders to question whether the organizations' licenses have in fact conveyed the right to play partially owned works.

Taking into consideration the foregoing, the Antitrust Division requests that the public comment on the following issues:

- Have the licenses ASCAP and BMI historically sold to users provided the right to play all the works in each organization's respective repertory (whether wholly or partially owned)?

- If the blanket licenses have not provided users the right to play the works in the repertories, what have the licenses provided?

- Have there been instances in which a user who entered a license with only one PRO, intending to publicly perform only that PRO's works, was subject to a copyright infringement action by another PRO or rightsholder?

- Assuming the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, should the Consent Decrees be modified to permit or require ASCAP and BMI to offer licenses that require users to obtain licenses from all joint owners of a work?

- If ASCAP and BMI were to offer licenses that do not entitle users to play partially owned works, how (if at all) would the public interest be served by modifying the Consent Decrees to permit ASCAP and BMI to accept partial grants of rights from music publishers under which the PROs can license a publisher's rights to some users but not to others?

- What, if any, rationale is there for ASCAP and BMI to engage in joint price setting if their licenses do not provide immediate access to all of the works in their repertories?

All comments should be submitted by electronic mail to ASCAP-BMI-decree-review@usdoj.gov

Email links icon
by November 20, 2015, and will be posted in their entirety for public review at http://www.justice.gov/atr/ASCAP-BMI-comments-2015. Information that parties wish to keep confidential should not be included in their comments. Comments may also be sent, preferably by courier or overnight service, to

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

Public Comments of Broadcast Music, Inc.
U.S. Department of Justice, Antitrust Division
Review of Consent Decree in United States v. Broadcast Music, Inc.

November 20, 2015

Broadcast Music, Inc. ("BMI") submits these public comments in response to the September 21, 2015 solicitation of public comments by the Antitrust Division of the U.S. Department of Justice concerning fractional licensing of public performance rights in co-owned musical works as a part of its review of the consent decrees in *United States v. Broadcast Music, Inc.*[1] and *United States v. American Society of Composers, Authors and Publishers*[2] (the "Public Notice").[3] BMI will continue its ongoing dialogue with the Department concerning fractional licensing and other topics in the hope of soon reaching an agreement on a set of necessary changes to the BMI consent decree. BMI submits these comments to state publicly its position on fractional licensing for the benefit of other interested parties.

As we described in BMI's August 6, 2014 public comments, the advent of digital processing and Internet streaming has revolutionized the way that the public hears music performances. The Department's ongoing review of the consent decree must address the current and foreseeable future marketplace and make the changes necessary to bring the consent decree into the 21st Century. In the 15 months since BMI previously provided public comments, the demands of larger publishers to take control of their catalogs and license directly to Internet

---

1. 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), amended, No. 64-CIV-3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

2. No. 41 Civ. 1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

3. As a party to the decree in *United States v. Broadcast Music, Inc.*, BMI stands on unique legal ground, not shared by any other members of the public, concerning the decree in that case. *See, e.g.*, *United States v. Am. Soc'y of Composers, Authors and Publishers*, 341 F.2d 1003, 1007 (2d Cir. 1965) (non-party to decree lacks standing to move in antitrust action against defendant). In submitting these comments, BMI reserves all of its rights as co-equal party to the decree with the Department.

users in order to negotiate royalties in a free market have become even more insistent. Certain songwriters formerly affiliated with BMI and ASCAP have signed with a new, unregulated performance rights organization, Global Music Rights ("GMR"), and terminated their relationship with the regulated PROs presumably in the hope of achieving greater royalties.

At the same time, unregulated, for-profit SESAC, through its recently acquired Harry Fox Agency ("HFA")[4] and RumbleFish, offers mechanical and synchronization rights (including micro-sync rights for high-volume, uniform-value synchronization largely for user-generated content) that BMI is not currently providing.[5]

If the uncertainty created by the Department's continuing review of the consent decree persists, it will place challenges on BMI's ability to compete and respond in this dynamic and rapidly evolving landscape. Equally, BMI's songwriters and publishers remain in a limbo of uncertainty concerning the performance rights that are typically their primary source of income. There is an urgent need for modification of the BMI consent decree without further delay, and to modify the decree in such a way as to permit BMI to compete under the same rules of play as these current (and future) unregulated entities.

To the extent that recent court decisions and the Department's Public Notice have drawn into question BMI's right to accept fractional interests from songwriters and publishers or issue fractional licenses to music users, the meaning of the decree should be clarified so that BMI may license on a fractional basis if it and its affiliated songwriters and publishers want it to do so. There is no reason to compel BMI to grant greater rights than music users have paid for,

---

4. SESAC acquired HFA in September of 2015, thereby adding to its ability to bundle licensing for digital services that require performance rights as well as synchronization and/or mechanical rights. *See* Ed Christman, *SESAC Buys the Harry Fox Agency*, Billboard (July 7, 2015), http://www.billboard.com/articles/news/6620210/sesac-buys-the-harry-fox-agency.

5. BMI continues to rely on the language of its decree, which does not prohibit it from licensing rights in addition to the public performing right.

or to act contrary to the preferences of its affiliates. Indeed, requiring BMI to license on a 100% basis would only increase its purported market power, a result hardly reflecting the purpose of the BMI consent decree.

Fractional licensing – where BMI represents only the interests of its writers and publishers – is the efficient, common-sense way to deal with the longstanding fact that many songs are co-written by BMI affiliates and non-BMI affiliates ("split works"). In fact, fractional pricing and distribution by BMI and ASCAP have been the indisputable norm among all the stakeholders for decades for compelling reasons:

- Fractional licensing makes sense for **music users** that want blanket access to all the works in the BMI and ASCAP repertoires but don't want to pay the PROs in full – twice – for the right to play jointly-authored works.

- Fractional licensing makes sense for **publishers** who don't want to account to other publishers for partial interests across their catalogs, co-owned by those other publishers.

- Fractional licensing makes sense for **songwriters** who want to have performances of their works valued by the PRO of their choice, want to be paid by the PRO of their choice, and want to choose their collaborators in a new song based on creative considerations, not the PRO affiliation of the other songwriters.

- Fractional licensing makes sense for **PROs** that need to collect fees and pay royalties that are fair for their songwriters but have no way to collect for, or to pay, the collaborators of their songwriters who have chosen a different PRO to represent them.

- Fractional licensing makes sense for **rate courts** that would otherwise have to deal with competing claims to license the same copyright interests and which (under mandatory 100% licensing, discussed below) would otherwise be challenged to value two independent PRO repertoires each of which would contain works whose performance could be licensed by either PRO.

By contrast, mandatory 100% licensing, whereby a music user holding either a BMI or ASCAP blanket license would obtain the right to perform all co-written songs without obtaining permission to perform those songs from the other PRO or any other non-affiliated co-writer or publisher, would inject great inefficiency and confusion into the pricing, collecting, and distribution of performance rights royalties. It would also have the perverse effect, from an antitrust policy point of view, of undercutting an individual publisher's ability to license their catalogs directly to music users (because the PROs will have already licensed any split works, which now make up a large portion of most publishers' catalogs), thereby shoring up and increasing the bargaining power of the collective licensing organizations. At the same time, mandatory 100% licensing by PROs would encourage opportunistic gamesmanship by any music user seeking to avoid paying the full value of all the rights it acquires.

Requiring BMI to license not only the interests of its own affiliates, but also the partial interests of unaffiliated co-songwriters and co-publishers, would impose an unworkable and unwarranted change to the existing and longstanding understanding by which both music users and music creators have operated for jointly-written songs. As the Public Notice states, "the historical practice" has been that "ASCAP and BMI have made and accepted payments . . . based on the fractional interest each copyright owner holds in works."

Pursuant to this practice, music users have obtained permission from the representatives of *all* co-owners of the songs they play – typically BMI, ASCAP, and SESAC. Songwriters have been able to look to *their own* trusted PROs and publishers for payment for *their* contribution to jointly-written songs.

Until now, there has never been any reason to consider whether BMI licenses that include split works, in the abstract, also cover the interests of ASCAP and SESAC writers and publishers in those same works. It is indisputable, however, that the market has consistently embraced a fractional-licensing model.

Basic Principles

Several basic principles underlie BMI's view on fractional licensing and are the foundation on which the remainder of the points addressed in these comments lie.

1. Requiring BMI to provide 100% licensing will undermine the copyright owner's right to license directly, thus contradicting the procompetitive goals of antitrust law and the fundamental purpose of the consent decree.

The BMI consent decree is not intended to regulate individual publishers or regulate the prices that they may charge. Rather, the fundamental purpose of the consent decree is to ensure that *BMI* does not exercise its alleged market power *as a result of its own collective licensing activity*.[6] Preserving the incentives of music users and individual copyright owners to enter into direct licenses in the free market has been consistently recognized as a check on any incremental market power that *BMI* could exercise through the pooling of performance rights in

---

6. *See, e.g.*, Brief for the United States as Amicus Curiae at 11, *Broad. Music, Inc. v. DMX Inc.*, No. 10-3429, 2011 WL 1462242 (2d Cir. Apr. 11, 2011) ("[T]he modifications sought are procompetitive" and would serve the "key purpose of the Consent Decree – limiting any alleged market power BMI may have.") (internal citations omitted); *United States v. Am. Soc'y of Composers, Authors and Publishers*, 157 F.R.D. 173, 193 (S.D.N.Y. 1994) ("The Consent Decree was 'designed to limit ASCAP's ability to exert undue control of the market for music licensing rights through its control of a major portion of the music available for performance and its use of the blanket license as a means to extract non-competitive prices.'") (internal citations omitted).

its control.[7] The consent decree was not intended to limit the "bargaining capital"[8] of copyright owners acting independently of the collective licensing pool.[9] Instead, as the Department has acknowledged, "the language and context of the decree show it was intended to promote competition."[10]

As we urged in BMI's August 2014 public comments, the BMI consent decree should be modified to permit music publishers to withdraw their catalogs from the BMI repertoire as to certain digital uses so as to seek unregulated, free-market prices in that important and growing music segment. Such a modification is consistent with the consent decree's overarching purpose. However, among contemporary pop songwriters a substantial – and increasing[11]– proportion of songs are written by two or more songwriters, and those writers often work through different publishers and different PROs. This recent trend toward even greater collaboration reflects a cultural shift in the craft of songwriting:

---

7. *See, e.g.*, Brief for the United States as Amicus Curiae at 10a, *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, No. 77-1578, 1978 WL 223155 (U.S. Nov. 27, 1978) ("Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the individual copyright holder should also be preserved for those who might be able to take advantage of it."); Memorandum of the United States in Response to Motion of Broadcast Music, Inc. to Modify the 1966 Final Judgment Entered in this Matter at 10-12, *United States v. Broad. Music, Inc.*, No. 64 CIV. 3787 (S.D.N.Y. June 20, 1994) (attached as Addendum B to Brief for the United States as Amicus Curiae, *Broad. Music, Inc. v. DMX Inc.*, No. 10-3429, 2011 WL 1462242 (2d Cir. Apr. 11, 2011) ("The Judgment already contains important provisions to assure that music users have competitive alternatives to the blanket license, including direct and per-program licensing, and source licensing for prerecorded programming. Under the Judgment, BMI may obtain only nonexclusive licenses from composers, thereby leaving the composers free to license any of their works directly to any music user who chooses to negotiate with them. . . . Thus, the Judgment provides important protections against supracompetitive pricing of the BMI blanket license for those music users wishing to explore competitive licensing alternatives.")

8. *Stewart v. Abend*, 495 U.S. 207, 229 (1990) ("The limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use.").

9. *Columbia Broad. Sys., Inc. v Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 936 (2d Cir. 1980) ("[I]f copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to deal with them, the blanket license is not a restraint of trade.").

10. Brief for the United States as Amicus Curiae at 9, *Broad. Music, Inc. v. DMX Inc.*, No. 10-3429, 2011 WL 1462242 (2d Cir. Apr. 11, 2011).

11. As of November 10, 2015, all ten songs in the top 10 on the Billboard Hot 100 were co-written. Billboard Hot 100, (Nov. 10, 2015), http://www.billboard.com/biz/charts/the-billboard-hot-100.

> BY THE MID-2000S the track-and-hook approach to songwriting— in which a track maker/ producer, who is responsible for the beats, the chord progression, and the instrumentation, collaborates with a hook writer/ topliner, who writes the melodies— had become the standard method by which popular songs are written. The method was invented by reggae producers in Jamaica, who made one "riddim" (rhythm) track and invited ten or more aspiring singers to record a song over it. From Jamaica the technique spread to New York and was employed in early hip-hop. The Swedes at Cheiron industrialized it. Today, track-and-hook has become the pillar and post of popular song. It has largely replaced the melody-and-lyrics approach to songwriting that was the working method in the Brill Building and Tin Pan Alley eras, wherein one writer sits at the piano, trying chords and singing possible melodies, while the other sketches the story and the rhymes. In country music, the melody-and-lyrics method is still the standard method of writing songs. (Nashville is in some respects the Brill Building's spiritual home.) But in mainstream pop and R&B songwriting, track-and-hook has taken over . . .[12]

Because joint authorship is so common, this needed reform would be rendered largely futile for those publishers that wish to explore direct licensing outside BMI and ASCAP if all their co-written songs were licensed in full by the regulated PROs.[13] This would happen whenever any interest in a withdrawn song remained with BMI because that interest would remain subject to BMI's mandatory licensing. 100% licensing makes partial digital withdrawal all but meaningless.

Instead of promoting competition, requiring 100% licensing by BMI would promote collective licensing over free-market negotiation. It would severely limit the number of works that can be licensed freely and exclusively by publishers that withdraw from or terminate their affiliation with BMI.

---

12. John Seabrook, *The Song Machine: Inside the Hit Factory* 200 (Kindle ed. 2015).

13. While we primarily discuss BMI in this Comment, all statements concerning the impact of a mandatory 100% licensing rule apply with equal force to ASCAP.

Moreover, requiring BMI to license on a 100% basis would be contrary to the desires of the publishers and songwriters. The galvanized response by thousands of songwriters and publishers to the mere suggestion that BMI may be required to license on a 100% basis is a strong indicator that they will respond with action if a 100% licensing rule were imposed. Some publishers would no doubt find it more advantageous to remove their works from BMI altogether than to subject themselves to a 100% licensing model that effectively thwarts direct licensing, and makes tracking and payment of royalties significantly more complicated and costly. Large publishers withdrawing entirely from BMI will adversely affect both digital users and traditional media users that rely on blanket licenses as an efficient and desirable way to secure music performing rights.

Faced with the departure of BMI's larger publishers, small co-publishers may be incentivized to leave BMI and perhaps allow themselves to be absorbed by the major publishers in order to enjoy free market licensing of their works. Publisher withdrawals would place the operational-cost burden on a smaller base of BMI affiliates, making affiliation with BMI that much less a competitive choice. The publishers that chose to remain with BMI would thereby be harmed by the cumulative impact of a requirement of 100% licensing, making it even more difficult for them to compete with larger publishers for songwriters. Music users, small publishers, their songwriters, and the public at large would then lose the efficiency benefits of blanket licensing.

2. The consent decree should conform to commercial and economic reality. The performance rights marketplace has, in practice, always operated on a fractional basis.

As the Public Notice accurately states, BMI has "made and accepted payments" fractionally. In other words, BMI pays its writers and publishers on a fractional basis (a writer

with a 50% interest gets a one-half credit when the song is performed) and does not pay ASCAP writers. Likewise, BMI has negotiated and priced its licenses to music users on a fractional basis, and assumes that music users will also obtain licenses from the non-BMI participants, who will in turn pay their own interest holders.

Participants in the performance rights marketplace, including music users, have always assumed that performance rights organizations were licensing on a fractional basis and, acting on that assumption, obtained blanket licenses from all PROs.

With a single *de minimis* exception, explained below, music users have not relied on the BMI blanket license to the exclusion of the ASCAP license for works with split-PRO representation. Any claim that they in fact relied on their BMI license to cover performances of split works is wholly disingenuous. Their practice has consistently been to obtain blanket licenses from all PROs. The consent decree should not abruptly be construed in a way that will change longstanding practices and relationships. The marketplace has developed and functioned under the consent decrees for the last 50 years with common understandings that should not now be upended.

3. From the songwriters' perspective, the freedom to team up with other songwriters in varying combinations is integral to the creative process.

The creative process of songwriting and composition should remain unaffected by a songwriter's PRO affiliation. Songwriters' freedom to choose and change collaborators whenever they are inspired to do so is a source of innovation, productivity, product quality, and output enhancement – all positive contributions to the market from an antitrust perspective.

Today, as always, songwriters freely choose collaborators without any regard for who their co-writers' publishers or PROs might be. Songwriters collaborate as they see fit, secure in the knowledge that *they* will be paid by *their own* publishers and *their own* PROs for

their own contribution to a co-written work. A regime in which BMI is required to pay non-BMI writers and non-BMI publishers for those performances of split works licensed by BMI, while BMI writers receive "accountings" from other PROs and publishers for that PRO's licensed performances of those same songs, would profoundly upset the relationship between songwriters and their trusted representatives.

It would also chill the creative process. Suddenly, without precedent, songwriters who wish to control the licensing of their interests by the PRO of their choice would be pressed to choose their collaborators based not on chemistry or complementary talents, but rather by the PRO affiliation of that collaborator (and even then, their collaborators could change their affiliation, thus upsetting even such careful plans to work within consent decree mandates).

The prospect of missing and delayed payments and lack of true accountability under a 100% licensing regime is all too plain. Songwriters should not be put to this choice. Above all else, the Department must preserve the songwriters' freedom to collaborate and receive payment for their joint works from their chosen PRO in a *pro rata* fractional way.

4. For the market to operate efficiently, the rules of the road must be clear. The current perceived ambiguity concerning the consent decree's position on 100% licensing must be remedied.

Prior interpretation of the PRO consent decrees never addressed the issue of whether the marketplace is or is not licensing on a 100% basis. Nonetheless, it has since been suggested that the reasoning of those decisions dictates that BMI also must license *all* interests in a song even though it has always accepted and made payments fractionally. While the BMI and ASCAP consent decree courts decided that under the existing decrees a publisher must grant the PROs rights to license a "composition" or a "work" to *all* public performance music users or

none,[14] those courts never addressed the issue of whether the marketplace is or is not licensing on a 100% basis. The decree courts gave no consideration to any antitrust rationale with regard to fractional licensing.

That said, given the questions raised by the Department and the insertion of perceived ambiguity into long-settled practices, the BMI consent decree now must be clarified so as to allow for fractional licensing as well as digital rights withdrawal more generally.

The marketplace would not be disrupted by making explicit that BMI may continue to accept and grant fractional rights in split works. To the contrary, such clarification would conform the language of the decree to existing practices and allow BMI to respond to current market forces. The decree was not intended to create inefficiencies or prevent competition in the marketplace, as would be the result of 100% licensing. Nor was it intended to limit competition by individual publishers and songwriters or limit their rights under copyright law. Of course, if BMI's songwriters and publishers (and their co-owners) want BMI to issue 100% licenses, and if BMI at that point wishes to do so, that too should be permitted. Simply put, BMI should be able to follow the market wherever it goes and allow its affiliates to compete fairly with unregulated entities.

---

14. "The BMI Consent Decree requires that all compositions in the BMI repertory be offered to all applicants," but "[i]f BMI cannot offer those compositions to New Media applicants, their availability does not meet the standards of the BMI Consent Decree, and they cannot be held in BMI's repertory. Since they are not in BMI's repertory, BMI cannot deal in or license those compositions to anyone." *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 CIV. 4037 (LLS), 2013 WL 6697788, at *3-4 (S.D.N.Y. Dec. 19, 2013), *appeal docketed*, No. 15-2060 (2d Cir. June 26, 2015). The Second Circuit, affirming the ASCAP consent decree court, stated that "[t]he licensing of works through ASCAP is offered to publishers on a take-it-or-leave-it basis. As ASCAP is required to license its entire repertory to all eligible users . . . ." *Pandora Media, Inc. v. Am. Soc'y of Composers, Authors and Publishers*, 785 F. 3d 73, 77 (2d Cir. 2015).

Discussion

The Performance Rights Marketplace has Always Operated on a Fractional Share Basis.

Before digital rights withdrawal was first suggested, virtually all song co-owners were affiliates of one PRO or another, and virtually all music users held licenses from all PROs covering all of the fractional shares of each composition. What mattered to music users was: (a) whom do we pay; and (b) what are we paying for? To those questions, the answer was unequivocal. The performance rights marketplace operates on a fractional share basis: PROs price and pay royalties to their members or affiliates on their own fractional share of the copyrights; PROs do not account to affiliates of other PROs; and music users obtain a license from each co-owner of the copyright or their respective PRO in order to publicly perform music. A modification to the consent decree to expressly clarify that BMI may offer fractional licenses would be consistent with market practice and avoid the massive disruption that would occur if that practice – and the whole ecosystem that has grown around it – were turned upside down.

Payments To and From BMI are Fractional.

As the Public Notice accurately states, PROs "have made and accepted payments . . . based on the fractional interest each copyright owner holds in works." In negotiations with music users and their joint negotiating agents, such as the Radio Music License Committee, BMI's fractional-share-adjusted proportion of music performances (as compared to ASCAP's and sometimes SESAC's) in a given medium is virtually always one of the principal topics of debate in determining a fair price for the BMI license. This is also true when negotiations fail and the rate court or the Copyright Royalty Board must determine a reasonable fee.

In all but an isolated case (discussed further below), it has been the uniform practice of BMI and the music users in negotiations and in court, to present evidence of music use on a fractional basis only. If a song has two songwriters – one BMI-affiliated and one ASCAP-affiliated – BMI would be credited with only a one-half interest in the work. Music users have never paid BMI for 100% of the value of works co-written by ASCAP or SESAC writers.

By the same token, BMI only pays its publishers and writers on a fractional basis. If there are two BMI writers with 50% shares, each gets half credit for a performance. If there is a BMI co-writer who holds a one-third interest in a song along with two ASCAP writers, BMI only gives the BMI writer a one-third royalty credit for the performance. BMI affiliation agreements with writers and publishers contain standard provisions incorporating this payment system.[15]

BMI Does Not Account to Co-Owners.

A critical component of the default rule in copyright law of tenancy-in-common is that a copyright owner of a co-owned song who licenses the song on a 100% basis bears the

---

15. The BMI Publisher Affiliation Agreement provides in paragraph 5(A)(3) that:

> In the case of Works which, or rights in which, are owned by Publisher jointly with one or more other publishers, the sum payable to Publisher under this subparagraph A shall be a pro rata share determined on the basis of the number of publishers, unless BMI shall have received from Publisher a copy of an agreement or other document signed by all of the publishers providing for a different division of payment.

> The BMI Writers Affiliation Agreements provides in paragraph 6(a)(ii) that:

> In the case of a Work composed by you with one or more co-writers, the sum payable to you hereunder shall be a pro rata share, determined on the basis of the number of co-writers, unless you shall have transmitted to us a copy of an agreement between you and your co-writers providing for a different division of payment.

concurrent obligation to account to its co-owner for the co-owner's share of the royalties.[16] However, as the Public Notice makes clear, BMI does "not 'account' to members of other performing rights organizations." Similarly, the BMI affiliation agreements do not impose an obligation on BMI to account to non-affiliated publishers and writers. Instead, they only impose on BMI the obligation to make payments to publishers and writers *pro rata* "determined on the basis of the number of" co-writers or co-publishers, as the case may be.

We expect that many publishers and writers would be astonished to learn that BMI and they themselves had been granting any rights on behalf of their co-owners, and in particular their non-BMI co-owners. After all, not only do their BMI affiliation agreements *not* provide for accounting to co-owners, but (i) the publishers and writers never actually receive money from BMI with which to account *to* their non-BMI-affiliated co-owners; and (ii) they never receive any money *from* their ASCAP-affiliated co-owners.

Music Users Have Acted on the Understanding that Works Were Licensed Fractionally and Did Not Rely on the BMI License or ASCAP License Exclusively.

Music users, like songwriters and publishers, necessarily have understood that the market in which they were operating was organized in a fractional manner. For example, last year, Spotify, a leading music streaming service, in a submission to the United States Copyright Office, explicitly acknowledged this fact:

---

16. *Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007) ("[A]s described in the House Report accompanying passage of the Copyright Act, [co-owners of a copyright in a work] are to 'be treated generally as tenants in common, with each co [-] owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co[-]owners for any profits.'" (quoting H.R. Rep. No. 94–1476, at 121 (1976))); *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998) ("Joint authorship entitles the co-authors to equal undivided interests in the whole work—in other words, each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made.").

> [C]ustom and practice in the music industry has developed such that each co-author of a musical work only licenses its proportionate share in the underlying work.[17]

In accordance with this understanding, music users do not rely solely on their BMI licenses for the right to perform split works co-owned by ASCAP members. Instead music users have invariably purchased both BMI and ASCAP licenses. (The one exception to this practice is with respect to performances of co-owned songs on local television stations and a cable network holding per program licenses.)[18] We are not aware of any music user that has purchased a license only from BMI and did not purchase one from ASCAP on the premise that split works were covered by its BMI license. Nor are we aware of any music user that has refused to obtain a BMI license, or sought an adjustment of the scope of its BMI license because split works were purportedly covered by its ASCAP license.

Even more tellingly, to our knowledge, no music user has ever contended in negotiations or in the BMI rate court – where their incentive to minimize payments to BMI is most clear – that the BMI license fee should be discounted because the music user already held, or would hold, an ASCAP license that granted 100% rights to co-written songs. Most recently, after obtaining a favorable rate in the ASCAP/Pandora rate court, Pandora did not take the position in the subsequent BMI/Pandora rate court case that Pandora only needed to secure a

---

17. Comments of Spotify USA Inc. dated May 23, 2014, In Response to Copyright Office Notice of Inquiry at 4, http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Spotify_USA_Inc_MLS_2014.pdf (last visited Nov. 19, 2015).

18. As a result of a decision in the ASCAP rate court, when a local television station holding a per program license broadcasts a song co-owned by BMI and ASCAP publishers in one of its programs the station may pay only BMI for that program and the co-writer affiliated with ASCAP is uncompensated. *United States v. Am. Soc'y of Composers, Authors and Publishers*, 157 F.R.D. 173, 193 (S.D.N.Y. 1994) ("[T]here is no legal basis in this circumstance to hold a broadcaster who holds a license from BMI for the use of a given work also liable for fees to the ASCAP copyright owner, there is no need to impose a per program fee for such use."). While this is unfair to the affected songwriters, this situation arises in only approximately 0.1% of programs. The overwhelming majority of this small universe of per program licensees never had such a situation arise and have never been able to rely on one PRO license to cover works co-written by affiliates of the other.

license for works held 100% by BMI. Rather, consistent with historical practice, Pandora sought a full blanket license for the entire BMI repertoire, and its license proposal to the Court (including its adjustable fee blanket license proposal) did not seek a credit for split works licensed from ASCAP.[19] Similarly, the BMI and ASCAP rate courts have assumed that fair market value for the licenses they were pricing would not provide any amounts to be paid over to songwriters affiliated with a different PRO. Nor have those courts, in pricing adjustable fee blanket licenses, ever provided 100% credits for split works.[20]

This consistent position of the music users has carried over to the current moment, where the issue of 100% vs. fractional licensing is top of mind for all parties. As recently as this summer, the Radio Music License Committee expressly agreed with SESAC that it would not seek any discount in license fees predicated on the argument that co-written songs with an interest licensed by BMI or ASCAP should be treated as fully licensed by those PROs.[21] Moreover, SESAC is not expecting an accounting from BMI and ASCAP for its writers.[22] This settlement agreement's prohibition of the radio industry from arguing for reduced rates on

---

19. *See, e.g.*, *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037 (LLS), 2015 WL 3526105, at *21-24 (May 28, 2015) (addressing Pandora's numerous arguments in support of its proposed reasonable BMI license rates and never mentioning reduced rates due to co-owned works being fully licensed by ASCAP), *appeal docketed*, No. 15-2060 (2d Cir. June 26, 2015).

20. *See id*. at *25 ("BMI and Pandora agree that Pandora should receive a pro rata, performance-based credit to account for any BMI-affiliated composition that is either directly licensed by Pandora or withdrawn from BMI's repertory . . . . Under BMI's proposed crediting mechanism, Pandora would receive a partial share credit for all works co-owned by a BMI-affiliated publisher and a withdrawn publisher that Pandora continued to perform." The court adopted BMI's crediting mechanism, including the "partial share credit.").

21. Settlement Agreement entered into between Radio Music License Committee, Inc. and SESAC ¶ 10, http://imgsrv radiomlc.org/image/rmlc/UserFiles/File/Final%20SESAC%20RMLC%20Settlement%20Agreement.pdf (last visited Nov. 19, 2015).

22. *See id*. ("Neither the RMLC nor any Represented Station shall argue that the value to be ascribed to such works should be diminished (other than proportionately to the partial ownership interests they represent) on account of the fact that other rightsholders-in-interest not represented by SESAC also own percentages of the copyright interest in such works.").

account of split works being licensed by another PRO proves that music users do not expect to pay BMI or ASCAP for 100% licenses.

Consequently, none of the players in the PRO marketplace has operated under a 100% licensing model. To mandate this now would reverse decades of commercial practice and throw the songwriting world into chaos.

The Consent Decree Should Be Clarified to Expressly Allow BMI to License Fractionally.

The mandatory license provision of the BMI consent decree should be clarified to expressly allow BMI to license fractional interests in a work. Because of the *Pandora* "all-in/ all-out" decisions, the Department's present request for public comments, and statements by others, it is apparently unclear to some whether the decree permits BMI to accept and license fractional interests in compositions.[23] The issue of 100% licensing has also come to the forefront as larger publishers continue to pursue the direct licensing of digital users themselves, presumably intending to grant only fractional licenses themselves and not seeking to account to other publishers, as they plainly have the right to do. In light of these developments, preservation of the current decree language is not an acceptable course. Rather, the consent decree needs to be clarified so that BMI too is permitted to respond to the changing marketplace and meet the needs of music users, songwriters, and publishers.

---

23. For example, at the BMI/Pandora rate trial, Pandora raised the prospect of future litigation on this point. Trial Tr. at 1842, *Broadcast Music, Inc. v. Pandora Media, Inc.*, No. 13 CV 4037 (S.D.N.Y. Mar. 3, 2015).

Requiring BMI to Provide 100% Licenses Would Obstruct Publishers' Lawful Division and Monetization of Their Copyright Interests.

The granting of 100% licenses by one owner (or its agent) is merely a default rule under copyright law.[24] As a default rule, its function is only to manage relations between joint owners who have failed to agree otherwise with each other. Like other default rules, it is not necessarily well-suited to most real-world situations, and is definitely not suited to the bulk licensing of music performance rights to high-volume music users seeking access to large numbers of co-owned songs.

Under the Copyright Act, publishers have the right to divide their interest in a co-owned work as they see fit.[25] Most specifically, copyright owners are free to agree with each other only to grant licenses that require the consent of all owners.[26] The divisibility of a copyright owner's interest is intended to give owners the flexibility to exploit their copyrights optimally and thereby realize their full value.[27]

A requirement placed on BMI to license all works on a 100% basis would take away this flexibility from publishers, since BMI, if it represented the interest of that publisher's

---

24. 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 6.08 (2015) ("*In the absence of agreement to the contrary*, all joint authors share equally in the ownership of the joint work.") (emphasis added).

25. *Id*. at § 6.09 (stating that joint owners of a copyright may, by contract, vary from the default tenancy-in-common rule governing joint ownership).

26. *Clifford Ross Co., v. Nelvana*, *Ltd.*, 710 F. Supp. 517 (S.D.N.Y. 1989) (enforcing an agreement between co-owners limiting the right of each co-owner to grant a license to a work without the other's permission), *aff'd mem.*, 883 F.2d 1022 (2d Cir. 1989).

27. *See* 17 U.S.C. § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part . . ."); 17 U.S.C. § 201(d)(2) ("Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately."); *Harper & Row, Publishers., Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985) ("Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright."); *see also* U.S. Copyright Office, *General Guide to the Copyright Act of 1976* (September 1977) at 5:4-5:5, http://copyright.gov/reports/guide-to-copyright.pdf (last visited Nov. 19, 2015) (noting the shift from pre-1976 Act understanding of a copyright as "a single, indivisible entity" to the current regime under the 1976 Act, which recognizes the importance of the divisibility of copyrights).

co-owner, would be required to license the interest of the publisher of a co-owned work who would otherwise directly license its works. BMI should be permitted to offer fractional licenses to support the decisions and agreements of publishers and co-writers with respect to their copyright interests, instead of restricting them.

In particular, requiring BMI to provide 100% licenses would frustrate any publisher's effort to partially withdraw from BMI in order to take advantage of the free market to license digital users. So long as the music user had obtained 100% blanket licenses from BMI and other PROs, the only songs the publisher would have the exclusive right to offer would be those in which it had a 100% interest. Because leading contemporary songwriters mostly work in ever-shifting teams, such a publisher would be unable to bring to market most of its current catalog and much of its back catalog as well. As *Billboard in Brief* reports, "roughly 90 percent of Billboard Hot 100 top 10s in 2014 were written by two or more writers, and nearly half were by at least four."[28] Even if the publisher went so far as to withdraw from BMI altogether and gave up all of the efficiencies of BMI blanket licensing, that publisher would *still* be subject to BMI's court-set prices (or licenses entered into in the shadow of the rate court) for every split work in which BMI had a fractional interest.

Even if publishers and writers, relying on the PROs' and the music users' uniform practice of paying fractionally, have not previously contracted out of the default rule with each other, they would work to do so if BMI and ASCAP were required hereafter to issue 100% licenses. Rather than enter a world of 100% licensing by their co-owners with all its complications and uncertainties, publishers and writers would opt to codify their rights to license

---

28. Gary Trust, *Why Solo Songwriters Are No Longer Today's Hitmakers*, Billboard in Brief, 6 (Oct. 23, 2015), http://www.billboard.com/articles/news/6738318/why-solo-songwriters-are-no-longer-todays-hitmakers. This author states that ten years ago "single writers (or singularly-credited entities) wrote only 14 titles" on the Billboard Hot 100 and twenty years ago "32 such songs" were written by single writers.

their own interests for themselves and to memorialize their existing understandings under a fractional licensing regime.

It is hardly surprising that the PROs, the music users, the songwriters, and publishers have all organized their economic relations with each other according to the far more intuitive and practical fractional model, rather than the 100% licensing model. Writers and publishers will not subject themselves voluntarily to 100% licensing. They have the right to contract away from tenancy-in-common and they will exercise their rights to license fractionally even if BMI is not permitted to do so.

This restriction on publishers is not at all what the consent decree was intended to accomplish. The only way for publishers to truly exercise their copyright rights in the free market would be to effect a complete restructuring of the long-standing relationships between collaborating songwriters and music publishers, and to avoid affiliation with BMI altogether despite the benefits of blanket licensing for a wide range of uses.

From an antitrust point of view, it makes no sense for the Department to seek to force publishers to license collectively through the PROs. The BMI consent decree was certainly not intended to favor collective licensing over individual free market negotiations. The intended effect of a mandatory 100% licensing rule would be to strengthen BMI's role in the market at the expense of individual publishers, by limiting the direct licensing any publisher would do on its own.

Finally, one brief but highly significant point: The tenancy-in-common rule has no application in most foreign countries, where fractional licensing is the norm. Accordingly, a rule of mandatory 100% licensing for BMI would also run into conflict with co-written foreign songs where BMI represents the interest of less than all the writers. We believe any

consideration of the issues outlined in the Department's notice must take into full account the impact on the worldwide rights marketplace of a decree modification requiring 100% licensing by BMI.

Requiring BMI to Provide 100% Licensing Would Create an Incentive for Music Users to Game the System and Unjustifiably Disadvantage BMI's Ability to Serve its Affiliates.

Requiring BMI to provide 100% licenses in a licensing landscape that is organized fractionally would create an opportunity for music users to game the system. Instead of obtaining licenses from all owners of co-owned compositions as they have historically and consistently, music users could seek out minority co-owners who might have little incentive to maximize the value of the copyright.[29] A music user might try to rely on a PRO blanket license to avoid paying free-market prices to a withdrawing co-publisher. The user could argue that the blanket license of one interest in a composition gave it all rights necessary to perform the composition.[30] It could then pick which co-owner it wished to pay on the basis of its fractional share, thereby devaluing the work. Such a scenario is the exact opposite of the competitive free market that is desirable and that the consent decree is intended to foster.

The risk of such gamesmanship could not be mitigated by BMI simply continuing the practice of collecting from music users and paying publishers and songwriters on a fractional

---

29. There is no antitrust purpose served in having co-owners of a given song copyright compete with each other in licensing that song to music users. Like other co-venturers, they have duties to each other (including a duty to protect the property of their co-venturers), *Maurel v. Smith*, 271 F. 211, 216 (2d Cir. 1921) ("[w]here two or more persons have a common interest in a property, equity will not allow one to appropriate it exclusively to himself, or to impair its worth as to others"), and it would make no sense for them to undercut each other's efforts. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) ("[A] joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells . . . it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful.").

30. Pandora made this argument to BMG Rights Management (US) LLC ("BMG") in 2014, when BMG was attempting to negotiate a direct licensing deal. Pandora argued to BMG that all co-written songs were covered by blanket licenses and did not want to pay BMG (or the BMG writers) for their interests.

basis even if the licenses themselves hereafter grant 100% rights. If 100% license grants are deemed mandatory, there is no reason to assume that music users will pay BMI 100% of the value of the performances licensed. Even if some music users might refrain from exercising their new-found rights, others would take the opportunity to avoid paying full value.

Requiring BMI to Provide 100% Licensing Would Create a Complex and Unnavigable Licensing Landscape.

If music users are going to rely on 100% licenses from BMI to discharge their duty to non-BMI co-owners, BMI could not continue to price its license on a fractional basis. BMI would have to seek compensation for the full value of the work being licensed, not just the BMI-affiliated share. At the same time, ASCAP would of course seek to price its license to reflect the 100% value of the split works it licenses. The result: two PROs each selling 100% rights to the same split works. In effect, music users seeking blanket licenses would be purchasing (and paying for) duplicative permission to play the split works as well as the many other works that are solely in the repertoire of one PRO.

A 100% licensing rule would also put a cloud over existing BMI licenses, which have been priced on a fractional basis without any allowance for accounting to non-BMI songwriters. There are hundreds of thousands of BMI licenses outstanding that have been priced by BMI with the understanding that BMI would not be accounting to non-affiliates.

In sum, BMI would have to navigate an untenable licensing landscape if it were not permitted to license fractionally. It would also fall completely out of sync with the manner by which rights are licensed in the free market; withdrawn or terminated publishers as well as unregulated PROs would have the ability to license their works fractionally, but BMI would not be able to follow suit.

BMI provides an important service to songwriters and publishers as their licensing, collecting, and distributing representative, and if BMI were unable to license fractionally, this would have an adverse impact on them. The BMI consent decree needs to be flexible enough to be responsive to the evolution of the market and make clear that BMI may license based on fractional interests if that is the desire of its publishers and songwriters.

Requiring BMI to Provide 100% Licensing Would Be Grossly Inefficient and Rate-Setting Would Break Down.

The Impact on BMI:

Requiring BMI to provide a 100% license in a market that, in practice, has been fractional would be burdensome and inefficient. The market would lose the efficiencies that BMI's blanket license provides, not only with respect to digital uses but also for traditional media that today still account for the large bulk of public performance royalties.

Because of the market's organization around fractional payments, neither BMI nor the publishers have developed a process or infrastructure for accounting to co-owners. To the extent the Department is concerned with changing the rules of a marketplace that has evolved with certain expectations, that concern should apply equally to the impact that mandatory 100% licensing would have on long-established PRO processes.

Imposing on BMI the burden of creating a mechanism for properly accounting to the hundreds of thousands of co-owners with whom it currently has no relationship, including procuring and maintaining contact and other confidential personal information, would be grossly inefficient. BMI already has an effective process for collecting royalties, counting performances, and matching the royalties to the performances for its affiliates, but has never had a reason to keep track of royalties for non-BMI songwriters and publishers. Mandating a 100% license

would create a huge and costly new burden on the equitable and transparent distribution of royalties.

The Impact on the Rate Courts:

Rate court proceedings would be enmeshed in a paradox. If there were simultaneous 100% licensing by BMI and ASCAP, there would be no way to determine whether split works were to be deemed licensed under a BMI blanket license or an ASCAP blanket license. Or, to put it more precisely, the courts would be asked to deal with the irrational scenario in which the licensee would be obtaining two licenses for many of the same rights. BMI's share of performances would be indeterminate and there would be no obvious way to use an ASCAP license agreement or even a prior BMI agreement as a benchmark for determining a future BMI license fee. Music users' historic concerns about conflicting fee demands from BMI and ASCAP and conflicting claims of market share would be vastly amplified. Instead, as stated above, at least some would likely seek to avoid paying in full for the rights they were acquiring from both BMI and ASCAP.

ASCAP and BMI would also need to adjust their distributions to avoid double payments. BMI would be forced to monitor non-affiliated co-owners or PROs to ensure that shares were properly accounted for and to ensure that the license governing the work was adequate. Opportunities for misrepresentation, misinformation, and confusion would be rife. We would expect that such a licensing environment would produce substantial litigated demands for audits as well as litigation between co-owners and PROs regarding the adequacy of the payment received from other co-owners licensing their fractional interests. If the PROs themselves evolved a process to assist each other in accounting to non-affiliates, a second layer of expense would need to be imposed on these royalties.

The Impact on Songwriters:

Imposing a 100% blanket license requirement on BMI would change the rules of the game radically for songwriters. Songwriters maximize their productivity by handing off their licensing and royalty collection efforts to a PRO. This choice has tangible consequences. BMI and ASCAP use different formulas for distributing royalties and often charge different prices to music users.

Working songwriters *choose* their publisher and PRO based on such factors as personal rapport, the publisher or PRO's sympathy and enthusiasm for the writer's work and potential, superior service and attention, a better monetary opportunity, better rates achieved by one PRO or the other, and personal trust. These relationships typically last for many years and often span whole careers.[31]

Conversely, while some songwriter teams last for decades, it is quite common for songwriters to team up on particular occasions or projects as serendipity and inspiration dictate. To cite an example, although Bob Dylan is ordinarily thought of as a songwriter who mostly composes alone, he jointly wrote the song "Steel Bars" with Michael Bolton, and Bolton recorded it. At that time, Dylan was affiliated with ASCAP, Bolton with BMI.[32] As Bolton told the story, the collaboration happened out of the blue:

> Someone who works with Dylan called me up and said, "Bob Dylan would like to write with you" . . . I was awed. I told him, "I don't even know how I could write a lyric when working with you . . . I'm too intimidated." But then we started messing around with some chords and wrote "Steel Bars," a song about obsession. It

---

31. For example, Mac Davis, recognized as a BMI Icon at the 2015 BMI Country Awards and a member of the Songwriters Hall of Fame for songs such as "Memories" and "A Little Less Conversation," has been a BMI affiliate since the 1960s. He is not only a prolific songwriter but also a frequent co-writer. Over the decades, he has co-written songs with more than 40 different songwriters.

32. The song is now co-published by Mr. Bolton's Music Inc. (a BMI publisher) and Special Rider Music (a SESAC publisher), as Dylan is now a SESAC affiliate.

> took us two sessions to write, and when I left, I was told, "Bob likes you and he wants you to come back."[33]

Under the fractional payment system, songwriters have never had to concern themselves with each other's choice of publisher or PRO and have never had to question where their royalty check would be coming from, when it would be coming, or who to call in case of a discrepancy.

100% licensing would change *everything*. Songwriters could no longer rely on *their* PRO to look out for *them* and, given the impact of such a rule on their relationships and bottom line, would have reason to think twice about working with songwriters belonging to a different PRO. Songwriters have already expressed alarm at the prospect that they might be forced to look to collecting agents they have not chosen and who are not truly accountable to them for the royalty checks that make up their livelihood. Indeed, nearly 13,000 BMI writers and publishers have expressed this alarm by signing joint letters voicing their objections to a 100% mandatory licensing requirement.

Michael Bolton and Bob Dylan should not have to understand (or indeed, care about) each other's current or future PRO affiliation before they enter the studio and start "messing around with some chords." It would be the height of folly, and an immeasurable loss for the listening public, if the Department were to take away the creative flexibility that the divisibility of copyrights mandated by Congress, and the fractional practice, have allowed to flourish.

---

33. Andy Greene, *Bob Dylan's Greatest Collaborations*, Rolling Stone, 5 (May 1, 2009), http://www rollingstone.com/music/news/together-with-bob-dylan-his-greatest-collaborations-20090501.

The Impact on Publishers:

This problem cannot be solved by one publisher acquiring the other interests in a song so as to eliminate split ownership of particular songs, since it would impact, ultimately, the songwriter's choice of PRO affiliation as well. One of the creator-friendly aspects of the music world is that it is the songwriters who get to choose which PRO (and publisher) they want to affiliate with. Publishers typically organize subsidiaries affiliated with BMI, ASCAP and, often, SESAC. By doing so, publishers are able to honor each songwriter's PRO preference, placing a songwriter's interest into the catalog of the publisher subsidiary affiliated with the songwriter's PRO of choice. It would be a great disservice to the songwriters if the Department were to seek to disrespect their wishes. Not incidentally, such a means of ensuring control over catalog would have the additional consequence of creating a universe of more and more copyrights held by fewer and fewer publishers.

The Impact on Other Market Participants:

In addition to the impact on PROs, the rate courts, songwriters, publishers, and the public interest, requiring the PROs to engage in 100% licensing would grant unregulated publishers and unregulated PROs a powerful advantage over BMI in signing and retaining the best, most productive songwriters.

* * *

The chilling effect of 100% licensing on songwriter collaboration would therefore be bad antitrust policy, and bad copyright policy. By contrast, explicitly permitting fractional licensing by BMI would allow collaborations among songwriters to continue unfettered, thereby fostering output and quality competition. The consent decree should not be used as a mechanism (intentionally or otherwise) for inhibiting the creative process and restructuring creative

relationships. It would also be strange antitrust policy to encourage buy-outs of fractional interests, as the most likely buyers would be those with the most ready access to capital – the larger publishers – and would, no matter the purchaser, further consolidate the parties in the marketplace owning copyrights.

Permitting Fractional Licensing Should Not Result in "Excessive Pricing" by Publishers.

Antitrust law does not police prices charged by copyright owners acting individually. As Assistant Attorney General Baer recently stated concerning patents:

> We don't use antitrust enforcement to regulate royalties. That notion of price controls interferes with free market competition and blunts incentives to innovate. For this reason, U.S. antitrust law does not bar "excessive pricing" in and of itself.[34]

As noted at the outset, the BMI consent decree is not intended to address how (and how much) individual publishers charge for permission to perform their songs when they license directly. It follows that the Department should not use the BMI consent decree as an instrument for regulating the publishers.

BMI has advocated a modification to the consent decree that would effectively overrule the "all-in/ all-out" decisions and expressly permit publishers to partially withdraw from the price-regulated BMI copyright pool in order to exercise their copyrights and to seek free market prices from digital streaming services. As the Assistant Attorney General said, there are no antitrust policy considerations that weigh against efforts by the holders of intellectual property rights to seek what they think are the appropriate prices for their works. This is as true of jointly-authored songs as it is of songs written by a single songwriter.

---

34. Assistant Attorney General Bill Baer, Reflections on the Role of Competition Agencies When Patents Become Essential at the 19th Annual International Bar Association Competition Conference 10 (Sept. 11, 2015) (transcript available at http://www.justice.gov/opa/file/782356/download).

It would be radically inconsistent with positions the Department has taken since the BMI consent decree was first entered for it now to apply the BMI consent decree for the purpose of regulating the pricing of individual publishers and the "bargaining capital" their catalogs possess.[35]

Even if "excessive pricing" by individual publishers for direct copyright licenses were a legitimate concern of the Department in the context of reviewing the BMI decree, there is no reason to believe that fractional licensing by BMI will confer improper negotiating power on directly licensing publishers, or otherwise impact the prices publishers can charge for their direct licenses to digital streaming services.

First, publishers have a great incentive to license their catalogs to these services rather than withhold access to their catalogs. Simply put, if publishers did not license their catalogs, they would not get paid and neither would their songwriters. Publishers representing co-writers would be under even greater pressure to license their catalogs and pay their writers; if a writer's publisher was not exploiting her copyright interest while her co-writer was receiving payments, the writer would be incentivized to leave her publisher for her co-writer's. Publishers would not want to diminish their catalogs by losing writers, and correspondingly, songs in their catalogs to other publishers.

Second, only a handful of music streaming services garner almost all the revenues for that sector. They possess substantial bargaining power of their own, which no publisher could ignore. It would be self-defeating if publishers withheld their catalogs from those dominant streamers – they would effectively be denying themselves virtually the entire digital music market.

---

35. If, as we anticipate, the actual effect would be an exodus of the large publishers from the regulated PROs, this unjustified goal would be entirely frustrated.

Moreover, these music users and publishers are dealing with one another repeatedly. Maintaining good relationships is essential to their repeated business dealings. If one publisher held out, music users would be less inclined to deal with them in the future and might choose to go forward without that publisher's catalog.

Perhaps most telling, to date no one has suggested that fractional licensing has in practice resulted in outsized pricing or market failure where and when it has occurred. For instance in Europe, fractional licensing is the norm for publishers who license directly to music streamers such as Spotify, Apple Music, Google Play, and YouTube. We are not aware of any actual or even claimed unfair behavior in those negotiations, any failure of those services to get access to the music they want, or of "excessive prices" completely dissimilar to what is paid in the United States.

We also see, in practice, that free market negotiations have led to voluntary, reasonable deals. In the case of Pandora, a series of publishers' direct licenses with Pandora that occurred both before and after the consent decree courts' "all-in/all-out" decisions in this country was recently found to be reasonable by the BMI rate court.[36] To boot, the recently announced direct licensing deal between Sony/ATV and Pandora illustrates that appropriate market-priced transactions between digital music users and large publishers are taking place in the absence of mandatory 100% licensing by PROs.[37]

In any event, ultimately, copyright owners have the right to divide their copyrights as they see fit in order to seek fair value for their works. The indisputable

---

36. *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 CIV. 4037 (LLS), 2015 WL 3526105, at *26 (S.D.N.Y. May 28, 2015), *appeal docketed*, No. 15-2060 (2d Cir. June 26, 2015).

37. Ben Sisario, *Pandora and Song/ATV in Deal on Songwriter Payments*, N.Y. Times (Nov. 5 2015), http://www nytimes.com/2015/11/06/business/media/pandora-and-sony-atv-in-deal-on-songwriter-payments.html?_r=0.

inefficiency and severe departure from ordinary antitrust principles entailed in trying to force copyright owners to license collectively all of their co-owned works surely must outweigh any theoretical and abstract concern about "excessive pricing."

Any such concern about the unilateral and lawful conduct of individual publishers should not be the basis for radically upending established industry practice upon which writers, publishers, and music users have relied for decades, and certainly the bilateral consent decree between BMI and the U.S. should not be the vehicle for such radical change.

The BMI Blanket License Will Continue to Serve an Invaluable, Pro-competitive Function in a Fractional-Licensing World.

The Public Notice asks the question why BMI should be "joint price setting" (presumably meaning, issuing blanket licenses for its affiliated publishers and songwriters) at all if it will not provide 100% licenses to music users. The short and plain answer is that BMI provides immediate access to millions of songs outright and also necessary permission to perform millions of other songs on behalf of the fractional owners it represents – whether its licenses hereafter are fractional or 100% in nature. An even shorter and plainer answer is that BMI has, in fact, been effectively licensing on a fractional basis for its entire history.

At the same time, BMI is the trusted bargaining and paying representative on behalf of many thousands of songwriters and publishers as to songs they own in whole or in part.

As previously noted, songwriters and publishers want to be, and have the right to be, paid by and through their own representatives, not accounted to by others. Those wishes should be honored. Moreover, BMI's hard-won reputation as the trusted representative of songwriters and publishers, and its ability to provide its invaluable services, will be jeopardized if it is forced to provide 100% licenses against the wishes of the publishers and songwriters.

The benefits of blanket licensing, recognized time and again by the Department and the courts, have never been predicated on a 100% licensing regime.

Conclusion

The BMI consent decree should be amended to explicitly permit BMI to issue fractional licenses for co-owned works in its repertoire. Fractional licensing is pro-competitive and in line with decades-old market practice. By contrast, requiring BMI, to provide 100% licensing would be wholly disruptive to the market and to the creative relationships that have given birth to the music the public enjoys today.

PUBLIC COMMENTS OF THE
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
REGARDING PRO LICENSING OF JOINTLY OWNED WORKS

November 20, 2015

Table of Contents

I. INTRODUCTION 1

II. BACKGROUND 4

A. Legal Framework 4

B. Historical PRO Licensing Practices 7

III. ASCAP'S RESPONSES TO THE DOJ'S QUESTIONS 12

A. Have the licenses ASCAP and BMI historically sold to users provided the right to play all the works in each organization's respective repertory (whether wholly or partially owned)? 12

B. If the blanket licenses have not provided users the right to play the works in the repertories, what have the licenses provided? 13

C. Have there been instances in which a user who entered a license with only one PRO, intending to publicly perform only that PRO's works, was subject to a copyright infringement action by another PRO or rightsholder? 13

D. Assuming the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, should the Consent Decrees be modified to permit ASCAP and BMI to offer licenses that require users to obtain licenses from all joint owners of a work? 14

E. If ASCAP and BMI were to offer licenses that do not entitle users to play partially owned works, how (if at all) would the public interest be served by modifying the Consent Decrees to permit ASCAP and BMI to accept partial grants of rights from music publishers under which the PROs can license a publisher's rights to some users but not to others? 16

F. What, if any, rationale is there for ASCAP and BMI to engage in joint price setting if their licenses do not provide immediate access to all of the works in their repertories? 18

IV. CONCLUSION 24

The American Society of Composers, Authors and Publishers ("ASCAP") respectfully submits the following comments in response to the September 22, 2015 request of the Antitrust Division of the U.S. Department of Justice for public comments concerning the licensing of jointly owned works by performance rights organizations ("PROs").[1]

I. INTRODUCTION

The Consent Decree should be modified to confirm expressly that ASCAP may grant licenses covering only those shares of co-owned works that have been granted to ASCAP by its members. Such "fractional licensing" is fully consistent with ASCAP's historical licensing practices, copyright law and the general understanding of ASCAP's composer, songwriter and publisher members. ASCAP and music users have historically negotiated and priced blanket licenses based on the fractional interest of the works in ASCAP's repertory. In addition, payments to ASCAP by music users, and distributions to ASCAP members, have historically been based on fractional shares. Because of these well-established licensing and payment practices, ASCAP and other PROs are able to license freely without regard to songwriter and publisher agreements that may restrict the ability of songwriters and publishers to license entire works without the consent of their co-owners.

Requiring ASCAP to offer "100% licenses"[2] to all music users would cause significant disruption of established licensing practice:

Requiring ASCAP to offer "100% licenses" would result in a costly and inefficient restructuring of the industry's creative and business relationships, disputes among rightsholders (potentially leading to litigation), and significant disruption of the licensing

---

[1] For the purposes of these public comments, ASCAP uses the term "co-owned works" to refer to what the DOJ's request for public comments describes as "jointly owned works."

[2] For the purposes of these public comments, ASCAP uses the term "100% licenses" to refer to what the DOJ's request for public comments describes as "full-work licenses."

marketplace. If ASCAP were required to offer "100% licenses" for all works to all music users, it would have to confirm with each of the thousands of members who co-own works with non-ASCAP members if there were any contractual bar to licensing those works by ASCAP. As a result, songs that are written jointly by ASCAP and non-ASCAP members would effectively be removed from the ASCAP repertory (and BMI's as well) and become stranded—*i.e.*, unable to be licensed by ASCAP (or BMI) or played by music users—until the PROs could determine that they could be licensed on a 100% basis. The magnitude of the potential problem is large: approximately one-quarter of the works in the ASCAP repertory performed by music users in 2014—upwards of 370,000 songs, based on ASCAP's most recent survey data—would no longer be available under an ASCAP license unless and until ASCAP could confirm that it has the rights to license those songs on a 100% basis.

Requiring ASCAP to offer "100% licenses" would also create significant administrative burdens and expenses for ASCAP. ASCAP today has no information concerning licensing restrictions among co-owners, which it understands are becoming increasingly common, and lacks the necessary information to account to non-member songwriters or publishers who are co-owners of songs in ASCAP's repertory. The additional expenses of collecting such information would result in additional administrative costs for ASCAP and its members, which would no doubt lead to increased costs for users.

Requiring ASCAP to offer "100% licenses" would create a substantial risk that certain of ASCAP's largest music publisher members will resign completely from ASCAP (and license their works on a fractional basis in any event, outside of ASCAP). Such a result would undermine the continued viability of collective licensing in the United States.

As discussed in ASCAP's August 6, 2014 public comments, problems in the current ASCAP rate-setting process, and the inability of ASCAP to offer multiple rights in music compositions to music users, have fueled a new interest on the part of copyright owners to license their works on an exclusive basis directly to certain users or categories of users. To avoid the prospect of members resigning from ASCAP altogether, ASCAP and the DOJ are in the process of discussing a modification to the ASCAP Consent Decree that would permit ASCAP to accept partial grants of rights from its members, and to enable those members partially to withdraw their works from ASCAP's repertory and license those works directly to certain users outside the shadow of the rate court. If ASCAP is prohibited from granting licenses to partially withdrawn works on a fractional basis, however, writers and publishers will likely resign from ASCAP and license their public performance rights through other means—whether directly to music users or through ASCAP's unregulated competitors, like GMR and SESAC, or foreign PROs, like PRS for Music and SOCAN, which have no restrictions on their ability to issue fractional licenses. Expressly confirming ASCAP's ability to grant fractional licenses would give full effect to the policy behind permitting partial withdrawals in the first place: enabling partially withdrawing ASCAP members to allow the free market to decide the value of their works and negotiate licenses at market rates for their shares of musical works. By contrast, requiring ASCAP to grant "100% licenses" to partially withdrawn co-owned works would undermine that goal and essentially mean that co-owned works would remain subject to rate regulation under the Consent Decree.

Requiring ASCAP to offer "100% licenses" would deprive songwriters of the benefits of the PRO of their choice and hinder the creative process. In every situation in

which an ASCAP and a non-ASCAP songwriter collaborate to create a song, one co-writer would always be forced to accept the terms and conditions of a different PRO with which he or she never intended to associate. Indeed, in a "100% license" world, ASCAP members could be subject to the payment schemes of other PROs in derogation of their historical reliance on ASCAP's payment practices. ASCAP members might also experience significant payment delays, because some of their royalties would have to flow from their co-owners' PRO to their co-owners and finally to the ASCAP member, or from their co-owners' PRO to ASCAP and then to the member. These changes in payment practices and schedules would inevitably lead some songwriters to consider collaborating only with those songwriters that are members/affiliates of the same PRO, intruding on the freedom of songwriters to select their collaborators based on creative choice and artistic chemistry, rather than based on rules imposed on them by the DOJ.

To avoid these problems, ASCAP proposes a simple modification to the Consent Decree expressly confirming that ASCAP may grant fractional licenses to music users. As discussed below, this proposed modification will promote competition by facilitating direct licensing; it will also minimize transaction costs for copyright owners, PROs and music users and minimize any potential disruption to the performing rights marketplace.

II. BACKGROUND

A. Legal Framework

The Copyright Act allows for ownership in a copyright to become divided in two ways. *First*, when multiple writers participate in the creation of a work—as, for example, when a composer and a lyricist collaborate on a musical work—each may have an ownership interest in the copyright, because the Copyright Act grants co-ownership of copyrights to "joint authors" of a single work. *See* 17 U.S.C. § 201(a). To be a joint

author, (1) the writer must have made an independently copyrightable contribution to the work, and (2) the parties must fully intend to be co-authors. *See, e.g.*, *Thomson* v. *Larson*, 147 F.3d 195, 200 (2d Cir. 1998) (citing *Childress* v. *Taylor*, 945 F.2d 500 (2d Cir. 1991)). Assuming the requirements of joint authorship are met, ownership of the work will be divided among each writer on a *per capita* basis absent an agreement between or among them to the contrary, *e.g.*, if there are two writers, each writer owns 50% of the copyright; if there are five writers, each writer owns 20% of the copyright. *See, e.g.*, *Community for Creative Non-Violence* v. *Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988).

Second, a copyright owner can convey some part of his or her interest in the copyright to another party. *See* 17 U.S.C. § 201(d) (ownership of copyright "may be transferred in whole or in part"). Copyrights in musical works can therefore be divided by operation of contract in myriad ways. Songwriters can agree among themselves how to divide up the copyright, and in turn, those songwriters can each enter into agreements with publishers further dividing their ownership interests. For example, of the top ten musical works most frequently performed on Pandora in 2014, nine have three or more copyright co-owners, with some co-owners holding an interest of as little as 1.25%.

The default rule, based upon common law principles governing property ownership, is that each copyright co-owner is a tenant-in-common, with a unilateral right to grant a non-exclusive license to the work in its entirety, subject to a duty to account for any profits to his or her co-owners. *See, e.g.*, *Davis* v. *Blige*, 505 F.3d 90, 98–100 (2d Cir. 2007); *Erickson* v. *Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994). This is the legal basis for each copyright co-owner being able to offer a "100% license" to the work.

It is important to note that the U.S. rule allowing each co-owner of a copyright to grant a non-exclusive license without the consent of the other co-owners is not followed in many countries. For example, in the U.K., France, Germany, the Netherlands and Italy, the consent of each copyright co-owner is required to license a work. *See, e.g.*, AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 332 (4th ed. 2010) ("KOHN"); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.10[D] (Matthew Bender rev. ed. 2015) ("NIMMER"). Therefore, to the extent that a music user seeks to license a work for worldwide use, it may not rely upon a license granted by a single co-owner and will need instead to seek licenses from *all* co-owners. *See, e.g.*, *Levitin* v. *Sony Music Entm't*, No. 14 Civ. 4461, 2015 WL 1849900, at *5–6 (S.D.N.Y. Apr. 22, 2015) (U.S. co-ownership rule does not apply to alleged infringing acts abroad); KOHN at 333; *see also* NIMMER § 6.10[D] (license to joint work granted in U.S. by one co-owner "would not be valid [in foreign jurisdictions] unless all joint owners are party to it").

Significantly, although U.S. copyright law gives each copyright co-owner the ability to grant "100% licenses" to his or her works, it does not mandate that each co-owner do so. Indeed, copyright co-owners can—and do—enter into agreements requiring the consent of all co-owners in order to license the work, whether on an exclusive or non-exclusive basis. *See* NIMMER § 6.10[C]. While such agreements between co-owners are not provided to ASCAP in the ordinary course, ASCAP understands that such restrictions among co-owners are becoming increasingly common in the music industry, particularly as hit songs crafted by teams of writer-producer collaborators have become standard industry practice. For example, when a singer-songwriter engages the services of a record producer, and the producer co-writes one or more songs with the singer-songwriter, ASCAP understands that

the singer-songwriter may seek agreement from the producer that neither party can license more than the respective share that each controls. Similarly, when two or more non-producer songwriters compose a song together, ASCAP understands that they may also agree that each writer may license only his or her respective share. In such instances, the co-owners may grant effectively only "fractional licenses"—licenses covering only that co-owner's interest in the work—and a licensee must obtain a separate license from each individual co-owner in order to be able to exploit the work.

Copyright owners can also grant to third parties the right to license their works, as, indeed, ASCAP's members grant to ASCAP the right to license public performances. But in those instances in which an ASCAP member is contractually barred by an agreement with his or her co-owners from unilaterally granting "100% licenses" to co-owned works, *see* NIMMER § 6.10[C], ASCAP may have the right to grant a license only to those shares in the work controlled by the ASCAP member.[3] This is consistent with the axiom that a copyright owner may not convey more than he or she owns. *See, e.g.*, *Blige*, 505 F.3d at 99; *Gilliam* v. *ABC, Inc.*, 538 F.2d 14, 21 (2d Cir. 1976).

B. Historical PRO Licensing Practices

Historically, when it came to licensing public performance rights in the U.S., music users paid little—if any—attention to which individual songs were licensed pursuant to which license(s), because the full rights to virtually any song they might want to perform

[3] Given that many works in the ASCAP repertory are co-written by two or more songwriters or composers, and that each co-writer may have a separate publisher, ascertaining the party with the right to license any given work may be a complex issue determined by the particular agreements among the writers and publishers, or co-publishers, at issue. ASCAP is typically not privy to the terms of those agreements. KOHN ON MUSIC LICENSING provides a useful illustrative example of how complex establishing the ownership and right to license a single work can become. *See* KOHN at 333–34.

were covered by the users' licenses with ASCAP, BMI and SESAC, and music users typically obtained a license from all three of those PROs.

But from a pricing and market share perspective, the fractional share of works controlled by each PRO has been of crucial importance to the parties involved in those transactions, and those parties have transacted as if each of those licenses conveyed only those shares of a co-owned work that each PRO has been granted by its members/affiliates. Licenses have historically been negotiated and priced based on each PRO's market share, and PROs and music users alike have historically based market share calculations on the fractional interest of the works in each PRO's repertory, not on the number of works in which the PRO has an interest. Royalties derived from license fees have historically been distributed by PROs to their members/affiliates based on fractional shares.

Thus, in its negotiations with licensees, ASCAP typically provides data on its overall market share and the share-weighted percentage of performances of ASCAP music on the music user's service. Both ASCAP and music users understand that these market share figures represent the sum of ASCAP's members' fractional interests in their works, and not the sum of all of the works in which ASCAP members have an ownership interest. ASCAP understands that BMI also bases the market share information it provides to music users on fractional shares.

The use of fractional share information to negotiate and value licenses is important to the efficiency of marketplace negotiations between the PROs and music users because it gives music users a basis on which to compare the rights offered by one PRO to those offered by the other PROs. Under this system, if the information provided by each PRO is accurate, the combined market share of the three PROs should equal approximately 100%.

This allows music users to make comparative judgments about the respective value of the rights offered by each PRO. Similarly, in seeking to value and price blanket license fees in rate court proceedings, ASCAP and music users rely on music use studies that are based on the sum of ASCAP's members' fractional interests in works in the ASCAP repertory.

If ASCAP and BMI and SESAC were to count in full each song in which their members/affiliates have only a fractional interest, then each PRO could make a claim to a much larger piece of the market than it does—and presumably command higher license fees as a result. Moreover, music users would be at risk of "double paying" for works that reside in multiple repertories by virtue of split ownership.[4] Those adverse consequences have been avoided, however, by the longstanding practice of negotiating and pricing licenses based on fractional shares.

Likewise, music users that have entered into direct licenses with publishers and subsequently sought a fee deduction, or carve-out, from their ASCAP license for that directly licensed music have also priced their carve-out based on fractional shares. The *DMX* rate court proceeding is illustrative. In that proceeding, DMX, a background music service, entered into approximately 850 direct licenses with music publishers for their

[4] Indeed, a provision of the Consent Decree recognizes that co-owners may belong to different PROs and that each co-owner should look to his or her respective PRO for payment based on his or her fractional ownership interest in a work. Specifically, when a member resigns from ASCAP and his or her works "continue to be licensed by ASCAP by reason of the continued membership of a co-writer, writer or publisher of such works," the resigning member "may elect to continue receiving distribution for such works on the same basis and with the same elections as a member would have, so long as the resigning member does not license the works to any other performing rights licensing organization for performance in the United States." (AFJ2 § XI.B(3).) Although this provision of the Decree is not currently operative (*see* AFJ2 § XI.C), similar language was included in the 1960 Order governing ASCAP's survey and distribution practices, and since 2001, a similar rule has been incorporated into ASCAP's Compendium of Rules and Regulations. These terms recognize licensing and payment practices in place since at least the 1950s, when ASCAP changed its rules to enable free collaboration between its members and non-members: Writers and publishers affiliated with different PROs often collaborate; they own shares of the works resulting from those collaborations; co-owned works may reside in the repertories of multiple PROs, depending on the affiliations of the co-owners; and each co-owner may separately license, and separately receive royalties based on, his or her share of the work from his or her chosen PRO.

public performance rights. It sought a carve-out adjustment of its ASCAP blanket license fee to reflect the extent to which it relied on directly licensed music. Specifically, DMX argued that its ASCAP blanket fee should "reflect ASCAP's share of total performances on the DMX network." *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 548 (S.D.N.Y. 2010). Indeed, using ASCAP's distribution data, DMX's expert determined that approximately 48% of performances on DMX were of works owned or controlled by ASCAP members. This figure was "share-weighted" and "account[ed] for the fact that certain works [were] only partially controlled by ASCAP." (Affidavit of Amy Bertin Candell ¶ 15, *in* Joint Appendix, Vol. II of XIII, at A388, *In re THP Capstar Acquisition Corp.*, No. 11-127-cv (2d Cir. Mar. 15, 2011); *see also* 756 F. Supp. 2d at 548 n.46.) In other words, DMX calculated ASCAP's share of performances on a fractional-share basis.[5] The rate court adopted DMX's proposal in full, including its share-weighted calculation based on fractional interests.

Distributions to writers and publishers are also based on fractional ownership interests. For example, if a work were co-written by an ASCAP member and a BMI affiliate who (1) each initially had a 50% interest in the work and (2) each entered into songwriter agreements with separate publishers, ASCAP would pay half of the writer's share (*i.e.*, 25% of the royalties) to the ASCAP writer member and half of the publisher's share (25%) to the ASCAP publisher member, while BMI would pay the remaining halves of the writer's and publisher's shares to its affiliates. *See* KOHN at 1259–60.[6]

---

[5] To arrive at its proposed fee, DMX multiplied the per-location fee resulting from its publisher direct licenses ($22.50) by approximately 48% (the ASCAP share of DMX performances), producing a rate of $10.74, which DMX contended represented the share of the direct-license per-location fee attributable to ASCAP affiliated-performances.

[6] The only exception arises in the context of local TV per-program licenses, where a program contains only co-owned works split between two or more PROs. In this situation, the stations typically pay only one of

ASCAP understands that some music users have suggested that the language of certain ASCAP license agreements should be construed as granting the right to perform entire works, even in those instances where ASCAP has the right to license only a share of the work. That language must be placed in the context of the industrywide understanding, as reflected in the negotiation and pricing of those agreements, that ASCAP was granting, and music users were receiving, only those rights granted to ASCAP by its members.

If the parties involved in any of these historical license transactions had ever viewed ASCAP or other PRO licenses as granting music users the right to fully perform any work in which the PRO holds a fractional interest, then every aspect of the licensing process would have looked radically different. License fees would have been negotiated based on the number of works in which each PRO has an interest (not the PRO's fractional share of the rights in those works). Music users would have paid a single PRO 100% of the royalties for each co-owned work performed. And either that PRO or its members/affiliates would have accounted to all other co-owners (or their PROs) for their fractional shares of those works. But the PRO license marketplace has never functioned in that way,[7] and it would be prohibitively expensive and inefficient for it to start doing so now, for the reasons discussed below.

---

the PROs, in which case the PRO then distributes 100% of the attributable license fee (minus the PRO's administrative expenses) to that PRO's member/affiliate. Neither PRO accounts to the other or to the other's members/affiliates.

[7] For example, although Pandora's ASCAP license pre-dates its license with BMI, and covers substantially the same time period, Pandora never suggested to the BMI rate court that it should pay a lower rate to BMI because it had already obtained a "100% license" from ASCAP that covered all of the songs in which both ASCAP and BMI represent a fractional interest. Nor has Pandora ever sought a "carve out" from its BMI license for those co-owned works also licensed through ASCAP, even though Pandora's BMI rate (2.5%) is higher than its ASCAP rate (1.85%).

III. ASCAP'S RESPONSES TO THE DOJ'S QUESTIONS

A. Have the licenses ASCAP and BMI historically sold to users provided the right to play all the works in each organization's respective repertory (whether wholly or partially owned)?

As discussed, ASCAP and the other PROs have historically priced and sold licenses based on each PRO's market share, as determined by the fractional interest of the works in each PRO's repertory, not by the number of works in which each PRO has an interest.

In ASCAP's case, although some music users apparently contend that their license agreements grant them the right to perform entire works, even in those instances where ASCAP has the right to license only a share of a work, the understanding and intent of the parties—as reflected in the negotiation and pricing of those agreements, and the payment of license fees thereunder—was that ASCAP was granting, and music users were receiving, only those shares of rights that have been licensed to ASCAP by its members. Others in the industry agree that the licenses ASCAP and BMI historically sold to users were based on fractional shares. *See, e.g.*, Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, BILLBOARD, July 30, 2015 (noting "the long-established industry practice of each rights owner greenlighting their particular portion of a song in order to establish a license—also known as fractional licensing"); Susan Butler, *Risky Business: Songs in Fractions* (Part One of Two), MUSIC CONFIDENTIAL, Sept. 4, 2015 ("Butler") (noting that "rights holders have been licensing only their rights/shares in songs in countless business deals for decades," and that one could argue "that the entire North American music publishing industry has been built upon—and has now become internationally financially and operationally dependent upon—licensing shares of songs rather than licensing a single product/unit called 'a song' or a copyrighted 'musical work' that happens to have multiple creators/owners").

Because the full rights to virtually any song a music user might want to perform were covered by licenses with ASCAP, BMI and SESAC, and because practically every music user obtained a license from all three of those PROs, music users have paid little—if any—attention to which individual songs were licensed pursuant to which license(s). *See* Butler (noting that "when it comes to licensing performance rights in the U.S., for many decades nobody directly involved in licensing paid much attention to which individual songs were licensed because practically all of the songs were covered under three blanket licenses"). Thus, by securing licenses from all three PROs, music users have obtained the full rights they need to play all of the works in each PRO's respective repertory.

B. If the blanket licenses have not provided users the right to play the works in the repertories, what have the licenses provided?

ASCAP's blanket licenses have granted music users those rights that are granted to ASCAP by its members. Thus, for those works that are fully owned by one or more ASCAP member(s), which represent more than half of the works in ASCAP's repertory, ASCAP's blanket licenses have provided music users the right to perform those songs. For those works that are not fully owned by ASCAP's members, ASCAP has licensed its members' shares in those works. Those shares, in combination with the shares licensed by BMI and SESAC, have provided music users the right to play those works in their entirety.

C. Have there been instances in which a user who entered a license with only one PRO, intending to publicly perform only that PRO's works, was subject to a copyright infringement action by another PRO or rightsholder?

ASCAP is not aware of any such instance. For nearly 100 years, ASCAP has enforced the rights of its members through copyright infringement actions. In all such cases, ASCAP has sought to enforce its rights only with respect to unlicensed public performances of works that are wholly owned or administered by ASCAP members,

thereby making irrelevant the question of whether the music user had been licensed by another PRO.

D. Assuming the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, should the Consent Decrees be modified to permit ASCAP and BMI to offer licenses that require users to obtain licenses from all joint owners of a work?

ASCAP does not agree with the assumption that the consent decrees require ASCAP and BMI to offer 100% or "full-work" licenses, and neither the ASCAP nor BMI rate court has interpreted the consent decrees to contain such a requirement.[8] Indeed, a reading of the consent decrees that would prohibit fractional licensing does not accord with rate court precedent.[9] *See, e.g.*, *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 547–51 (S.D.N.Y. 2010) (Cote, J.) (adopting fee structure based on fractional ownership shares in the ASCAP repertory), *aff'd sub nom. Broad. Music, Inc.* v. *DMX Inc.*, 683 F.3d 32 (2d Cir. 2012).

Nonetheless, given the questions raised by the DOJ, and so as to avoid any possible ambiguity, the consent decrees should be modified to confirm expressly that the licenses granted by ASCAP and BMI include only those rights that are granted to ASCAP and BMI by their members/affiliates. With respect to the ASCAP Consent Decree, this could be achieved through the following modification of the definition of "ASCAP repertory" in AFJ2 § II (proposed new text underlined):

---

[8] The summary judgment opinions of the ASCAP and BMI rate courts in *Pandora*, and the Second Circuit's affirmance of the ASCAP rate court's decision, did not address this question, which was never before the courts. Those decisions dealt with a situation where musical works were unquestionably in the ASCAP repertory for the purpose of licensing most music users, but were withdrawn for the specific purpose of licensing certain new media users. *See In re Pandora Media, Inc.*, No. 12-cv-8035, 2013 WL 5211927, at *5 (S.D.N.Y. Sept. 17, 2013), *aff'd sub nom. Pandora* v. *Am. Soc'y of Composers, Authors and Publishers*, 785 F.3d 73, 77–78 (2d Cir. 2015); *Broad. Music, Inc.* v. *Pandora Media, Inc.*, No. 13 CIV. 4037, 2013 WL 669778, at *3-4 (S.D.N.Y. Dec. 19, 2013). Thus, the courts never considered whether (or held that) the term "works" in the decrees meant "full works" or interests in works.

[9] Further, as described in footnote 4, Section XI.B(3) of the ASCAP Consent Decree effectively recognizes members' fractional ownership of works.

> II. (C) "ASCAP repertory" means those works or interest(s) in works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time[.]

At the very least, to give effect to partial withdrawals for digital services, ASCAP and BMI should be permitted to issue fractional licenses for digital services covering those shares of partially withdrawn co-owned works that remain in their repertories. With respect to the ASCAP Consent Decree, this could be achieved by inserting the following underlined text into AFJ2 § VI:

> VI. Licensing. ASCAP is hereby ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory, except that, in the case of a work that has been partially withdrawn for the purpose of licensing digital services pursuant to Section [ ] of this Consent Decree, ASCAP is ordered and directed to grant to any Standalone Digital Music Service making a written request therefor a non-exclusive license solely for the interest(s) in that work, if any, belonging to any Member or Members who have not partially withdrawn from ASCAP pursuant to Section [ ]; provided, however, that ASCAP shall not be required to issue a license to any music user that is in material breach or default of any license agreement by failing to pay to ASCAP any license fee that is indisputably owed to ASCAP. ASCAP shall not grant to any music user a license to perform one or more specified works in the ASCAP repertory, unless both the music user and member or members in interest shall have requested ASCAP in writing to do so, or unless ASCAP, at the written request of the prospective music user shall have sent a written notice of the prospective music user's request for a license to each such member at the member's last known address, and such member shall have failed to reply within thirty (30) days thereafter.

By making this proposal, ASCAP is seeking to maintain the status quo, prevent marketplace disruption, and ensure that the opportunity to make partial withdrawals for digital services is meaningful, as discussed more fully below.

E. If ASCAP and BMI were to offer licenses that do not entitle users to play partially owned works, how (if at all) would the public interest be served by modifying the Consent Decrees to permit ASCAP and BMI to accept partial grants of rights from music publishers under which the PROs can license a publisher's rights to some users but not to others?

The public interest would be served by such a modification because it would maintain the public benefits of collective licensing through ASCAP and BMI for the overwhelming majority of music users. As discussed in ASCAP's August 6, 2014 public comments, it is vitally important that ASCAP's Consent Decree be modified to permit ASCAP's members to partially withdraw their works from ASCAP's repertory and license those works directly to certain users outside the shadow of the rate court. As discussed above, however, to give full effect to partial withdrawals, the Consent Decree should be modified to confirm that ASCAP may grant licenses covering only those shares of co-owned works that have not been withdrawn from the ASCAP repertory for the purpose of licensing digital services.

The purpose of partial withdrawals is to allow ASCAP members to test the free market and obtain market rates for their musical works by engaging in direct licensing of certain digital services. For many works in the ASCAP repertory, the right to license is divided among multiple writer and publisher members. If a modified Consent Decree compels ASCAP to offer "100% licenses," there can be little doubt that digital services will continue to license partially withdrawn co-owned works from ASCAP as long as they can obtain lower license fees that are set not by competition, but instead by regulation via the rate court process. This result may and likely will push major publishers who are seeking

the ability to make partial withdrawals to resign from ASCAP completely, severely diminishing the procompetitive utility of the blanket license for all categories of licensees.[10]

In that case, those publishers will likely choose either to license their public performance rights directly, or to do so through ASCAP's unregulated competitors, like GMR and SESAC, or foreign PROs, like PRS for Music and SOCAN. If they choose to license their works directly, nothing will prevent them from doing so on a fractional-share basis. Likewise, if they choose to license their works through one of ASCAP's unregulated competitors, nothing will prevent that competitor from accepting partial grants of rights from resigned ASCAP members and licensing only those resigned members' fractional interests in their co-owned works. Thus, prohibiting ASCAP from granting fractional licenses, when such licenses may be preferred by music creators, would place it at a significant competitive disadvantage vis-à-vis these competitors.[11]

Accordingly, facilitating partial withdrawals through fractional licensing is essential to maintaining the public benefits of collective licensing through ASCAP and BMI.

---

[10] While the resignation of major publishers from ASCAP would not in itself address the ability of ASCAP to license co-owned works in which it controls only a fraction, ASCAP believes that major publishers would nonetheless be so discouraged with licensing through PROs that they would resign completely and explore other options (including licensing through ASCAP's unregulated competitors).

[11] The existence of this competitive disadvantage to ASCAP is only underscored by SESAC's recent purchase of the Harry Fox Agency (HFA) from the National Music Publishers' Association. *See* Ben Sisario, *Music Publishing Deal Driven by Shift From Sales to Streaming*, N.Y. TIMES, July 6, 2015, *available at* http://www.nytimes.com/2015/07/07/business/media/music-publishing-deal-driven-by-shift-from-sales-to-streaming.html; Ed Christman, *SESAC Finalizes Acquisition of Harry Fox Agency*, BILLBOARD, Sept. 14, 2015, *available at* http://www.billboard.com/articles/business/6693385/sesac-finalizes-acquisition-of-harry-fox-agency. With its purchase of HFA, SESAC has become the first U.S. PRO (and, unless the ASCAP and BMI consent decrees are modified, the *only* U.S. PRO) able to license mechanical rights and bundle those rights with public performance rights. Fractional licensing has long been the standard practice for licensing mechanical rights and synchronization rights.

F. What, if any, rationale is there for ASCAP and BMI to engage in joint price setting if their licenses do not provide immediate access to all of the works in their repertories?

The Supreme Court discussed the rationale for permitting ASCAP and BMI to engage in collective licensing and price-setting in *BMI* v. *CBS, Inc.*, 441 U.S. 1 (1979). The Court observed that "ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions." *Id.* at 20. The Court further noted that ASCAP and BMI reduce costs for rightsholders and music users by offering blanket licenses that cover millions of songs, obviating the need for separate license agreements between every music user and every rightsholder. *See id.* at 21. The Court found that "ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses." *Id.* The Court noted that the ability of ASCAP and BMI to offer such bulk licenses "is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established." *Id.* As the Court observed, "[t]his substantial lowering of costs . . . is of course potentially beneficial to both sellers and buyers." *Id.*

The current licensing practices of ASCAP and BMI, in which licenses are negotiated and priced on the basis of the fractional shares controlled by each PRO, in no way alters the fundamental rationale supporting their ability to engage in collective licensing on behalf of their members/affiliates. Indeed, confirming the current practice through clarification of the consent decrees will simply maintain the public benefits of this long-established practice.

Fractional licensing also will not diminish the efficiencies associated with the blanket license. Although partial withdrawals for digital service providers may result in an

increase in transaction costs, that would happen regardless of whether ASCAP is required to issue "100% licenses" to co-owned works or not. Digital service providers will still be required to negotiate with both ASCAP and any partially withdrawn ASCAP members in order to ensure that they have licenses to perform those partially withdrawn musical works that are not co-owned. Indeed, this is how licensing of performance rights by digital service providers works in the rest of the world, where those services already negotiate and obtain licenses from multiple rightsholders—including licenses from PROs and direct licenses from publishers—on a fractional-share basis.

More importantly, as discussed in ASCAP's August 6, 2014 public comments, partial withdrawals are necessary to prevent the complete resignation of ASCAP members, who must be either "all in" or "all out" in the wake of the Second Circuit's decision in the *Pandora* proceeding. *See Pandora Media, Inc.* v. *Am. Soc'y of Composers, Authors and Publishers*, 785 F.3d 73, 77–78 (2d Cir. 2015) (partial withdrawals prohibited by AFJ2). To the extent that ASCAP members decide that they must resign completely from ASCAP in order to have any prospect of achieving actual market rates, full resignations would threaten the procompetitive benefits of the collective licensing model and lead to exponentially increased transaction costs for all categories of licensees.[12] Any increase in transaction costs imposed by partial withdrawals for digital services—including those incurred by fractional licensing—would pale by comparison to those imposed by the major publishers leaving ASCAP altogether.

---

[12] Requiring ASCAP to grant "100% licenses" to co-owned works where one or more co-owners have fully resigned from ASCAP would not solve this problem. As discussed *supra* at 7, co-owners can contract around the default rule allowing them to grant "100% licenses" unilaterally to licensees. *See* NIMMER § 6.10[C]. If a member resigns from ASCAP, the resigning member may seek to enter into agreements with other members granting the resigning member the sole right to license works, thereby ensuring that no shares of co-owned works remain in the ASCAP repertory in the long run.

Moreover, requiring ASCAP and BMI to offer "100% licenses" to all music users would be a significant change from established industry practice, resulting in a costly and inefficient restructuring of creative and business relationships and widespread disruption in the licensing marketplace. As discussed above, ASCAP can license only those rights granted to it by its members. In those instances where a member is contractually barred by an agreement with his or her co-owners from granting "100% licenses" unilaterally to co-owned works, ASCAP has the right to grant only a fractional license to those shares of the member's work in the ASCAP repertory. If ASCAP were instead required to offer "100% licenses" for all works to all music users, those works would effectively be removed from the ASCAP repertory and remain stranded until the co-owners amended their agreements to allow for "100% licensing" by one or more co-owners. In the interim, music users could not license—or play—a substantial number of songs in ASCAP's repertory, and songwriters and publishers would lose considerable royalties.

This is not a trivial issue affecting only a small number of works. In 2014, for example, more than one-quarter of the works in the ASCAP repertory performed by music users were works in which non-ASCAP members have a fractional interest.[13] ASCAP's proposal will prevent the material marketplace disruption that will result if ASCAP is prevented from licensing such works.

In addition, a requirement of "100% licenses" may lead to disputes among rightsholders, with co-owners of a work taking conflicting positions about ownership shares or pursuing litigation over which co-owners have the right to license the work. Like the co-

[13] This figure includes co-owned works held in the repertories of foreign PROs and licensed through ASCAP by virtue of reciprocal arrangements between ASCAP and foreign PROs, but in which ASCAP has only a fractional interest. As discussed above, in most countries outside of the U.S., the consent of each copyright co-owner is required to license a work.

owner agreements discussed above, disputes among rightsholders also would have the effect of stranding certain works until co-owners could resolve their differences and agree to allow for "100% licensing" by one or more co-owners—shrinking the PROs' licensable repertory, increasing costs to music users, and reducing royalties for songwriters and publishers.

Requiring ASCAP and BMI to offer "100% licenses" to all music users also would create significant administrative burdens and expenses for ASCAP and BMI, neither of which is set up to account to non-member/affiliate songwriters or publishers who are co-owners of songs in their repertories. For example, while ASCAP knows and makes publicly available on its ACE database the fractional shares that ASCAP members control for each copyrighted work in the ASCAP repertory, ASCAP does not know for every co-written song in its repertory:

- The identity of all non-member co-writers and their respective fractional shares;
- The identity of all non-member publishers who co-own or co-control an interest in each song and their respective fractional shares;
- Which non-member co-writers may have transferred the right to receive performance royalties to someone else; and
- Where all of these individuals and entities are located and how to contact them.

This information is simply not available on an industry-wide basis, and it would be an extraordinarily expensive and time-consuming task for ASCAP to attempt to compile this information for each copyrighted work in its repertory, assuming that it were even possible to do so.[14] In the meantime, with respect to these works, if ASCAP were required to grant

[14] ASCAP is committed to providing transparency to music users and rightsholders as to the contents of ASCAP's repertory. ASCAP recognizes that, particularly in a world of partial withdrawals, users and

100% licenses to music users, this lack of information would make it impossible to account to non-members for the respective shares of license fees that they are entitled to receive. And even if ASCAP were able to do so, it would be burdened with the added expense of identifying the scope of rights and restrictions among member and non-member co-owners, calculating and distributing each fractional payment, and resolving disputes with those non-members concerning the amount and accuracy of those payments, resulting in additional administrative costs and less money going to songwriters and publishers. ASCAP's proposal is intended avoid these adverse consequences.

The transition from the current practice of negotiating and pricing licenses based on fractional interest, to negotiating and pricing "100% licenses," would also substantially increase the transaction costs of all parties involved. Licenses that were previously renewed or renegotiated based on prior license terms would have to be adjusted to cover the full share of rights licensed. In order to negotiate and price those adjustments, ASCAP and BMI would need to understand what rights the music user has already licensed from others and for what time period. Moreover, because those other licenses are likely to have different expiration dates, the appropriate rate for each music user would effectively become a moving target. As a result, ASCAP and BMI would regularly need to renegotiate and readjust the rates for each one of their tens of thousands of licensees. ASCAP's proposal would avoid these additional transaction costs.

Finally, requiring ASCAP and BMI to offer "100% licenses" to all music users would deprive many of ASCAP's members (and BMI's affiliates) of the benefits of the

---

rightsholders need information about the ownership of works in the ASCAP repertory and the contents of members' catalogs. For these reasons, ASCAP is continuing to make improvements to its publicly available ACE database, most recently upgrading ACE to permit users to view or download the catalogs of any ASCAP writer or publisher member and displaying share information on ACE.

PRO of their choice, and force them instead to accept the terms and conditions of a different PRO with which they never intended to associate. For example, if an ASCAP member and a BMI affiliate are co-owners of a song, and BMI licenses 100% of that song to one or more music users, the ASCAP member will need to be paid for those performances according to the distribution rules and practices of BMI, even though the ASCAP member never chose to be affiliated with BMI. Thus, if BMI chose to license the work for less than ASCAP, the ASCAP member would have no choice but to accept that lower royalty payment. The ASCAP member would also bear the additional burden of monitoring the distribution procedures of an organization he or she has no relationship with, so as to determine how his or her distribution is calculated, whether it accurately measures all of the performances of the work during the period, and when he or she will be paid. And to the extent that the ASCAP member seeks to challenge the timeliness or the amount of a royalty distribution, he or she will have to figure out how to do so under BMI's rules and procedures, none of which the ASCAP member ever agreed to be bound by. These consequences will inevitably cause certain ASCAP songwriters to consider collaborating only with fellow ASCAP writers in order to keep their works entirely within ASCAP.[15] In other words, a decision that was once driven by creative choice and artistic chemistry will now be controlled by rules imposed by the DOJ. ASCAP's proposal will prevent such an unwarranted intrusion into its songwriters' creative process.

[15] Likewise, those songwriters who have chosen not to license their works through ASCAP or BMI, but who have co-written songs with ASCAP members or BMI affiliates, will be compelled to accept the licensing and distribution terms of a PRO they never elected to join, effectively eliminating their ability to control their property rights by deciding with whom they wish to license and on what terms.

IV. CONCLUSION

ASCAP thanks the DOJ for the opportunity to address these important questions, and for the DOJ's willingness to discuss much-needed consent decree reform that is vital to protect the continued viability of collective licensing through ASCAP and BMI.

Dated: November 20, 2015

Jay Cohen
Andrew C. Finch
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
Phone: (212) 373-3000
Fax: (212) 757-3990

Clara Kim
Richard Reimer
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS
One Lincoln Plaza
New York, New York 10023
Phone: (212) 621-6000

Counsel for the American Society of Composers, Authors and Publishers

Before the
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Washington, D.C.

COMMENTS OF MEDIA LICENSEES

The National Association of Broadcasters, iHeartMedia, Inc., the National Cable & Telecommunications Association, the National Religious Broadcasters Music License Committee, Netflix Inc., Pandora Media, Inc. ("Pandora"), the Radio Music License Committee, Inc. ("RMLC"), Rhapsody International Inc., Sirius XM Radio, Inc., the Television Music License Committee, LLC, and Viacom Inc. (collectively the "Media Licensees") jointly submit these comments in response to the request of the United States Department of Justice Antitrust Division ("DOJ") for public comment regarding the licensing of so-called "split works," an inquiry undertaken as a part of the DOJ's ongoing review of the antitrust consent decrees in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) (each a "Decree" and, collectively, the "Decrees"). *See* Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works, *available at* http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015. Those Decrees regulate various aspects of the conduct and operations of the two dominant U.S. music performing rights organizations ("PROs"), ASCAP and BMI.

Media Licensees are (or represent the interests of) many of the most significant licensees of ASCAP and BMI, spanning the broadcast radio and television, cable television, satellite radio, background music, and so-called "new media" audio and audiovisual entertainment industries. Collectively, these entities (or the licensees they represent) make annual payments to each of ASCAP and BMI amounting to hundreds of millions of dollars. The radio industry's license

relationships with ASCAP date back as far as the 1920s; background music's with ASCAP to the 1930s; broadcast television's with ASCAP and BMI to the 1940s; while other of Media Licensees' PRO dealings span many decades. Each has gained a sophisticated understanding of the music licensing marketplace, the historic absence of meaningful competition in the licensing of music performance rights, as well as the crucial role the Decrees play in mitigating the monopoly power enjoyed by ASCAP and BMI. Many of the signatories to these Comments have previously provided the DOJ with extensive comments on issues posed by the ongoing Decree review process beyond those that are the subject of the instant comments. We will assume from that interface the DOJ's familiarity with the Media Licensees' and their constituents' businesses.

OVERVIEW

Media Licensees welcome the DOJ's inquiry into the historical licensing practices of ASCAP and BMI as they relate to the licensing of split works, as well as regarding whether to modify the Decrees to require the consent of all joint owners to license the public performance of a given work.

Consistent with the DOJ's apparent understanding, the express language of ASCAP's and BMI's own agreements with their respective members and affiliates, as well as their respective agreements with Media Licensees, provide for ASCAP and BMI to grant the right to publicly perform all of the *works* in the repertories of those PROs – irrespective of whether such works are owned solely by affiliates of the licensing PRO or constitute "split works," one or more of whose joint owners may be affiliated with a separate PRO or with no PRO at all. Never in any of Media Licensees' experience with ASCAP and BMI has any question arisen as to the nature and encompassing scope of this grant. This undeviating licensing practice is deeply embedded in

the very license systems developed by ASCAP and BMI, and it is part and parcel of the efficiency rationale that ASCAP and BMI have put forth to support the legality of PRO blanket licensing in the face of serious antitrust concerns. *See BMI v. CBS*, 441 U.S. 1, 5, 21-22 (1979). This longstanding practice has provably worked to minimize licensing friction, infringement exposure, and undue cost on the part of licensees, while still enriching ASCAP and BMI (and their affiliated composers and music publishers) at levels that have reached "historic[ally]" high and "record breaking" sums of more than $1 billion apiece annually.[1]

The PROs' prior licensing practices with respect to split works also are consistent with fundamental principles of copyright law (and the manner in which copyright law treats the licensing of split works). These licensing practices have worked well for the entire lifespan of the PROs and there is no evidence that these practices are in need of reform. Correspondingly, there is no basis for concluding that Decree modifications bringing about a profound change in how PROs license split works are warranted as a matter of sound antitrust policy.

So far as Media Licensees can discern, the driving forces behind seeking to move to a licensing regime that would require licensees of ASCAP and BMI to acquire license authority from every joint owner of a musical work are the very same music publishers that are pressing for rights of so-called "partial withdrawal" from ASCAP and BMI. For the reasons elsewhere conveyed to the DOJ, Media Licensees view the partial withdrawal impetus with deep suspicion and with great concern as to its potential anticompetitive effects. It therefore comes as no surprise to Media Licensees that, as part of these publishers' efforts to gain as much leverage as possible in future bilateral negotiations with users, they would seek to be in a position to demand

[1] *See* 2014 ASCAP Annual Report, *available at* http://www.ascap.com/~/media/files/pdf/about/annual-reports/ascap_annual_report_2014.pdf; BMI Quarterly Distribution Update, *available at* http://www.bmi.com/distribution/letter/572233.

licenses not merely with respect to those musical works 100%-controlled by them, but also with respect to the significant number of works in the ASCAP and BMI repertories as to which they own any fractional ownership interest whatsoever.

This change of license practice would have the effect of contracting, if not eliminating altogether, the ability of affected users to engage in self-help measures to avert the full anticompetitive force of publisher withdrawals and newly formed, unregulated PROs, such as Global Music Rights ("GMR"). This is the case since such a coordinated and collective policy adopted by the publishers and PROs to change the current licensing practice would amplify the market power of each unregulated licensing entity (whether a publisher or unregulated PRO) by giving each such entity the ability to block performances of any work in which it has any ownership interest, including works in the ASCAP and BMI repertories. The end result of this proposed concerted action would be to substantially diminish the scope of rights that a PRO license would grant to licensees, all without a corresponding diminution in the PROs' market power. Users would face a Hobson's choice: either shoulder the commercially infeasible administrative burden of seeking to avoid performances of all the works in which such unregulated licensing entities hold merely a fractional interest, or accede to said entities' license fee demands. In the case of Media Licensees transmitting content previously produced by third parties – where the musical content of such programming has been already determined and cannot be altered – negotiations with fractional rightsholders would, moreover, necessarily occur after the opportunity for any meaningful price negotiation has passed.

Limiting ASCAP's and BMI's ability to license split works would cause a further competitive distortion by undermining one of the Decrees' root purposes by gutting the force of Decree-mandated alternative forms of license, such as the per-program license. That form of

license, among other things, enables users to reduce their license fee obligations to ASCAP and BMI where a split work is the only work in a program that is not "cleared" by paying a license fee to one of ASCAP or BMI, but not both. As discussed below, imposition of a regime requiring that the user obtain licenses from every joint owner of a musical work would eliminate those savings, substantially diminish the opportunity to rely on such license alternatives, and reduce the impetus for ASCAP and BMI to compete with one another in affording users attractive alternative licenses.

As we further describe, imposition of a regime requiring the tracking down and securing of a license from every owner of a joint work – particularly given the lack of transparency as to the often-changing identities of the owners of musical works and the PROs with which those composers and publishers are affiliated – invites numerous other distortions into the music rights licensing marketplace. These include dramatically increasing both the transaction costs incurred and the risk of copyright infringement assumed by users in securing music performance licenses. Indeed, as the DOJ's questions appear to suggest, permitting ASCAP and BMI to limit the scope of their licenses in relation to split works would undermine the very rationale for the PROs and blanket licensing in the first instance, and could even chill the very behavior that these PROs are meant to enable – the public performance of musical works. If PRO licenses were necessary *but not sufficient* to authorize public performances of copyrighted music, and if a user was required to hold licenses from every copyright claimant to a given work or its PRO in order to avert copyright infringement exposure, ASCAP and BMI – which would suffer no diminution in their market power – would be joined by these other fractional owners of such rights as "must have" sellers to a far greater extent than is the case today. The result would be stacked monopoly

conditions that should be viewed by DOJ, and would be viewed by Media Licensees, as intolerable and unlawful under the Sherman Act.

While the above-described destabilizing effects of a change in current split works licensing practice may be desired by a narrow segment of participants in the marketplace as a means of raising prices, there is no sound pro-competitive rationale supporting the requested change to the Decrees. Indeed, the requested change likely would harm consumers through underinvestment by licensees, whether in music or other aspects of their programming or services, and/or through increased costs passed on to the consumers.

We address below the specific questions posed by the DOJ.

RESPONSES TO SPECIFIC QUESTIONS

1. Have the licenses ASCAP and BMI historically sold to users provided the right to play all the works in each organization's respective repertory (whether wholly or partially owned)?

The answer to the Department's first question is unquestionably "Yes."

The DOJ's Request for Comments accurately marshals evidence attesting to the fact that, historically and through the present, ASCAP's and BMI's licenses with users have entitled users to publicly perform any and all of the works in their repertories, irrespective of whether the ASCAP members or BMI affiliates, as the case may be, are the sole owners of the copyrights in the licensed works or joint owners in the works with one or more other co-owners unaffiliated with that PRO. There is abundant additional evidence to support this conclusion.

One begins with the organic grants of rights secured by ASCAP and BMI from rights holders. One need only visit these PROs' websites to ascertain that both organizations secure from the "writers" (*i.e.*, composers) of the works that populate their repertories the right to license any and all works in which the writer has any ownership interest – including split works.

ASCAP's form writer agreement thus grants to ASCAP "the right to license non-dramatic public performances" of "each musical work": (1) of which "the owner is a copyright proprietor"; (2) that the owner "wrote, composed, published, acquired or owned" "alone, *or jointly, or in collaboration with others*"; (3) in which "the owner now has any right, title, interest or control whatsoever, *in whole or in part*; (4) that "may be written, composed, acquired, owned, published, or copyrighted by the owner, *alone, jointly or in collaboration with others*; or (5) in which "the owner may hereafter … have any right, title, interest or control, whatsoever, *in whole or in part*."[2] BMI's form writer agreement – while less detailed – accomplishes the same result. That agreement grants to BMI the right to license non-dramatic public performances of "*all* musical compositions … composed *by you alone or with one or more co-writers*."[3]

The operative agreements with these writers make no mention of any reservations of rights on the part of the writers with respect to ASCAP's or BMI's licensing of split works, such as a stipulation that such works may not be incorporated into the license repertory of the PRO if one or more joint owners are not affiliated with the same PRO, or a conditioning of any grants of

---

[2] ASCAP Writer Agreement, *available at* http://www.ascap.com/~/media/files/pdf/join/ascap-writer-agreement.pdf (emphasis added). This grant of rights is consistent with ASCAP's Compendium Rules, which state that "a Member [of ASCAP] grants to ASCAP the non-exclusive right to license the non-dramatic public performance of that Member's musical compositions." ASCAP Compendium § 2.7.1, *available at* http://www.ascap.com/~/media/files/pdf/members/governing-documents/compendium-of-ascaprules-regulations.pdf. *See also* ASCAP Survey and Distribution System, Rules & Policies, § 3.3.1(i), *available at* https://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf (providing for continued distributions to be made to resigning ASCAP members post-resignation in circumstances where, "the Society shall continue to have the right to license the performing rights in the United States to a work or works of such writer or publisher as a result of continued membership in the Society of one (1) or more of the members in interest with respect to such work or works…").

[3] BMI Writer Agreement, *available at* http://www.bmi.com/forms/affiliation/bmi_writer_kit.pdf (emphasis added).

rights to users with respect to split works upon the user acquiring rights to the work from the remaining co-owners. To the contrary, as illustrated by several examples cited by the DOJ, ASCAP and BMI publicly and unreservedly present their licenses as affording users unrestricted access to all of the works in their repertories.

The Decrees themselves define the PROs' repertories in terms of "works" or "compositions," and not in terms of shares or portions of those works. ASCAP Decree VI; BMI Decree II(C). Judge Cote relied on the import of this language in determining that partial withdrawals are not permitted under the ASCAP Decree as written. *See In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2013 WL 5211927, at **5-7 (S.D.N.Y. Sept. 17, 2013), *affirmed sub nom Pandora Media, Inc. v. ASCAP*, 785 F.3d 73, 77 (2d Cir. 2015) (per curiam) (agreeing that "ASCAP repertory" is a "defined term[] articulated in terms of 'works or 'compositions,' as opposed to in terms of a gerrymandered parcel of 'rights,'" and holding that "'works' in AFJ2 means 'composition[s]' and not 'rights in compositions'").

Media Licensees' multi-decade license experience with ASCAP and BMI reflects this broad authorization. All of these users' license agreements contemplate unreserved access to the full repertories of ASCAP and BMI works.[4] Further, Media Licensees are unaware of any

[4] By way of example, drawn from broadcast radio's license experience, the most recent agreement negotiated between the RMLC and ASCAP grants radio broadcasters the right to publicly perform "*all musical works* in the ASCAP repertory." ASCAP 2010 Radio Station License Agreement, 3.A, available at http://www.ascap.com/~/media/files/pdf/licensing/radio/rmlc-license-agreement.pdf (emphasis added). The corresponding, current BMI-RMLC license grants radio broadcasters the right to publicly perform "*all musical works* in the BMI repertoire." BMI Radio Station Blanket/Per Program License Agreement, 3.A, available at http://www.bmi.com/forms/licensing/radio/2012_RMLC_blanket_per_program.pdf (emphasis added). Radio broadcasters' ability to publicly perform split works is nowhere separately addressed or in any way limited under either agreement. Similarly, the final judgment setting forth the terms of Pandora's ASCAP license grants Pandora the right "to perform *all of the works*

ASCAP or BMI license that has included any reservations of rights or restrictions on public performance insofar as split works are concerned, notwithstanding the fact that split works historically have comprised a substantial portion of each PRO's repertory.[5]

Indeed, just this year, BMI confirmed in no uncertain terms that its understanding regarding this issue was the same as Media Licensees'. As part of its support for its proposed adjustable-fee blanket license proffered to Pandora, BMI sponsored the following expert testimony:

> A: I'm saying that the fraction of the Sony and Universal repertoire that would no longer be available to play under BMI license would be a fraction of the 50 percent, because the 50 percent includes split works, which would continue to be included under the BMI licenses.
>
> Q: Is it your testimony … that if a work is co-owned by a withdrawn publisher and a publisher that has not withdrawn [from BMI], that the licensee doesn't have to get a license from the withdrawn publisher to legally perform the work; is that your testimony?
>
> A: My testimony is that if it's a split work …, then even if – so suppose there is a work that's owned jointly by Sony and BMG. If BMG withdraws but Sony remains, then if that work is jointly owned and Sony is still under BMI, then that work can legally be played.

BMI v. Pandora Media, Inc., Trial Tr. at 1841:5-22 (Feb. 10, 2015).

The foregoing summary of historic and prevailing PRO licensing practice also is fully in keeping with basic precepts of copyright law. It is well established that any co-owner of a copyrighted musical work "may grant a non-exclusive license to use the work unilaterally" – that is, without the consent of the other co-owners. *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007);

---

in the ASCAP repertory." *In re Pandora Media, Inc.*, J. Order, No. 12 Civ. 8035 (DLC) ¶ 1 (S.D.N.Y. Jul. 25, 2014), Dkt. 739 (emphasis added).

[5] *See generally* ASCAP ACE Database, *available at*: https://www.ascap.com/Home/ace-title-search/index.aspx.

see also Brownstein v. Lindsay, 742 F.3d 55, 68 (3d Cir. 2014); *Bridgeport Music, Inc. v. DJ Yella Muzick*, 99 F. App'x 686, 691 (6th Cir. 2004). This rule flows, *inter alia*, from the very nature of split works – works "prepared by two or more authors *with the intention that their contributions be merged* into inseparable or interdependent parts of *a unitary whole*." 17 U.S.C. § 101 (emphasis added). "The touchstone [of a joint work] is the intention, at the time the writing is done, that the parts be absorbed or combined into an *integrated unit*." *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991) (emphasis added) (citation omitted); *accord Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998).[6] Joint authors hold "undivided" interests in a work. *Childress*, 945 F.2d at 505. Thus, under prevailing copyright law, a joint work is not divisible into "shares" that may be licensed apart from the work as a whole. It is similarly well established that the right of a co-owner to grant non-exclusive licenses "is an incident of ownership." *Davis*, 505 F.3d at 98, *quoting Maurel v. Smith*, 271 F. 211, 214 (2d Cir. 1921). When a co-owner grants such a non-exclusive license, the licensee assumes no obligations of any kind in relation to co-owners who are not parties to the license agreement. It is, instead, the obligation of the licensing co-owner to account to all other co-owners. *Id.*

These basic principles of copyright law, as also embodied in existing ASCAP and BMI license arrangements with their respective members and affiliates and their licensed users, were confirmed more than two decades ago in the 1993 *Buffalo Broadcasting* ASCAP rate-setting proceeding involving the local television industry.[7] The issue there involved whether a

[6] Moreover, when multiple authors intend joint authorship, "they accepted whatever the law implied as to the rights and obligations which arose from such an undertaking." *Childress*, 945 F.2d at 508, *quoting Maurel v. Smith*, 220 F. 195, 198 (S.D.N.Y. 1915) (L. Hand, J.).

[7] *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, No. 13-95 (WCC), 1993 WL 60687, at **79-80 (S.D.N.Y. Mar. 1, 1993) ("*Buffalo Broadcasting*").

television station operating under a BMI blanket license and an ASCAP per-program license that aired a program whose only ASCAP music content was a split work, the other ownership interests in which were represented by BMI, nonetheless was required to pay ASCAP a license fee with respect to such program. ASCAP's rationale was not copyright-law based but, rather, founded on the contention that to conclude otherwise would encourage broadcasters to play ASCAP off against BMI, by taking the lower-priced blanket license offering from one and relying on per-program licenses from the other. *Id.* at *79. The court rejected ASCAP's argument on both antitrust policy grounds *and* under basic copyright law. The court correctly opined that the very inter-PRO competition ASCAP sought to stifle was to be encouraged. As to copyright law, it correctly held that "once a broadcaster has obtained a license from one of two joint copyright holders, he is immune from copyright liability to the other copyright holder." *Id.* at *79.[8]

Media Licensees expect certain publishers – consistent with their publicly reported statements[9] – to argue that industry practice among co-owners of copyrighted musical compositions is to contractually preclude "100% licensing." They will likely suggest that, in other non-PRO licensing contexts (such as synch licensing), publishers frequently purport to license only their fractional shares of works that are the subject of the license and explicitly condition the licensee's exploitation of such works upon the licensee obtaining additional

[8] Despite all of the foregoing, in an effort to drum up support for the proposed modification to the licensing of split works, ASCAP has recently embarked on a campaign that misleads its members by claiming that it has historically only licensed fractions of works. That simply is not true. *See* Let the Justice Department Know Where Music Creators Stand on Fractional Licensing, *available at*: http://www.ascap.com/about/legislation/doj-letter.aspx.

[9] *See, e.g.*, http://www.billboard.com/biz/articles/6649207/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for-song; http://hitsdailydouble.com/news&id=297581.

licenses from the other co-publishers of the works. First, any such practice is irrelevant to the question at hand, which relates to historic practices of *performance rights* licensing by ASCAP and BMI – as to which, as discussed above, the history is unambiguously to the contrary. Second, there is a significant question of whether, under prevailing copyright law, an agreement among the co-owners of a work that purports to require a user to obtain a license from all co-owners of that work in order to avoid infringement risk would be enforceable against users. Third, even if found enforceable, such agreements certainly would not immunize those co-owners from the antitrust laws. Like other forms of agreement, an agreement between and among ASCAP, BMI, and their respective members and affiliates regarding the licensing of split works would be unlawful if it amounted to an unreasonable restraint of trade or monopolization.

Publishers' publicly-reported statements also suggest that there is something unfair about enabling licensee services to rely on PRO licenses to perform split works, apparently due to the belief that such licensing will allow licensees to pick and choose among PROs, thereby forcing PROs to compete with each other when licensing their repertories. As an initial matter, there is absolutely nothing unfair about expecting and requiring co-owners to live with the basic principles of copyright law that they accepted by intending to be joint authors. *See Childress*, 945 F.2d at 508. Moreover, even if the publishers were correct and such inter-PRO competition would take place, such competition should be encouraged, not eliminated, *see Buffalo Broadcasting*, at ** 79-80 – let alone through concerted action between and among the PROs and their members and affiliates to bring such circumstance about.[10]

[10] The expectation of the publishers generally seems to be that they would not (and should not have to) compete with each other on price. *See* Matt Pincus, "SONGS Music's Matt Pincus: Why Music Publishing's Two-Class System Could Spell the End for Indie Firms," BILLBOARD, Oct. 29, 2015, at 2-4 (arguing that smaller publishers should receive the same rates as larger

The fact that ASCAP and BMI (or their members/affiliates) over time may have failed to account to copyright owners affiliated with other PROs (or with no PRO at all) in respect of split works in no way calls into question the fact that ASCAP and BMI licensees historically *have* secured the right to publicly perform *all* of the works in the repertories of those PROs.[11] To the extent that the PROs have failed to provide accountings to co-owners, that is an issue between co-owners and their PROs; it has no bearing on the scope of the rights conferred upon Media Licensees and other users or the validity of those rights. *See, e.g., Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007) ("a licensee is not liable to a non-licensing co-owner for use authorized by the license, because the licensee's rights rest on the license conveyed by the licensing co-owner"). Should the major publishers' recent efforts to capitalize on their substantial market power by withdrawing from the PROs (whether in whole or in part) implicate additional complications with respect to accountings between co-owners, that, too, would be a problem of their own (and the PROs') making. Any burdens in resolving such problems should fall on them. Requiring services to license split works from all co-owners would transfer the role of identifying and accounting for ownership in musical works from the PROs and publishers, who are best positioned to do so, to the licensees.[12] Upending a license system that, in respect to the licensing

---

publishers), *available at* http://www.billboard.com/files/pdfs/Bulletin/october-29-2015-billboard-bulletin.pdf.

[11] At least as to ASCAP and BMI members and affiliates, there is, in any event, reason to doubt that there has been any significant misallocation of royalties between and among owners of split works. This is the case since ASCAP and BMI typically receive license fees commensurate with their estimated market shares.

[12] In this regard, the PROs appear to be claiming that they do not have the capability to account to unaffiliated co-owners, and that requiring them to do so would be burdensome. This argument is unavailing, as ASCAP and BMI can surely pay their respective affiliates and members and leave it to those affiliates and members to make the required accountings. The PROs also remit royalties to foreign collecting societies under reciprocal agreements and should be capable of

of split works, has worked for decades without significant complaint from any quarter is not the proper response.

2. If the blanket licenses have not provided users the right to play the works in the repertories, what have the licenses provided?

The preceding discussion, which establishes that the licenses conveyed by ASCAP and BMI have afforded users full rights to publicly perform all the works in their repertories, makes further response to this question unnecessary.

3. Have there been instances in which a user who entered into a license with only one PRO, intending to publicly perform only that PRO's works, was subject to a copyright infringement action by another PRO or rightsholder?

Media Licensees are unaware of any such instance.

4. Assuming the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, should the Consent Decrees be modified to permit or require ASCAP and BMI to offer licenses that require users to obtain licenses from all joint owners of a work?

No. Collective licensing of the sort engaged in by ASCAP and BMI "provide[s] some efficiencies" – as it reduces transaction costs by allowing for one-stop shopping through which licensees are able to secure the right to perform all of the works in the repertory of the licensing PRO without having to identify and transact with individual copyright holders. Brief for the United States as Amicus Curiae, *In Re Application of THP Capstar Acquisition Corp.*, Case No. 11-127, dated May 6, 2011 (2d Cir.), at 1. At the same time, as the DOJ has previously recognized, collective licensing unquestionably leaves the PROs with "significant market power." *Id.*

---

paying one another and making adjustments based upon a comparison of claimed ownership interests.

The Decrees, as they relate to ASCAP's and BMI's dealings with users, are intended to rein in that market power. *Id.*; *see also* Memorandum of the United States In Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civ. No. 41-1395 (WCC), dated Sept. 4, 2000 (S.D.N.Y.), at 15-16 ("the [ASCAP Decree] contains a number of provisions intended to provide music users with some protection from ASCAP's market power."). While the Decrees, as enforced by the rate courts, have provided Media Licensees with at least some degree of relief from the monopoly pricing power of ASCAP and BMI, those PROs nevertheless maintain significant market power. *See, e.g.*, Memorandum of the United States on Decree Construction Issues, *BMI v. DMX, Inc.*, 08 Civ. 216 (LLS), dated Apr. 13, 2010, (S.D.N.Y.), at 3 ("While the Court's ratemaking authority places a constraint on the exercise of BMI's market power, it is not the equivalent of a true competitive constraint.").

The state of antitrust equipoise between ASCAP and BMI and users such as Media Licensees is a fragile one that can be easily disturbed. Allowing certain rightsholders to constrain ASCAP's and BMI's ability to license split works in their repertories would be more than enough to disrupt this balance. It is quite apparent that the push for such constraints is not designed to enable unilateral action on the part of rightsholders, who are free to license directly (as they have done) under the current system. To the contrary, the implementation of this licensing regime change would involve, at a minimum, the *collective* action of ASCAP, BMI, and their thousands of respective members and affiliates to determine how their works will be licensed by PROs.[13] The purpose and effect of such a collective effort would be to artificially

[13] In a somewhat analogous context, in *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), provisions of ASCAP's by-laws that forced the splitting of copyrights (there synchronization and public performance rights), thereby artificially requiring movie theater owners to enter into separate negotiations with different entities, when, but for the by-law

increase the market power of any music publisher choosing to license its fractional ownership share in any copyrighted musical work outside of a PRO. Moreover, were the requested modification permitted, there is every reason to believe that the PROs would seize upon those artificially elevated extra-PRO license fees as asserted benchmarks for their own blanket fees – thereby benefiting all of the PROs' affiliated rightsholders. When a similar tactic was judicially tested in the ASCAP rate court, it was swiftly exposed and rejected. *See In re Pandora Media, Inc.*, No. 12 Civ. 8035(DLC), 2014 WL 1088101, at *35 (S.D.N.Y. Mar. 14, 2014), *affirmed sub nom Pandora Media, Inc. v. ASCAP*, 785 F.3d 73, 77 (2d Cir. 2015) (per curiam).

There is no countervailing benefit either to the orderly functioning of copyright licensing or the interests of the antitrust laws that would be attained by endorsing such a change in practice. To the contrary, the efficiencies afforded users under existing PRO license arrangements, which undergird much of the historic rationale for permitting ASCAP and BMI to survive antitrust scrutiny, would be largely eliminated. No longer would users enjoy the transaction cost efficiencies created by collective licensing, as they would instead face the prospect of attempting to identify and negotiate with each and every co-owner of the split works they perform. The increased costs faced by licensees would invariably lead to higher prices for consumers and underinvestment by licensees, including fewer services entering the market, some services exiting, and, for those remaining in the market, a choice between reduced use of music

---

provisions, a single negotiation would take place, was found to violate the antitrust laws. *See also M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 847-50 (D. Minn 1948) (holding that an industry practice of splitting sync and performance rights was copyright misuse and an antitrust violation because the copyright holders "obtained a potential economic advantage which far exceeds that enjoyed by one copyright owner.").

and underinvestment in features and service improvements that would benefit consumers. As a result, consumer welfare would be harmed.

Indeed, as noted above, without the transaction cost efficiencies and the attendant protections of the Consent Decrees, there would be scant justification for allowing collective licensing of the type engaged in by ASCAP and BMI to continue; at a minimum, significant new antitrust concerns would arise in evaluating the continuing legality of these PROs under the prevailing rule-of-reason analysis in a world where ASCAP and BMI could not fully license public performance rights in split works.

A. A Change to the Licensing of Split Works Would Create Market Power and Undermine the Protections Afforded to Users by the Consent Decrees

The ASCAP and BMI Decrees mandate that those PROs must provide a license to any user immediately upon request, thereby eliminating the ability of ASCAP and BMI to engage in "gun-to-the-head" licensing tactics by threatening copyright infringement lawsuits in the event that the licensee fails to accede to these PROs' license fee demands.[14] ASCAP Decree VI; BMI Decree XIV.

A change to the status quo that would require a licensee to secure not only a license from each of ASCAP and BMI, but also a license from each copyright owner of a split work that is unaffiliated with ASCAP and BMI, would all but eliminate this protection. No longer would a user be able to perform split works in the repertories of ASCAP and BMI under the umbrella of the protections afforded users by the Decrees. Its public performances would be subject to the

[14] As a result of recent antitrust lawsuits brought against SESAC by the local television industry and the RMLC, that PRO is now also barred, by virtue of the settlement agreements it reached in those actions, from engaging in such licensing tactics, as it too must now provide the local television and radio station licensees that have availed themselves of those settlement agreements with immediate access to its entire repertory.

veto power of any and every co-owner of a split work not affiliated with ASCAP or BMI, as a license from each such owner would become a necessary addition to any blanket license.[15] And that assumes that the user would be in a position even to identify every such part owner – an impracticable, if not impossible, prospect in and of itself due to transparency issues endemic to the music industry as discussed in prior comments submitted by Media Licensees. Such a system would create strong incentives for copyright owners with partial ownership interests to exploit the market power created as a result of the requested change to the status quo. Stated starkly, the fundamental change in ASCAP's and BMI's licensing practice sought by certain rightsholders would dramatically devalue the ASCAP and BMI licenses, and the efficiencies and protections from copyright infringement they offer, in favor of affording musical works rightsholders a vehicle to do precisely what the Decrees prohibit: place ASCAP and BMI licensees at their legal peril in performing split works in the ASCAP and BMI repertories. The magnitude of works potentially implicated is nothing short of enormous – by some estimates as much as 85% of all musical works are split works (and the number of co-writers of individual songs is reportedly increasing, *see* http://priceonomics.com/how-many-people-take-credit-for-writing-a-hit-song/). The potential magnitude of adverse competitive effects that would be brought about by such a change in practice is just as enormous.[16]

---

[15] *See* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2156-2161 (2013); Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting*, in I ADAM B. JAFFE, ET AL., INNOVATION POLICY AND THE ECONOMY 119-50 (2001) *available at* http://faculty.haas.berkeley.edu/shapiro/thicket.pdf (markets with multiple "must have" suppliers not only fail to be workably competitive, they are even worse for buyers than markets controlled by a single, monopoly supplier).

[16] The European Commission, in analyzing performance rights licensing markets in the context of recent mergers, came to the same conclusion. There, the EC concluded that a proper analysis of a rightsholder's market power must account for that rightsholder's control share, that is, the share of works it has sufficient interest in to prevent their use absent a license from that

These potential adverse effects are particularly acute for licensees that utilize third-party produced programming that contains copyrighted music, such as many television programs, movies, certain radio programs, and many commercial advertisements. As is discussed in prior comments submitted to the DOJ, the music in such programming is selected by third parties, and the licensee typically has no choice but to play the music that has been pre-selected for it. Requiring such licensees to identify and to engage in after-the-fact negotiations with every co-owner of split works embodied in their programming would be particularly impracticable. Indeed, these licensees could well have to forego offering entire television series/episodes, radio programs, commercial advertisements, or films as a result of the hold-up power of one co-owner of one composition. It is not uncommon, for example, that a given television program will have dozens of cues, each controlled by various combinations of different copyright owners. Under such circumstances, not only would the licensee be harmed, but the co-owners that did grant a license would also be harmed, as they would no longer earn royalties for performances of their works.

The anticompetitive consequences of requiring downstream performing entities to secure public performance rights for compositions already integrated into "in the can" content was first addressed in the context of audiovisual works in *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948). There, the court found that ASCAP's practice of prohibiting its members from granting public performance rights along with synchronization rights to motion picture producers violated the antitrust laws. *Id.* at 893-94. ASCAP's practice compelled movie theaters wishing

---

rightsholder. *See Sony/Mandala/EMI Music Publishing*, Case No. COMP/M.6459, Commission Decision C(2012) 2745, at 47 ¶ 213 (2012). Consistent with the analysis set forth above, the European Commission concluded that a rightsholder's market power is greatly amplified if it can insist that a user take a license with it before the user can perform any of the works in which the publisher has even a small ownership interest.

to publicly perform motion pictures with music embedded in the soundtrack to engage in a separate round of licensing – after the music had been selected and synchronized and could not be removed – to secure public performance rights. This allowed ASCAP to seek dramatic rate hikes given the theaters' lack of ability to choose among competing sources of music. After *Alden-Rochelle*, ASCAP's Decree was amended to prevent ASCAP from licensing movie theaters the right to publicly perform music synched with motion pictures – thereby ensuring that movie theaters would no longer be subject to the holdup power that stems from a licensee being forced to secure performance rights to works over which the licensee has no control. AFJ2 § IV(E). However, at ASCAP's urging, the Decree limitations brought about by *Alden-Rochelle* were not extended beyond movie theaters and there currently is no restriction on ASCAP's ability to license Media Licensees' transmissions of even the same motion pictures as are shown in theaters.

Having averted the full logical force of the competitive protections afforded by *Alden-Rochelle* with respect to pre-programmed audiovisual programming, rightsholders now seek to pull the rug out from under downstream exhibitors of such audiovisual content by substantially diluting their ability to rely on ASCAP and BMI blanket licenses to mitigate audiovisual content producers' failure to secure public performance rights at the time they license synchronization rights in the same compositions. For the reasons discussed in *Alden-Rochelle*, it would be patently anticompetitive for rightsholders to withhold public performance rights during initial licensing negotiations with third-party producers and also deprive downstream exhibitors/performers of full blanket license coverage from ASCAP and BMI for already-produced content. Forcing the downstream entity to reengage with the same rightsholders who withheld public performance rights at the outset, only at a time when the downstream exhibitor

has no option but to use the publisher's music, would unfairly enhance the rightsholders' bargaining power (a most anomalous result given that the exclusion of public performance rights from the initial licensing negotiations with music rightholders was predicated on the availability of full blanket licenses from the PROs that would obviate any need for a later round of negotiations on a work-by-work basis).

Another consequential effect of requiring licenses from all fractional owners of split works would be an undermining of the decretal provisions requiring that ASCAP and BMI offer users viable alternatives to the blanket license. As the Antitrust Division has previously noted, these decretal provisions serve "to assure that music users have competitive alternatives to the blanket license, including direct and per-program licensing … ," so as to provide such users with "important protections against supracompetitive pricing of the [PRO] blanket license …." Memorandum of the United States in Response to Motion of Broadcast Music, Inc. to Modify the 1966 Final Judgment Entered in this Matter, *United States v. BMI*, 64 Civ. 3787, dated June 20, 1994 (S.D.N.Y.), at 10-11, 12; *see also Buffalo Broad. Co., Inc. v. ASCAP*, 744 F.2d 917, 925 (2d Cir. 1984) (noting the importance of license alternatives).

Not surprisingly, given the purpose of these decretal provisions, ASCAP and BMI have gone to great lengths to limit the use of such alternative licenses. *See, e.g., Buffalo Broadcasting*, ** 79-80. The relief requested here would do precisely that. If required to obtain a license from each co-owner, an ASCAP per-program licensee would be required to pay ASCAP a per-program license fee for programs for which it currently has no obligation to do so – those programs whose only music content consists of a split work for which the licensee had secured a license from a source other than ASCAP. As a result, the per-program license would become more expensive, rendering it a less viable alternative to the blanket license. Similar adverse

impact can be foreseen in relation to the efficacy of other forms of alternative licenses, including the adjustable-fee blanket license. The neutering of such license alternatives in this fashion would strike at the heart of the Decrees, not only artificially elevating the fees paid by users to the PROs, but diminishing inter-PRO competition in offering attractive alternative license options to users.

In addition, granting the requested relief would significantly disrupt the licensing for interactive digital music services. Publishers have taken the position that interactive services require mechanical licenses for the operation of their businesses. To obtain such licenses, many interactive services rely on Section 115 of the Copyright Act, whether as the source of a compulsory license or as a starting point for the negotiation of voluntary agreements.[17] The current Section 115 license grants only reproduction and distribution rights and does not grant public performance rights. As a result, for interactive services, the Section 115 license has worked in tandem with PRO blanket licenses to ensure that interactive services can efficiently secure all of the licenses they conceivably need to lawfully perform musical works.

Were the proposed modification to the licensing of split works to be implemented, the balanced relationship between the Section 115 licensing regime and the regime imposed by the Consent Decrees would be undermined. Such an abrupt change to the licensing of only one right in a complementary set of rights would enable publishers to render the Section 115 compulsory license effectively useless for interactive services, unless the services accede to the publishers' unregulated fee demands for public performance rights in any work for which the publishers own

[17] *See* U.S. Copyright Office, Report, "Copyright and the Music Marketplace," at 30-31 (2015), available at http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf. The current industry understanding is that non-interactive digital music services do not require this license.

even a fractional interest. All of this would take place under circumstances where there is ample opportunity for collusion, as the publishers who sit on ASCAP's board also enjoy antitrust immunity with respect to joint efforts in mechanical licensing under 17 U.S.C. § 115(c)(3)(B).[18]

A similar imbalance would result in relation to the Section 114 statutory license taken by noninteractive services to secure the right to publicly perform sound recordings. Here, too, an abrupt change to the licensing of only one right in a complementary set of rights would enable publishers to render the Section 114 compulsory license effectively useless, unless a Section 114 licensee acceded to the publishers' unregulated fee demands for public performance rights in any works for which the publishers own even a fractional interest. Undermining the efficacy of the Section 114 and 115 statutory licenses can hardly be seen as serving the public interest.

B. A Change to the Status Quo Would Eradicate the Transaction Cost Efficiencies of Collective Licensing

Allowing for the requested relief would dramatically increase the potential for abuses of market power and, at the same time, undermine the ability of licensees to protect themselves against such abuses by availing themselves of the alternative license types guaranteed to them by

[18] The requested modification to the licensing of split works would also have significant adverse implications for the distribution and interactive streaming of sound recordings, as it would effectively give publishers of split works the ability to block the commercialization of sound recordings embodying those musical works by withholding the performance right even where interactive streamers would be able to copy and distribute such works under the Section 115 compulsory license. For as long as musical works copyright owners have enjoyed federally recognized reproduction and distribution rights in recordings of their songs, those rights have been subject to a statutory compulsory license that allows those copyright owners to block only the initial recording of their songs. Once they "used or permitted or knowingly acquiesced in" a recorded use of a work, they had no subsequent right to block distribution of that recording or any other recordings of that work. Copyright Act of 1909, Pub. L. No. 60-349, § 1(e) 35 Stat. 1075 (1909). Congress re-affirmed its intent to deprive the owners of copyrights in compositions of a right to block the reproduction and distribution of sound recordings in 1976, 17 U.S.C. § 115; H.R. Rep 94-1476, at 107-11 (1976), and again in 1995, Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 4 (1995).

the Decrees. It would, moreover, also leave licensees in the untenable position of having to undertake what is currently the near-impossible task of identifying and transacting with every co-owner (or PRO with which those co-owners are affiliated) before performing musical works.

As noted in the comments previously submitted to the DOJ, many users do not control much of the music that they perform. Even for those users that do control the selection of most or all of the music that they perform, due to the lack of transparency of music publishing information, complete and reliable, real-time information identifying the owners of each work, and the PROs (if any) with which those copyright holders are affiliated, is not available. Accordingly, attempting to secure the necessary license coverage to avoid infringement lawsuits would include identifying, tracking down, and negotiating with all co-owners of split works. As is self-evident, without access to the necessary information, the transaction costs that a licensee would have to incur in such an undertaking would be crippling, potentially swamping the value of the performance rights licenses themselves.[19]

PROs are entities that have an antitrust lease on life that enables otherwise competing songwriters and publishers to collectively price and license performance rights in the interests of user access to musical works through an efficient, bundled "product." Such collectives should not be permitted to modify their rules of operation in a manner that would significantly reduce the value of the "new product" they offer,[20] dramatically increase transaction costs borne by

[19] These transaction costs would be further amplified should the Decrees be modified to allow for partial withdrawals – as the number of parties with which a licensee would have to negotiate could only go in one direction – up.

[20] The Supreme Court ultimately determined that the ASCAP and BMI blanket licenses do not constitute illegal price-fixing under the *per se* rule because the "substantial lowering of costs [enabled by the blanket licenses] . . . differentiates the blanket license from individual use licenses. . . . Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering

licensees, and increase the market power of publishers on whose behalf the PROs function – all of which will ultimately harm consumers by raising prices, lessening the incentives for innovation and investment, and reducing the overall number of performances of musical works. For all of these reasons, the answer to the fourth question posed by the DOJ should be "No."

5. If ASCAP and BMI were to offer licenses that do not entitle users to play partially owned works, how (if at all) would the public interest be served by modifying the Consent Decrees to permit ASCAP and BMI to accept partial grants of rights from music publishers under which the PROs can license a publisher's rights to some users but not to others?

Were the Consent Decrees modified both to allow publishers to partially withdraw from ASCAP and BMI and to require fractional share licensing by each and every co-owner of split works, the anticompetitive consequences would be enormous. Under such circumstances, the number of otherwise competing owners of copyrighted musical works – or their licensing agents – possessing hold up power would increase exponentially. To illustrate, consider an example in which there are four co-owners of a split work, three of which are ASCAP affiliates and one of which is an affiliate of GMR. Should the requested modification to the licensing of split works be granted, GMR would have significant hold-up power: if its licensing demands were not met, the licensee would be unable to perform the work lawfully despite having obtained and paid for its ASCAP blanket license. The net effect of such circumstance would be to render the user's ASCAP license (at least with respect to that work) valueless. The user's license predicament would only be compounded if, in addition, two of the three ASCAP affiliates partially withdrew

---

its blanket license, of which the individual compositions are raw material." *BMI v. CBS*, 441 U.S. at 21-22. The primary rationale provided by the Supreme Court for allowing the blanket license to exist – the substantial lowering of costs for what it characterized as a "new product" – would be severely diminished if the blanket licensee were obliged to seek out further licenses from all co-owners or face infringement liability.

from ASCAP with respect to that licensee. This would require the licensee not only to secure a license from ASCAP and GMR, but also to secure direct licenses from each of the withdrawing ASCAP affiliates. As a result, the licensee would have to negotiate with four separate entities, three of which, freed from the constraints of the ASCAP Consent Decree, could demand whatever fees they wanted. The fourth license participant, ASCAP, while remaining regulated (but still a necessary licensor in this scenario), would have nothing of real value to the user to license. It is inconceivable to Media Licensees how such a reformed music license marketplace – the only consequences of which would be rampant abuses of market power resulting in starkly higher license fees, dramatically enhanced transaction costs,[21] and magnified risks of inadvertent copyright infringement – would serve the public interest in any way.[22]

[21] Under such circumstances, not only would the transaction costs borne by licensees increase, but those borne by the PROs and publishers would increase as well. Those entities would have to track which performances are licensed by the PRO and which are licensed directly by the publisher, and the publishers would have to incur the costs associated with paying their writers for performances by licensees that they license directly. The willingness on the part of the PROs and publishers to suffer such an increase in transaction costs makes sense only if the gains from increased market power exceed the costs they would bear under such a regime.

[22] As noted above, the PROs' adoption of fractional share licensing and partial withdrawals would do nothing to diminish the market power of the PROs. Even if many publishers and songwriters were to withdraw from ASCAP and BMI, these PROs would likely still enjoy substantial market power due to the partial interests they would retain. On the other hand, because of the significant increase in publisher concentration – more accurately assessed by reference to "control shares" (see note 12) – the withdrawal of only a small number of publishers would render the PRO licenses valueless as a standalone means of acquiring the rights necessary for a licensee to operate without infringement risk. In other words, the modifications advanced – in unison – by publishers, songwriters and the PROs have nothing to do with the unilateral exploitation of property rights or the diminution of PRO market power; they would have the effect of preserving and extending collective market power.

6. What, if any, rationale is there for ASCAP and BMI to engage in joint price setting if their licenses do not provide immediate access to all of the works in their repertories?

The Media Licensees respectfully submit that there no longer would be any rationale for allowing the members and affiliates of ASCAP and BMI to continue to engage in joint price setting through those PROs if the requested relief were granted.

As discussed, the practical effect of the requested relief would be to deprive users of the intended protections of the Decrees, as a significant percentage of the musical works now licensed by ASCAP and BMI would be subject to the hold-up power of publishers not affiliated with those PROs (or of new PROs). Moreover, the efficiencies afforded users under existing PRO license arrangements, which undergird much of the historic rationale for permitting ASCAP and BMI to survive antitrust scrutiny in the first place, would be largely eliminated. Rather than providing "one-stop shopping," ASCAP and BMI each would provide only one of the many licenses that would now be required. Licensees would still be forced to incur substantial transaction costs just to secure the necessary licenses to perform works in the ASCAP and BMI repertories. These increased costs, in turn, would reduce innovation, lower output, and lead to higher prices paid by consumers – results directly at odds with the goals of antitrust law.

Perhaps more fundamentally, without the transaction cost efficiencies and the attendant protections of the Decrees, there would be scant justification for allowing collective licensing of the type engaged in by ASCAP and BMI to persist; at a minimum, significant new antitrust concerns would arise in evaluating the continuing legality of these PROs under the prevailing rule of reason analysis.

* * * *

We thank the Department for considering these comments and stand ready to supplement them as requested.

Respectfully submitted,

Dated: November 20, 2015

/s/ Kenneth L. Steinthal Kenneth L. Steinthal Joseph R. Wetzel Katherine E. Merk KING AND SPALDING LLP 101 Second Street San Francisco, CA 94105 (415) 318-1200 *Counsel for iHeartMedia, Inc., Netflix Inc., Rhapsody International Inc., and Viacom Inc.*	/s/ R. Bruce Rich R. Bruce Rich Benjamin E. Marks Todd Larson Jacob B. Ebin WEIL, GOTSHAL & MANGES LLP 767 Fifth Avenue New York, NY10153-0119 (212) 310-8000 *Counsel for the National Association of Broadcasters, the Radio Music License Committee, Inc., Sirius XM Radio, Inc., and the Television Music License Committee, LLC.*
/s/ Bruce G. Joseph Bruce G. Joseph WILEY REIN LLP 1776 K Street Washington, DC 20006 (202) 719-7000 *Counsel for the National Religious Broadcasters Music License Committee.*	/s/ Charles E. Biggio Charles E. Biggio Daniel P. Weick WILSON SONSINI GOODRICH & ROSATI PC 1301 Avenue of the Americas, 40th Floor New York, NY 10019-6022 (212) 999-5800 Susan A. Creighton Gary R. Greenstein WILSON SONSINI GOODRICH & ROSATI PC 1700 K Street NW, Fifth Floor Washington, D.C., 20006-3817 (202) 973-8800 *Counsel for Pandora Media, Inc.*
/s/ Bruce D. Sokler Bruce D. Sokler MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO 701 Pennsylvania Avenue, N.W. Washington, D.C. 20004 (202) 434-7300 *Counsel for the National Cable & Telecommunications Association.*	

National Music Publishers' Association

975 F Street NW
Suite 375
Washington, DC 20004
Tel: 202-93-NMPA (6672)

Comments by the National Music Publishers' Association
Submitted in Response to U.S. Department of Justice
Antitrust Division September 22, 2015, Solicitation of Public Comments
Regarding PRO Licensing of Jointly Owned Works

The National Music Publishers' Association ("NMPA") submits these comments on behalf of its music publisher members and the songwriters they represent who create and license the vast majority of musical compositions enjoyed by listeners in the U.S. today. As the owners and creators of music, NMPA's members are directly affected by the operation of the ASCAP and BMI Consent Decrees. For that reason, in August 2014, NMPA urged the U.S. Department of Justice (DOJ) to modify those Decrees to adapt to the music marketplace in the digital era. As currently written and interpreted, the ASCAP and BMI Decrees have become an impediment to a well-functioning market for licensing the performance of musical works, creating inefficiencies and denying songwriters and music publishers fair, market-based compensation for the use of their music. In addition, pursuant to judicial decisions in the ASCAP and BMI rate courts, individual publishers are prohibited from taking exclusive control of their right to license new media services without forfeiting their right to engage in any collective licensing at all, creating an unsupportable licensing ecosystem in the modern market. Many submissions in response to DOJ's first request for public comments on the Decrees widely acknowledged these concerns.

NMPA believes that DOJ had been prepared to make important revisions to the Decrees, which would have enabled more efficient, free-market licensing of performance rights. One of those important improvements was to give publishers the right to negotiate and license their interests in compositions with new media services directly, rather than through the PRO collectives. The purpose of the Decrees, after all, was to regulate the PROs, not to restrict the intellectual property rights of their individual members and affiliates.

DOJ's current request for comments, however, signals a potentially disastrous reversal of its position that, in addition to eliminating any prospect for competitive, free-market licensing, would wreak havoc on the market by upending decades of settled licensing practices. NMPA appreciates the opportunity to address apparent misperceptions about the way performance rights in jointly-owned works are licensed and to explain the disruption and anticompetitive consequences that would result from requiring ASCAP and BMI to license 100% of a song based on the fractional ownership of their members or affiliates. It is not an exaggeration to say that imposing such a change would "break" the market. It would have the opposite effect of the original purpose of this review by substantially disrupting the market and making it less free and less efficient.

DISCUSSION

Before turning to DOJ's specific questions, NMPA believes it is important to address certain misunderstandings that appear to underlie those questions and are fundamental to a correct

assessment of the Consent Decrees. First, DOJ's request for comments appears to assume that the licenses ASCAP and BMI issue are for more than the fractional shares of works controlled by their members and affiliates. This is mistaken. As explained in these comments, ASCAP and BMI license only the fractional rights granted to them by their members and affiliates. This interpretation is supported by decades of industry practice, extending to Pandora's recent license of fractional rights from Sony.

Second, DOJ's request for comments appears to assume that the Second Circuit in *Pandora Media, Inc. v. American Society of Composers, Authors & Publishers* [1] has already determined that the Consent Decrees as currently drafted require the PROs to issue 100% licenses based on the fractional rights controlled by their members and affiliates. But that issue was *not* decided by the Second Circuit. Its decision addressed solely the right of copyright owners to license some, but not all users, through the PROs. The Second Circuit said nothing about the issue of fractional rights licensing, nor was it necessary for the Court to do so.

In this regard, it is important to distinguish between fractional rights and partial rights licensing, which are both implicated in DOJ's fourth question. When two or more persons write a song, they each own a fraction of the song, either equally or according to what they may contract as between each other. NMPA understands "fractional rights" licensing to refer to a license for the percentage that a co-writer owns or controls in a song. "Partial rights" licensing, in contrast, refers to limitations on the nature or type of rights a licensor grants in its entire copyright interest — e.g., a grant of public performance rights to a PRO that withholds the right to license new media services.

The following is a general explanation of how fractional rights in joint works are licensed today and the disruption and harm to NMPA's members that would occur if this system were changed and ASCAP and BMI were required to issue only full-work, or 100%, licenses to a song even if their members or affiliates controlled only a fraction of the song.

Fractional Licensing of Joint Works

It is well established that copyrighted works may be, and have been, licensed on a fractional basis. As a matter of law, the U.S. Copyright Act guarantees co-owners of the copyright in a joint work the complete freedom to decide how to allocate ownership of and the rights to license the full work. [2] The U.S. Copyright Act and court decisions interpreting it permit a co-owner to license its interest in a joint work on the condition that the user also secure a license from all other co-owners before exploiting the work. Such a condition may be implied from historical trade practice and custom even in the absence of explicit language in a license agreement.[3]

---

[1] 785 F.3d 73 (2d Cir. 2015).

[2] Letter from Paul Goldstein to David Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 18, 2015).

[3] *Id.*

ASCAP and BMI (and their respective rate courts) determine royalty rates for their license agreements with music users[4] and pay their songwriters and publishers[5] expressly based on their fractional shares. NMPA is not aware of any instance in which a PRO has purported to have the ability to license shares of works not controlled by its members or affiliates, sought a royalty rate based on 100% of ownership of a work where its members or affiliates control less than 100% of the interests in the copyright, or tried to collect 100% of the royalties for a work in which its members or affiliates control less than 100% of the interests.[6] Neither ASCAP nor BMI have processes in place to account to co-owners who are not their members or affiliates. In fact, both ASCAP's rules and BMI's form affiliation agreements explicitly prohibit them from making distributions to writers affiliated with another PRO.[7]

SESAC, a PRO that competes with ASCAP and BMI and issues blanket licenses for its repertory on similar terms to ASCAP and BMI, explicitly states on its website that "Licenses with ASCAP and BMI DO NOT grant you authorization to use the copyrighted music of SESAC represented songwriters, composers and publishers."[8] SESAC recommends that, "[s]ince a license with ASCAP and/or BMI does not grant authorization to publicly perform songs in the SESAC repertory, most businesses obtain licenses with all three to obtain proper copyright clearance for virtually all of the copyrighted music in the world."[9] This demonstrates fractional rights licensing in practice.

---

[4] *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 548 n.46 (S.D.N.Y. 2010) ("DMX calculates the percentage of ASCAP music from ASCAP's royalty distribution data from the period beginning in the third quarter of 2005 and ending in the fourth quarter of 2008. This figure is '*share-weighted*,' *meaning that it accounts for the fact that certain works are only partially controlled by ASCAP*.")(emphasis added); Press Release, ASCAP, *ASCAP Adds Licensable Share Information to Promote Greater Transparency in Public Performance Rights* (November 10, 2015), available at http://www.ascap.com/press/2015/11-10-ascap-adds-licensable-share-info.aspx.

[5] *See, e.g.*, BMI Writer Affiliation Agreement, ¶6(a)(ii) ("In the case of a Work composed by you with one or more co-writers, the sum payable to you hereunder shall be a pro rata share, determined on the basis of the number of co-writers, unless you shall have transmitted to us a copy of an agreement between you and your co-writers providing for a different division of payment.") available at http://www.bmi.com/forms/affiliation/bmi_writer_kit.pdf; BMI Publisher Affiliation Agreement, ¶5(A)(3) ("In the case of Works which, or rights in which, are owned by Publisher jointly with one or more other publishers, the sum payable to Publisher under this subparagraph A shall be a pro rata share determined on the basis of the number of publishers, unless BMI shall have received from Publisher a copy of an agreement or other document signed by all of the publishers providing for a different division of payment.") available at http://www.bmi.com/forms/affiliation/bmi_publisher_kit.pdf.

[6] Letter from Donald Passman to David Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 20, 2015); Letter from Todd Brabec to Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 3, 2015).

[7] *See* ASCAP Compendium 3.4.1, 3.4.2; BMI Writer Affiliation Agreement, ¶ 9; BMI Publisher Affiliation Agreement, ¶ 8; *see also United States v. Am. Soc'y of Composers, Authors & Publishers*, Civ. No. 41-CV-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) (Second Amended Final Judgment ("AFJ2")); *United States v. Broadcast Music, Inc.*, 64 Civ. 3787, Art. V(C) (S.D.N.Y. Nov. 18, 1994) (Amended Final Judgment).

[8] SESAC, Frequently Asked Questions: General Licensing, *available at* http://www.sesac.com/Licensing/FAQsGeneral.aspx.

[9] *Id.*

Mandating 100% Licensing Would Wreak Havoc in the Marketplace

The change DOJ appears to be contemplating — interpreting or modifying the Consent Decrees to prohibit fractional licensing by ASCAP and BMI — would wreak havoc on the industry and is inconsistent with the objective of improving the Consent Decrees to bring the industry closer to an efficient, free market system. It would significantly impair the efficiency of the market for performance rights, disrupt the relationships songwriters have with each other and their respective PROs and likely result in years of litigation as the industry determines relative rights and responsibilities under the altered regime.[10] NMPA is not aware of a single countervailing public interest that could be said to justify these results. Simply put, there is no problem with the status quo of fractional rights licensing that needs to be addressed.

Most popular works are co-written,[11] with the co-writers belonging to different PROs. For example, every song in the 2014 Billboard Hot 100 list has co-owners. In total, ownership is divided among over 1,300 fractional interests, and the overwhelming majority of songs have co-owners that belong to separate PROs. ASCAP writers own fractions in eighty-two of the songs; BMI writers own fractions in seventy-two of the songs; PRS writers own fractions in twenty-four of the songs; [12] and SESAC writers own fractions in fourteen of the songs. Many such works are subject to agreements in which the songwriters agree to license only their fractional share[13] or originate from non-US jurisdictions where there is no right for a fractional owner to license the whole.[14] If DOJ were to take the position that ASCAP and BMI cannot include these works in their repertories, then immediately many works could not be licensed through ASCAP or BMI and there would be enormous confusion in the marketplace as to which songs were properly licensed. As a result, certain songs may not get played (or the illegal use of music would increase), writers and publishers would not get paid, and relative rights

---

[10] Letter from Todd Brabec to Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 3, 2015).

[11] *See* Dan Kopf, *How Many People Take Credit for Writing a Hit Song*, Priceonomics, Oct. 30, 2015, *available at* http://priceonomics.com/how-many-people-take-credit-for-writing-a-hit-song/.

[12] PRS is the United Kingdom performance rights society and, like most foreign societies, has reciprocal agreements with the U.S. PROs that allow licensing and payment here in the U.S. Foreign copyright laws do not allow for 100% licensing. Letter from Paul Goldstein to David Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 18, 2015). PRS (and other foreign societies) accordingly could not grant 100% of the rights of the songs through their agreements with ASCAP and BMI.

[13] Letter from Donald Passman to David Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 20, 2015).

[14] Letter from Paul Goldstein to David Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 18, 2015).

and responsibilities would be determined through inevitable litigation. This clearly would not serve the public interest or the goals of the Copyright Act.[15]

Several songwriters and their counsel are submitting their own comments to explain the additional, extraordinarily negative impact that requiring 100% licensing based on fractional rights would have on them going forward — by skewing their incentives to enter into profitable and successful collaborations, restricting their ability to control the exploitation of their creative output, and making it more difficult for them to ensure they are fully and timely compensated for their efforts.[16] Importantly, moreover, these effects don't matter to songwriters only. They impact everyone who benefits from the output of an unimpeded, vibrant musical community, from music services through to the listening public.

As an example, adopting such a policy would significantly disrupt songwriters' relationships with their PROs, undermining the reasons for and benefits of each songwriter's choice to join a specific PRO. PRO relationships are significant and personal to a songwriter. Each songwriter chooses a particular PRO because the songwriter believes that PRO will best represent his or her interests. The benefits of joining ASCAP, BMI, SESAC, or GMR are very different. Each has different royalty payment schedules, royalty distribution formulas, and other affiliation terms. In addition, the royalty rates paid by a user can vary by PRO — as is the case, for example, with the rates paid by music service Pandora to ASCAP and BMI.[17] But if another PRO with which a songwriter is *not* affiliated ends up licensing his or her ownership interest, then the songwriter loses all the benefits of affiliation negotiated with its chosen PRO, including even certainty that he or she will actually be paid, at least on a timely basis.

In addition, each PRO's internal systems are set up to account and make payment only to its own members or affiliates. They currently do not have the capability to ensure that non-member or non-affiliated co-writers receive payment for their interests in jointly owned works. Songwriters and publishers that are not members or affiliates of a PRO that is licensing 100% of their compositions could thus not be assured of timely payment (presuming they are paid at all) and would lose the transparency they currently have into the payment streams they can expect from their own PRO.

---

[15] Alternatively, if DOJ were actually to conclude that the PROs must issue 100% licenses regardless of the songwriters' agreements and what rights they intended to grant the PROs, then it would be disrupting those contractual licenses, exposing the songwriters and PROs to breach of contract and infringement claims and causing enormous confusion in the marketplace as to which licenses are effective, who licensees must pay, and who will pay the copyright owners.

[16] Letter from National Music Publishers' Association Songwriter Advisory Council, NMPA, to Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 20, 2015); Letter from Martin Sandberg to David Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 18, 2015); Letter from Todd Brabec to Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 3, 2015).

[17] Ben Sisario, *Ruling in Royalty Case Gives BMI a Victory Against Pandora*, *N.Y. Times*, May 14, 2015 (reporting that BMI's rate for Pandora is 2.5 percent, but ASCAP's rate for Pandora is only 1.85 percent) *available at* http://www.nytimes.com/2015/05/15/business/media/ruling-in-royalty-case-gives-bmi-a-victory-against-pandora.html?_r=0.

PROs would also have less incentive to compete for songwriters and publishers. ASCAP and BMI — and other PROs, like SESAC and GMR — currently compete to provide licensing and administrative services to songwriters and publishers. But if ASCAP and BMI could issue 100% licenses based on fractional ownership shares, they would have no incentive to obtain more than one co-writer of a given work as a member or affiliate. It would also likely be much more difficult for innovative new PROs to enter the market and offer a strong competitive alternative to ASCAP and BMI. This result would be anticompetitive and contrary to an important objective of the Consent Decrees, to enable songwriters' choice and ability to switch between and among PROs. The Consent Decrees were not intended to lock songwriters and publishers into licensing through one or two PROs.

A mandatory 100% licensing scheme would also likely undermine the creative process that gives rise to the rich diversity of music that listeners in the U.S. enjoy today by forcing songwriters to choose creative partners on other than artistic grounds. Since a user could obtain a 100% license from any co-writer's PRO, songwriters may feel compelled to restrict their collaboration with co-writers belonging to the same PRO. This is not a trivial concern given the importance of collaboration to the creation of a successful song. Most major hits today were written through a collaborative process, depending on creative relationships between specific songwriters — not based on PRO or publisher affiliation or membership. Under a 100% licensing framework, however, songwriters would be incentivized to limit their collaborations to maintain creative control and financial viability. Mandating 100% licensing would thus have a chilling effect on collaboration between songwriters that is inconsistent with the bedrock policy behind copyright of promoting "the Progress of Science and useful Arts."[18]

In sum, DOJ should focus on those changes to the Consent Decrees that will remove impediments to a well-functioning market for licensing the performance of musical works and help to ensure that songwriters and music publishers are able to achieve fair, market-based compensation for the use of their music. Requiring ASCAP and BMI to issue 100% licenses would have the opposite effect and bring a vibrant music-licensing marketplace to a grinding halt.

DOJ QUESTIONS

1. Have the licenses ASCAP and BMI historically sold to users provided the right to play all the works in each organization's respective repertory (whether wholly or partially owned)?

----

2. If the blanket licenses have not provided users the right to play the works in the repertories, what have the licenses provided?

ASCAP and BMI have historically licensed only the fractional shares of copyrights owned or controlled by their respective songwriter and music publisher members (in the case of ASCAP) and affiliates (in the case of BMI). Under the existing framework, a music user must obtain a license from

[18] *See* U.S. Const. art. I, § 8, cl. 8.

each co-owner of a copyright or their respective PROs in order to perform a work. Thus, a user that takes a blanket license from ASCAP (for example) cannot be sued for infringement by ASCAP or its songwriter and publisher members. But to perform songs in ASCAP's repertory that are co-owned by BMI affiliates (for example), a user must also take a license from BMI or license directly with a publisher or publishers, which users have historically done.[19] NMPA understands that virtually all users have historically taken licenses from each PRO. This system of fractional licensing is consistent with how all music markets work, from synchronization rights to lyric rights to performance rights. Fractional licensing is also consistent with how music is licensed in Europe, and is indeed the worldwide norm.[20]

ASCAP and BMI accordingly negotiate royalties based on "market shares" accounting for the fractional interests of their members and affiliates.[21] Licensees pay each PRO separately for those interests, and publishers and writers are separately paid by their respective PROs based on the ownership interest in the compositions affiliated with each PRO. To NMPA's knowledge, no PRO has ever sought or been paid royalties for 100% of a song as to which it controls less than 100% of the interests, and no PRO has a process to account for royalties to non-members or non-affiliates who co-own a work.

The terms of the ASCAP and BMI license agreements are not inconsistent with fractional licensing. As DOJ has noted, ASCAP's Business Blanket License provides that ASCAP grants the user a license to perform publicly all musical works in the ASCAP repertory that ASCAP has the right to license.[22] It is reasonable to interpret this language on its face as purporting to license only the copyright interest owned by ASCAP's members, especially given the industry practice of fractional licensing. According to Prof. Paul Goldstein (author of the highly-respected *Goldstein on Copyright*), courts in this instance could reasonably define the scope of these licenses by reference to the pricing

[19] Again, SESAC explicitly represents that "Licenses with ASCAP and BMI DO NOT grant you authorization to use the copyrighted music of SESAC represented songwriters, composers and publishers," and that users must obtain a SESAC license to perform music in the SESAC repertory. SESAC, Frequently Asked Questions: General Licensing, *available at* http://www.sesac.com/Licensing/FAQsGeneral.aspx.

[20] Letter from Paul Goldstein to David Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 18, 2015).

[21] To illustrate how this has worked, assume as a simplified example, ASCAP has 10,000 songs in its repertory of which its members hold 75% of the interests (the remaining 25% is held by BMI members). ASCAP's royalty rate is 4% of the user's revenues from playing the songs, which is $1 million. The user pays ASCAP 1,000,000 x 0.04 x 0.75, or $30,000, and ASCAP distributes the royalties to its members according to its contractual arrangement with them. It does not pay anything to BMI or writers belonging to BMI. In contrast, if ASCAP were required to issue 100% licenses even on songs to which it represents a fractional interest, it would collect 1,000,000 x 0.04, or $40,000. Someone, ASCAP or its members, would have to pay $10,000 to co-owners, which may be less than those co-owners would have received from BMI based on its royalty rate and its arrangements with its members.

[22] *See* ASCAP's Music In Business, Blanket License Agreement, ¶ 1(a) ("SOCIETY grants . . . a license to perform . . .the separate musical compositions now or hereafter during the term of this Agreement in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights"); *see also* ASCAP's 2010 Radio Station License Agreement, January 1, 2010-December 31, 2016.

and distribution practices of the PROs and arrangements among musical works owners.[23] Moreover, it is fundamental that a copyright licensor cannot license more than the rights it has been granted. This applies with equal force to the PROs.

A recently announced license agreement between Pandora and Sony/ATV demonstrates this long-established practice of users obtaining fractional licenses. According to public reports, that license covers only Sony's shares in compositions it owns or administers, showing that licensees understand this fractional licensing reality. By its actions, Pandora appears to recognize that in addition to obtaining a license from one fractional co-owner, in this case represented by Sony/ATV, it must also obtain separate licenses from the co-owners (or their PROs) for the fractional interests in songs not represented by the first fractional co-owner.[24]

3. Have there been instances in which a user who entered a license with only one PRO, intending to publicly perform only that PRO's works, was subject to a copyright infringement action by another PRO or rightsholder?

NMPA is not aware of any such infringement actions, which is not surprising given that users routinely take blanket licenses from multiple PROs in order to avoid infringement.

But that would change if DOJ were to permit, or even further require, ASCAP and BMI to issue whole-work licenses based on the fractional interests of their songwriter members. As explained above, this would be a total departure from current practice, pursuant to which the PROs have licensed split works on a fractional basis. This long-time industry practice of fractionally licensing split works has reduced the risk of infringement and eliminated friction between and among collaborating songwriters with respect to the terms of licensing and the need for accounting. Forcing a change to this practice would introduce a tremendous amount of uncertainty and disruption in the marketplace and would very likely result in significant litigation among all stakeholders with respect to infringement, failure to account, and the sufficiency of licensing terms. Under the existing regime, such litigation has simply not occurred.

---

[23] Letter from Paul Goldstein to David Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 18, 2015).

[24] *Sony/ATV CEO Martin Bandier Says Pandora Deal Will Bring "Significant" Bump in Royalties*, Nov. 10, 2015, Billboard, available at http://www.billboard.com/articles/business/6760578/sonyatv-martin-bandier-letter-pandora-deal.

4. Assuming the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, should the Consent Decrees be modified to permit or require ASCAP and BMI to offer licenses that require users to obtain licenses from all joint owners of a work?

As an initial matter, NMPA rejects the premise of this question. The Consent Decrees do not by their terms prohibit fractional licensing[25] and, as discussed above, the Second Circuit in *Pandora Media* did not address the issue of fractional licensing. The legal issue addressed by the Second Circuit regarding the partial withdrawal of rights by copyright owners had nothing to do with the question whether PROs can or must license more than the fractional share of a copyright owned by its members or affiliates. The sole issue before the Second Circuit (and Judges Cote and Stanton) was whether a copyright owner could limit the users to which a PRO could license its catalogue if its catalogue were within the PRO repertoire for other purposes. Judge Cote ruled that if a copyright owner granted ASCAP the right to license any users, it granted ASCAP the right to license all users,[26] and the Second Circuit affirmed her decision.[27] Judge Stanton held that if a copyright owner withdrew any right to license any users, it withdrew the rights to license all users.[28] No court said anything at all about, or was asked to address, whether an owner of a fractional interest in a copyright could or must authorize its PRO to license the interests of co-owners not belonging to or affiliated with the PRO.

Moreover, in general, music publishers and songwriters have not understood the Consent Decrees to require 100% licensing by ASCAP or BMI or, where there are co-writers, that their grant of rights to ASCAP or BMI would cover the entire work. This premise is flatly inconsistent with how the market has worked for decades.

In this regard, it is also critically important to recognize that the Consent Decrees do not create any rights in the PROs that do not already exist, nor purport to alter the property rights and privileges of the owners of copyrights. Indeed, NMPA does not believe the Consent Decrees could be interpreted to override the rights afforded to copyright owners under U.S. copyright law.

The U.S. Copyright Act guarantees co-owners of the copyright in a joint work the complete freedom to agree on how to allocate and license their interests in the work. They are legally entitled to agree that no co-owner may grant even a non-exclusive license to perform the co-owned work without

---

[25] Indeed, to the contrary, it could be argued by reference to Section XI.B(3) of the ASCAP Consent Decree that the Consent Decrees actually do recognize fractional licensing. This section, which NMPA believes was intended to preserve the ability of copyright owners to withdraw from a PRO, provides that if a joint work continues to be licensed by ASCAP by virtue of the continued membership of a co-owner, the withdrawing member can continue to be compensated by ASCAP so long as he or she has not licensed the work to another PRO. This provision only makes sense in a world of fractional licenses. *See* AFJ2, § XI.B(3).

[26] *In re Pandora Media, Inc.*, No. 12-Civ.-8035, slip op. at 19 (S.D.N.Y. Sept. 17, 2013).

[27] *Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 785 F.3d 73, 77–78 (2d Cir. 2015).

[28] *Broadcast Music, Inc. v. Pandora Media, Inc.*, No. 13-Civ.-3787, slip op. at 9-13 (S.D.N.Y. Dec. 19, 2013).

the assent of all co-owners.[29] With such an agreement, a licensee's public performance of a musical work without the consent of all co-owners under a license that is fractional rather than 100% would infringe the copyright in the work.[30]

Assuming that DOJ nevertheless believes there to be any uncertainty, however, then modifying the Consent Decrees to permit users to obtain licenses from all joint owners of a work is consistent with industry practice. While licensing from all joint owners has not been an explicit requirement under the Consent Decrees, it is to an extent self-enforcing: by operation of U.S. copyright law, music users have been required to reach license agreements with all PROs to ensure the widest availability of music on their service or in their establishment. Changing that system through the Consent Decrees would result in unwarranted confusion, inefficient licensing practices and significant creative disruption.

5. If ASCAP and BMI were to offer licenses that do not entitle users to play partially owned works, how (if at all) would the public interest be served by modifying the Consent Decrees to permit ASCAP and BMI to accept partial grants of rights from music publishers under which the PROs can license a publisher's rights to some users but not to others?

As a preliminary matter, it is important to distinguish between the licensing of a copyright owner's fractional interest in a joint work and a partial grant of those rights limiting who can be licensed. As explained above, ASCAP and BMI today license the fractional ownerships of their members and affiliates. For decades the music industry has worked under the legal and economic framework of fractional rights licensing, under which users have obtained all necessary permissions from each fractional owner. Users have routinely obtained blanket licenses from ASCAP, BMI and other PROs (such as SESAC) and licensed rights directly from songwriters and music publishers. Music has been played, song owners paid, and the public interest served by an efficient system of contracting that has honored the intellectual property of songwriters while enabling wide access to music.

Not allowing ASCAP and BMI to continue to accept fractional grants of rights from songwriters and their publishers would be against the public interest. It would devastate the industry by calling into question the enforceability of existing licenses, disrupting creative relationships between and among songwriters, undermining the legal right of co-writers to determine how to license their compositions, imposing significant additional transactional and administrative costs on licensors and licensees, and spurring litigation between and among stakeholders — all without any apparent counterbalancing benefit.

DOJ has further asked whether allowing PROs to "license a publisher's rights to some users but not others" is in the public interest. NMPA understands DOJ's question to refer to circumstances in which a music publisher withholds certain rights from its grant of rights to a PRO, such as the public performance of certain new media transmissions. And the answer is that yes, it is in the public interest.

[29] Letter from Paul Goldstein to David Kully, Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 18, 2015).

[30] *Id.*

Direct licensing is the default rule under antitrust principles. The Consent Decrees were not intended to compel copyright owners to license collectively. Banning direct, bilateral negotiation and forcing publishers to license collectively for all purposes is inconsistent with the original purpose of the Consent Decrees, sound antitrust policy, and the principle of free markets. In fact, publishers already engage in direct, bilateral market negotiations with digital services and other licensees for a number of other licensed rights, including synchronization and lyrics. Only the market for performance rights is constrained by the Consent Decrees.

Allowing publishers to withdraw rights vis-à-vis new media, would allow for more efficient, market-driven pricing, which is clearly in the public interest. The benefits of direct licensing include (i) providing more flexibility in setting license terms to meet the licensee's specific needs; (ii) fostering the development of new sources of music distribution; (iii) licensing services more quickly; (iv) reducing administrative costs; (v) providing better administrative solutions; (vi) reducing the cost and uncertainty of rate disputes; and (vii) increasing competition among publishers to sign writers. These benefits accrue to the market broadly and to all of its participants — songwriters, publishers, music services and music users.

Based on public reports, the recent Pandora-Sony/ATV agreement evinces many of these benefits. Industry press called it a "rare win-win for the music industry," where "the two sides . . . both came away with things they wanted."[31] Sony/ATV CEO Martin Bandier said in a letter to songwriters that it "will result in a significant increase in the royalties that you will receive," and songwriters will be paid directly based on fractional share.[32] Pandora noted that the deal gave it the ability "to add new flexibility to the company's product offering over time" and may well pave the way for international expansion.[33]

As NMPA explained in its comments submitted in August 2014, collective licensing through the PROs developed as a market-based solution to the inefficiencies and high transaction costs associated with licensing performance rights to thousands of dispersed music users that inhibited the broad legal use of music. But such collective licensing is unnecessary where licensing transactions do not involve the same high transactions costs, as when publishers negotiate directly with large, centralized music users like on-line streaming services. Even small publishers, with adequate technology, can efficiently engage in direct licensing with such users. Doing so would potentially reduce administrative fees and would allow the publishers to bundle performance rights licenses with other types of licenses and enter into unique deals with certain users that benefit both parties and consumers of music.

---

[31] Glenn Peoples and Ed Christman, *The Pandora-Sony/ATV Deal: What It Means, Who Wins,* Nov. 13, 2015, Billboard, *available at* http://www.billboard.com/articles/business/6762423/the-pandora-sonyatv-deal-what-it-means-who-wins.

[32] *Sony/ATV CEO Martin Bandier Says Pandora Deal Will Bring "Significant" Bump in Royalties*, Nov. 10, 2015, Billboard, *available at* http://www.billboard.com/articles/business/6760578/sonyatv-martin-bandier-letter-pandora-deal.

[33] Pandora, Press Release, Nov. 5, 2015, http://press.pandora.com/phoenix.zhtml?c=251764&p=irol-newsArticle&ID=2107353.

6. What, if any, rationale is there for ASCAP and BMI to engage in joint price setting if their licenses do not provide immediate access to all of the works in their repertories?

As explained in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979)("*BMI*"), ASCAP was formed because "those who perform copyrighted music for profit were so numerous and widespread, and performances so fleeting," that it was practically impossible for the many individual copyright owners to negotiate with and license all users and detect unauthorized use.[34] ASCAP was organized, the Supreme Court noted, as a "clearing house" for copyright owners and users to address these issues and help ensure that music is performed and composers paid. BMI was created for the same purpose.[35]

Implicit in DOJ's question is an assumption that the inclusion of fractional interests in a blanket license negates these benefits and makes the blanket license anticompetitive and illegal. However, nothing in the reasoning of *BMI* supports such an analysis. The inclusion of fractional rights does not change the purpose or nature of these blanket licenses, which aggregate rights that otherwise would have to be separately identified and licensed. Speaking for the Court, Justice White wrote: "The blanket license, as we see it, is not a 'naked restrain[t]' of trade with no purpose except stifling of competition, but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use."[36]

Justice White explained:

> ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, . . . the costs are prohibitive for licenses with individual radios stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose.[37]

This aggregation is valuable even when a user desiring indemnified access to songs co-owned by writers separately affiliated with ASCAP, BMI and/or another licensing entity may need to obtain more than a single license. Obtaining two, three or four licenses, for example, is still significantly less costly than obtaining hundreds or thousands of licenses.

Even for television network licenses, where the Court believed the need for and advantages of a blanket license might be "far less obvious," it found that the PROs "reduce costs absolutely by creating a

[34] 441 U.S. at 2.

[35] *Id*. at 4.

[36] *Id*. at 20.

[37] *Id.*

blanket license that is sold only a few, instead of thousands, of times and that obviates the need for closely monitoring the networks to see that they do not use more than the pay for."[38] ASCAP and BMI provide resources needed for blanket sales and enforcement that most writers and many music publishers do not themselves possess. "[A] bulk license of some type is a necessary consequence if the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established."[39]

This substantial lowering of costs also "differentiates the blanket license from individual use licenses."[40] The blanket license is to some extent a different product from what any individual copyright owner could issue, comprising both the individual composition rights and the aggregating service.[41] As the Court noted, "[m]any consumers clearly prefer the characteristics and cost advantages of this marketable package, and even small performing-rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses."[42] Indeed, to the extent the blanket license is a different product, ASCAP and BMI are not really joint sales agencies offering the individual goods of many sellers, but are separate sellers offering blanket licenses, of which the individual composition rights are the raw material.[43]

[38] *Id.*

[39] *Id.* at 21.

[40] *Id.* at 22.

[41] *Id.* at 22-23.

[42] *Id.* at 23.

[43] *Id.*

17 Cardozo J. Conflict Resol. 595

Cardozo Journal of Conflict Resolution
Winter 2016

Notes

UNLOCK THE MUSIC: REPLACING COMPULSORY MUSIC LICENSES WITH FREE MARKET NEGOTIATION

Karen (Kai-Wen) Hsieh [a1]

I. INTRODUCTION

Underneath the glamour of top-selling hits, legendary rock bands, and sold-out live concerts is an indispensable system of music licensing. Ranging from an indie songwriter to a major film studio, music licensing connects all the players of the music and entertainment industry. Music licenses are crucial to the music industry because they enable the distribution, recording, and performance of song compositions. For example, record labels need to obtain mechanical licenses from songwriters or publishers in order to produce and distribute records to the public. [1] Similarly, music users--radio stations, online streaming services, restaurants, and concert venues--must acquire performing rights licenses to play and/or perform top forty hits or any music not within the public domain. [2] Sync licenses permit film studios and advertising agencies to incorporate music into audiovisual works, such as movies, television shows, and commercials. [3] Despite the importance of licensing, two of the music industry's most important licenses--the mechanical license and the performing rights license--stay stagnant as compulsory licenses, [4] thereby depriving copyright holders the full value of their song compositions and robbing them of the control they should have over their creations. [5]

***596** On March 17, 2014, in its effort to evaluate the music licensing environment, Congress published a Notice of Inquiry (“Notice”), soliciting comments on the current methods of licensing. [6] Included in this Notice are inquiries on the effectiveness of the mechanical and performing rights licenses. [7] The Notice garnered eighty-five comments from a diverse group of music professionals and companies, including performing rights organizations, record labels, songwriters, publishers, and online radio and streaming services. [8] After the Notice's publication and the submission of the comments, two Congressional hearings took place on June 10 and June 25, 2014 to consider the reform on U.S. copyright law; [9] Congress also held three public roundtables on music licensing issues in Nashville, Los Angeles, and New York in June. [10] Following Congress' footsteps in evaluating the music licensing sector, the Department of Justice (“DOJ”) opened review of the decades old consent decrees that currently compel two major performing rights organizations, ASCAP and BMI, to issue licenses to every music user upon request. [11]

Congress's inquiry into the effectiveness of licensing practices puts the term “free market negotiation” in the spotlight. [12] During the Congressional hearings, “[r]epresentatives for songwriters, music publishers, performers and producers expressed their desire for royalty rates that result from, or approximate, free market

negotiations" [13] --in other words, the royalty rates agreed upon by a willing buyer and a willing seller. [14] One of the witnesses, David Israelite, the president and CEO of the National Music Publishers Association ("NMPA"), asserted that the current standard employed to set royalty rates pays rights owners far below the fair market value. [15] On the other hand, there were individuals, such as Lee Knife, Executive Director of the Digital Music Association, who warned against free market negotiation, arguing that the interests of copyright ***597** owners should be balanced with the interests of music licensees. [16] Rep. Zoe Lofgren implied that free market negotiation would create an unworkable system where both online streaming services and rights owners do not get paid. [17]

Therefore, the issue that music professionals, Congress, and the DOJ want to resolve is whether free market negotiation should replace the compulsory mechanical and performing right licenses in order to establish fairness and efficiency within the music licensing sector. To understand the impact that compulsory licenses have on the music industry, Section II of this Note focuses on the three major licenses for music compositions--the mechanical license, the performing rights license, and the sync license. Section III discusses why compulsory licenses no longer benefit the music industry and why free market negotiation is the superior approach. This section will also address the potential problems arising from free market negotiation, such as the power imbalance in negotiations between major record labels and new artists. Finally, Section IV proposes online mediation to remedy the difficulties that may occur due to unrestricted private negotiation.

II. OVERVIEW OF THE MUSIC INDUSTRY'S MAJOR MUSIC LICENSES

A. *The Mechanical License*

Mechanical licenses enable licensees, such as record labels, to reproduce and distribute copyrighted music compositions. [18] Section 115(a) of the Copyright Act provides the following the rule:

> When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. [19]

Therefore, after a songwriter's composition has first been recorded and distributed, any subsequent individual may record and distribute ***598** the same composition even if it goes against the copyright holder's intent on how he or she wants the music to be used.

Currently, for physical and permanent digital downloads, the statutory rate for the compulsory mechanical license is $0.91 per track for song compositions five minutes or less and $0.0175 per minute for compositions longer than five minutes. [20] The Copyright Royalty Board ("CRB"), which consists of three copyright royalty judges, is in charge of setting the statutory rate. [21] Out of the three copyright royalty judges, § 802(a) requires only one judge to have "significant knowledge of copyright law." [22] To determine the rate, the CRB considers the following objectives: "to maximize availability of song uses; to afford a fair return to the copyright owner and a fair income to the song user that reflect the roles of each; and to minimize the disruptive impact on the structure of the industries involved" [23] --there is no requirement to consider evidence related to fair market negotiation.

Congress enacted the statutory rate following the 1908 Supreme Court case, *White-Smith Music Pub. Co. v. Apollo Co.*, where the Court ruled that the unconsented reproduction of a music composition through a mechanical piano player did not constitute copyright infringement, reasoning that since only the piano player--and not humans--could read the perforated roll, the reproduction was not a "copy" within the meaning of the Copyright Act. [24] In response to the ruling, Congress in 1909 amended the Copyright Act, expanding copyright protection to include mechanical reproduction and also introducing the compulsory mechanical license. [25] The enactment of the compulsory license was Congress's effort to keep a player piano roll company, the Aeolian Company, from monopolizing the market. [26]

***599** Today, more than a hundred years later, the compulsory mechanical license is still in effect, with the statutory rate having increased only 7.1 cents from two cents [27] to 9.1 cents. [28] For songwriters, royalties are "dictated" by the Copyright Act, whereas recording artists have the freedom to negotiate the royalties for their performances of the music compositions. [29] According to Israelite, "[r]oughly two-thirds of a songwriter's income is heavily regulated by law or through outdated government oversight[, which] results in devalued intellectual property rights . . ." [30] The compulsory mechanical license therefore prevents songwriters and music publishers from obtaining rates that reflect the free market value. [31]

B. *Performing Rights License*

Section 106 of the Copyright Act provides that a copyright owner has the exclusive right to "perform [and display] the copyrighted work publicly." [32] Performing "in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" is a public performance subject to the Act. [33] Additionally, transmitting "by means of any device" to the public is a public performance or display, "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." [34] Thus, music users, such as radio stations, concert venues, television networks, and restaurants, need to obtain performing right licenses (usually from performing rights organizations) in order to play or perform music. [35]

Currently in the United States, there are three major performing rights organizations ("PROs") for songwriters and publishers-- ***600** ASCAP, BMI, and SESAC. [36] The PROs collect and distribute performing right royalties to their songwriter and publisher members. [37] Instead of issuing licenses on a song-by-song basis, PROs usually offer music users blanket licenses that cover all of the music in their repertoires. [38] In 1941, as a result of an investigation of antitrust violations, the Department of Justice ("DOJ") established consent decrees for ASCAP and BMI, limiting the two PROs' licensing practices. [39]

While there is no statutory compulsory license for performing rights, the consent decrees require ASCAP and BMI to "provide a license to any person who seeks to perform copyrighted musical works publicly, [and to] offer the same terms to similarly situated licensees." [40] Moreover, if the PROs and licensees are unable to reach an agreement on the royalty fee, they need to bring their issue to the rate court, which will dictate the fees for them; an interim fee supplements the actual fee during the rate court process. [41] Last revised in 1994 (BMI) and 2001 (ASCAP), both consent decrees were "amended before the proliferation of digital music," thus prompting music publishers, songwriters, and PROs to urge the DOJ to eliminate the consent decrees. [42] Currently, the Department

of Justice is considering making major changes to the consent decrees, such as allowing music publishers to establish direct deals for digital licenses while letting ASCAP and BMI continue administering royalty payments to songwriters or with respect to other licenses. [43] The rate courts have prohibited such practice, ruling that publishers cannot partially withdraw-- they ***601** need to either stay with the PROs or completely withdraw their catalog from the PROs. [44]

Being two of the three PROs in the United States, ASCAP and BMI account for many, if not most, songwriters' performing rights. [45] Consequently, the consent decree directly affects the income of the copyright holders, similar to how the compulsory mechanical license affects songwriters, composers, lyricists, and publishers.

C. *Synchronization License*

To use a song in a film, television show, commercial, or any audiovisual works, the music user (for example, an advertising agency or a film studio) must obtain (1) a synchronization license ("sync license") from the songwriter or publisher and (2) a master use license from the recorded music's owner, such as a record label. [46] Unlike mechanical licenses and performing right licenses, the music publisher or songwriter directly issues sync licenses to the music user. [47]

Sync licenses are negotiated freely between the licensor and licensee, which, according to David Israelite, makes sync licenses the category with the "most free market success." [48] While there are some programs, such as Rumblefish, that permit songwriters to put their music in a pre-cleared catalog for music users to license, [49] songwriters and publishers ultimately have control over the use of their music. If the songwriter or publisher decides to issue a license directly, a variety of factors will determine the fee, such as the music placement (for example, background or on-screen performance), ***602** the length used, the popularity of the song, and the type of audiovisual work. [50]

Currently, sync licensing is one of the main vehicles that generate income and exposure for songwriters. [51] While artists from earlier generations saw licensing their music to brands and advertisements as selling out, [52] many artists today, such as Ingrid Michaelson, perceive sync licensing as an opportunity to expose their music to a wider audience and to increase income. [53]

III. THE NEED FOR FREE MARKET NEGOTIATION

A. *Why Compulsory Licenses Do Not Work Anymore*

In 1908, Congress created the compulsory mechanical license to prevent the Aeolian Company (a company that no longer exists) from having a monopoly over the player piano roll market. [54] Similarly, due to the fear of monopolies, the DOJ bound ASCAP and BMI to consent decrees in order to prevent monopolistic behavior in the market for performing rights licenses. [55] While the compulsory mechanical license and the consent decree might have addressed the government's fear of monopolies more than half a ***603** century ago, they do not have the same effect in today's environment. [56] MaryBeth Peters, the former Register of Copyrights, in her statement on music licensing reform makes the following comment:

> At its inception, the compulsory license facilitated the availability of music to the listening public. However, the evolution of technology and business practices has eroded the effectiveness of this provision. Despite several attempts to amend the compulsory license and the Copyright Office's corresponding regulations in order to keep pace with advancements in the music industry, the use of the Section 115 compulsory license has steadily declined to an almost non-existent level. It primarily serves today as merely a ceiling for the royalty rate in privately negotiated licenses. [57]

As MaryBeth Peters implies in her statement, compulsory licenses do not serve their original purpose of making music available to the public. Instead, they adversely impact the music industry by burdening music composers and copyright holders for the following reasons: (1) Compulsory licenses deliver to copyright owners a substandard licensing rate that does not reflect the fair market value of song compositions, [58] and (2) they deny music composers, lyricists, and publishers the choice of how they want their compositions to be used. [59] Because of the negative impact compulsory licenses have on the songwriting industry, numerous music professionals perceive free market negotiation as the better alternative. [60] In the discussion below, this Note will address why compulsory ***604** licenses for song compositions should be removed from the music industry and be replaced by free market negotiation.

1. Compulsory Licenses Create Inefficiency

Compulsory licenses prevent rights holders from fully reaping the true value of their work. Set at 9.1 cents today, [61] the compulsory mechanical license does not reflect a music composition's market value, nor does it reflect inflation and other economic factors. The rate has not changed since January 2006. [62] Furthermore, the value of the rate first set in 1909 (two cents) would roughly be the equivalent of fifty-one cents today, [63] which is far greater than today's rate.

According to David Israelite of the NMPA, the songwriting industry sustained an enormous loss in revenue because of the compulsory licenses: “[c]urrently the U.S. songwriting industry is worth roughly $2.2 billion; however, over $2.3 billion is lost due to unjust government regulations.” [64] In the event that ASCAP or BMI reaches a negotiation stalemate with its potential licensee and thus goes to rate court to establish the license fee, the court is not required to consider “all relevant evidence when determining songwriter compensation,” which explains why the rates for performing rights licenses do not reflect their market value. [65] Similarly for mechanical licenses, the CRB is not required to consider the fair market value when setting a rate, which results in the arguably arbitrary rate of 9.1 cents. [66]

***605** i. The Inefficiency of Compulsory Performing Rights License

While ASCAP and BMI (hereinafter, also referred to as “PRO(s)”) may from the outset negotiate with potential music users on the license fees, the consent decrees limit their ability to pursue the song compositions' true value that results from unrestricted negotiation. Due to the requirement of compulsory licenses, PROs are still obligated to license their repertoire if they and their potential licensees have trouble reaching an agreement on the fee. [67] During the time the PRO or rate court determines what the license fee should be, a licensee can start using music as

an applicant or as an interim licensee. [68] Because the license fees are set retroactively, licensees may "strategically dela[y] or exten[d] the negotiation process" by withholding adequate information on the use of the music, thus preventing the PRO from coming up with a fair market price for both parties. [69] In that case, the licensee can start using the music without paying the PRO, which ultimately leads to nonpayment to the songwriter or publisher. Additionally, by failing to provide adequate information on the use, the licensee may choose to stay as an interim licensee until the PRO finally decides to go through a lengthy and expensive rate court proceeding. [70]

The PRO is stuck between a rock and a hard place. Unable to get adequate information from the licensee regarding the use, the PRO can only provide an interim license that is likely below the compositions' market value. In a recent report, the U.S. Copyright Office summarizes the inefficiency arising from consent decrees:

> Since the consent decrees do not provide for immediate and concurrent payment for uses made during these periods--and do not establish a timeframe for the commencement of a rate court proceeding--an applicant is able to publicly perform a ***606** PRO's catalog of works for an indefinite period without paying. [71]

Consequently, the songwriter and publisher members are denied the market value of their compositions--they receive instead what may only be a thin slice of the total potential revenue. Because the rate court is not allowed to use all relevant evidence to establish the license fee or rate (for example, the rate for the public performance of a *sound recording*, determined by a willing buyer and willing seller, is relevant evidence that the court is not permitted to use), [72] it is unlikely that the court can find a fee or rate that reflects the market value.

Because of the consent decrees, fees or rates determined by the rate courts stray significantly from those privately negotiated between a willing buyer and willing seller; the consent decrees thus deny creators fair compensation for the use of their work and "[harm] the very songwriters [the consent decrees] were designed to protect." [73] According to entertainment lawyer Dina LaPolt's comment for the Music Licensing Study, because rate courts are not allowed to use "relevant market data as evidence when setting rates[[,] . . . the compulsory royalty rates for streaming musical compositions is one twelfth of the royalty rates paid to record labels for the same exact uses." [74] Unlike ASCAP and BMI, SoundExchange, a digital performance rights organization for sound recordings, [75] is allowed to negotiate with the licensee on a rate that best reflects the market value of sound recordings, which the Copyright Royalty Board may adopt and implement for other similarly situated cases. [76] To be able to negotiate a rate creates significantly different results for SoundExchange, even though it provides, with regard to digital performance rights, essentially the same services as ASCAP and BMI. [77]

PROs under the consent decrees will also need to account for the high costs and time lost due to the rate court procedure, [78] ***607** which ultimately counteracts the court-established rate. Moreover, as explained by LaPolt in her comment, rate courts produce inconsistent results that confuse songwriters and publishers, further adding to the inefficiency created by consent decrees: "[H]aving separate rate courts for both ASCAP and BMI is creating even more confusion among songwriters and publishers. Nothing obligates the rate courts to reach similar results on rate-setting or other issues. This could lead to vastly different treatment of two songwriters of the exact same composition if those writers are affiliated with different PROs." [79] In May 2015, BMI successfully obtained a higher rate from Pandora-- the rate court ruled that Pandora should pay 2.5 percent of its revenue to BMI, which was significantly higher than the 1.85 percent that another rate court gave ASCAP. [80] Both of these rates apply

to Pandora with regard to performing rights licenses-- however, because of the different rate court judges, there are now two distinct rates. As predicted by LaPolt, two songwriters--one of whom is affiliated with ASCAP and the other with BMI--will now receive different payments with respect to the same song.

Because of the compulsory license, ASCAP and BMI--together representing over ninety percent of the U.S. market share for performing rights [81] --are unable to collect royalties that fully compensate rights holders for their works. The consent decrees therefore greatly burden ASCAP, BMI, and their members because they leave the PROs with two bad choices: (1) license their repertoire and collect royalties for songwriters and publishers at a substandard rate due to the interim license, or (2) receive a potentially higher, yet still substandard (as evidence reflecting the fair market value cannot be used) rate after going through a time-consuming and costly rate court proceeding.

ii. The Inefficiency of the Compulsory Mechanical License

Similar to consent decrees, the compulsory mechanical license prevents rights holders from capturing the true value of their song compositions. As previously mentioned in Section II, the CRB is in charge of setting the statutory rate. However, only one judge ***608** out of the three is required to have "significant knowledge of copyright law." [82] Additionally, there is no requirement to consider evidence of the market value of mechanical rates. [83] Because the Copyright Act does not require these judges to have expertise in the music industry, the CRB is not in the best position to determine the fate of hundreds of thousands of songwriters, publishers, copyright holders, and music users. A statutory rate of 9.1 cents that has not changed since 2006 [84] does not account for inflation, technological advances (for example, music streaming services), [85] the surge in popularity of television musicals, [86] and the increase of YouTube covers, which artists depend on as another source of income. [87] These factors drastically increased the demand of mechanical licenses throughout the years, which, in a competitive market, would drive the rate up. However, the rate stays stagnant, depriving songwriters and copyright holders the real value of their compositions.

Even though a licensor and licensee may negotiate privately on the mechanical rate, [88] the rate will never exceed 9.1 cents because of the price ceiling imposed by the government. While the statutory rate initially "facilitated the availability to the listening public," the "evolution of technology and business practices has eroded the effectiveness of [Section 115 of the Copyright Act]." [89] According to Marybeth Peters, the former Register of Copyrights, "the use of the Section 115 compulsory license has steadily declined to an almost non-existent level. It primarily serves today as merely a ceiling for the royalty rate in privately negotiated licenses." [90] For example, the Harry Fox Agency ("HFA") issues ***609** mechanical licenses on behalf of songwriters and publishers. [91] Although the licenses HFA issues are not the compulsory licenses established in the Copyright Act, [92] the rate used for the mechanical license is the same as the statutory rate, [93] since licensees can easily obtain the compulsory license if mechanical licenses with rates higher than 9.1 cents are offered instead.

Moreover, a licensee may use the compulsory license as a vehicle to privately negotiate for a lower rate: "[the] current rate-setting system risks the possibility of an even lower royalty rate, which would severely harm American songwriters. Recording companies and online retailers have tried to exploit this in the past, such as in 2008, when Apple argued for a four cent rate for digital downloads." [94] This exploitation is exemplified in the standard recording agreement between record labels and singer-songwriters. Because of the statutory rate, most record labels successfully negotiate to pay mechanical royalties at a lower rate to recording artists who own or co-own the

music compositions. [95] The common practice is for record labels to instill a controlled composition clause into the recording agreement, which generally provides that the record label pay at a "75% rate (specifically, 6.82¢, which is three-quarters of the 9.1¢ full statutory rate) for all controlled compositions [or, in other words, compositions owned by the recording artist]." [96] Due to new artists' lack of leverage and bargaining power, the controlled composition clause provides no room for negotiation--the artists have to take it as it is or leave it. [97] As the controlled composition clause in artist agreements further reduces the already low mechanical rate for songwriters, "[m]any recording artists and songwriters universally condemn the controlled composition clause [because] its application, in almost all instances significantly lowers the economic benefit to the singer/songwriter." [98]

***610** 2. Compulsory Licenses Create Inequity

In addition to inefficiency, another reason why compulsory licenses should not be used in the music industry is that they rob songwriters and publishers of the control over their works. Mechanical and performing rights are two of the most important rights in the music industry because they protect song composers and lyricists, who make up the foundation of the industry. Without song composers and lyricists, the industry would be completely void of music to record, distribute, and perform.

Wisely stated by Alfred Schweitzer and quoted by Justice Arabian in the famous case *Nahrstedt v. Lakeside Village Condo. Ass'n., Inc.*, "[t]here are two means of refuge from the misery of life: music and cats." [99] It is therefore crucial that songwriters have the incentive to compose music. As music compositions are "nonrivalrous" goods, where "[o]ne party's use of the good does not interfere with another party's use," copyright law necessarily gives "incentives to creators and publishers and thereby prevents underproduction of creative works." [100] While copyright law aims to incentivize creators to produce creative works, compulsory licenses diminish a songwriter's incentive to compose by taking away her control over how she wants her compositions to be used.

According to LaPolt and Aerosmith's Steven Tyler in their comment paper against compulsory licenses (the comment was signed by a group of artists in support of their opinion), "in [their] experience, approvals are paramount to anything else on an artist's agenda during negotiations--the money is always secondary. If an artist or songwriter does not want his or her music used in a certain way, no amount of money will change his or her mind." [101] Without having the ability to deny a party from using their compositions, creators cannot prevent licensees from exploiting their works to promote negative messages. As a result of the unconsented exploitation, the value of the compositions may decrease.

Aptly put in words by David Newhoff from the website *The Illusion of More*, "if the artist creates from a place that is deeply personal or politically motivated, it is easy to see-- indeed we have ***611** seen-- how a *permissionless* environment invites degradation that is a disservice to cultural diversity." [102] For example, "[a] black artist writing about black issues could not stop a racist hate group from appropriating his music as long as they paid the license. A politician who opposes everything an artist ever stood for could turn that artist's work into his campaign soundtrack." [103] While LaPolt and Newhoff both refer to compulsory licenses in the context of derivative works, their comments and opinions apply to compulsory licenses for mechanical rights. Compulsory mechanical licenses prevent songwriters and publishers from denying a licensee the right to record their compositions, which may be used in contexts or in furtherance of messages that contrast what the creators intend the original compositions to convey. Not having control over their original compositions is therefore a major deterrent for songwriters from creating new works. [104]

3. The Songwriter Equity Act

As an alternative to eliminating the compulsory license, the Songwriter Equity Act ("SEA"), introduced in February 2014, aims to create a statutory rate that reflects the fair market value. [105] While the SEA tackles the issue of substandard rates, there are multiple issues left unaddressed, such as the limit on one's control over his creative work and, arguably, the CRB's inability to quickly enact a rate that reflects the constantly changing market rate.

Similar to performance royalty rates for commercial radio, [106] the market rate for mechanical licenses may fluctuate frequently. Analytic services, such as Nielsen's Soundscan [107] and Next Big Sound, [108] show us that the preferences of music consumers and listeners vary daily. Depending on the type of exposure a song receives ***612** (for example, a placement on a popular television show), the popularity of a song may increase exponentially within one day. [109] To determine the market value for mechanical licenses, the CRB by itself would have to consider many different factors, such as the performance of the song, popularity of the songwriter, usages of the song, different music genres, and listeners' reactions to the song. To account for all those factors would make the rate setting process lengthy and inefficient. Moreover, a rate that the CRB comes up with one day may not reflect the market value rate the next day. While the requirement to consider other evidence would be a step up from the current rate setting procedure, relying solely on one entity to make changes to the rates would not eliminate the issue of finding a rate that reflects the fair market value.

4. The U.S. Copyright Office's Approach on Cover Recordings

The U.S. Copyright Office sympathizes with songwriters who do not have control over their song compositions. [110] In its report "Copyright and the Music Marketplace" from February 2015, the Copyright Office recommends giving copyright owners the choice to refuse licensing their content to online users: "the dissemination of such recordings for interactive new media uses, as well as in the form of downloads, would be subject to the publishers' ability to opt out of the compulsory regime." [111] However, "those who seek to re-record songs could still obtain a license to do so, including in physical formats." [112] Giving copyright owners the freedom to deny license requests with regard to online interactive services and downloads is an improvement, but the compulsory nature of mechanical licenses still applies to many other aspects of the music industry, such as "physical compact discs, broadcast radio and live concerts." [113] Essentially, the approach is wishy-washy (sometimes ***613** it is compulsory, sometimes it is not) and it creates uncertainty--the licensee has to keep track of what can or cannot be distributed online while everything offline can be distributed, which further complicates the already complex music licensing system. Completely eliminating the compulsory license gives licensees the confidence to look for and use song compositions that have been cleared.

B. ***Free Market Negotiation***

1. Why Free Market Negotiation is the Better Approach

Together, the substandard statutory mechanical rate, the cumbersome and ineffective rate court process, and the rights holders' lack of control over their works may reduce a creator's incentive to compose and make his or her work available to the public. Consequently, the number of available works will decrease and competition will

go down, resulting in lower quality works and a shrinking music industry. According to Josh Herr of the *Fiscal Times*, third quarter music sales in 2014 are disappointing:

> Not a single artist's album has reached platinum status in 2014. The *Frozen* soundtrack [a 2013 release] is the only album to have crossed the million mark . . . Aside from that success, 2014 has been so bad that the two top-selling records are carryovers released late last year, one from Beyonce and the other from Kiwi songstress Lorde. Both have sold in the 750,000 range, well short of platinum status. [114]

The lack of artists coming out with top-selling records makes it easier for other artists to "score their first No. 1 albums this year," which according to Herr is "not due to the quality of the work or the strength of sales but simply as the result of a lack of meaningful competition." [115] Compulsory licenses, as deterrents to songwriters' motivation to create, therefore contribute to the lack of competition in the music industry today.

Due to the increase of music platforms, [116] today's competitive music environment calls for a different approach. To ensure the music industry grows and flourishes in a fair environment, free ***614** market negotiation must replace compulsory licenses. During the congressional hearing on June 25, 2014, multiple members of Congress admitted that the government had no place in determining what was best for the music industry. [117] Rep. Doug Collins summarized the futile effect the government's past efforts had on music licensing, which had left both licensors and licensees unsatisfied: "one bad business model 5 years ago could now be the bad business model today . . . you don't need Congress to come in and prop up either one of you." [118] Instead of asking the government to intervene whenever a problem arises, Rep. Collins suggested solving the problem with a "holistic approach" that would involve the participation of everyone affected by music licensing. [119]

Similarly, Rep. Cedric Richmond emphasized the importance of music licensors and licensees working together, instead of looking to the government for help: "[If Congress solves] this problem, nobody is going to like it and it is probably going to be wrong [because] we are not the subject matter experts on it . . . [Nobody] has a better ballgame position [than the music licensees and licensors]." [120] Because of their lack of expertise in the music industry, the government, the CRB, and the rate court judges should not be in the position to determine what is best for hundreds of thousands of music professionals.

i. Free Market Negotiation Expands and Enhances the Music Industry

Free market negotiation should replace compulsory licenses because music industry professionals, due to their knowledge and expertise, are more capable than the government or rate court judges of determining what best benefits the industry. As implied during the congressional hearing, licensees and licensors need to work together to negotiate a rate that accurately reflects the interests of both parties, which ultimately minimizes unnecessary costs. Because of the statutory rate and expensive rate court procedures, income that can be utilized to benefit and expand the music industry gets buried in the arbitrary price ceiling and litigation costs. [121]

***615** Marybeth Peters specified in her 2005 Statement on Music Licensing Reform that the statutory rate "placed artificial limits on the free marketplace," and that "[v]irtually all other countries which at one time provided a compulsory license for reproduction and distribution of phonorecords of nondramatic musical works have eliminated that provision in favor of private negotiations and collective licensing administration." [122] Basic

economic principles tell us that government-imposed price ceilings create shortages of goods. [123] While a song composition is not a tangible good that is limited in quantity, the price ceiling nevertheless harms the market for song compositions and creates a shortage in quality music. The statutory rate of 9.1 cents incentivizes music users to obtain only the licenses for popular songs, which, in a fair and competitive market, would be greater than 9.1 cents. This practice compromises the true value of popular song compositions, and, at the same time, takes away the opportunities for lesser-known songs to be used, which account for more than ninety percent of the music industry. [124]

Likewise, costs arising from compulsory performing rights licenses harm the music industry. As ASCAP and BMI are the two biggest performing rights organizations in the United States, any decision made by the rate court judges directly affects the majority of the songwriters. [125] Because the consent decrees compel the issuance of licenses upon request, the PROs need to provide interim licenses to their licensees if both parties cannot settle on a rate. If the interim license is assumed to be more favorable to the licensees, they may delay providing the PRO with adequate information on the music's use, thus making it impossible for the PRO to determine a rate that reflects the market value of the song compositions. [126] The compulsory nature of the license and the costly and ***616** time consuming rate court process therefore put music licensees in an advantageous position where they can almost always obtain licenses at a discounted rate. [127]

While individual songwriters and publishers are not subject to the compulsory licenses imposed by the DOJ, [128] the majority of copyright holders choose to be members of the two PROs because of the convenience and efficiency of having collection agencies manage their rights. Due to the myriad of performing rights licenses issued in the United States (for example, licenses for music played and performed on the radio and television, in restaurants and bars, at concert venues, etc.), it is nearly impossible for individual rights holders to collect royalties by themselves. Performing rights organizations such as ASCAP and BMI are therefore indispensable to the music industry because they ensure (1) efficient royalty collection for rights holders and (2) seamless transactions between licensees and licensors within and outside the music industry.

Without sufficient revenue to support their work, songwriters would not have the means or incentive to create--the industry could shrink to the point where pop music is the only genre that has adequate support to survive, thus depriving the public of other categories of quality music. In fact, the current music industry evidences such effect, where pop music--specifically, the top ten best-selling tracks--increasingly dominates radio airplay: "[t]op 40 stations last year played the 10 biggest songs almost twice as much as they did a decade ago." [129] As a result, while the "advent of do-it-yourself artists in the digital age may have grown music's long tail, [its] fat head keeps getting fatter." [130] Popularity, however does not indicate quality:

[Research shows that pop music is] growing increasingly bland, loud, and predictable, recycling the same few chord progressions over and over. The study, which looked at 464,411 popular recordings around the world between 1955 and 2010, found that the most played music of the new millennium demonstrates "less variety in pitch transitions" than that of any preceding decade. [131]

***617** Because the music industry's "fat head keeps getting fatter," [132] the revenue does not make its way to other talented songwriters and, instead, stays concentrated in the group of "increasingly bland" pop music. [133]

Fair market negotiation weakens the monopoly that top-selling song compositions have over the market for music licenses. If the privately negotiated rate for a popular song is too high, the music user will be compelled to license a less popular song at a lower rate, thereby distributing the income to other copyright holders. Similarly, if popular songwriters and publishers can refuse to license their song compositions, music users will try to obtain licenses for other, lesser-known copyrighted works. This expands the music industry-- different types of music will be involved and songwriters will have more incentive to create, which will prevent the music industry from experiencing a shortage in diverse and quality music.

2. Potential Issues with Free Market Negotiation

i. Free Market Negotiation May Limit the Public's Access to Music and May Burden Online Music Services

One issue stemming from eliminating compulsory licenses is that the public's access to music might be limited because paying a potentially higher rate makes it difficult for current music services, such as Pandora, to survive. [134] Rep. Collins countered that argument in the congressional hearing on June 25: "[There is a lot of businesses in this country who go out of business because they can't afford their cost. That is an issue we have to deal with on both the broadcaster side and the digital side. The performers and the copyright holders are in the middle." [135] A songwriter's right to receive income at a fair market rate should not be abrogated just because licensees want to cut down their costs.

Another potential issue with the elimination of compulsory licenses is that copyright holders may choose not to license their works. While a songwriter or publisher has the right not to license ***618** in the absence of compulsory licenses, she should know that it is to her advantage to make her music available. The value of a song composition decreases if it becomes irrelevant to today's music listeners: "If an artist's song should fall into disuse, the value of the copyright will decline over time, along with the number of people who may still remember it." [136] To maximize a composition's value, its owner has the incentive to issue licenses in order to gain exposure for the copyrighted work. For example, songwriters will want other recording artists to cover their works because this will help expose their music to the public. Getting rid of the compulsory license therefore will not stop songwriters from licensing their song compositions--it simply eliminates the price ceiling and accords to copyright holders a rate that reflects the market value.

Additionally, a copyright holder's refusal to license his or her work will not harm the music industry--it may in fact help the industry by forcing songwriters to create original works or cover songs that are lesser known, which will open up opportunities for other artists. A study shows that consumers and record labels are more likely to prefer popular music, not because of its quality, but merely because of the song ratings. [137] This creates a downward spiraling cycle, where the same type of music is being recycled and produced, thus blocking the market entrance for new and arguably higher quality music. This puts music listeners at a disadvantage because they don't know what they are missing. Additionally, the lack of competition will lead to lower quality music.

Collection agencies and blanket licenses address the issues of inefficiency that may arise due to the elimination of compulsory licenses. [138] As members of the collection agencies, copyright owners need not worry about keeping track of where and how their works are being used as the agencies will manage and account for the royalties earned. Licensees also spend less time looking for and negotiating with the rights owners by simply obtaining blanket ***619** licenses that cover a great and diverse selection of music. However, a copyright holder may decide not to assign his or her rights to a collection agency like the Harry Fox Agency or any of the PROs. Therefore, a

music licensee needs to negotiate directly with the copyright holder. In that case, several issues regarding fairness and efficiency may surface, which we will discuss below.

ii. Songwriters Lacking Bargaining Power Will not be Able to Negotiate a Rate that Accurately Reflects the Song's Value

The American Association of Independent Music ("A2IM") asserts in its response to the Notice that the compulsory license is the proper mechanism to ensure fairness in music licensing: "The CRB process supports A2IM's belief that each song is created equal and each copyright holder should be compensated equally for each song, and that size of the creator of the song performance or the economic power of the investor in the sound recording should be irrelevant." [139] According to A2IM, consumers and market demand (evidenced, for example, in the number of streams and purchases) should determine the portion of wealth attributed to specific songs, not how powerful a copyright holder is in negotiating a license fee. [140] While A2IM has a valid point on how the license rate should not depend on one's bargaining power, they make the incorrect assumption that compulsory licenses facilitate fairness in music licensing. Compelling copyright holders to license their works at a substandard license rate creates a loss in income for the songwriting and licensing industries. Additionally, due to the existence of blanket licenses and collection agencies, compulsory licenses no longer serve the purpose of promoting efficiency in music licensing--instead, their existence merely abrogates the copyright holders' rights. [141]

In contrast to A2IM's belief, compulsory licenses and statutory rates are arbitrary and do not serve any meaningful purpose other than to create a price ceiling or barrier that denies copyright owners full compensation. Even if independent artists do not have as much leverage as major artists, they still do not receive fair compensation ***620** due to the statutory rate. The statutory rate merely shrinks the income of all copyright holders--thus, independent artists are receiving even less than what they would have received if free market negotiation were to replace compulsory licenses. By stating that compensation varies due to consumer demand, A2IM counters its own argument that all music compositions are created equal. [142]

In a competitive environment where the barrier of entry is low or nonexistent, consumer demand determines the value of the song, which will be reflected in the negotiated licensing fee. However, as A2IM suggests, a copyright holder that has great bargaining power can negotiate a higher than market value price, and one lacking leverage is likely to succumb to a license fee that is lower than the market value and even the current statutory rate of 9.1 cents. With the compulsory mechanical license, an independent artist is therefore at least guaranteed the minimal income of 9.1 cents. Eliminating the compulsory license raises the problem that smaller, less popular artists may not have the bargaining power to negotiate license fees that correctly reflect the fair market value of their music. [143]

iii. Negotiation Slows Down the Music Licensing Process

Compulsory licenses force copyright holders to license their material even when they are unsatisfied with the license fee. Additionally, the low statutory rate makes it inexpensive for music users to license song compositions. Compulsory licenses put music licensees at an advantage over licensors; they cut short the time and costs arising from private negotiations. Replacing compulsory licenses with free market negotiation therefore adds back into the music licensing process the time and fee normally associated with unrestricted negotiation.

In a fast flowing music industry, timing is of utmost importance; a lagging negotiation process slows down the entire music industry. In a perfect world, negotiators would be able to reach consensus on the fee quickly with

both parties leaving the table satisfied. In reality, factors such as the genre, popularity, use, personal grievances, and the bargaining power of the licensee and licensor may impede the negotiation process, which will have a domino effect on the entire music industry. In a world without ***621** compulsory licenses, a composition cannot be performed at a concert or used in a television commercial without the copyright holder's consent. A singer who wants to record and perform a cover of a song for popular television shows, such as *American Idol* or *The Voice*, may not do so until they acquire the necessary licenses. While this may inconvenience the licensee, the licensor is also harmed because the slow negotiation process limits and slows down the composition's exposure to the listening public. For a songwriter, any opportunity for exposure is crucial as it will help his or her work stay relevant and valuable in the industry. [144] A major label may revoke its offer to record a lesser-known song composition if the time taken away from the negotiation proves to be more costly than the actual license fee itself. Due to the lack of bargaining power, an independent artist may therefore hastily agree to license at a fee far below the song's market value, thus compromising the value of his or her work.

IV. USING MEDIATION TO PROMOTE EFFICIENCY AND FAIRNESS

Private negotiation between two parties can be costly and time consuming. It can be a lengthy process that requires legal assistance and traveling. Moreover, a copyright holder without leverage in the music business will have trouble negotiating a license fee that accurately depicts the value of his work in the market. [145] For example, an independent artist with tremendous talent and a loyal fan base, but whose music lacks radio airplay, may have to accept inadequate contractual terms as they are. [146] However, if the compulsory licenses stay intact, all songwriter and copyright holders in the music industry will consistently be held to their disadvantage and never be accorded the true value of their compositions. This has a deleterious effect on the quality of available music and also prevents the music industry from expanding. [147]

Online mediation addresses the problems of fairness and efficiency by helping the licensor and licensee understand each other's interests in a fast and inexpensive manner. In the sections below, ***622** we will explore the relevant types of traditional and online mediation that may prove helpful in the music license marketplace.

A. *Relevant Types of Mediation*

1. Facilitative Mediation

As noted above, eliminating compulsory licenses is necessary to achieve a fair licensing environment. However, direct private negotiation in the absence of compulsory licenses and collection agencies may create problems of inequity and inefficiency. In recent years, music professionals have recognized the value of dispute resolution mechanisms with respect to music licensing. [148] Mediation, especially facilitative mediation, is a dispute resolution mechanism that can greatly assist the licensee and licensor in reaching a satisfactory outcome when negotiation becomes stagnant or unfair.

Compared to other dispute resolution mechanisms (arbitration, for example), facilitative mediation is more flexible due to its "ability to work on many issues at the same time and focus the parties on their relationship concerns." [149] By analogizing to a spider web, Carol Menkel-Meadow describes the deleterious effect arbitration may have on situations that can be more aptly resolved with mediation: "Where a problem was like a 'spider web' in which unraveling one thread of a 'polycentric' problem . . . might destroy the whole web, mediation, with its

ability to work on many issues at the same time and focus the parties on their relationship concerns, would be better." [150] Like a spider web, music licensing concerns a multitude of different factors, including the type of music composition, the popularity of the work, the proposed use, the timing, the distinct characteristics of the artist or songwriter, and the relationship between the licensor and licensee. A song composition worth monetarily close to nothing today can, due to a performance on national television, become overnight the most sought ***623** after work. [151] Due to the music industry's constant fluctuation, mediation is the appropriate mechanism because it is able to meet the always-changing needs of music professionals.

Consequently, facilitative mediation benefits the music licensing industry by (a) helping the licensor and licensee achieve their respective interests without disadvantaging the other and (b) necessarily preserving the relationship between the two parties. [152] First, instead of directly coming up with a solution, the mediator helps the parties resolve their own issue by highlighting their respective interests. A singer-songwriter with little bargaining power can therefore use this opportunity to make his or her interests known. The record label can also present its own interests. Rather than feeling apprehension from agreeing on terms that are less than ideal, the singer-songwriter or record label will have the opportunity to understand the opposite party's reasoning. The process will ameliorate feelings of negativity, which makes it more likely for the parties to come to an agreement.

In the music industry, licensors and licensees usually enter into exclusive long-term contracts. For example, a typical recording agreement between a record label and a singer-songwriter gives record labels the right to extend the agreement for another term (an agreement might include six option periods, which the record label can exercise at the end of each term). [153] It is therefore crucial that both parties know and are satisfied with what they are agreeing on. It is also equally important for the parties to maintain a good relationship with each other, since the agreement may exist for many years. Mediation is "essentially a private process between a third party facilitator and two parties already in a relationship or trying to make a relationship work." [154] By placing emphasis on preserving the relationship, [155] facilitative mediation helps the licensor and ***624** licensee achieve an outcome that have both parties leaving the table satisfied and sympathetic of each side's interests.

2. Online Mediation

While facilitative mediation can help the licensor and licensee reach a satisfying outcome and can also preserve their business relationship, it may be inefficient. Because the process "requires skillful planning by the mediator and substantial understanding of the parties' interests" [156] as well as finding a place for the mediation to take place, it can be costly and time consuming. In the music industry, fast and concise transactions are crucial to ensure the seamless flow of business. For example, *The Voice*, a popular television show, showcases live performances of songs that are then distributed to music listeners the very next day via iTunes. The show airs weekly and sometimes two nights in a row. [157] Failing to acquire performing rights licenses for the live television show and mechanical licenses for distribution on iTunes can greatly delay or prevent the show from proceeding. The songwriter benefits from having his or her music performed and exposed on television. [158] Additionally, as technology continues to advance, there is more global demand for licensed music. [159] Promptness and efficiency are therefore indispensable to the industry's growth and welfare.

Online mediation meets the need for efficiency. In contrast to in person or offline mediation, online mediation is cheaper [160] and more readily available:

> An asynchronous ODR process can occur twenty-four hours a day, seven days a week, at the parties' and mediator's convenience. The parties, their attorneys or advocates, and the mediator do not have to travel to a distant location. There is no ***625** expense to provide a neutral facility at which to conduct the mediation. [161]

Online mediation can proceed in the comfort of the parties' usual place of business, where every document and information they need is within their reach. [162] Additionally, web-based, online mediation seems to be more successful in helping parties reach an agreement. [163]

i. Automated Mediation

There are three types of online mediation that can assist licensees and licensors in reaching an agreement: automated mediation, crowd-sourced mediation, and traditional mediation utilizing computer technology, such as videoconference, email, and instant message. Automated mediation uses a computer software that helps parties resolve the existing issue themselves. Because of its data of past disputes, an automated mediation system, such as Square Trade, [164] is able to categorize the different types of disputes that generally occur, "which allows it to create forms which the parties fill out and these forms clarify and highlight both what is dividing the parties and what solutions are desired." [165] Similarly, the proposed AutoMed (an automated mediation mechanism for "bilateral negotiations under time constraints") collects the negotiators' preferences, creates a WCP net [166] from the preferences, comes up with a list of all *pareto optimal* [167] agreements from the WCP net, and finally suggests an agreement if both parties are unable to come up with a pareto optimal agreement themselves. [168]

***626** In disputes concerning purely monetary matters, blind bidding mechanisms, such as Cybersettle, [169] allow two negotiators to propose their own settlement amounts; the software then creates potentially three rounds of settlement. [170] During the first round, if each party's settlement amount is within thirty percent of the other party's amount, the computer software will declare a settlement amount. [171] If the first amount is not within the thirty percent range, the parties move on to the second or third round. [172]

Despite being cost and time efficient, automated mediation neglects an important value of traditional offline mediation-- face-to-face interaction. A mediator has a better grasp during traditional face-to-face mediation in creating an amicable and trusting environment--both parties are more likely to listen to each other's interests and intentions. [173] A significant issue with automated mediation is that it may not be as helpful as offline mediation in facilitating and preserving the ongoing relationship between a licensor and licensee.

ii. Crowdsourced Mediation

Another mechanism for online mediation is crowdsourced mediation, where parties utilize the crowd's judgment to determine an outcome. In contrast to traditional mediation where only one mediator is involved, crowdsourced mediation gathers information and questions from a collective group of people, which arguably leads to more transparency and information. [174] Instead of a single ***627** individual, the crowd acts as mediator to facilitate the negotiation between the two parties. [175] The group can then collectively recommend and/or vote on the best

outcome.[176] In order to retain every participant's opinion, it is ideal to have everyone in the crowd ask the negotiating parties questions. However, if the crowd has a great number of people, it may be impractical as the entire process may take an exceedingly long period of time. Instead, the better and more pragmatic approach is to take questions from a smaller group of individuals who best represent the diversity of the bigger group.[177]

With respect to music licensing, the licensor and licensee benefit from crowdsourced mediation. The crowd, due to the consolidation of different knowledge and expertise, can give insight to the history and trends in the music industry, provide a more accurate BATNA,[178] and allow both parties to better understand the position of the other party (for example, the licensor will be less wary in signing a contract if he or she acknowledges that the licensee is suggesting terms that are better than the traditional terms used in the industry). Additionally, because crowdsourced mediation can only take place if the negotiating parties reveal their information to the crowd,[179] the licensor and licensee have incentive not to lie or bluff about their positions--the crowd ultimately acts as a check against the parties. Having a diverse group of people who have great knowledge of the music industry and who also represent the different professions within the industry will minimize bias, thus creating a more fair, informed, and satisfied decision.

While crowdsourced mediation is valuable in that it provides transparency and widens the range of available information, the parties may feel uncomfortable publicizing the information used in their negotiation. Revealing trade secrets and past negotiations can hurt the parties and weaken their bargaining power in future negotiations with other parties. To give the parties more confidence and security in revealing their information, the participants (the crowd) in the crowdsourced mediation should sign non-disclosure agreements. Additionally, clear instructions should be given on what can or cannot be asked by the crowd. Finally, to protect the negotiating parties, specific information--the parties' identities ***628** (if requested not to be exposed), the parties' net worth, and their income statements--should not be revealed. Only the following facts should be taken into consideration: the song composition, genre, use, length, time and date of the use, targeted market, past uses of the works, and type of licensee and licensor. These facts should be sufficient to help the crowd come up with recommendations for the negotiation's outcome.

B. *Proposed Solution: An Escalating Online Mediation System for Music Licensing*

Online mediation is the best mechanism to help music licensors and licensees reach a satisfied agreement in an efficient manner. However, there is not one type of online mediation that caters to all the complex issues arising from music licensing. Different factors--the genre of the song, the popularity of the song, the use, the songwriter, and many more--constantly influence a song composition's monetary worth. To reach a satisfactory outcome, the negotiating parties should have easy access to different types of online mediation at one location.

A Web-based, escalating online mediation system provides multiple stages of mediation.[180] It gives disputing parties the opportunity to utilize the mediation mechanism that is most compatible to the characteristics of their negotiation. Moreover, the Web interface “provides a more structured set of exchanges between the parties than occurs with email . . . [The] use of the Web provides a structure and format that allows parties to participate whenever they wish and with a mediator who may be located anywhere.”[181] SquareTrade, for example, offered an escalating two-stage mediation system on the Web for disputes relating mostly to eBay sellers and buyers. In the first stage, which SquareTrade labeled as “Direct Negotiation,” parties utilize an online automated resolution tool that “enables parties to articulate, vent, see opportunities for compromise and hopefully

achieve self-settlement." [182] If the parties fail to reach an agreement in Direct Negotiation, the mediation process escalates, where the "resolution can be facilitated by a professional ***629** human third party, primarily deploying traditional mediation, but all online." [183] Having taken on more than 800,000 disputes in over 120 countries, [184] SquareTrade's two tiered mediation system was highly successful. More importantly, it was able to "enhance[ ] trust and reduce[ ] the sense of risk that [was] felt by potential purchasers," [185] an achievement crucial to improving and expanding the e-commerce universe.

Similar to the ecommerce context, there should also be a Web-based, escalating mediation system to facilitate negotiation or resolve disputes between music licensors and licensees. Instead of solely employing automated and traditional mediation, crowdsourced mediation should also be included. As mentioned previously, crowdsourced mediation benefits the music licensors and licensees. Because of the new technologies and constant fluctuation of trends and preferences, a diverse crowd of music industry professionals can provide great insight, thereby helping both parties--the music licensor and licensee-- reach a more informed and satisfied resolution.

By imitating SquareTrade's model, an escalating online mediation system would first--by employing an automated resolution software--allow the parties to settle on a licensing fee by themselves. It would also be helpful to include the blind-bidding mechanism, as demonstrated by Cybersettle, [186] to facilitate negotiations regarding one-time monetary transactions (for example, a small YouTube artist who wants to record a cover song can quickly obtain the license via the blind-bidding mechanism). As the music industry becomes increasingly globalized, licensees and licensors from all over the world will have more opportunities to work together. The most efficient way for parties in different countries to collaborate with each other is to communicate online. Automated mediation therefore meets the need for parties to quickly settle on a license fee without having to travel and negotiate in person.

If automated mediation does not resolve their issue, the parties can choose to employ either online traditional mediation or crowdsourced mediation by paying a small fee. Crowdsourced mediation ***630** gives the parties more transparency and information on the issue, but it invites many people outside the negotiation to participate. While it is more likely that the parties will reach a satisfied outcome due to increased transparency and information, the parties may not want to disclose the details of their negotiation to outside participants. In that case, they can opt for online traditional mediation, where a human mediator can help facilitate the negotiation or resolve the issue.

A major record label or a party that has great bargaining power may not want to join this system. After all, they can use their leverage to compel the other party to sign an agreement that is favorable to them. However, it is to their long-term benefit to utilize this mediation system. Mediation allows the negotiating parties to understand each other's interests and needs, [187] thus minimizing feelings of inferiority and apprehension. As a result, the relationship between the parties is preserved and even strengthened, which encourages future collaborations. Additionally, a major record label or any powerful, well-known music company can boost its image by announcing its use of the online escalating mediation system. By adding their names to the list of users on the system's website, big companies or popular songwriters can promote their willingness to work fairly with potential licensors or licensees, therefore displaying flexibility instead of stone-cold stubbornness. This may give smaller companies, publishers, and songwriters more confidence and enthusiasm to communicate and collaborate with them.

V. CONCLUSION

The music industry is constantly changing due to new technologies, trends, and consumer preferences. Licenses are necessary for the recording, distribution, and performance of music. However, due to the compulsory licenses imposed by the Copyright Act and the DOJ, songwriters and licensors are compelled to license their music creations at substandard rates, such as at 9.1 cents for mechanical licenses. Because of the statutory rate and the compulsory nature of the mechanical and performing right licenses, music creators and owners are arguably receiving less than the fair market value of their works. Moreover, the creators and owners do ***631** not have the option to refuse licensing their works, even if the licensees want to use the works for purposes that may diminish the works' value. In light of the technological advances, current economy, and fluctuating preferences of listeners, compulsory licenses have proved to be outdated, inefficient, and unfair. [188]

Numerous music professionals are currently petitioning for the elimination of the compulsory mechanical license and the consent decrees. [189] Ideally, fair market negotiation would allow both licensors and licensees to achieve their needs without abrogating the other party's interests. However, due to issues of leverage and time, private one-on-one negotiation may potentially burden an individual with little bargaining power and impede the music licensing process--this creates a domino effect, thereby slowing down the entire music industry. Royalty collection agencies, such as HFA, ASCAP, and BMI, address these problems through collective licensing and blanket licenses. [190] However, the issues of inefficiency and leverage persist when a copyright owner chooses not to join the collection agencies.

With regard to the abovementioned issues, the negotiating parties should utilize online mediation to reach a satisfactory outcome while preserving their business relationship. Online mediation is beneficial to the music industry because it reduces the time and costs of negotiating in person. However, online mediation comes in different forms, ranging from human facilitative mediation to automated mediation. Due to the constantly changing listeners' preferences, the different genres of music, and the unique characteristics of licensors and licensees, one single type of mediation does not sufficiently address all of the parties' the needs. The music industry should therefore create an escalating mediation system, [191] where the licensor and licensee can easily access the mediation technique that best caters to their needs. My proposed escalating mediation system includes three forms of online mediation: (1) automated, (2) crowdsourced, and (3) traditional. This system will use a Web interface, which has proved to generate successful results. [192]

***632** Giving negotiating parties a one-stop access to all three types of mediation techniques takes into account the myriad factors influencing the license rate that compulsory licenses neglect. It also pushes parties out of the stalemate that regularly occurs when two negotiating parties cannot agree on an outcome. Additionally, for copyright holders or licensors with little bargaining power, the escalating mediation system is a safeguard against unfair contracts of adhesion. Instead of asking for government intervention that may benefit one party and disadvantage another, music licensors and licensees should use an escalating online mediation system in order to reach a more efficient and fair outcome.

Footnotes

a1 Articles Editor, *Cardozo Journal of Conflict Resolution*; B.A., 2011, New York University; M.A., 2013, New York University; J.D. Candidate, 2016, Benjamin N. Cardozo School of Law. The author would like to thank her family and friends for their support, love, and encouragement.

1 *What is a Mechanical License?*, THE HARRY FOX AGENCY (last visited Nov. 10, 2014), https://www.harryfox.com/license_music/what_is_mechanical_license.html.

2 *BMI and Performing Rights*, BROADCAST MUSIC, INC. (last visited Nov. 10, 2014), http://www.bmi.com/licensing/entry/business_using_music_bmi_and_performing_rights.

3 *Types of Copyright*, BROADCAST MUSIC, INC., http://www.bmi.com/licensing/entry/types_of_copyrights.

4 17 U.S.C. § 115(a) (2011); U.S. v. Am. Soc'y of Composers, Authors, & Publishers, No. 41-1395(WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2011).

5 Glenn Peoples, *'Free' & 'Market' Often Repeated at Music Licensing Hearing*, BILLBOARD (June 10, 2014), http://www.billboard.com/biz/articles/news/digital-and-mobile/6114165/free-market-often-repeated-at-music-licensing-hearing.

6 Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14739 (Mar. 17, 2014), http://copyright.gov/fedreg/2014/79fr14739.pdf [hereinafter Notice].

7 *Id.* at 14742.

8 *Music Licensing Study: Comments*, U.S. COPYRIGHT OFFICE (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/index.html.

9 *Congressional Hearings*, U.S. COPYRIGHT OFFICE, http://copyright.gov/laws/hearings/ (last visited Nov. 10, 2014).

10 Notice, *supra* note 6.

11 *Antitrust Consent Decree Review*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Nov. 10, 2014).

12 Peoples, *supra* note 5.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *See* Peoples, *supra* note 5.

18 *What is a Mechanical License?*, *supra* note 1.

19 17 U.S.C. § 115(a) (2011).

20 *What are Mechanical Royalty Rates?*, THE HARRY FOX AGENCY (last visited Nov. 10, 2014), https://www.harryfox.com/license_music/what_mechanical_royalty_rates.html.

21 17 U.S.C. § 801(a) (2011).

22 17 U.S.C. § 802(a) (2011).

23 Ed Christman, *Songwriter Equity Act Picks Up Momentum in Senate, Aims to Modernize Copyright Law*, BILLBOARD (May 12, 2014, 8:39 PM) http://www.billboard.com/biz/articles/news/publishing/6084822/songwriter-equity-act-senate-copyright-law; *see also* 17 U.S.C. § 801(b) (2011).

24 White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 18 (1908).

25 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:45 (2014).

26 Kal Raustiala & Chris Sprigman, *White-Smith Music case: A terrible 1908 Supreme Court decision on player pianos*, SLATE (May 12, 2014, 10:00 AM), http://www.slate.com/articles/technology/history_of_innovation/2014/05/white_smith_music_case_a_terrible_1908_supreme_court_decision_on_player.html. Aeolian, the equivalent of Microsoft or Google in the early 20th century, "[a]nticipating that Congress would overturn *White-Smith Publishing* ... swiftly bought up song rights from musicians and publishing companies so it could copy them onto player piano rolls. Aeolian's weaker competitors complained to Congress about this attempt to corner the music market." *Id.*

27 *What are Mechanical Royalty Rates?*, *supra* note 20.

28 17 U.S.C. § 115(a) (2011).

29 *Id.*

30 *Id.*

31 *Id.*

32 17 U.S.C. §§ 106(4)-(5) (2011).

33 17 U.S.C. § 101 (2011).

34 *Id.*

35 *Get an ASCAP License*, ASCAP, http://www.ascap.com/licensing/licensefinder (last visited Jan. 7, 2015).

36 Chris Robley, *What is a Performing Rights Organization*, THE DIY MUSICIAN (Apr. 29, 2013), http://diymusician.cdbaby.com/2013/04/what-is-a-performing-rights-organization.

37 *Id.*

38 Notice, *supra* note 6.

39 *Id.* ("SESAC, a smaller performing rights organization created in 1930 to serve European publishers, is not subject to similar consent decrees, although it has been involved recently in private antitrust litigation"). *See* U.S. v. Am. Soc'y of Composers, Authors, & Publishers, No. 41-1395(WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2011).

40 *Id. See* U.S. v. Am. Soc'y of Composers, Authors, Publishers, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. Jun. 11, 2001) (ASCAP is "ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory"); U.S. v. Broadcast Music, Inc., No. 64 CIV. 3787, 1994 WL 90165264 (S.D.N.Y. Nov. 18, 1994).

41 Notice, *supra* note 6, at 14741.

42 *Id.*

43 Ed Christman, *Dept. of Justice Considering Major Overhauls on Consent Decrees, Sources Say*, BILLBOARD (Apr. 7, 2015, 2:29 PM), http://www.billboard.com/articles/business/6524359/dept-of-justice-consent-decrees-overhaul-publishing-ascap-bmi.

44 Ed Christman, *Pandora Ruling Has Far-Reaching Implications for U.S. Publishing Industry*, BILLBOARD (Dec. 23, 2013, 11:53 AM), http://www.billboard.com/biz/articles/news/publishing/5847835/pandora-ruling-has-far-reaching-implications-for-us-publishing.

45 Alan Dodson, *ASCAP, BMI, and SESAC Explained for DJs and KJs*, MOBILE BEAT (Jan. 26, 2014), http://www.mobilebeat.com/prosanddjs/.

46 *Type of Copyright*, BMI, http://www.bmi.com/licensing/entry/types_of_copyrights (last visited Jan. 10, 2015).

47 *Id.*

48 David Israelite, *Our Best Bet for Screwing Up Copyright Reform? More Government Intervention (Guest Post)*, BILLBOARD (Jul. 14, 2014, 12:10 PM), http://www.billboard.com/biz/articles/news/publishing/6157555/our-best-bet-for-screwing-up-copyright-reform-more-government.

49 *License Your Music*, CDBABY, http://members.cdbaby.com/license-your-music.aspx (last visited Jan. 10, 2015).

50 *Negotiating Music for Films*, BOYENNE LAW, http://entertainment-lawyer.us/negotiating-music-for-films/ (last visited Jan. 10, 2015).

51 Neil Gillis, *Jumpstart Your Music Career with Sync Licensing*, HYPEBOT (Apr. 28, 2014), http://www.hypebot.com/hypebot/2014/04/jumpstart-your-music-career-with-sync-licensing.html.

52 *Still Fighting for the Right to His Voice*, N.Y. TIMES (Jan. 20, 2006), http://www.nytimes.com/2006/01/20/arts/music/20wait.html?_r=0&adxnnl=1&adxnnlx =1415637127-sU4GY1aNQxHbmNGpnMWS/w ("At a time when musicians are increasingly open to licensing their music for advertising, television and other commercial uses, Mr. Waits has steadily built a reputation not only for refusing to license his music, but also for aggressively defending his style as a unique legal property.").

53 Josh Sanburn, *Advertising Killed the Radio Star: How Pop Music and TV Ads became Inseperable*, TIME (Feb. 3, 2012), http://business.time.com/2012/02/03/advertising-killed-the-radio-star-how-pop-music-and-tv-ads-became-inseparable/3/ ("When Michaelson's "The Way I Am" got picked up by Old Navy, it was no accident that clothing was in the lyrics ... Michaelson's song has since sold 1.5 million copies.").

54 *See* Raustialia & Sprigman, *supra* note 26 (Aeolian, the equivalent of Microsoft or Google in the early 20th century, "[a]nticipating that Congress would overturn *White-Smith Publishing*, swiftly bought up song rights from musicians and publishing companies so it could copy them onto player piano rolls. Aeolian's weaker competitors complained to Congress about this attempt to corner the music market.").

55 Notice, *supra* note 6 ("SESAC, a smaller performing rights organization created in 1930 to serve European publishers, is not subject to similar consent decrees, although it has been involved recently in private antitrust litigation.").

56 Aaron, *What is the Consent Decree with Danielle Aguirre at the NMPA*, EXPLORATION (Jul. 31, 2014), http://exploration.io/what-is-the-consent-decree-with-danielle-aguirre-at-the-nmpa-interview/ ("Since before WWII, songwriters have lived under consent decrees that unfairly burden them and result in below-market rates. The DOJ is beginning to acknowledge this burden and the fact that many provisions in the ASCAP and BMI consent decrees no longer make sense in this new digital music market.").

57 *Statement of MaryBeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on Judiciary*, 109th Cong. 1st Sess. (2005) (Hearing on Music Licensing Reform), http://www.copyright.gov/docs/regstat062105.html.

58 Peoples, *supra* note 5.

59 David Newhoff, *Compulsory Licensing & Chilling Effects*, THE ILLUSION OF MORE (Feb. 10, 2014), http://illusionofmore.com/compulsory-licensing/ ("The compulsory license strips one of the fundamental properties of copyright, the right of choice, from the artist; and this is why Tyler and LaPolt were supported with letters from other creators including, Don Henley, Joe Walsh, Sting, Ozzy Osbourne, and Mick Fleetwood.").

60 Peoples, *supra* note 5 ("Representatives for songwriters, music publishers, performers and producers expressed their desire for royalty rates that result from, or approximate, free market negotiations.").

61 *What are Mechanical Royalty Rates?*, *supra* note 20.

62 David Israelite, *Stop Shortchanging Songwriters*, THE HILL (Mar. 25, 2014, 1:11 PM), http://thehill.com/opinion/op-ed/201663-stop-shortchanging-songwriters ("[T]he dozen eggs that you buy for almost $3 at the grocery store today would have cost 14 cents in 1909, demonstrating that standard rates of inflation seem to somehow not apply to songwriters.").

63 Dina LaPolt, *RE: Music Licensing Study: Notice and Request for Public Comment*, U.S. COPYRIGHT OFFICE (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Dina_LaPolt_MLS_2014.pdf ("The current statutory mechanical royalty rate is 9.1 cents per reproduction for songs five minutes long or less. This is a pretty low rate considering that the statutory royalty rate was first set in1909 at 2 cents-the equivalent of 51 cents today.").

64 David Israelite, *Future of Streaming Music Must Include Fairness for Songwriters*, FOX NEWS (Jun. 26, 2014), http://www.foxnews.com/opinion/2014/06/26/future-streaming-music-must-include-fairness-for-songwriters/.

65 *The Songwriter Equity Act (SEA)--What You Need to Know*, NMPA (last visited Feb. 14, 2015) , https://www.nmpa.org/media/showwhatsnew.asp?id=100; *see also* Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014), https://www.congress.gov/bill/113th-congress/house-bill/4079/text; 17 U.S.C. § 114(i) (2011).

66 *See* Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014), https://www.congress.gov/bill/113th-congress/house-bill/4079/text; *see also* 17 U.S.C. § 801 (2011).

67 *Antitrust Consent Decree Review*, *supra* note 11; *see* ASCAP, *Comments of the American Society of Composers, Authors and Publishers*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/ASCAP_MLS_2014.pdf (last visited Feb. 14, 2014) (ASCAP's response to the Music Licensing Study: Notice of Inquiry).

68 ASCAP, *supra* note 67. Some music users may strategically decide to stay on interim terms if they find the interim license to be more favorable to them--this ultimately leads to an expensive rate court process. Other applicants have also "applied for a license--claiming the shelter of the Consent Decree's guarantee of a right to perform ASCAP members' music while an application is pending--while simultaneously disclaiming the need for such a license and refusing to provide the information necessary for ASCAP to formulate a fee proposal." *Id.*

69 *Id.*

70 *Id.*

71 U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS (Library of Congress, 2015), http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

72 Songwriter Equity Act of 2014, *supra* note 66.

73 LaPolt, *supra* note 63.

74 *Id.*

75 *About*, SOUNDEXCHANGE, http://www.soundexchange.com/about/ (last visited Feb. 14, 2015).

76 *Id.*

77 *Id.*

78 ASCAP, *supra* note 67.

79 LaPolt, *supra* note 63.

80 Ed Christman, *BMI Wins in Rate Court Battle with Pandora*, BILLBOARD (May 14, 2015, 8:30 PM), http://www.billboard.com/articles/business/6568286/bmi-wins-court-battle-pandora.

81 Dodson, *supra* note 45; *see About ASCAP*, ASCAP, http://www.ascap.com/about/ (last visited Feb. 14, 2015) ("[ASCAP is] a membership association of more than 540,000 US composers, songwriters, lyricists and music publishers of every kind of music.").

82 17 U.S.C. § 802(a) (2011).

83 *See* Christman, *supra* note 23.

84 *What are Mechanical Royalty Rates?*, *supra* note 20.

85 Steve Guttenberg, *Watch Out, Spotify, Tidal is Upping the Ante for Streaming-Music Sound Quality*, CNET (Jan. 10, 2015, 7:10 AM), http://www.cnet.com/news/watch-out-spotify-tidal-is-upping-the-ante-for-streaming-music-sound-quality/.

86 Craig McLean, *Glee: the making of a musical phenomenon*, TELEGRAPH (Jan. 24, 2011, 9:00 AM), http://www.telegraph.co.uk/culture/8271318/Glee-the-making-of-a-musical-phenomenon.html.

87 Noah Nelson, *Covering Pop Hits on You Tube is Starting to Pay*, NPR (May 13, 2013, 5:00 AM), http://www.npr.org/blogs/therecord/2013/05/13/182880665/covering-pop-hits-on-youtube-is-starting-to-pay.

88 17 U.S.C. § 115(c)(E)(i) (2011) ("License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by the Librarian of Congress and Copyright Royalty Judges.").

89 *Statement of MaryBeth Peters*, *supra* note 57.

90 *Id.*

91 *What Does HFA Do?*, HFA, https://www.harryfox.com/publishers/what_does_hfa_do.html (last visited Feb. 14, 2015).

92 17 U.S.C. § 115.

93 *What are Mechanical Royalty Rates?*, *supra* note 20.

94 LaPolt, *supra* note 63.

95 *Controlled Composition Clauses*, ASCAP, http://www.ascap.com/music-career/articles-advice/music-money/money-clauses.aspx (last visited Feb. 14, 2015).

96 *Id.*

97 Jay Rosenthal, *The Recording Artist/Songwriter Dilemma: The Controlled Composition Clause--Enough Already!*, 73 LANDSLIDE 4 (2011).

98 *Id.*

99 Nahrstedt v. Lakeside Village Condo. Ass'n., Inc., 8 Cal.4th 361 (1994).

100 JULIE E. COHEN & LYDIA P. LOREN, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6 (Vicki Been et al. eds., Aspen Publishers 3d ed. 2010).

101 Dina LaPolt & Steven Tyler, *RE: Request for Comments on Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy*, U.S. PAT. & TRADEMARK OFFICE (Feb. 10, 2014), http://www.uspto.gov/ip/global/copyrights/lapolt_and_tyler_comment_paper_02-10-14.pdf.

102 Newhoff, *supra* note 59.

103 *Id.*

104 LaPolt & Tyler, *supra* note 101 (LaPolt stated in her comment that requiring compulsory licenses for derivative works would deter artists from releasing their works: “Steven and the other artists who have expressed support for our comments have stated that they probably would have withheld some of their work if they knew that one day they would be required to give up their right to approve derivative uses.”).

105 Songwriter Equity Act of 2014, *supra* note 66.

106 *Royalty Policy Manual*, BMI (Sep. 18, 2015), http://www.bmi.com/creators/royalty_print.

107 *Music Sales Measurement*, NIELSEN, http://www.nielsen.com/content/corporate/us/en/solutions/measurement/music-sales-measurement.html (last visited Jan. 7, 2015) (service that tracks music sales, radio play, consumer behavior, etc.).

108 NEXT BIG SOUND, https://www.nextbigsound.com (last visited Jan. 7, 2015) (service that “analyzes social, sales, and marketing signals” by taking into account the artists and songs trending on social media websites, such as Facebook, Twitter, YouTube, and SoundCloud).

109 Liv Buli, *Do TV Show Music Placements Lead to Greater Artist Awareness?*, HYPEBOT.com (Jan. 10, 2013), http://www.hypebot.com/hypebot/2013/01/do-tv-show-music-placements-lead-to-greater-artist-awareness.html (“Golden State, a much smaller band in terms of fan base and consumption, with only 1500 Twitter followers and close to 350,000 video views on YouTube, featured on a season finale episode of Gossip Girl in May, and what constitutes a significant spike in their numbers immediately follows.”).

110 U.S. COPYRIGHT OFFICE, *supra* note 71 (“While some artist songwriters may view imitation as flattery, others do not appreciate that they are unable to prevent the re-recording of their songs by others. Many music creators seek more control over their works.”).

111 *Id.*

112 *Id.*

113 Eriq Gardner, *Why Taylor Swift May Soon Be Able to Stop Cover Songs on Spotify Too*, THE HOLLYWOOD REPORTER (Feb. 5, 2015, 5:16 PM), http://www.hollywoodreporter.com/thr-esq/why-taylor-swift-may-soon-770698.

114 Josh Herr, *Startling Proof that the Music Industry is Doomed*, THE FISCAL TIMES (Oct. 20, 2014), http://www.thefiscaltimes.com/2014/10/20/Latest-Startling-Proof-Music-Industry-Doomed.

115 *Id.*

116 Physical albums, radio, digital downloads, and non-interactive and interactive online streaming are examples of music platforms.

117 *Music Licensing Under Title 17 (Part I & II): Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the Comm. on the Judiciary*, 113th Cong. (2014), http://judiciary.house.gov/_cache/files/6e799edc-1cb8-4365-a9bb-e48c32b91353/113-105-88240.pdf.

118 *Id.* at 396.

119 *Id.*

120 *Id.* at 398.

121 *Statement of MaryBeth Peters*, *supra* note 57 ("The increased transactional costs (e.g., arguably duplicative demands for royalties and the delays necessitated by negotiating with multiple licensors) also inhibit the music industry's ability to combat piracy. Legal music services can combat piracy only if they can offer what the "pirates" offer. I believe that the majority of consumers would choose to use a legal service if it could offer a comparable product.").

122 *Id.*

123 LIBBY RITTENBERG & TIMOTHY TREGARTHEN, ECONOMICS 93 (Worth Publishers, 2d ed. 1999), https://books.google.com/books?id=HveHgrID5GYC&printsec=frontcoverv=onepage&q&f=false ("A price ceiling that is set below the equilibrium price creates a shortage that will persist.").

124 Derek Thompson, *The Shazam Effect*, THE ATLANTIC (Dec. 2014), http://www.theatlantic.com/magazine/archive/2014/12/the-shazam-effect/382237/?single_page=true ("The top 1 percent of bands and solo artists now earn 77 percent of all revenue from recorded music, media researchers report.").

125 ASCAP, *supra* note 81.

126 *Antitrust Consent Decree Review*, *supra* note 11.

127 ASCAP, *supra* note 67.

128 *Notice*, *supra* note 6.

129 Thompson, *supra* note 124 ("[The] 10 best-selling tracks command 82 percent more of the market than they did a decade ago.").

130 *Id.*

131 *Id.*; *see* Lenika Cruz, *In Music, Uniformity Sells*, THE ATLANTIC (Jan. 4, 2015, 8:20 AM), http://www.theatlantic.com/entertainment/archive/2015/01/in-music-uniformity-sells/384181/?curator=MusicREDEF ("[T]he success of a song or album *has little to do with its complexity or quality*, and more to do with social influence, or what *other* people seem to enjoy listening to.").

132 Thompson, *supra* note 124.

133 *Id.*

134 Glenn Peoples, *Industry Argues Its Worth to Congress (and Itself) in Second Round of Testimony*, BILLBOARD (Jun. 25, 2014, 4:38 PM), http://www.billboard.com/biz/articles/news/legal-and-management/6133928/industry-argues-its-worth-to-congress-and-itself-in.

135 *Music Licensing Under Title 17*, *supra* note 117.

136 AL KOHN & BOB KOHN. KOHN ON MUSIC LICENSING 1039 (Aspen Publishers, 2d ed. 1996).

137 Thompson, *supra* note 124 (In a study on the influence of song rankings, researchers showed that "popularity can be a self-fulfilling prophecy." According to the study, "participants who saw rankings were more likely to listen to the most-popular tracks.").

138 *Statement of MaryBeth Peters*, *supra* note 57. According to Peters, most countries have substituted the compulsory licensing system with collective administration. In the United States, "[d]omestic performing rights organizations, such as ASCAP, BMI and SESAC, have already proven that collective licensing can and does succeed in this country." Peters urges the United States to embrace "a system of private, collective administration, which would restore the free marketplace as well as bring the United States in line with the global framework in which digital transactions must necessarily operate." *Id.*

139 A2IM, *Response to Request for Comments: Music Licensing Study Comments by the American Association of Independent Music ("A2IM")*, U.S. COPYRIGHT OFFICE (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/American_Association_of_Independent_Music_MLS_2014.pdf.

140 *Id.*

141 *Statement of MaryBeth Peters*, *supra* note 57.

142 A2IM, *supra* note 139 ("The only differentiation in pay should be based upon consumer demand for the music, e.g. the number of streams each receives, not the ownership company.").

143 *See infra* Part IV.

144 KOHN & KOHN, *supra* note 136.

145 Rosenthal, *supra* note 97.

146 *Id.*

147 *See supra* Part III.B.

148 NSAI, *Comments from Bert Herbison, Executive Director, Nashville Songwriters Association International, on "Music Licensing Study" before the United States Copyright Office, Library of Congress*, U.S. COPYRIGHT OFFICE (Sep. 11, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/Nashville_Songwriters_Association_International_NSAI.pdf.

149 Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 16 (2000).

150 *Id.* at 16.

151 Keith Caulfield, *Robyn's 'Dancing' Gets a Big Bump From 'Girls' Golden Globe Wins*, BILLBOARD (Jan. 14, 2013, 8:06 PM), http://www.billboard.com/articles/news/1499662/robyns-dancing-gets-a-big-bump-from-girls-golden-globe-wins ("Label sources indicate that the song's daily sales tripled on [the night of the Golden Globes] from its normal daily average.").

152 John Rymers & Debbie Reinberg, *Contrasting Styles of Mediation: Evaluative, Facilitative and Transformative*, ELDERESOLUTIONS, http://www.cobar.org/repository/Inside_Bar/Elder/10.15.09/CONTRASTING%20TYPES%C20OF%20MEDIATION.pdf; (last visited Feb. 14, 2015) *see* Menkel-Meadow, *supra* note 149.

153 Julia Bell & Juan Lopez, *Recording Agreement Explained Part 2: Term and Options*, AVENANT MUSIC AND MEDIA LAW, http://www.avenantlaw.com/recording-agreement2/ (last visited Feb. 14, 2015).

154 Menkel-Meadow, *supra* note 149, at 17.

155 *Id.*; *see* Rymers & Reinberg, *supra* note 152.

156 Rymers & Reinberg, *supra* note 152.

157 *The Voice*, NBC, http://www.nbc.com/the-voice/ (last visited Feb. 14, 2015).

158 Caulfield, *supra* note 151.

159 IFPI, DIGITAL MUSIC REPORT 2014: LIGHTING UP NEW MARKETS 5 (IFPI 2014), ttp://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf ("[D]igital music is moving into a clearly identifiable new phase as record companies, having licensed services across the world, now start to tap the enormous potential of emerging markets ... Emerging markets have huge potential, and, through digital, the music business is moving to unlock it. Most of these territories are seeing internet and mobile music penetration soaring, with rising demand for handheld devices.").

160 Llewellyn Joseph Gibbons et al., *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M.L. REV. 27, 43 (2002), http://www.mediate.com/pdf/ODR_CMC_NEW_MEXICO.htm ("In the ecommerce context it may be the only financially feasible option for low dollar value disputes and for individuals who cannot afford to travel long distances (at great expense) to resolve a dispute").

161 *Id.* at 42.

162 *Id.*

163 Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code*, 49 N.Y.L. SCH. L. REV. 271, 278 (2004), http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/11/49-1.Katsh_.pdf ("Not only do parties seem more willing to negotiate via the Web than via email but the negotiations are more frequently successful.").

164 *Id.* at 278.

165 *Id.*

166 Michal Chalamish & Sarit Kraus, *AutoMed - An Automated Mediator for Bilateral Negotiations Under Time Constraints*, *in* PROCEEDINGS OF THE 6TH INTERNATIONAL JOINT CONFERENCE ON AUTONOMOUS AGENTS AND MULTIAGENT SYSTEMS 1 (AAMAS 2007), http://www.ash-college.ac.il/cs/.upload/staff/michalChalamish/AAMAS07_0294_af32d078.pdf (a weighted consumer preference network, after considering each party's preference, gives a numerical value to each suggested outcome).

167 *Id.* at 2. ("An agreement is *pareto optimal* ... if there is no other agreement that is better for one negotiator without being worse to its opponent.").

168 *Id.*

169 Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2 DUKE LAW & TECH. REV. 1, 1- 16 (2003), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr.

170 Robert R. Marquardt, *Settling Disputes Online: Just Another Tool, or are Negotiators, Mediators and Arbitrators Approaching Extinction?*, ADR RESOURCES (last visited Feb. 14, 2015), http://adrr.com/adr4/sdo.htm.

171 *Id.*

172 *Id.*; *see* Katsh, *supra* note 163.

173 Anthony J. Fernandez & Marie E. Masson, *Online Mediations: Advantages and Pitfalls of New and Evolving Technologies and Why We Should Embrace Them*, 81 DEF. COUNS. J. 395, 395-403 ("[The] mediator's perception of emotions from each of the parties during traditional mediation enables her to convey the verbal and non-verbal messages qualified by the parties' attitudes, which is an aspect of the mediation process that cannot be conveyed during fully automated online mediations.").

174 Daniel Dimov & Jaap Van den Herik, *Towards Crowdsourced Online Dispute Resolution, Part 3*, MEDIATE.com (Jan. 2012), http://www.mediate.com/articles/DimovD3.cfm ("If CODR [Crowdsourced ODR] uses mediation or negotiation, the parties and mediator or facilitator may use information provided by the crowd in order to facilitate the process and reach a decision. For instance, the crowd's opinion may better inform them about their BATNA, which will facilitate the dispute resolution process.").

175 *Id.*

176 *What is Ujuj?*, UJUJ, http://www.ujuj.org/whatisujuj.html (last visited Feb. 14, 2015).

177 Dimov & Van den Herik, *supra* note 174.

178 *Id.*

179 *What is Ujuj?*, *supra* note 176.

180 Steve Abernethy, *Building Large-Scale Online Dispute Resolution & Trustmark Systems*, *in* PROCEEDINGS OF THE UNECE FORUM ON ODR (UNECE 2003) 1, 7, http://www.mediate.com/Integrating/docs/Abernethy.pdf.

181 Katsh, *supra* note 163, at 278-79.

182 Abernethy, *supra* note 180, at 7.

183 *Id.*

184 *Id.* at 2.

185 *Id.*

186 Goodman, *supra* note 169, at 3 (Cybersettle gives three rounds of bidding, thus allowing the initiating party to enter a different settlement offer for each round. Its computer software then contacts the other party, requesting them to enter counteroffers. The software then compares the different offers at each round to determine whether they're within the range of settlement.).

187 Rymers & Reinberg, *supra* note 152.

188 *Statement of MaryBeth Peters*, *supra* note 57.

189 *Id.*; *see Notice*, *supra* note 6, at 14741.

190 *Statement of MaryBeth Peters*, *supra* note 57.

191 Abernethy, *supra* note 180.

192 Katsh, *supra* note 163, at 278 ("Not only do parties seem more willing to negotiate via the Web than via email but the negotiations are more frequently successful.").

17 CDZJCR 595

End of Document

November 3, 2015

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

Re*:* **Second Request for Public Comments on U.S. Department of Justice Consent Decree Review**

To Whom It May Concern:

My name is Todd Brabec, and my extensive career in the music publishing industry includes positions as Executive Vice President and Worldwide Director of Membership for American Society of Composers, Authors and Publishers ("ASCAP"), Adjunct Professor at the University of Southern California where I teach a course on Music Publishing, Music Licensing and film, television and videogame scoring and song contracts, and author of the award-winning "Music, Money and Success: the Insiders Guide to Making Money in the Music Business." In addition, I am a former Governing Committee member, Music Chair and Budget Chair for the ABA Forum on the Entertainment and Sports Industries and the recipient of the Deems Taylor Award for Excellence in Music Journalism, the Educational Leadership Award from the Music & Entertainment Industry Educators Association and the Texas Star Award from the Entertainment and Sports Section of the State Bar of Texas for significant contributions to the practice of entertainment law. During my thirty-seven year career at ASCAP, I was responsible for signing many of ASCAP's most successful songwriters and composers; was in charge of all Membership operations; oversaw most major writer and publisher membership and affiliation changes; and implemented many changes in ASCAP's distribution and payment rules and practices.

Performance rights for musical compositions in the United States are primarily licensed by three Performance Rights Organizations ("PRO") - ASCAP, BMI, and SESAC. Songwriters, composers, and music publishers affiliate with or join ASCAP, BMI, or SESAC with the purpose of allowing the PRO to license their composition to users and to receive payment for performances outside of the United States through reciprocal agreements with PROs in other territories.

Creators may choose to affiliate with or join a particular PRO for a number of reasons, as discussed below, but, during the songwriting process, most songwriters at some point create musical works with a songwriter who belongs to a different PRO, resulting in a "split work" that is represented by more than one PRO. As the vast majority of split works are ASCAP and BMI co-written compositions, these comments will primarily address those two PROs, although they are certainly applicable to split works created by songwriters belonging to any of the PROs.

Each PRO Has a Unique Business Structure and Offers Creators Distinct Benefits

Since their inception in 1914 and 1939, respectively, ASCAP and BMI have been entirely different in nearly every aspect of their operations. These PROs have, and continue to have, different payment methodologies, payment formulas, and royalty categories, both for category of use (theme, score, visual vocal, jingle, audio-only performance, etc) and category of user (radio, television, live performance venue, theme park, streaming service, background music service, etc.). Each PRO uses different membership or affiliation agreements, which contain, among other things, 1) different resignation/termination rules and procedures, 2) withdrawal of works provisions, 3) royalty payment systems, 4) allocation of revenue procedures, 5) dispute resolution practices, 6) bonus and rewards practices, 7) change of payment procedures. These distinguishing factors are discussed in more detail below.

In fact, the only general similarities between ASCAP and BMI are their overall role in negotiating license agreements for the use of their writers' and publishers' works, collecting license fees attributable to those agreements, and then distributing royalties to their writer and publisher members and affiliates.

The above differences are among the many factors that a writer or publisher considers when choosing which PRO to affiliate with or join to represent their creative works. Creators may, in fact, switch from one PRO to another during their careers based on these very same differences, taking into consideration factors involving the PRO business models, including which model will allow them to generate the most income from their works in the short term or throughout the life of their copyrights, which model has proved successful for their co-writers, or which model offers certain other benefits and incentives, such as advances, loans, or guarantees.

In some cases, the difference between an ASCAP and BMI affiliation or membership can represent hundreds of thousands of dollars. Throughout my career, I have advised writers regarding the potential benefits and pitfalls of affiliating with or joining a particular PRO. An additional complicating aspect is that many songwriters also have co-publishing deals with other publishers or own their publishing 100%. The publishing company where they place their works must be associated with the particular PRO they join or affiliate with as a writer. Consequently anything that affects their writer share will similarly affect their publisher share in any split work situation. The following, which were briefly mentioned above, provide some examples of considerations writers must take into account when choosing a PRO.

Royalty Payments and Computations

Royalty payments and calculations across different licensees and type of use differ drastically between ASCAP and BMI.

Radio

The basic starting point for a radio performance royalty is the particular license fee of the station. For any successful song, the license fee is only a starting point- whether it's a current hit,

a hit song from years past, a "standard" (a song with a long history of performances), a popular holiday song, an album cut or a song receiving its first and only performance. In addition to the basic radio performance royalty (which is calculated differently by ASCAP and BMI), the PROs offer "bonus/success" payments for performances of successful songs; however, these payments are vastly different depending on whether a writer is affiliated with or a member of ASCAP or BMI.

Bonus Payments

- ASCAP pays bonus monies based on the popularity of a song in a given quarter. Each quarter, performance thresholds are set for songs in various genres with additional royalties being given to songs reaching these thresholds. The threshold levels are different for each radio genre and the amount of bonus payments are also different for success in each genre. For example, a country song might have a threshold of 2,500 quarterly performance credits to receive a bonus ("Premium") whereas a Latin song might have a minimum threshold of 1,000 credits. Each genre also has multiple performance thresholds where as the song reaches the higher thresholds, the bonus/add on monies increase.

- The bonus factor represents a significant portion of the earnings for any hit song, many times representing between 30% to well over 60% in some cases of the writer and publisher total distribution .

- BMI, on the other hand, has an entirely different radio bonus payment system. Under the BMI system a song receives its basic performance royalty for all performances in a quarter until the song reaches 95,000 performances. At that point, the writer will receive a "hit song" bonus, which increases as the song achieves higher performance levels. The "hit song " bonus can easily range between 30% to 70% of the final writer and publisher payment during a song's chart activity period.

- BMI also offers an additional "Standards" bonus, which applies to any BMI song that has reached 2.5 million performances from the date of its first performance. For these works, a writer receives additional payments for all radio performance of that song. In contrast, ASCAP has no such "Standards" bonus, so the ASCAP writer and publisher in a split work situation for this type of work would only receive regular radio royalty payments with no additional bonus.

These two very different "success on radio" payment systems have produced significant differences in royalties for split works. Throughout my career, I have yet to see a split work situation that has produced equal royalties for radio performances for the work's co-writers. To provide just two examples of the effects of these systems for writers affiliated with different PROs, a split work could hit a bonus threshold at ASCAP and receive significant additional

royalties whereas the same work at BMI may not reach 95,000 performances and receive no bonus. However, a split work reaching 250,000 performances in the BMI system could generate a substantial bonus payment whereas the same work might reach a lower quarterly threshold with a much lower bonus payment at ASCAP resulting in a substantial difference in payments to writers of the same song for the same performances.

Television

ASCAP and BMI payment structures for television performances are even more dramatic and complex than those for radio performances. The primary types of music on television are theme songs, background music/score and "feature performances" (visual vocals or instrumentals/the performance on camera of songs). The ASCAP and BMI definitions for these types of uses are similar. From that point on, however, the payment rules and actual payments are completely different.

Time of Day versus Audience Measurement

- For ASCAP, one of the primary factors affecting royalties in television (both cable and broadcast) is the "Time-of-Day" factor, which differentiates between performances based on the time of day during which they occur. Performances occurring during "primetime" (7pm-12:59am) receive 100% crediting, while performances occurring in the afternoon (1pm- 6:59pm) are reduced to 75% of the primetime royalty rate. Finally, performances of works on morning shows (7am-12:59pm) are reduced to 50% of the primetime rate while overnight performances (1am-6:59am) receive only 25% of the primetime rate.

- In contrast, BMI does not use the "Time-of-Day" or similar factors in their royalty calculations. The primary factor in BMI's calculations is the audience measurement of the show, which considers the number of people viewing the performance. For example, a very popular morning show might generate significantly higher royalties for a BMI writer than an ASCAP writer whose royalties would not be based on the size of the audience watching, but rather reduced under the morning royalty rate.

Duration of the Use

- At ASCAP, the duration of the use is only taken into account for feature performances up to 2 minutes in duration and for all background music/score. For songs with a substantial past history of performances ("Qualifying Works"), writers and publishers receive full payment when the Qualifying Work is used as a feature performance, regardless of the duration up to one minute (for example, a 5 second use would be paid the same as a 60 second use). All other types of short duration performances are paid on a pro-rata basis. However, duration of performance is not a payment factor for theme songs- a short theme is paid the same as a long theme- nor is it a factor for music used in advertising commercials.

- At BMI, the duration of the use is a royalty factor for every primary type of television royalty calculation (feature performances, theme songs and background music). As opposed to ASCAP which pays only up to 2 minutes of use for a feature performance, BMI continues to pay for the full use regardless of how long it is. For any performances over 2 minutes, a writer or publisher affiliated with BMI could, depending on the royalty calculation starting point,, significantly out earn his co-writer for the same use of the split work.

Multiple Uses of the Same Song in a Television Program:

- ASCAP has substantial royalty reductions for multiple uses of the same composition in the same program.

- BMI has no such reductions and pays fully on all uses of a song.

Bonus/Premium Payments:

- ASCAP has a bonus/"Premium" system which adds extra royalties to theme songs, underscore and feature performances which are included in shows with a high Nielsen rating. Multiple tier levels of Nielsen ratings are set each quarter with increased royalties given depending on which Nielsen ratings tier a show reaches. Shows below these tiers receive the standard royalty rates paid to all writers and publishers. For successful shows, the add-on monies can be substantial.

- BMI, on the other hand, pays based on the four factors of license fee, type of use (feature, score, theme, etc.), audience measurement/viewership of the show and duration of the use with additional bonus monies paid for visual and background vocals and visual instrumentals with a duration of one minute or longer. In addition, BMI has a theme song bonus for qualifying network themes. Additional monies are also added from the general licensing area.

Depending on all of these factors, significant payment differences can and do occur in any split work situation.

Additional Areas of Royalty Differences:

- While the most significant areas of differences between the methods used by ASCAP and BMI are in radio and television, the PROs similarly use different payment methodologies for many other performance categories, such as live concerts and sporting events. Co-writers for split works can expect disparate payments for these uses as well based on membership or affiliation with ASCAP or BMI.

Television royalties represent the most complex area of ASCAP and BMI royalty computations and payments. Specific royalties for any type of performance- whether visual vocals, background music/score, theme songs, jingles, commercials using hit songs, promos,

logos, symphonic/classical music, copyrighted arrangements of public domain works etc.- involve many factors including the size of the license fees received from each audiovisual media licensee, the type of use, the time of day of the performance, the audience measurement of people watching the show, the duration of the use, the past performance history of the composition being used, Nielsen ratings, number of airings in a quarter, multiple uses in the same show, the payment schedule in effect at the time of the performance, applicable bonus/rewards for success provisions, among others. Due to these significantly different royalty calculations based on a number of different factors, royalties paid to writers or publishers of a split work often differ substantially based on their membership or affiliation with ASCAP or BMI.

ASCAP and BMI Organizational Differences

Agreements

When choosing a PRO, a writer must also consider the ASCAP and BMI membership and affiliation agreements, which present a number of differences. For example, ASCAP member agreements are able to be terminated annually with automatic annual renewals, but members do not negotiate the basic agreement. BMI, however, requires its affiliates to enter into two year writer and five year publisher standard agreements, which automatically renew for two and five years, respectively, if effective termination notices are not sent. Unlike the ASCAP agreement, certain terms of the basic BMI agreement are negotiable.

Both ASCAP and BMI have different withdrawal of works provisions. "Licenses in effect" applies to all ASCAP removal requests, meaning that works owned or controlled by members terminating their ASCAP membership will continue to be licensed by ASCAP to licensees under any license that is currently in effect until the license term has expired. At BMI, many older contracts do not have "licenses in effect" provisions. Further, in cases where a BMI writer switches to ASCAP and attempts to remove works from BMI, ASCAP will not claim nor pay on the writer share of the work unless the corresponding BMI publisher share is also effectively removed from BMI.

Payment Plans

ASCAP writers have a choice of two different distribution plans, "Current Performance" or "Average Performance" (previously known as the Four Funds System), for the quarterly payment of their royalties.

The Current Performance allows a writer to receive the full amount of performance royalties earned each quarter. The Averaged Performance plan, on the other hand, bases 80% of a writer's quarterly payment on five and ten year averages of the writer's catalogue, with only 20% of each distribution based on the most recent quarter of performances- in short, a quasi averaging of income plan.

The type of payment plan that a writer chooses has a substantial effect on the amount of royalties he receives both short term and long term. In any split work situation, it would be impossible for BMI, which offers no such Average Performance-type plan, to compensate the ASCAP Averaged Performance writer in a 100% licensing situation.

Conclusion

Since 1939, writers and publishers have had a licensing choice as to which PRO is best for them. Writers and publishers join ASCAP or affiliate with BMI based on many factors described above. The primary considerations have always been about which PRO will license a writer's creative works most effectively and pay the best compensation in the both the long and short term.

Throughout my thirty-seven year career at ASCAP, no writer or publisher, in my experience, ever believed that ASCAP was licensing more than its individual share of a composition. In every instance of a split work, all writers and publishers understood that ASCAP would license and pay for their share of a work with BMI licensing and paying for their writer and publisher share of the split work. No writer was ever told that ASCAP was licensing and paying on the full work nor are there any examples of ASCAP paying the non-member shares. Even in situations where the writer was not affiliated with BMI and wanted to join ASCAP, ASCAP could not account to the writer if the work had already been placed with a BMI publisher.

In licensing negotiations with users, PROs, in my experience, base their negotiations on their percentage shares of compositions- their market share of all performances in a given media. There have been many instances in the past where, based on the argument that they could license 100% of any work for which they controlled a fractional share, ASCAP and BMI could both claim they have 90% or 100% of a major popularity chart; however, no user would take such a claim seriously and would never negotiate a licensing deal on such a basis. ASCAP, BMI, and the user community have always operated on the understanding that licensing negotiations involve only the shares controlled by each organization's writers and publishers.

Given their history of only licensing for their own fractional shares, requiring ASCAP and BMI to account to the other PRO's writer and publisher in a split work situation would be impossible, based on the way royalty payments are calculated and the different ways each writer and publisher may elect to receive such payments. Further, even if a system of payment could be devised, such a change to the existing licensing procedures would completely undermine writers' and publishers' rights to make a meaningful choice as to which PRO to affiliate with or join, as they would be forced to allow a different PRO, with which, in most cases, they had no pre-existing relationship, to apply their royalty calculations and payment plans and license works on their behalf. Such a scenario would undoubtedly lead to a barrage of audits and litigation in addition to causing uncertainty about the status of writers and publishers who have taken advances, bank loans, or guarantee deals which are recoupable from PRO earnings. Each of

these financial agreements has been negotiated based on specific projections and applicable distribution rules of a particular PRO.

For the many reasons discussed above, all of which illustrate that substantial differences between ASCAP and BMI and the existing licensing practices, requiring ASCAP and BMI to license 100% of any split work would remove any ability of songwriters and publishers to choose which PRO best fits their specific needs in addition to creating a flood of new issues regarding how payments will be made by PROs to writers and publishers who belong to a different PRO. Such a determination would result in a profoundly disruptive and negative impact on the music industry, and I urge the Department of Justice to clarify that 100% licensing is not required by the PROs.

Respectfully submitted,

Todd Brabec
toddbrabec@gmail.com

MODERN WORKS
MUSIC PUBLISHING
new york nashville tucson

November 18, 2015

Chief, Litigation III Section
Antitrust Division
US Department of Justice
450 5th Street NW Suite 4000
Washington DC 20001

Dear Sir/Madam,

I am writing in response to the "Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works".

Background

I shall begin by telling you about Modern Works, the music publishing company that I built with my partner Dan Coleman over the course of the past ten years. I feel a brief history of our company isg relevant to this issue because Modern Works is typical of the thousands of publishing companies who represent hundreds of thousands of songwriters many of whom could be negatively impacted if the 100% licensing rule is implemented.

We created Modern Works at a moment in the history of the music industry when many publishers were abandoning the business model generally referred to as "Administration" (or more commonly "Admin"). Unlike most publishers who own all or part of the compositional copyrights in their catalogues, an Admin company like Modern Works owns zero percent of the copyrights that it oversees. Nevertheless, Modern Works provides its clients with the same panoply of services that are offered by the large publishers (including the registration of copyrights with the appropriate rights agencies in every territory around the world, the collection, accounting and payment of publishing royalties, the exploitation of compositions through film and advertising synchronization licenses and the general administration of songwriters' catalogs). In an Admin deal, a company like Modern Works will receive a commission (typically 10%-20%) for providing these services but it will never receive the additional (and potentially lucrative) payments that flow to copyright owning publishers when

there is a synch license for a song placement in a major motion picture or a Super Bowl commercial.

The differential between these two possible outcomes is usually a result of the amount of risk that a publisher is willing and able to incur on the "front end" of its relationship with a songwriter.A publisher willing to risk advance payments to a songwriter (generally in the $10k to $200k range—but could be considerably more than that) is usually rewarded with an ownership interest in a set number of compositions (generally for that songwriter's first few albums as a recording artist) for a certain period of time (generally the exploitation term is 12 years to perpetuity).

Because we built Modern Works without a dollar of Wall Street capital, my partner and I were not able to play at the major publisher roulette table. There was also another motivation which drove our decision to become Admin publishers and that was to provide much needed administration services to those songwriters who decided they would prefer to own the copyrights to the compositions they created rather than to sell them early in their careers when these works were probably at their lowest perceived value.

I'm happy to tell you that the decision that Dan Coleman and I made a decade ago was a very good one—for the artists we represent and for our employees. Today Modern Works is the country's 25th largest music publisher and one of the largest companies focused exclusively on Administration. Modern Works administers 30,000 copyrights including some which have sold millions of records. At the most recent Grammy Awards, 13 Modern Works' artists received nominations for our industry's most prestigious award.

I apologize for the long-winded introduction but I believe it's crucial to your analysis of this issue that you understand one very important underlying truth—it would have been impossible for my partner and me to build an independent music publishing company in this manner for this purpose—without the regular assistance, support and collective negotiating power of ASCAP and BMI. Therefore any actions you take which might have a negative impact on the business model of these organizations (such as the imposition of 100% licensing) is likely to have a direct and negative impact on independent music publishers like Modern Works.

Why 100% Licensing Will Negatively Impact Our Industry

I have been a music lawyer for forty years. During this time the gross publishing income in the United States has increased by 400%. During this entire period fractional licensing has been the accepted manner for licensing compositions. It's not that publishers and songwriters were unaware of their right to grant a non-exclusive license on behalf of all of the other rights holders (provided they met certain criteria)—it's simply a process which developed out of respect for the fact that we weren't leasing rooms in a recording studio instead we were licensing songs which represented the hearts and souls of the songwriters who created them.

If 100% licensing became the operative way of doing business:

(i) How would this impact the songwriter/publisher agreements where this type of licensing right is not enunciated? Or even worse—where it is prohibited. I'll answer my own question—it will lead to costly and time-consuming litigation.

(ii) How will ASCAP be able to pay writers and publishers associated with BMI when the information on splits, songwriter and publisher names & addresses and account status (recouped or unrecouped) is not available to them?

(iii) Isn't it likely that a double commission will be taken against the writers/publishers whose PRO did not initially process the license? In other words if ASCAP did the 100% licensing they will take their fee out of the full amount of gross proceeds. They will then pay their songwriters and publishers. The balance will be remitted to BMI which will commission this amount before accounting and paying their songwriters and publishers. If this hypothetical becomes standard operating procedure, the BMI writers and publishers will suffer a "double-dip" of commissions.

(iv) What right does the songwriter/publisher of one PRO have to audit another PRO? In the example cited above, if the BMI songwriters believe that they were underpaid by ASCAP—what recourse do they have to review ASCAP's books and records? I think the answer is—none.

(v) Won't this destroy the incentive of publishers who seek to withdraw rights from the PRO's—if they are still forced to accept the fact that any PRO which still has a 1% interest in one of their compositions is free to license the full 100% (including the shares of the publishers who withdrew their rights in the first place)?

(vi) How will this impact those who have paid advances to their songwriters? Until now publishers and PRO's have been able to award

advances based upon historic performance of earnings. Under the 100% licensing model, it could conceivably take longer for artists to recoup (see subparagraph iii above) and monies could be directed to songwriters without the remitting party being aware of that songwriter's financial status with its publisher or PRO (i.e. recouped or unrecouped).

(vii) How will this affect bars, restaurants and clubs who obtain licenses from the PRO's for the public performance of music in those venues? Will it cause the venue operator to choose to obtain only one PRO license? And how does the income get divided between members of different PROs if the criteria and amount of fees charged for the licensing of public performances is calculated differently by ASCAP than it is by BMI?

(viii) Won't this increase the likelihood that songwriters will be influenced to join a specific PRO for the sole purpose of being able to co-write songs with other members of that same PRO? I think the answer is "yes". Personally I don't believe that's the right basis for a songwriter to choose to affiliate with one PRO versus another.

Conclusion

When the Department of Justice announced that they were going to revisit the Consent Decrees entered into by ASCAP and BMI more than 50 years ago—I was elated. Like most independent publishers I hoped and believed that the DOJ would finally release these PROs from strictures that were created for a vinyl music world but were unfortunately still alive and well in a digital music marketplace.

I hoped that the DOJ would consider what happened when a few major publishers partially withdrew their digital music rights and negotiated directly with the Digital Service Provider's. The result was a considerably higher market rate for their music catalogs—versus the rates paid to publishers like Modern Works through ASCAP and BMI where such amounts are artificially depressed by Consent Decrees and Rate Courts.

Instead of focusing on these aspects of the PROs' business which are being unfairly undervalued—the DOJ has instead aimed its initial inquiry at one part of the PROs' business model which is working flawlessly—fractional licensing. Until publication of the "Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works" I have to confess—I was unaware that there was a problem and I've been a music lawyer for 40 years and a music publisher for 10 years.

Let me say this as succinctly as I possibly can. Fractional share licensing works. It worked when the Consent Decrees were signed in the 1940s—and it still works fifteen years into the 21st century!

I'd like to add one closing thought. Whenever a staff member at the DOJ or their sons and daughters turn on their car radio or stream music on their computer—those listeners aren't using those music sources in order to hear a disc jockey introduce song titles or to check out the commercials. The only reason for turning that dial is to listen to music and enjoy the compositions created by the gifted songwriters like our clients Erroll Garner who co-wrote "Misty" or Bootsy Collins who co-wrote "Flashlight". Without these extraordinary songs and thousands more just like them there is no reason to listen to Pandora on your iPhone…there is no reason to make a Spotify playlist on your laptop and there is no reason to set your clock radio to Z-100 or Hot 99.5. What those Digital Service Providers and radio stations are selling is just one single product…and it's called music. And those multimedia conglomerates didn't create that music—they just play it. And that music which those companies are selling through ads and subscriptions was created through the hard work, expense and genius of songwriters and their publishers. I hope that this fact doesn't get lost as you seek to create fair regulations for ASCAP and BMI two companies who have been true creative and business collaborators for songwriters and publishers like Modern Works for a very long time.

Thank you for considering my point of view on this issue.

Respectfully Submitted,

Bob Donnelly
Partner
Modern Works Music Publishing