November 19, 2015

Mr. John Read
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 4000
Washington, DC 20001
Via email: ASCAP-BMI-decree-review@usdoj.gov

Dear Mr. Read:

I am the founder and principal of Rights Management Holdings LLC, a strategic advisory and consulting firm serving the intellectual property market with a specialization in music copyright. Prior to founding Rights Management Holdings, I held senior level executive positions leading corporate strategy and digital licensing at a major United States performing rights organization where I served on the executive team for more than 20 years.

I thank the Department for opening this issue for comments as a proper understanding of the dynamics of the marketplace is critical to ensure that the DOJ does not advocate for changes, specifically a requirement that PRO's engage in 100% licensing which will suppress competition, limit commercial choice for America's music publishers, songwriters and composers and devalue compensation for America's music creators. I offer the following comments on this topic for your consideration:

1. **100% Licensing is Anti - Competitive: It Reduces Choice and Competition to Earn Representation of Writers' and Publishers' Copyrights**

Other than direct licensing which itself is blunted if not rendered impractical by any 100% licensing requirement, the current U.S. marketplace lacks a provision for the owners of music copyrights to opt in or out of PRO representation at will. The recent "all in or all out" decisions by the ASCAP and BMI Rate Courts deprive rights owners of the ability to actively choose which categories of licensees they want to have licensed through the PRO's, and which categories they choose to license themselves or assign to an alternative agent. Other major global markets allow such provisions, providing the owners of copyrights the option to actively manage their licensing income streams and service providers. These alternative options inject the benefits of competition into the licensing marketplace.

A 100% licensing provision would be a king making move, unwittingly saddling the incumbent PRO's (whom themselves are advocates for digital withdrawal) with more power through the requirement that they license and thereby remove a musical work from possible alternative forms of license – even if they only represented 1% of that work. All other parties with the remaining 99% interest in the work would be deprived of their right to pursue alternate forms of licensing via direct license or via partial withdrawal from the PRO's if that is ultimately codified, or even via resignation from the PRO system. Forcing works to stay in the PRO system where 1% or less of the work is represented by a PRO is counter to the desire of the Department to foster a competitive multi-player market for the licensing of musical works.

2. In Reality Owners and Representatives Have Been Licensing Based on Shares Owned or Represented

While the copyright law allows any party with an interest in a musical work to license that entire work and then account back to the other interested parties, the U.S. performing rights market simply does not work that way. Many musical works are owned by multiple parties and a single work is usually licensed by multiple parties or agencies. In reality, the owners of musical work copyrights and the U.S. PRO's have priced and offered licenses only for those shares of the musical work which the licensor owns or represents.

Take terrestrial broadcast radio for example. There is a long history of agreements negotiated between the radio industry and the performing rights agencies. The most recent set of agreements provide for a fee of 1.7% of gross revenue, less certain deductions, paid to ASCAP plus the same 1.7% fee paid to BMI. This result is an aggregate gross fee of 3.4% paid for cumulative ASCAP and BMI shares. If either the ASCAP or BMI agreements intended to offer – or if the radio industry assumed that they were purchasing options for - 100% shares from either society then this total fee should be reduced or adjusted by the percentage of redundant works which have both ASCAP and BMI affiliated interests in them. This option would reduce the total compensation pool considerably. In reality the radio industry has never triggered this possibility. Clearly it has been explicitly understood through market practice and the payments of literally billions of dollars in fees, that the societies were licensing and collecting fees for only the shares of works in their repertoires.

3. **Royalty Distributions to Owners and Representatives Have Been Based on These Licensed Shares**

Similarly, when royalty distributions are made to songwriters, composers and publishers by licensors, these distributions are made only for the shares licensed and only to the interested parties with whom the licensor has a relationship. ASCAP pays ASCAP writers and publishers for their shares in the works licensed. BMI does the same for its writers and publishers.

4. **There is not a Centralized, Transparent and Accountable Clearinghouse or System to Ensure that Proceeds from any 100% Licenses Would be Fairly and Accurately Distributed Amongst Copyright Participants**

There is currently no centralized clearinghouse service or audit function to ensure that payment from any 100% licenses which any PRO would undertake would or could be fairly distributed. Putting the onus on ASCAP to identify, locate and pay a BMI represented publisher or writer or vice versa creates an expensive and undue hardship.

The lack of data, visibility into distribution practices and accountability would create a giant loophole through which proper value may never be realized and fair distributions to all owners of the rights in a musical work may never be made. This system could perpetuate the ultimate "black box" in which royalties could be overpaid to one participant at the expense of all others or diverted entirely from their rightful beneficiaries.

5. **100% Licensing Voids Non-Exclusive Licensing Provisions**

As mandated in the Consent Decrees, publisher and writer grants to ASCAP and BMI are non-exclusive. Owners of works retain the right to enter into direct licenses. When publisher owners of musical works enter into direct licenses, they undertake to make direct distributions to their writers. If the societies are forced to license 100% of a work to any licensee, regardless of the desire to direct license shares by any of the other multiple owners of the work, they are effectively depriving the other rights holders of their ability to offer direct licenses for their shares. This is at odds with the Consent Decrees.

6. 100% Licensing Binds All Publishers to the Current System and Roadblocks Marketplace Innovation and New Entrants

As mentioned above, due to the fragmented nature of music composition rights ownership, the rights portfolios owned by publishers are full of co-owned works. Today if a publisher wanted to resign completely from ASCAP and BMI to license directly or via an alternative provider of services they would be able to terminate their affiliation agreements and move on.

The 100% license provision essentially eliminates this option as all of their co-licensed works would defacto remain in the incumbent system. Choice is reduced and those same "monopolistic" powers, which the Department and the licensee community state they fear ASCAP and BMI wield, are actually strengthened and perpetuated indefinitely. This strangles innovation and the launch of new entities which may be better able to service music publishers and songwriters and licensees in all or select segments of the licensing, administration and royalty distribution landscape. In fact, the societies themselves have appealed to the Department to allow publishers and writers to withdraw their rights for digital applications to allow additional licensing options to enter the market.

In summary, the 100% licensing concept is a dangerous market breaker as opposed to an innovative market maker. It is simultaneously disruptive and regressive.

On the disruption front, it endangers current compensation including licensing fees and fair royalty distributions to all interested parties. It disrupts an ecosystem where music publishers carefully build their portfolios of copyrights share by share and song by song. It makes fractional song ownership – which is the state of the industry – a regulatory sinkhole devoid of options to embrace new licensing formats and constructs.

It essentially strips property owners of choice in choosing their licensing agents by effectively denying free market options to any new player who does not completely control all shares in all compositions. It discourages any publisher from experimenting or leaving the current system for all works that are co-owned. It locks out progress and closes what should be a vibrant marketplace open to innovation and competition. It places an unfair burden on ASCAP and BMI to license and administer shares of works completely outside of their mandate, knowledge and repertoire.

On the regressive front, it violates many of the basic protections the Department seeks to promulgate in its management of the Consent Decrees. It makes direct licensing, an historical operative pillar of the Consent Decrees, moot. It effectively perpetuates the gridlock of the two shop oligopoly the Department seeks to blunt and discourages innovation and competition in the marketplace.

Now more than ever our industry demands innovation, transparency and accountability. Independent publishers are re-emerging building repertoire share by share. New services seek fresh licensing solutions that respond to changing markets. We need more players and more services and more administrative options, not fewer. New entrants can work side by side with the endemic players to provide more options for publishers, writers and licensees alike.

Thank you again for the opportunity to share my comments on this most important issue.

Respectfully Submitted,