

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

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