Before the
United States Department of Justice
Antitrust Division
Washington, D.C. 20001

In the Matter of	
Antitrust Consent Decree Review 2015	*United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.)

FURTHER COMMENTS OF PUBLIC KNOWLEDGE

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Public Knowledge submits these comments in response to the Department of Justice's ("DOJ") requests for comments on PRO Licensing of Jointly Owned Works[1], a follow up on the DOJ's 2014 solicitation of comments on the consent decrees governing the operation of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI").[2]

INTRODUCTION

ASCAP and BMI are organizations that license the public performance of musical compositions to a wide array of license seekers. By offering something close to a one-stop-shop for licenses, these Performing Rights Organizations ("PROs") create efficiencies in the licensing marketplace for both licensors and licensees. However, the concentration of licensing authority in the hands of only a few organizations also raises antitrust concerns and the specter of abuse. As a result of those antitrust concerns, the PROs must abide by a set of conditions codified in their respective antitrust consent decrees--conditions that are intended to ensure that the public enjoys the benefits from the efficiencies offered by the PROs without suffering the harms of market concentration. Among the bedrock conditions of the consent decrees are that licenses must be granted to any user requesting them, and that the PRO may not discriminate amongst similarly situated users.[3]

[1] *Antitrust Consent Decree Review - ASCAP and BMI 2015*, United States Department of Justive (last visited Nov. 18, 2015), http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015.
[2] *Antitrust Consent Decree Review*, United States Department of Justice (last visited Nov. 18, 2014), http://www.justice.gov/atr/cases/ascap-bmi-decree-review.
[3] Sections IV.C and VI, U.S. v. ASCAP, Second Amended Final Judgment, No. 41-1395, 11 June 2001 (SDNY) ("ASCAP Consent Decree"); Section VIII, U.S. v. BMI, Final Judgment, No. 64-3787, 18 November 1994 (SDNY).

In the last year, the DOJ has been considering modifications to the ASCAP and BMI Consent Decrees (together, the "Consent Decrees"), in particular whether to permit music publishers to "partially withdraw" their catalogs of musical compositions from the PROs, i.e. to direct ASCAP and BMI to deny licenses to certain classes of license seekers but not others. In practice, music publishers have attempted to selectively require "new media" companies, i.e. internet streaming platforms, to negotiate direct licensing deals with them rather than through the regulated PROs, with the expectation of extracting higher royalty rates.[4] Public Knowledge has expressed its concerns about modifying the Consent Decrees to permit this practice in our previously submitted comments.[5]

In considering the implications of a world where partial withdrawals are permitted, the DOJ has correctly identified music industry licensing treatment of co-authored works as a complicating factor. Ironically, permitting music publishers the ability to both partially withdraw their catalogs from PROs, and amplify their market power by requiring licensees to obtain permission from all owners of a work (a practice at odds with the normal operation of copyright law), would be akin to blessing the very same concentration in market power that led the DOJ to bring antitrust actions against the PROs.

I. Split Works Licensing Has No Basis In Copyright Law

In the request for comments, the DOJ asks whether the Consent Decrees should be modified to permit or require ASCAP and BMI to offer licenses that require users to obtain

[4] See, e.g., *Pandora Media, Inc. v. Amer. Soc. of Composers, Authors and Publishers*, 785 F.3d 73 (2d Cir. 2015).
[5] Comments of Public Knowledge, In the Matter of Antitrust Consent Decree Review, August 6, 2014, *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307976.pdf

licenses from all joint owners of a work. Split work licensing is the practice of requiring consent from all joint owners of a work in order to license the work. Such a requirement has no basis in copyright law. It is well established that a license from one joint owner of a work without consent of the other joint owners is defense against copyright claims against all owners of the work for the uses licensed.[6]

To the extent the practice exists as a matter of common industry practice, it is inappropriate for the DOJ to codify it into the operation of the marketplace for musical composition performance licenses. To the extent such a practice is supported by contractual agreements among all joint owners of works, the market concentrating effect of the practice, discussed in greater detail below, should trigger a DOJ review of the extent to which such contracts exist, how they impact the extent to which music publishers can exert control over the licensing marketplace, and to what extent they are freely entered into amongst authors, or instead have been imposed broadly by the music publishers in the form of "standard terms."

II. Split Works Licensing is Unsound Competition Policy

In addition to not being grounded in law, the practice of split work licensing in the context of permitting "partial withdrawals" raises concerns about exacerbating the market power already held by the major music publishers. As we noted in our prior comments, the music publishing business, as measured by share of total revenue, is dominated by three companies: Sony/ATV (29.5%), Universal Music Publishing (23%), and Warner/Chappell (12.5%) hold a

[6] See *Nimmer on Copyright* §6.10 The Right of One Joint Owner to License the Work without the Consent of the Other Joint Owners (2015); *Patry on Copyright* §5:7 Economic consequences of joint ownership (2010) ("A license from one co-owner is a defense to a claim of infringement brought by the other, nonlicensing joint owner. This is a significant point: a co-owner may unilaterally grant non-exclusive licenses… The only obligation of a co-owner is to account for any profits earned from the exploitation.")

combined three-firm market share of 65%.[7] The next largest publisher, BMG Rights Management, is less than half the size of any of the three major publishers, estimated to hold another 5.4% of the market. While these numbers are troubling on their own, examining the market in terms of "control share" paints a starker portrait.

"Control share" is a term used by the European Commission in its antitrust review of both the Universal-BMG and Sony/ATV-EMI deals, two of the most significant recent mergers involving music publishers. As the Commission explained, "[t]he market investigation has shown that market shares on the basis of revenues alone might not fully reflect the market positions of the different publishers since they do not adequately take into account their power on the basis of co-publishing and recording rights."[8] The Commission's observations on the effect of split works licensing in the context of the Sony/ATV-EMI merger are very relevant to the present review:

> Online customers[9] (or indeed any type of customer) face difficulties in identifying the musical works to which a specific publisher holds rights. This is exacerbated by the prevalence of fractional ownership rights. Online customers have explained that due to the legal risks they run when certain musical works are not fully licensed, they need to obtain licences[sic] that cover as many ownership interests in musical works as possible. In undertaking these negotiations, customers are aware that if they do not agree to the full terms and conditions requested by the publishers, they face difficulties in offering both the repertoire in which the publisher holds a 100% interest and the repertoire in which it holds co-publishing rights. The market investigation showed that because of the fractional ownership structure of songs, customers generally consider that pure revenue based market shares do not necessarily equate to the effective control a publisher has over a range of songs and that the bargaining power of a publisher is the same if that publisher holds 100% in nine songs or a 25% interest in the same amount of songs."[10]

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[7] *Recorded music market share gains for WMG in 2014, Sony/ATV is the publishing leader*, Music & Copyright Blog, available at https://musicandcopyright.wordpress.com/category/market-share-2/.

[8] Case No COMP/M.4404 - Universal/BMG Music Publishing, Commision Decision of 22 May 2007, pg. 66, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m4404_20070522_20600_en.pdf

[9] The European Commission uses the term "customer" here in the sense of "license seeker."

[10] Case No. COMP/M.6459– Sony/ Mubadala/ EMI Music Publishing, Commision Decision, 19 April 2012, pg. 41 (citations omitted), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m6459_20120419_20212_2499936_EN.pdf ("Sony Report")

The Commission concluded based on this and other evidence that "control shares, which take account of co-publishing rights on an equal base to full publishing rights, remain a valid proxy for assessing the market power of a music publisher."[11] While data concerning the contents of music publisher catalogs, let alone fractional ownership data, is not easily or publicly available, the Commission's analysis offers some insight into the impact "control share" can have on enhancing market power. In its analysis the Commission found that while a combined Sony/ATV and EMI would hold a 20-30% and 30-40% revenue-based market share in Ireland and the UK, respectively[12], an examination of control share increased that control to 60-70% and 50-60% of the markets in Ireland and the UK, respectively.[13] On the basis of the too-concentrated market share created by the amplifying effect of fractional ownership, the Commission ultimately required Sony/ATV to divest a number of catalogs before approving the merger.[14]

The DOJ should take note of the Commission's analysis in those mergers. The same market power enhancing effects of split works licensing that supported the Commission's concerns should color the DOJ's view of how the music publishers are likely to leverage their catalogs in negotiations outside of the scope of the Consent Decree's protective restrictions.

Given the concentrated state of the music publishing industry, split work licensing may have the effect of turning the major publishers' catalogs into near-perfect complementary goods. A license from any one publisher has little value unless the user has licenses from most (or all) other publishers. As a result, competition amongst music publishers to monetize their catalogs,

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[11] Sony Report at 42
[12] Sony Report at 13
[13] Sony Report at 43
[14] *Mergers: Commission approves Sony and Mubadala's takeover of EMI's music publishing business, subject to conditions*, European Commission Press Release Database, 19 April 2012, *available at* http://europa.eu/rapid/press-release_IP-12-387_en.htm.

e.g. through the offering of better terms and competitive rates, would be stifled. Without the ability to launch even a niche service with sufficient breadth, license seekers would have no leverage in shopping around for better license terms.

Taken a step further, it is possible to imagine a situation where given the amplifying effect of split works licensing, music publishers need not even collude with one another to extract above-market rates through hold-up effects against license seekers. Each might have effective control over a sufficient share of the market to eliminate any threat that a defection by another publisher might pose. The end result would be a marketplace where music publishers would be empowered to choose winners and losers among distribution and streaming platforms, regardless of the quality or value offered by the service to the public.

Ultimately, permitting partial withdrawal of catalogs combined with split works licensing practices would only have the effect of exacerbating competition issues already present in the music publishing industry - the very competition issues that led to the DOJ placing the PROs under consent decrees in the first place.

III. Permitting Split Works Licensing Does not Serve the Public Interest

The public interest in the music licensing marketplace lies in policies that "maximize the availability of creative works to the public," the standard imposed on various copyright royalty setting bodies created by Congress, and which has been codified in 17 U.S.C. §801 since the Copyright Act of 1976.[15] In considering alterations to the Consent Decrees, the DOJ should similarly take into consideration whether those changes maximize the availability of creative works to the public. A licensing environment that encourages the creation and offering of new

[15] Copyright Act of 1976, Pub. L. 94-553 (Oct. 19, 1976), *available at* http://copyright.gov/history/pl94-553.pdf.

services and platforms that serve music to the public is one yardstick for measuring access maximization. The public interest is also served by competition - among platforms and services, as well as among licensors competing for consumer dollars.

Enabling music publishers to leverage partial withdrawal and split licensing to amplify their market power and extract above-market rates will stifle the growth and launch of new services. It will also favor large incumbents who are able to afford high rates, reinforcing the strength of major players like Amazon, Apple, and Google, who are able to pay above-market rates for music licenses by cross-subsidizing their music offerings in order to enhance the value of their other offerings in video, retail, mobile, etc.[16] Neither of these outcomes serves the public interest.

CONCLUSION

As stated in our prior comments, the ASCAP and BMI consent decrees have served an important role in promoting competition and encouraging a robust music composition licensing market despite the dramatic market concentration among both music publishers and the PROs. As the recent attempt of publishers to partially withdraw their rights from the PROs and the market power leveraged by the major record labels against online music services both provided important insights into the harms that could result from weakened consent decrees, so to do the European Commission's consideration of "control share" and the impact of split work licensing. Given the high potential for mischief that split works licensing would enable, and the general lack of any compelling public interest codifying the practice, Public Knowledge encourages the

[16] Sherwin Siy and John Bergmayer, Why Apple Can't Save Music Streaming, HypeBot, June 8, 2015, *available at* "http://www.hypebot.com/hypebot/2015/06/why-apple-cant-save-music-streaming.html.

DOJ to prohibit music publishers from leveraging their fractional ownership shares in parts of their catalog as an enhancer of their market positions.

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