

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 repertoires 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 repertoires.

The Decrees themselves define the PROs' repertoires 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 repertoires 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 statements⁹ – 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 repertoires. 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 repertoires 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 repertoires 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 repertoires 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 repertoire.

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 repertoires. 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://priceconomics.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,

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