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

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

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

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

DISCUSSION

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

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

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

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

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

Fractional Licensing of Joint Works

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

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

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

[3] *Id.*

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

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

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

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

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

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

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

[9] *Id.*

Mandating 100% Licensing Would Wreak Havoc in the Marketplace

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DOJ QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[30] *Id.*

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

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

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

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

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

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

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

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

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

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

Justice White explained:

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

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

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

[34] 441 U.S. at 2.

[35] *Id*. at 4.

[36] *Id*. at 20.

[37] *Id.*

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

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

[38] *Id.*

[39] *Id.* at 21.

[40] *Id.* at 22.

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

[42] *Id.* at 23.

[43] *Id.*