

Written Statement of **The Association of Independent Music Publishers** regarding the
Request for Public Comment on PRO Licensing of Jointly Owned Works

ASCAP & BMI CONSENT DECREE REVIEW before the

Chief, Litigation III Section

Antitrust Division

U.S. Department of Justice

450 5th Street NW, Suite 4000

Washington, DC 20001

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Formed in 1977, the primary focus of the **Association of Independent Publishers (AIMP)** is to educate and inform independent music publishers about the most current industry trends and practices relevant to ‘indies’, as well as the issues and problems confronting the music publishing industry as a whole in this ever-changing music business. Originally formed by a group of Los Angeles-based music publishers, the association now has chapters in Los Angeles, New York, and Nashville, and counts amongst its membership much of the independent music publishing sector, and also many executives from other sectors of the industry, including motion picture, television, multimedia and home video producers, the record industry, music licensing and supervision, songwriters, artist managers, and members of the legal and accounting professions.

Thank you for the opportunity to offer comments on the PRO licensing of jointly-owned works, as this is an issue of keen importance not only to independent music publishers, but to the continued success of our nation’s global leadership role in the industries of intellectual property, popular culture, and more specifically, American music culture.

Great songs start with the songwriter. Unlike other industries where market forces play a leading role, the lasting impact and global reach of our music result from freedom of expression, freedom to collaborate, and the entrepreneurial spirit. Songwriters and independent music publishers in particular are the small businesses that fuel the overall music business, providing the necessary creativity to drive the culture continually forward, creating new genres and trends that spread globally. Groundbreaking, forward-thinking creativity in music can be readily nurtured and supported by independent music publishers, because it is the very essence of ‘indie’ culture. The ‘indies’ aren’t driven primarily by economics, but by passion, and it is the combining of this passion with truly creative, visionary songwriters, that allows great songwriting to flourish. A hit song, however you define it, can be written as readily in a studio apartment in Wisconsin, as it can be in the best recording studios in New York, Nashville, and Los Angeles. We must continue to support the process that makes this possible. And the economic success and global impact of our music has been made possible through the unique and collaborative relationship amongst songwriter, music publisher, and PRO.

The PROs have played a vital role in allowing the formation and sustenance of these creative and visionary ‘independents’, because they give them standing and leverage in a much larger marketplace. If the ability to negotiate license agreements relied solely on an independent

publisher's market share and economic leverage, then most creative and visionary songs and songwriters would never realize their full potential. The success, size, and market share of the large, publicly-traded music companies is owed in large part to their acquisition and amalgamation over the years of many independent music publishing and songwriter catalogs, aggregating these established and highly successful 'independent' song catalogs under one 'major' roof. Without such visionary & successful companies to be acquired and then wielded economically and aesthetically as leverage in the marketplace, the path to success for the 'majors' would be much different. All music companies, large and small, play a vital, important, and valuable role in this business. But it is much easier to acquire a visionary, successful, and creative company, than it is to create one. Having representation at the PRO allows the success of the song to be based in large part on the creative merits of the song, not solely on the economic heft of its business partner, the independent music publisher. This is how it should be.

Moreover, the U.S. system of having multiple PRO's (i.e. ASCAP, BMI, and SESAC) available to songwriters and publishers, as opposed to the one-society system in many other countries, has allowed for robust competition in the marketplace. While the consent decrees ASCAP and BMI are currently operating under have severely limited their ability to negotiate fair market rates for their members (as addressed more fully in prior public comments submitted to the DOJ on this issue), having choice has still resulted in improvements in transparency, accountability, advocacy, technology, business practices, and other refinements at the PROs, benefiting their member-publishers and songwriters greatly over time. This has also allowed our PROs to serve as a template for best practices at PROs in other markets. Therefore, being allowed to choose which PRO to join, both for publishers and for songwriters, has been a significant advantage for our market, and for our music industry. Thus, for the sake of our creative music industry, the benefits of being allowed choice should not be diminished in any way, shape, or form. The implementation of any requirement that ASCAP and BMI must license 100% of any composition in which it controls a fractional interest must be therefore be dropped from consideration, as it would greatly diminish the advantages and benefits of allowing such choice in the marketplace.

Songwriters and publishers choose which PRO to affiliate with based on numerous factors (in no particular order here):

- working relationships with PRO staff, who can provide support, creative vision, and access to the industry at-large, often beyond the reach of the independent songwriter
- accounting practices and transparency
- valuation methodology of music
- administration fees
- support services (networking, education, training, discounts)
- ability for the PRO to negotiate fair market rates for blanket licensing deals
- advocacy efforts in rate courts, legislation, etc.

Allowing such choice incentivizes the PROs to improve their service in all of these areas in order to stay competitive. This is American competition at work (consent decrees aside).

Requiring ASCAP and BMI to license 100% of any split work would have the following negative consequences:

- This would result in a ‘race to the bottom’ in the marketplace, where licensees will seek out and only license from the PRO which has agreed to the lowest licensing rates, thus devaluing the market-rates overall for music, and negatively impacting all songwriters and publishers.
- The benefits of choice in terms of PROs for publishers & songwriters would be greatly diminished/eliminated, since any co-written songs with songwriters affiliated with a different PRO will therefore be bound 100% by the one PRO from which the song is licensed (see ‘race to the bottom’ above).
- The PROs would be forced to account royalties to thousands of songwriters & publishers with whom they do not have existing working relationships, and therefore do not have the necessary payment information on file. This will result in payment delays, inaccuracies, and monies going to the wrong recipients, or into the ‘black box’, never making it to their rightful recipients. The time it would take for the PROs to get up to speed with all of these new accounting obligations would result in a mass upheaval of the industry from which it may never recover, with significant songwriter & publisher royalties being lost in the process. Songwriters and publishers would have to monitor payments from entities with which they have no relationship, adding an unwieldy administrative burden to an already challenging business.

For the above reasons, songwriters would then be very wary of collaborating with any songwriters who are not affiliated with the same PRO as their own. Especially today, many of the most successful songs are co-written by numerous songwriters and producers. Also, the sampling/interpolation of pre-existing works is a very common practice, and the decision on whether to interpolate a particular work would be based not solely on the creative merits of the interpolated work, but also on the PRO affiliation of the writers associated with that work. Successful songwriting means being able to work and collaborate with any songwriter, regardless of PRO affiliation. Choice of collaborator should be driven by artistic chemistry, creative merit, and compatibility, not by regulatory intervention. This gets right to the heart of the issue. The success of our creative industries has resulted from freedom of choice. We should not mess with it.

It should also be noted that music publishers, large and small, have spent billions of dollars acquiring ownership/control of fractional interests in songs with the expectation that they could choose in a free market how best to exploit those interests, including choosing a PRO who can secure them the best rates, procuring royalty advances from a PRO based on competitive advantages, and basing many of their business strategies on the current customs & practices in our business. A significant change to these customs & practices, as in mandating 100% licensing of joint works, could have a tremendous negative impact on these publishers and their songwriters. The publishers and songwriters that would be adversely affected in this scenario are an American treasure. We must protect and maintain a marketplace that allows them to continue to flourish.

In summary, the Consent Decrees should be modified, if needed, to permit or require ASCAP and BMI to offer licenses that require users to obtain licenses from all joint owners of a

work. The success of our music industry, domestically and abroad, requires an ecosystem where expression and creativity can thrive on their own merits, beyond mere market forces and economic leverage. The relationship between songwriter, music publisher, and choice of PRO, have allowed the U.S. to maintain a dominant position in the market by allowing such creativity to flourish. Surely there are needed changes in other areas that would improve upon existing practices. Mandating 100% licensing is not one of them.

Thank you again for the opportunity to share our concerns regarding this issue.

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