MODERN WORKS
MUSIC PUBLISHING
new york nashville tucson

November 18, 2015

Chief, Litigation III Section
Antitrust Division
US Department of Justice
450 5th Street NW Suite 4000
Washington DC 20001

Dear Sir/Madam,

I am writing in response to the "Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works".

Background

I shall begin by telling you about Modern Works, the music publishing company that I built with my partner Dan Coleman over the course of the past ten years. I feel a brief history of our company isg relevant to this issue because Modern Works is typical of the thousands of publishing companies who represent hundreds of thousands of songwriters many of whom could be negatively impacted if the 100% licensing rule is implemented.

We created Modern Works at a moment in the history of the music industry when many publishers were abandoning the business model generally referred to as "Administration" (or more commonly "Admin"). Unlike most publishers who own all or part of the compositional copyrights in their catalogues, an Admin company like Modern Works owns zero percent of the copyrights that it oversees. Nevertheless, Modern Works provides its clients with the same panoply of services that are offered by the large publishers (including the registration of copyrights with the appropriate rights agencies in every territory around the world, the collection, accounting and payment of publishing royalties, the exploitation of compositions through film and advertising synchronization licenses and the general administration of songwriters' catalogs). In an Admin deal, a company like Modern Works will receive a commission (typically 10%-20%) for providing these services but it will never receive the additional (and potentially lucrative) payments that flow to copyright owning publishers when

there is a synch license for a song placement in a major motion picture or a Super Bowl commercial.

The differential between these two possible outcomes is usually a result of the amount of risk that a publisher is willing and able to incur on the "front end" of its relationship with a songwriter.A publisher willing to risk advance payments to a songwriter (generally in the $10k to $200k range—but could be considerably more than that) is usually rewarded with an ownership interest in a set number of compositions (generally for that songwriter's first few albums as a recording artist) for a certain period of time (generally the exploitation term is 12 years to perpetuity).

Because we built Modern Works without a dollar of Wall Street capital, my partner and I were not able to play at the major publisher roulette table. There was also another motivation which drove our decision to become Admin publishers and that was to provide much needed administration services to those songwriters who decided they would prefer to own the copyrights to the compositions they created rather than to sell them early in their careers when these works were probably at their lowest perceived value.

I'm happy to tell you that the decision that Dan Coleman and I made a decade ago was a very good one—for the artists we represent and for our employees. Today Modern Works is the country's 25th largest music publisher and one of the largest companies focused exclusively on Administration. Modern Works administers 30,000 copyrights including some which have sold millions of records. At the most recent Grammy Awards, 13 Modern Works' artists received nominations for our industry's most prestigious award.

I apologize for the long-winded introduction but I believe it's crucial to your analysis of this issue that you understand one very important underlying truth—it would have been impossible for my partner and me to build an independent music publishing company in this manner for this purpose—without the regular assistance, support and collective negotiating power of ASCAP and BMI. Therefore any actions you take which might have a negative impact on the business model of these organizations (such as the imposition of 100% licensing) is likely to have a direct and negative impact on independent music publishers like Modern Works.

Why 100% Licensing Will Negatively Impact Our Industry

I have been a music lawyer for forty years. During this time the gross publishing income in the United States has increased by 400%. During this entire period fractional licensing has been the accepted manner for licensing compositions. It's not that publishers and songwriters were unaware of their right to grant a non-exclusive license on behalf of all of the other rights holders (provided they met certain criteria)—it's simply a process which developed out of respect for the fact that we weren't leasing rooms in a recording studio instead we were licensing songs which represented the hearts and souls of the songwriters who created them.

If 100% licensing became the operative way of doing business:

(i) How would this impact the songwriter/publisher agreements where this type of licensing right is not enunciated? Or even worse—where it is prohibited.I'll answer my own question—it will lead to costly and time-consuming litigation.

(ii) How will ASCAP be able to pay writers and publishers associated with BMI when the information on splits, songwriter and publisher names & addresses and account status (recouped or unrecouped) is not available to them?

(iii) Isn't it likely that a double commission will be taken against the writers/publishers whose PRO did not initially process the license? In other words if ASCAP did the 100% licensing they will take their fee out of the full amount of gross proceeds. They will then pay their songwriters and publishers. The balance will be remitted to BMI which will commission this amount before accounting and paying their songwriters and publishers. If this hypothetical becomes standard operating procedure, the BMI writers and publishers will suffer a "double-dip" of commissions.

(iv) What right does the songwriter/publisher of one PRO have to audit another PRO? In the example cited above, if the BMI songwriters believe that they were underpaid by ASCAP—what recourse do they have to review ASCAP's books and records? I think the answer is—none.

(v) Won't this destroy the incentive of publishers who seek to withdraw rights from the PRO's—if they are still forced to accept the fact that any PRO which still has a 1% interest in one of their compositions is free to license the full 100% (including the shares of the publishers who withdrew their rights in the first place)?

(vi) How will this impact those who have paid advances to their songwriters? Until now publishers and PRO's have been able to award

advances based upon historic performance of earnings. Under the 100% licensing model, it could conceivably take longer for artists to recoup (see subparagraph iii above) and monies could be directed to songwriters without the remitting party being aware of that songwriter's financial status with its publisher or PRO (i.e. recouped or unrecouped).

(vii) How will this affect bars, restaurants and clubs who obtain licenses from the PRO's for the public performance of music in those venues? Will it cause the venue operator to choose to obtain only one PRO license? And how does the income get divided between members of different PROs if the criteria and amount of fees charged for the licensing of public performances is calculated differently by ASCAP than it is by BMI?

(viii) Won't this increase the likelihood that songwriters will be influenced to join a specific PRO for the sole purpose of being able to co-write songs with other members of that same PRO? I think the answer is "yes". Personally I don't believe that's the right basis for a songwriter to choose to affiliate with one PRO versus another.

Conclusion

When the Department of Justice announced that they were going to revisit the Consent Decrees entered into by ASCAP and BMI more than 50 years ago—I was elated. Like most independent publishers I hoped and believed that the DOJ would finally release these PROs from strictures that were created for a vinyl music world but were unfortunately still alive and well in a digital music marketplace.

I hoped that the DOJ would consider what happened when a few major publishers partially withdrew their digital music rights and negotiated directly with the Digital Service Provider's. The result was a considerably higher market rate for their music catalogs—versus the rates paid to publishers like Modern Works through ASCAP and BMI where such amounts are artificially depressed by Consent Decrees and Rate Courts.

Instead of focusing on these aspects of the PROs' business which are being unfairly undervalued—the DOJ has instead aimed its initial inquiry at one part of the PROs' business model which is working flawlessly—fractional licensing. Until publication of the "Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works" I have to confess—I was unaware that there was a problem and I've been a music lawyer for 40 years and a music publisher for 10 years.

Let me say this as succinctly as I possibly can. Fractional share licensing works. It worked when the Consent Decrees were signed in the 1940s—and it still works fifteen years into the 21st century!

I'd like to add one closing thought. Whenever a staff member at the DOJ or their sons and daughters turn on their car radio or stream music on their computer—those listeners aren't using those music sources in order to hear a disc jockey introduce song titles or to check out the commercials. The only reason for turning that dial is to listen to music and enjoy the compositions created by the gifted songwriters like our clients Erroll Garner who co-wrote "Misty" or Bootsy Collins who co-wrote "Flashlight". Without these extraordinary songs and thousands more just like them there is no reason to listen to Pandora on your iPhone…there is no reason to make a Spotify playlist on your laptop and there is no reason to set your clock radio to Z-100 or Hot 99.5. What those Digital Service Providers and radio stations are selling is just one single product…and it's called music. And those multimedia conglomerates didn't create that music—they just play it. And that music which those companies are selling through ads and subscriptions was created through the hard work, expense and genius of songwriters and their publishers. I hope that this fact doesn't get lost as you seek to create fair regulations for ASCAP and BMI two companies who have been true creative and business collaborators for songwriters and publishers like Modern Works for a very long time.

Thank you for considering my point of view on this issue.

Respectfully Submitted,

Bob Donnelly
Partner
Modern Works Music Publishing