

November 20, 2015

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

RE: Second Request for Public Comments on U.S. Department of Justice Consent Decree Review

Thank you for this opportunity to again submit my comments regarding the United States Department of Justice's review of the consent decrees governing the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). I am writing this paper to urge the Department to maintain the current industry practice with respect to fractional licensing of the works represented by ASCAP and BMI, because to alter this practice would cause chaos in the music business and serious harm to music creators.

I. Introduction

My name is Dina LaPolt and I am the owner of LaPolt Law, P.C., a boutique transactional entertainment law firm that specializes in representing music creators, including songwriters, recording artists, producers, and musicians. Over the past several years, I have actively participated in legislative reform efforts relating to copyright and licensing laws in Washington, D.C. on behalf of my clients and the broader music creator community. Last August, I submitted a comment paper to your Department in response to your first request for public comments on the ASCAP and BMI consent decree review¹, and this April, I also met with Ethan Glass and his staff in Washington, D.C. to personally discuss issues that affect music creators. As discussed in my previous comment paper, I am well-qualified to discuss this subject because a majority of our music clients utilize ASCAP or BMI's services, thus the consent decrees constantly impact them.

I applaud the Department's efforts to study and reform the consent decrees and have thus far been optimistic that the process will result in a better legal framework for songwriters. However, I am writing this comment paper because of reports that you have informed ASCAP and BMI that your understanding is that the two performing rights organizations ("PROs") must license entire compositions rather than the fractional interests owned by the writers they represent. This suggests that the Department of Justice does not fully understand the PROs' current practices, and I am very concerned about this course of action. A ruling to this effect would certainly cause severe harm to our country's songwriters, including many of my clients, and create widespread chaos in the music industry.

¹ Letter of Dina LaPolt, Esq., *RE: Request for Public Comments on U.S. Department of Justice Consent Decree Review*, Aug. 6, 2014 available at <http://www.justice.gov/sites/default/files/atr/legacy/2014/09/22/307930.pdf>

In this comment paper, I lay out and elaborate upon the arguments previously submitted to Ms. Renata Hesse in your Department in a letter dated August 19, 2015.

II. Current Industry Practice and the Potential Ramifications of Altering Same

The PROs do not currently license full compositions that they do not 100% represent, nor have they ever. Licensees are well aware of this practice and will never attempt to exploit a work without obtaining permission from each individual rightsholder with respect to any given work. It is common for a single composition to be written by several writers who are each affiliated with a different PRO, and industry practice dictates that a licensee will obtain a license from each writer's PRO.

Take one of our songwriter clients, Danielle Brisebois, as an example. Danielle is a prominent American songwriter who has had many hit songs over the life of her career in music. Two of her #1 songs were "Unwritten" and "Pocketful of Sunshine", both co-written and sung by Natasha Bedingfield. Danielle is a BMI songwriter, but Natasha is a member of ASCAP (each song has a third, ASCAP member songwriter as well). Right now, licensees operate on the assumption that each writer has conveyed only his or her fractional interest in each composition to his or her respective PRO and that the licensee must enter into agreements with each of the PROs in order to receive the necessary rights to use either composition.² Danielle, Natasha, and the other co-writers are then each paid directly by their respective PROs for their fractional interests in the compositions, less whatever administrative fees are charged by the PROs. At no point do Danielle, Natasha, and the co-writers account for or make payments to each other.

The implementation of any requirement that ASCAP and BMI must license 100% of any composition in which it controls a fractional interest would substantially disrupt the settled business practice described above and create uncertainty in the marketplace. If such a requirement is adopted, for every song with interests controlled by multiple PROs, licensees will obtain a single license from only one PRO, even if that PRO represents a single co-writer who controls only a small fraction of a composition, effectively negating the other co-writers' relationships with other PROs. This will force the licensing PRO to account to writers with whom it has no pre-existing relationship or payment information, creating enormous issues with accounting. If the licensing PRO even has the ability to account to other PROs' writers, there would likely be a significant delay to any payments. Further, such a practice would likely require writers not affiliated with the licensing PRO to bear the cost of that PRO's administration fee while also opening up the door for litigation by co-writers who are unhappy with the rates and terms entered into with licensees by the licensing PRO. It is also my

² Further, contracts between songwriters almost always specify that each party has the sole right to license and administer that party's share of a co-written composition. For example, the songwriter split agreements we draft on behalf of our clients always contain substantially the following language: "Each party shall have the right to administer its respective copyright ownership interest in the Composition, including the right to license, collect and receive their combined writer's and publisher's share of the income." The 100% licensing requirement would undermine and disrupt these contractual agreements.

understanding that the PROs' own rules and regulations do not currently even permit them to account to members or affiliates of another PRO.

Although it is not clear how the market would ultimately respond to a 100% licensing requirement, it is clear that there would be a significant negative effect on songwriters. Using the example above, for instance, because Danielle has affiliated with BMI, she would expect to receive 2.5% of Pandora Internet Radio's revenue under the recent rate court ruling. However, Pandora may choose to obtain a 100% license from ASCAP requiring that it only pay 1.85% of its revenue, undermining Danielle's decision to affiliate with BMI and receive the benefits therefrom. Danielle's only recourse in this situation would be to attempt to convince Natasha and the other ASCAP songwriters to end their ASCAP membership, causing friction between not only the PROs but also the songwriters themselves. The only winner in this scenario is Pandora, which would immediately see a windfall gain to its profits at the expense of Danielle, a songwriter.

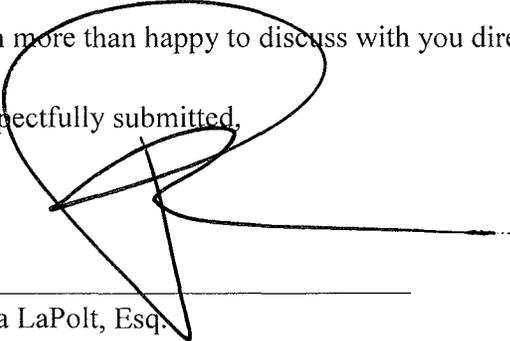
Not to mention, the suggested 100% licensing requirement would drive a wedge between songwriters and their PROs. If you are not aware, songwriters in America have intimate, personal relationships with their PROs that in some instances have decades of history behind them. Each songwriter chooses a PRO based on relationships and the creative vision of that PRO in connection with his or her music. The 100% licensing requirement essentially forces songwriters to use companies they do not have this relationship with and with whom they feel no emotional connection. For a creative person, this is the kiss of death.

III. Conclusion

I fear that this development risks compromising any progress whatsoever made by the Department of Justice's consent decree review, to the detriment of songwriters and the current structure of the music business. I urge you, on behalf of our country's music creators, to abandon this path and restore our confidence in a positive outcome from your efforts.

I am more than happy to discuss with you directly. Thank you for your time and consideration.

Respectfully submitted,



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