

From: Kelly Donley [mailto:k[REDACTED]@redacted.com]]
Sent: Friday, November 20, 2015 7:32 PM
To: ATR-LT3-ASCAP-BMI-Decree-Review
Subject: ANTITRUST CONSENT DECREE REVIEW - ASCAP AND BMI 2015

To the Department of Justice,

Thank you for seeking comment on the interpretation and impact of the Antitrust Consent Decrees applicable to public performance rights organizations BMI & ASCAP. I am an attorney with Safford Motley, PLC. Our firm's entertainment practice in Nashville, TN, regularly serves songwriter and music publisher clients. We counsel and advocate for songwriters of all career paths, including independent songwriters, writers signed to exclusive publishing agreements, and writers signed to exclusive administration agreements. We represent independent music publishers, as well. The achievements of our clients, including number one radio hits, ASCAP awards, and BMI awards, reflect the importance of the public performance rights in their songs and the organizations that license such rights.

I can speak to the experience of the typical Nashville songwriter and the typical independent music publisher. Songwriters and independent music publishers are the lifeblood of what makes Nashville "Music City." The prospect of 100% licensing threatens the ability of songwriters and independent music publishers to devote resources to their most rewarding endeavors--developing and investing in creative works. If their time and money are diverted elsewhere, the industry could lose valuable talent, and our culture could miss out on precious songs.

Among the issues on which you have requested comment are the following:

1. 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?
2. 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?

The first question, I answer affirmatively. As to the second question, I believe that allowing fractional licensing would enable songwriters and publishers to operate freely and efficiently in the market for songs, constituting protection of and investment in our country's musical heritage. Assuming, without conceding, that the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, the Consent Decrees should 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. Adhering to a rule that 100% of a song must be licensed by the PRO with which at least one of the songwriters of such song is affiliated would conflict with the accounting practices of the PROs and create costly inefficiencies.

BMI and ASCAP historically pay only their own respective members and do not account to the members of another PRO. If BMI or ASCAP purported to issue a license for 100% of a song that was co-written by an unaffiliated writer and subsequently failed or refused to pay the unaffiliated writer a portion of the licensing fees, the affiliated writer would be responsible for accounting to and paying the unaffiliated writer for his or her share of the income. Since historically the writer's share of public performance income does not flow through a writer's music publishing deal, even

a signed writer would not be able to rely upon its music publisher to handle such accounting and payment. This burden could prevent songwriters from receiving fair payment.

For example, one of our firm's clients, like many of his peers, is a co-writing warrior. He turns out hundreds of co-written songs every year. Last week, he had 8 co-writing sessions, each blocked for a few hours, each resulting in a new song. He wrote with 1 or 2 other writers in each session. Our client is affiliated with ASCAP, and good number of his go-to co-writers are affiliated with BMI. He would never dream of declining a collaboration with someone just because they were affiliated with BMI. To do so would rule out nearly half of Nashville's hitmakers.

Our client is signed to an exclusive publishing agreement with a major publishing company. The company has agreed to pay him \$47,000 in his first year of the deal. Few songwriters command that high of a salary during their first year as a staff writer, even at a major publishing company. Although our client has a song climbing the charts, and several songs being considered for the recording projects of country stars, due to accounting lag times from licensees to the publisher, and from the publisher to the writer, it could be a year or longer before our client sees the full monetary upside of those successes.

In the meantime, his writer's share of performance income from his song on the charts will start trickling in from ASCAP. To support his own career as a recording artist, our client tours heavily on the weekends and writing persistently on the weekdays. He invests almost every penny of his songwriting income back into his career, covering travel expenses, the cost of hiring a band, and the cost of equipment. Rather than take on a side job, he keeps other costs to a bare minimum and devotes almost all his time to writing songs, preparing for co-writing sessions, rehearsing, and touring. It's not in vain--his exploits are essentially prerequisites for getting a record deal in Nashville. Even a writer who wanted to stick solely to his songwriting craft instead of doubling as a recording artist would have to be relatively judicious when living in Nashville on a \$47,000 income.

If ASCAP purportedly issues the radio broadcasters a license to play 100% of that song, and collects 100% of the radio income from that song, who is responsible for paying the two BMI songwriters? If ASCAP abides by its history and continues to account to only its own affiliated members, the responsibility for paying those two BMI songwriters would fall on our client. He can't look to his publisher to bear the burden--as is typical in a publishing agreement, his writer's share of performance royalties from ASCAP do not flow through his publishing agreement. Short on time to collect addresses from his hundreds of past co-writers and to calculate and issue periodic payments, my client would be faced with the prospect of squeezing his already tight budget to pay an administrator to handle the headache. Honest and hardworking as he is, the risk of saddling him and his peers with accountings and payments is that of erroneous payment or non-payment of royalties to co-writers. Such outcomes could have easily been avoided if each PRO could issue fractional licenses and directly pay only its own affiliated songwriters.

A writer used to relying on a steady stream of "mailbox money" from his PRO may find less money trickling his way if the revenues are managed by an array of his co-writers. It's not inconceivable that faced with such expenses and such diminishing revenues, a writer would have to take on a side job or give up the craft; in either case, creativity suffers. Fewer songs, and fewer writers, means a more concentrated, less diverse music market. My client's other option for avoiding the administrative burden would be to write only with ASCAP writers, which would be a tragic detriment to creativity, and/or to convince his co-writers to switch to ASCAP, which would frustrate the goals of having a competitive, free market in which songwriters, publishers, and music users can participate.

Even if the PRO assumes the responsibility of payment to unaffiliated writers, music rights holders suffer. The PRO would have to invest in personnel and systems for collecting and

maintaining the addresses and payment information of effectively every single songwriter in the U.S. and for calculating and distributing payments for every one of those writers, music rightsholders. It would be an administrative nightmare, significantly raising the PRO's overhead and frustratingly duplicating the administrative work of the other PRO. With public performance royalties being critical to the bottom line of songwriters and independent music publishers, keeping related overhead low is crucial. The effect is intensified as non-performance income from downloads and CD sales shrinks.

Regardless of whether the ASCAP assumed the burden of accounting to unaffiliated writers, my songwriter client would have to look to BMI or his co-writers to receive his share of income from 100% licenses issued by BMI. Not unlike any young professional renting in Nashville, my client changes address fairly frequently. He would have to update his address not only with his ASCAP but also with BMI and/or his hundreds of collaborators...or risk nonpayment of royalties.

Another one of my clients is an independent publisher with an entrepreneurial spirit and the flexibility to bet the house on budding talent. His publishing business is his passion and would ideally support his retirement. Had he known that PRO payments could significantly decrease or that he could be forced to take on the burden of accounting to the numerous co-publishers of his catalog of songs for such income, I would imagine he would have hesitated to invest in signing five songwriters and hiring multiple song-pluggers.

In the scenario of 100% licenses, independent publishers would see diminishing incentives to break into and stay in the music business. Being left with only a handful of major music publishers able to weather the storm is a sad scenario. It means fewer jobs for music executives, smaller songwriter rosters, and a shorter Music Row.

I want to see the music community in Nashville, and in the United States, flourish. It can only do so if the music industry is allowed to operate efficiently and freely. Allowing fractional licensing would serve such public interest.

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Kelly Donley
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