

**PUBLIC COMMENTS OF THE  
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS  
REGARDING PRO LICENSING OF JOINTLY OWNED WORKS**

November 20, 2015

## Table of Contents

I.	INTRODUCTION .....	1
II.	BACKGROUND .....	4
A.	Legal Framework .....	4
B.	Historical PRO Licensing Practices .....	7
III.	ASCAP’S RESPONSES TO THE DOJ’S QUESTIONS.....	12
A.	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)? .....	12
B.	If the blanket licenses have not provided users the right to play the works in the repertories, what have the licenses provided?.....	13
C.	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?.....	13
D.	Assuming the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, should the Consent Decrees be modified to permit ASCAP and BMI to offer licenses that require users to obtain licenses from all joint owners of a work?.....	14
E.	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? .....	16
F.	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? .....	18
IV.	CONCLUSION .....	24

The American Society of Composers, Authors and Publishers (“ASCAP”) respectfully submits the following comments in response to the September 22, 2015 request of the Antitrust Division of the U.S. Department of Justice for public comments concerning the licensing of jointly owned works by performance rights organizations (“PROs”).<sup>1</sup>

## **I. INTRODUCTION**

The Consent Decree should be modified to confirm expressly that ASCAP may grant licenses covering only those shares of co-owned works that have been granted to ASCAP by its members. Such “fractional licensing” is fully consistent with ASCAP’s historical licensing practices, copyright law and the general understanding of ASCAP’s composer, songwriter and publisher members. ASCAP and music users have historically negotiated and priced blanket licenses based on the fractional interest of the works in ASCAP’s repertory. In addition, payments to ASCAP by music users, and distributions to ASCAP members, have historically been based on fractional shares. Because of these well-established licensing and payment practices, ASCAP and other PROs are able to license freely without regard to songwriter and publisher agreements that may restrict the ability of songwriters and publishers to license entire works without the consent of their co-owners.

Requiring ASCAP to offer “100% licenses”<sup>2</sup> to all music users would cause significant disruption of established licensing practice:

*Requiring ASCAP to offer “100% licenses” would result in a costly and inefficient restructuring of the industry’s creative and business relationships, disputes among rightsholders (potentially leading to litigation), and significant disruption of the licensing*

---

<sup>1</sup> For the purposes of these public comments, ASCAP uses the term “co-owned works” to refer to what the DOJ’s request for public comments describes as “jointly owned works.”

<sup>2</sup> For the purposes of these public comments, ASCAP uses the term “100% licenses” to refer to what the DOJ’s request for public comments describes as “full-work licenses.”

*marketplace.* If ASCAP were required to offer “100% licenses” for all works to all music users, it would have to confirm with each of the thousands of members who co-own works with non-ASCAP members if there were any contractual bar to licensing those works by ASCAP. As a result, songs that are written jointly by ASCAP and non-ASCAP members would effectively be removed from the ASCAP repertory (and BMI’s as well) and become stranded—*i.e.*, unable to be licensed by ASCAP (or BMI) or played by music users—until the PROs could determine that they could be licensed on a 100% basis. The magnitude of the potential problem is large: approximately one-quarter of the works in the ASCAP repertory performed by music users in 2014—upwards of 370,000 songs, based on ASCAP’s most recent survey data—would no longer be available under an ASCAP license unless and until ASCAP could confirm that it has the rights to license those songs on a 100% basis.

*Requiring ASCAP to offer “100% licenses” would also create significant administrative burdens and expenses for ASCAP.* ASCAP today has no information concerning licensing restrictions among co-owners, which it understands are becoming increasingly common, and lacks the necessary information to account to non-member songwriters or publishers who are co-owners of songs in ASCAP’s repertory. The additional expenses of collecting such information would result in additional administrative costs for ASCAP and its members, which would no doubt lead to increased costs for users.

*Requiring ASCAP to offer “100% licenses” would create a substantial risk that certain of ASCAP’s largest music publisher members will resign completely from ASCAP (and license their works on a fractional basis in any event, outside of ASCAP).* Such a result would undermine the continued viability of collective licensing in the United States.

As discussed in ASCAP's August 6, 2014 public comments, problems in the current ASCAP rate-setting process, and the inability of ASCAP to offer multiple rights in music compositions to music users, have fueled a new interest on the part of copyright owners to license their works on an exclusive basis directly to certain users or categories of users. To avoid the prospect of members resigning from ASCAP altogether, ASCAP and the DOJ are in the process of discussing a modification to the ASCAP Consent Decree that would permit ASCAP to accept partial grants of rights from its members, and to enable those members partially to withdraw their works from ASCAP's repertory and license those works directly to certain users outside the shadow of the rate court. If ASCAP is prohibited from granting licenses to partially withdrawn works on a fractional basis, however, writers and publishers will likely resign from ASCAP and license their public performance rights through other means—whether directly to music users or through ASCAP's unregulated competitors, like GMR and SESAC, or foreign PROs, like PRS for Music and SOCAN, which have no restrictions on their ability to issue fractional licenses. Expressly confirming ASCAP's ability to grant fractional licenses would give full effect to the policy behind permitting partial withdrawals in the first place: enabling partially withdrawing ASCAP members to allow the free market to decide the value of their works and negotiate licenses at market rates for their shares of musical works. By contrast, requiring ASCAP to grant "100% licenses" to partially withdrawn co-owned works would undermine that goal and essentially mean that co-owned works would remain subject to rate regulation under the Consent Decree.

*Requiring ASCAP to offer "100% licenses" would deprive songwriters of the benefits of the PRO of their choice and hinder the creative process.* In every situation in

which an ASCAP and a non-ASCAP songwriter collaborate to create a song, one co-writer would always be forced to accept the terms and conditions of a different PRO with which he or she never intended to associate. Indeed, in a “100% license” world, ASCAP members could be subject to the payment schemes of other PROs in derogation of their historical reliance on ASCAP’s payment practices. ASCAP members might also experience significant payment delays, because some of their royalties would have to flow from their co-owners’ PRO to their co-owners and finally to the ASCAP member, or from their co-owners’ PRO to ASCAP and then to the member. These changes in payment practices and schedules would inevitably lead some songwriters to consider collaborating only with those songwriters that are members/affiliates of the same PRO, intruding on the freedom of songwriters to select their collaborators based on creative choice and artistic chemistry, rather than based on rules imposed on them by the DOJ.

To avoid these problems, ASCAP proposes a simple modification to the Consent Decree expressly confirming that ASCAP may grant fractional licenses to music users. As discussed below, this proposed modification will promote competition by facilitating direct licensing; it will also minimize transaction costs for copyright owners, PROs and music users and minimize any potential disruption to the performing rights marketplace.

## **II. BACKGROUND**

### **A. Legal Framework**

The Copyright Act allows for ownership in a copyright to become divided in two ways. *First*, when multiple writers participate in the creation of a work—as, for example, when a composer and a lyricist collaborate on a musical work—each may have an ownership interest in the copyright, because the Copyright Act grants co-ownership of copyrights to “joint authors” of a single work. *See* 17 U.S.C. § 201(a). To be a joint

author, (1) the writer must have made an independently copyrightable contribution to the work, and (2) the parties must fully intend to be co-authors. *See, e.g., Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998) (citing *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991)). Assuming the requirements of joint authorship are met, ownership of the work will be divided among each writer on a *per capita* basis absent an agreement between or among them to the contrary, *e.g.*, if there are two writers, each writer owns 50% of the copyright; if there are five writers, each writer owns 20% of the copyright. *See, e.g., Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988).

*Second*, a copyright owner can convey some part of his or her interest in the copyright to another party. *See* 17 U.S.C. § 201(d) (ownership of copyright “may be transferred in whole or in part”). Copyrights in musical works can therefore be divided by operation of contract in myriad ways. Songwriters can agree among themselves how to divide up the copyright, and in turn, those songwriters can each enter into agreements with publishers further dividing their ownership interests. For example, of the top ten musical works most frequently performed on Pandora in 2014, nine have three or more copyright co-owners, with some co-owners holding an interest of as little as 1.25%.

The default rule, based upon common law principles governing property ownership, is that each copyright co-owner is a tenant-in-common, with a unilateral right to grant a non-exclusive license to the work in its entirety, subject to a duty to account for any profits to his or her co-owners. *See, e.g., Davis v. Blige*, 505 F.3d 90, 98–100 (2d Cir. 2007); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994). This is the legal basis for each copyright co-owner being able to offer a “100% license” to the work.

It is important to note that the U.S. rule allowing each co-owner of a copyright to grant a non-exclusive license without the consent of the other co-owners is not followed in many countries. For example, in the U.K., France, Germany, the Netherlands and Italy, the consent of each copyright co-owner is required to license a work. *See, e.g.,* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 332 (4th ed. 2010) (“KOHN”); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.10[D] (Matthew Bender rev. ed. 2015) (“NIMMER”). Therefore, to the extent that a music user seeks to license a work for worldwide use, it may not rely upon a license granted by a single co-owner and will need instead to seek licenses from *all* co-owners. *See, e.g., Levitin v. Sony Music Entm’t*, No. 14 Civ. 4461, 2015 WL 1849900, at \*5–6 (S.D.N.Y. Apr. 22, 2015) (U.S. co-ownership rule does not apply to alleged infringing acts abroad); KOHN at 333; *see also* NIMMER § 6.10[D] (license to joint work granted in U.S. by one co-owner “would not be valid [in foreign jurisdictions] unless all joint owners are party to it”).

Significantly, although U.S. copyright law gives each copyright co-owner the ability to grant “100% licenses” to his or her works, it does not mandate that each co-owner do so. Indeed, copyright co-owners can—and do—enter into agreements requiring the consent of all co-owners in order to license the work, whether on an exclusive or non-exclusive basis. *See* NIMMER § 6.10[C]. While such agreements between co-owners are not provided to ASCAP in the ordinary course, ASCAP understands that such restrictions among co-owners are becoming increasingly common in the music industry, particularly as hit songs crafted by teams of writer-producer collaborators have become standard industry practice. For example, when a singer-songwriter engages the services of a record producer, and the producer co-writes one or more songs with the singer-songwriter, ASCAP understands that

the singer-songwriter may seek agreement from the producer that neither party can license more than the respective share that each controls. Similarly, when two or more non-producer songwriters compose a song together, ASCAP understands that they may also agree that each writer may license only his or her respective share. In such instances, the co-owners may grant effectively only “fractional licenses”—licenses covering only that co-owner’s interest in the work—and a licensee must obtain a separate license from each individual co-owner in order to be able to exploit the work.

Copyright owners can also grant to third parties the right to license their works, as, indeed, ASCAP’s members grant to ASCAP the right to license public performances. But in those instances in which an ASCAP member is contractually barred by an agreement with his or her co-owners from unilaterally granting “100% licenses” to co-owned works, *see* NIMMER § 6.10[C], ASCAP may have the right to grant a license only to those shares in the work controlled by the ASCAP member.<sup>3</sup> This is consistent with the axiom that a copyright owner may not convey more than he or she owns. *See, e.g., Blige*, 505 F.3d at 99; *Gilliam v. ABC, Inc.*, 538 F.2d 14, 21 (2d Cir. 1976).

## **B. Historical PRO Licensing Practices**

Historically, when it came to licensing public performance rights in the U.S., music users paid little—if any—attention to which individual songs were licensed pursuant to which license(s), because the full rights to virtually any song they might want to perform

---

<sup>3</sup> Given that many works in the ASCAP repertory are co-written by two or more songwriters or composers, and that each co-writer may have a separate publisher, ascertaining the party with the right to license any given work may be a complex issue determined by the particular agreements among the writers and publishers, or co-publishers, at issue. ASCAP is typically not privy to the terms of those agreements. KOHN ON MUSIC LICENSING provides a useful illustrative example of how complex establishing the ownership and right to license a single work can become. *See* KOHN at 333–34.

were covered by the users' licenses with ASCAP, BMI and SESAC, and music users typically obtained a license from all three of those PROs.

But from a pricing and market share perspective, the fractional share of works controlled by each PRO has been of crucial importance to the parties involved in those transactions, and those parties have transacted as if each of those licenses conveyed only those shares of a co-owned work that each PRO has been granted by its members/affiliates. Licenses have historically been negotiated and priced based on each PRO's market share, and PROs and music users alike have historically based market share calculations on the fractional interest of the works in each PRO's repertory, not on the number of works in which the PRO has an interest. Royalties derived from license fees have historically been distributed by PROs to their members/affiliates based on fractional shares.

Thus, in its negotiations with licensees, ASCAP typically provides data on its overall market share and the share-weighted percentage of performances of ASCAP music on the music user's service. Both ASCAP and music users understand that these market share figures represent the sum of ASCAP's members' fractional interests in their works, and not the sum of all of the works in which ASCAP members have an ownership interest. ASCAP understands that BMI also bases the market share information it provides to music users on fractional shares.

The use of fractional share information to negotiate and value licenses is important to the efficiency of marketplace negotiations between the PROs and music users because it gives music users a basis on which to compare the rights offered by one PRO to those offered by the other PROs. Under this system, if the information provided by each PRO is accurate, the combined market share of the three PROs should equal approximately 100%.

This allows music users to make comparative judgments about the respective value of the rights offered by each PRO. Similarly, in seeking to value and price blanket license fees in rate court proceedings, ASCAP and music users rely on music use studies that are based on the sum of ASCAP's members' fractional interests in works in the ASCAP repertory.

If ASCAP and BMI and SESAC were to count in full each song in which their members/affiliates have only a fractional interest, then each PRO could make a claim to a much larger piece of the market than it does—and presumably command higher license fees as a result. Moreover, music users would be at risk of “double paying” for works that reside in multiple repertories by virtue of split ownership.<sup>4</sup> Those adverse consequences have been avoided, however, by the longstanding practice of negotiating and pricing licenses based on fractional shares.

Likewise, music users that have entered into direct licenses with publishers and subsequently sought a fee deduction, or carve-out, from their ASCAP license for that directly licensed music have also priced their carve-out based on fractional shares. The *DMX* rate court proceeding is illustrative. In that proceeding, *DMX*, a background music service, entered into approximately 850 direct licenses with music publishers for their

---

<sup>4</sup> Indeed, a provision of the Consent Decree recognizes that co-owners may belong to different PROs and that each co-owner should look to his or her respective PRO for payment based on his or her fractional ownership interest in a work. Specifically, when a member resigns from ASCAP and his or her works “continue to be licensed by ASCAP by reason of the continued membership of a co-writer, writer or publisher of such works,” the resigning member “may elect to continue receiving distribution for such works on the same basis and with the same elections as a member would have, so long as the resigning member does not license the works to any other performing rights licensing organization for performance in the United States.” (AFJ2 § XI.B(3).) Although this provision of the Decree is not currently operative (*see* AFJ2 § XI.C), similar language was included in the 1960 Order governing ASCAP's survey and distribution practices, and since 2001, a similar rule has been incorporated into ASCAP's Compendium of Rules and Regulations. These terms recognize licensing and payment practices in place since at least the 1950s, when ASCAP changed its rules to enable free collaboration between its members and non-members: Writers and publishers affiliated with different PROs often collaborate; they own shares of the works resulting from those collaborations; co-owned works may reside in the repertories of multiple PROs, depending on the affiliations of the co-owners; and each co-owner may separately license, and separately receive royalties based on, his or her share of the work from his or her chosen PRO.

public performance rights. It sought a carve-out adjustment of its ASCAP blanket license fee to reflect the extent to which it relied on directly licensed music. Specifically, DMX argued that its ASCAP blanket fee should “reflect ASCAP’s share of total performances on the DMX network.” *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 548 (S.D.N.Y. 2010). Indeed, using ASCAP’s distribution data, DMX’s expert determined that approximately 48% of performances on DMX were of works owned or controlled by ASCAP members. This figure was “share-weighted” and “account[ed] for the fact that certain works [were] only partially controlled by ASCAP.” (Affidavit of Amy Bertin Candell ¶ 15, *in* Joint Appendix, Vol. II of XIII, at A388, *In re THP Capstar Acquisition Corp.*, No. 11-127-cv (2d Cir. Mar. 15, 2011); *see also* 756 F. Supp. 2d at 548 n.46.) In other words, DMX calculated ASCAP’s share of performances on a fractional-share basis.<sup>5</sup> The rate court adopted DMX’s proposal in full, including its share-weighted calculation based on fractional interests.

Distributions to writers and publishers are also based on fractional ownership interests. For example, if a work were co-written by an ASCAP member and a BMI affiliate who (1) each initially had a 50% interest in the work and (2) each entered into songwriter agreements with separate publishers, ASCAP would pay half of the writer’s share (*i.e.*, 25% of the royalties) to the ASCAP writer member and half of the publisher’s share (25%) to the ASCAP publisher member, while BMI would pay the remaining halves of the writer’s and publisher’s shares to its affiliates. *See* KOHN at 1259–60.<sup>6</sup>

---

<sup>5</sup> To arrive at its proposed fee, DMX multiplied the per-location fee resulting from its publisher direct licenses (\$22.50) by approximately 48% (the ASCAP share of DMX performances), producing a rate of \$10.74, which DMX contended represented the share of the direct-license per-location fee attributable to ASCAP affiliated-performances.

<sup>6</sup> The only exception arises in the context of local TV per-program licenses, where a program contains only co-owned works split between two or more PROs. In this situation, the stations typically pay only one of

ASCAP understands that some music users have suggested that the language of certain ASCAP license agreements should be construed as granting the right to perform entire works, even in those instances where ASCAP has the right to license only a share of the work. That language must be placed in the context of the industrywide understanding, as reflected in the negotiation and pricing of those agreements, that ASCAP was granting, and music users were receiving, only those rights granted to ASCAP by its members.

If the parties involved in any of these historical license transactions had ever viewed ASCAP or other PRO licenses as granting music users the right to fully perform any work in which the PRO holds a fractional interest, then every aspect of the licensing process would have looked radically different. License fees would have been negotiated based on the number of works in which each PRO has an interest (not the PRO's fractional share of the rights in those works). Music users would have paid a single PRO 100% of the royalties for each co-owned work performed. And either that PRO or its members/affiliates would have accounted to all other co-owners (or their PROs) for their fractional shares of those works. But the PRO license marketplace has never functioned in that way,<sup>7</sup> and it would be prohibitively expensive and inefficient for it to start doing so now, for the reasons discussed below.

---

the PROs, in which case the PRO then distributes 100% of the attributable license fee (minus the PRO's administrative expenses) to that PRO's member/affiliate. Neither PRO accounts to the other or to the other's members/affiliates.

<sup>7</sup> For example, although Pandora's ASCAP license pre-dates its license with BMI, and covers substantially the same time period, Pandora never suggested to the BMI rate court that it should pay a lower rate to BMI because it had already obtained a "100% license" from ASCAP that covered all of the songs in which both ASCAP and BMI represent a fractional interest. Nor has Pandora ever sought a "carve out" from its BMI license for those co-owned works also licensed through ASCAP, even though Pandora's BMI rate (2.5%) is higher than its ASCAP rate (1.85%).

### III. ASCAP'S RESPONSES TO THE DOJ'S QUESTIONS

#### A. **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)?**

As discussed, ASCAP and the other PROs have historically priced and sold licenses based on each PRO's market share, as determined by the fractional interest of the works in each PRO's repertory, not by the number of works in which each PRO has an interest.

In ASCAP's case, although some music users apparently contend that their license agreements grant them the right to perform entire works, even in those instances where ASCAP has the right to license only a share of a work, the understanding and intent of the parties—as reflected in the negotiation and pricing of those agreements, and the payment of license fees thereunder—was that ASCAP was granting, and music users were receiving, only those shares of rights that have been licensed to ASCAP by its members. Others in the industry agree that the licenses ASCAP and BMI historically sold to users were based on fractional shares. *See, e.g.,* Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, BILLBOARD, July 30, 2015 (noting “the long-established industry practice of each rights owner greenlighting their particular portion of a song in order to establish a license—also known as fractional licensing”); Susan Butler, *Risky Business: Songs in Fractions* (Part One of Two), MUSIC CONFIDENTIAL, Sept. 4, 2015 (“Butler”) (noting that “rights holders have been licensing only their rights/shares in songs in countless business deals for decades,” and that one could argue “that the entire North American music publishing industry has been built upon—and has now become internationally financially and operationally dependent upon—licensing shares of songs rather than licensing a single product/unit called ‘a song’ or a copyrighted ‘musical work’ that happens to have multiple creators/owners”).

Because the full rights to virtually any song a music user might want to perform were covered by licenses with ASCAP, BMI and SESAC, and because practically every music user obtained a license from all three of those PROs, music users have paid little—if any—attention to which individual songs were licensed pursuant to which license(s). *See* Butler (noting that “when it comes to licensing performance rights in the U.S., for many decades nobody directly involved in licensing paid much attention to which individual songs were licensed because practically all of the songs were covered under three blanket licenses”). Thus, by securing licenses from all three PROs, music users have obtained the full rights they need to play all of the works in each PRO’s respective repertory.

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

ASCAP’s blanket licenses have granted music users those rights that are granted to ASCAP by its members. Thus, for those works that are fully owned by one or more ASCAP member(s), which represent more than half of the works in ASCAP’s repertory, ASCAP’s blanket licenses have provided music users the right to perform those songs. For those works that are not fully owned by ASCAP’s members, ASCAP has licensed its members’ shares in those works. Those shares, in combination with the shares licensed by BMI and SESAC, have provided music users the right to play those works in their entirety.

**C. 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?**

ASCAP is not aware of any such instance. For nearly 100 years, ASCAP has enforced the rights of its members through copyright infringement actions. In all such cases, ASCAP has sought to enforce its rights only with respect to unlicensed public performances of works that are wholly owned or administered by ASCAP members,

thereby making irrelevant the question of whether the music user had been licensed by another PRO.

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

ASCAP does not agree with the assumption that the consent decrees require ASCAP and BMI to offer 100% or “full-work” licenses, and neither the ASCAP nor BMI rate court has interpreted the consent decrees to contain such a requirement.<sup>8</sup> Indeed, a reading of the consent decrees that would prohibit fractional licensing does not accord with rate court precedent.<sup>9</sup> *See, e.g., In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 547–51 (S.D.N.Y. 2010) (Cote, J.) (adopting fee structure based on fractional ownership shares in the ASCAP repertory), *aff’d sub nom. Broad. Music, Inc. v. DMX Inc.*, 683 F.3d 32 (2d Cir. 2012).

Nonetheless, given the questions raised by the DOJ, and so as to avoid any possible ambiguity, the consent decrees should be modified to confirm expressly that the licenses granted by ASCAP and BMI include only those rights that are granted to ASCAP and BMI by their members/affiliates. With respect to the ASCAP Consent Decree, this could be achieved through the following modification of the definition of “ASCAP repertory” in AFJ2 § II (proposed new text underlined):

---

<sup>8</sup> The summary judgment opinions of the ASCAP and BMI rate courts in *Pandora*, and the Second Circuit’s affirmance of the ASCAP rate court’s decision, did not address this question, which was never before the courts. Those decisions dealt with a situation where musical works were unquestionably in the ASCAP repertory for the purpose of licensing most music users, but were withdrawn for the specific purpose of licensing certain new media users. *See In re Pandora Media, Inc.*, No. 12-cv-8035, 2013 WL 5211927, at \*5 (S.D.N.Y. Sept. 17, 2013), *aff’d sub nom. Pandora v. Am. Soc’y of Composers, Authors and Publishers*, 785 F.3d 73, 77–78 (2d Cir. 2015); *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 CIV. 4037, 2013 WL 669778, at \*3–4 (S.D.N.Y. Dec. 19, 2013). Thus, the courts never considered whether (or held that) the term “works” in the decrees meant “full works” or interests in works.

<sup>9</sup> Further, as described in footnote 4, Section XI.B(3) of the ASCAP Consent Decree effectively recognizes members’ fractional ownership of works.

- II. (C) “ASCAP repertory” means those works or interest(s) in works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time[.]

At the very least, to give effect to partial withdrawals for digital services, ASCAP and BMI should be permitted to issue fractional licenses for digital services covering those shares of partially withdrawn co-owned works that remain in their repertories. With respect to the ASCAP Consent Decree, this could be achieved by inserting the following underlined text into AFJ2 § VI:

- VI. Licensing. ASCAP is hereby ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP repertory, except that, in the case of a work that has been partially withdrawn for the purpose of licensing digital services pursuant to Section [ ] of this Consent Decree, ASCAP is ordered and directed to grant to any Standalone Digital Music Service making a written request therefor a non-exclusive license solely for the interest(s) in that work, if any, belonging to any Member or Members who have not partially withdrawn from ASCAP pursuant to Section [ ]; provided, however, that ASCAP shall not be required to issue a license to any music user that is in material breach or default of any license agreement by failing to pay to ASCAP any license fee that is indisputably owed to ASCAP. ASCAP shall not grant to any music user a license to perform one or more specified works in the ASCAP repertory, unless both the music user and member or members in interest shall have requested ASCAP in writing to do so, or unless ASCAP, at the written request of the prospective music user shall have sent a written notice of the prospective music user’s request for a license to each such member at the member’s last known address, and such member shall have failed to reply within thirty (30) days thereafter.

By making this proposal, ASCAP is seeking to maintain the status quo, prevent marketplace disruption, and ensure that the opportunity to make partial withdrawals for digital services is meaningful, as discussed more fully below.

**E. 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 public interest would be served by such a modification because it would maintain the public benefits of collective licensing through ASCAP and BMI for the overwhelming majority of music users. As discussed in ASCAP's August 6, 2014 public comments, it is vitally important that ASCAP's Consent Decree be modified to permit ASCAP's members to partially withdraw their works from ASCAP's repertory and license those works directly to certain users outside the shadow of the rate court. As discussed above, however, to give full effect to partial withdrawals, the Consent Decree should be modified to confirm that ASCAP may grant licenses covering only those shares of co-owned works that have not been withdrawn from the ASCAP repertory for the purpose of licensing digital services.

The purpose of partial withdrawals is to allow ASCAP members to test the free market and obtain market rates for their musical works by engaging in direct licensing of certain digital services. For many works in the ASCAP repertory, the right to license is divided among multiple writer and publisher members. If a modified Consent Decree compels ASCAP to offer "100% licenses," there can be little doubt that digital services will continue to license partially withdrawn co-owned works from ASCAP as long as they can obtain lower license fees that are set not by competition, but instead by regulation via the rate court process. This result may and likely will push major publishers who are seeking

the ability to make partial withdrawals to resign from ASCAP completely, severely diminishing the procompetitive utility of the blanket license for all categories of licensees.<sup>10</sup>

In that case, those publishers will likely choose either to license their public performance rights directly, or to do so through ASCAP's unregulated competitors, like GMR and SESAC, or foreign PROs, like PRS for Music and SOCAN. If they choose to license their works directly, nothing will prevent them from doing so on a fractional-share basis. Likewise, if they choose to license their works through one of ASCAP's unregulated competitors, nothing will prevent that competitor from accepting partial grants of rights from resigned ASCAP members and licensing only those resigned members' fractional interests in their co-owned works. Thus, prohibiting ASCAP from granting fractional licenses, when such licenses may be preferred by music creators, would place it at a significant competitive disadvantage vis-à-vis these competitors.<sup>11</sup>

Accordingly, facilitating partial withdrawals through fractional licensing is essential to maintaining the public benefits of collective licensing through ASCAP and BMI.

---

<sup>10</sup> While the resignation of major publishers from ASCAP would not in itself address the ability of ASCAP to license co-owned works in which it controls only a fraction, ASCAP believes that major publishers would nonetheless be so discouraged with licensing through PROs that they would resign completely and explore other options (including licensing through ASCAP's unregulated competitors).

<sup>11</sup> The existence of this competitive disadvantage to ASCAP is only underscored by SESAC's recent purchase of the Harry Fox Agency (HFA) from the National Music Publishers' Association. See Ben Sisario, *Music Publishing Deal Driven by Shift From Sales to Streaming*, N.Y. TIMES, July 6, 2015, available at <http://www.nytimes.com/2015/07/07/business/media/music-publishing-deal-driven-by-shift-from-sales-to-streaming.html>; Ed Christman, *SESAC Finalizes Acquisition of Harry Fox Agency*, BILLBOARD, Sept. 14, 2015, available at <http://www.billboard.com/articles/business/6693385/sesac-finalizes-acquisition-of-harry-fox-agency>. With its purchase of HFA, SESAC has become the first U.S. PRO (and, unless the ASCAP and BMI consent decrees are modified, the *only* U.S. PRO) able to license mechanical rights and bundle those rights with public performance rights. Fractional licensing has long been the standard practice for licensing mechanical rights and synchronization rights.

**F. 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 repertoires?**

The Supreme Court discussed the rationale for permitting ASCAP and BMI to engage in collective licensing and price-setting in *BMI v. CBS, Inc.*, 441 U.S. 1 (1979). The Court observed that “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.” *Id.* at 20. The Court further noted that ASCAP and BMI reduce costs for rightsholders and music users by offering blanket licenses that cover millions of songs, obviating the need for separate license agreements between every music user and every rightsholder. *See id.* at 21. The Court found that “ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses.” *Id.* The Court noted that the ability of ASCAP and BMI to offer such bulk licenses “is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.” *Id.* As the Court observed, “[t]his substantial lowering of costs . . . is of course potentially beneficial to both sellers and buyers.” *Id.*

The current licensing practices of ASCAP and BMI, in which licenses are negotiated and priced on the basis of the fractional shares controlled by each PRO, in no way alters the fundamental rationale supporting their ability to engage in collective licensing on behalf of their members/affiliates. Indeed, confirming the current practice through clarification of the consent decrees will simply maintain the public benefits of this long-established practice.

Fractional licensing also will not diminish the efficiencies associated with the blanket license. Although partial withdrawals for digital service providers may result in an

increase in transaction costs, that would happen regardless of whether ASCAP is required to issue “100% licenses” to co-owned works or not. Digital service providers will still be required to negotiate with both ASCAP and any partially withdrawn ASCAP members in order to ensure that they have licenses to perform those partially withdrawn musical works that are not co-owned. Indeed, this is how licensing of performance rights by digital service providers works in the rest of the world, where those services already negotiate and obtain licenses from multiple rightsholders—including licenses from PROs and direct licenses from publishers—on a fractional-share basis.

More importantly, as discussed in ASCAP’s August 6, 2014 public comments, partial withdrawals are necessary to prevent the complete resignation of ASCAP members, who must be either “all in” or “all out” in the wake of the Second Circuit’s decision in the *Pandora* proceeding. *See Pandora Media, Inc. v. Am. Soc’y of Composers, Authors and Publishers*, 785 F.3d 73, 77–78 (2d Cir. 2015) (partial withdrawals prohibited by AFJ2). To the extent that ASCAP members decide that they must resign completely from ASCAP in order to have any prospect of achieving actual market rates, full resignations would threaten the procompetitive benefits of the collective licensing model and lead to exponentially increased transaction costs for all categories of licensees.<sup>12</sup> Any increase in transaction costs imposed by partial withdrawals for digital services—including those incurred by fractional licensing—would pale by comparison to those imposed by the major publishers leaving ASCAP altogether.

---

<sup>12</sup> Requiring ASCAP to grant “100% licenses” to co-owned works where one or more co-owners have fully resigned from ASCAP would not solve this problem. As discussed *supra* at 7, co-owners can contract around the default rule allowing them to grant “100% licenses” unilaterally to licensees. *See* NIMMER § 6.10[C]. If a member resigns from ASCAP, the resigning member may seek to enter into agreements with other members granting the resigning member the sole right to license works, thereby ensuring that no shares of co-owned works remain in the ASCAP repertory in the long run.

Moreover, requiring ASCAP and BMI to offer “100% licenses” to all music users would be a significant change from established industry practice, resulting in a costly and inefficient restructuring of creative and business relationships and widespread disruption in the licensing marketplace. As discussed above, ASCAP can license only those rights granted to it by its members. In those instances where a member is contractually barred by an agreement with his or her co-owners from granting “100% licenses” unilaterally to co-owned works, ASCAP has the right to grant only a fractional license to those shares of the member’s work in the ASCAP repertory. If ASCAP were instead required to offer “100% licenses” for all works to all music users, those works would effectively be removed from the ASCAP repertory and remain stranded until the co-owners amended their agreements to allow for “100% licensing” by one or more co-owners. In the interim, music users could not license—or play—a substantial number of songs in ASCAP’s repertory, and songwriters and publishers would lose considerable royalties.

This is not a trivial issue affecting only a small number of works. In 2014, for example, more than one-quarter of the works in the ASCAP repertory performed by music users were works in which non-ASCAP members have a fractional interest.<sup>13</sup> ASCAP’s proposal will prevent the material marketplace disruption that will result if ASCAP is prevented from licensing such works.

In addition, a requirement of “100% licenses” may lead to disputes among rightsholders, with co-owners of a work taking conflicting positions about ownership shares or pursuing litigation over which co-owners have the right to license the work. Like the co-

---

<sup>13</sup> This figure includes co-owned works held in the repertories of foreign PROs and licensed through ASCAP by virtue of reciprocal arrangements between ASCAP and foreign PROs, but in which ASCAP has only a fractional interest. As discussed above, in most countries outside of the U.S., the consent of each copyright co-owner is required to license a work.

owner agreements discussed above, disputes among rightsholders also would have the effect of stranding certain works until co-owners could resolve their differences and agree to allow for “100% licensing” by one or more co-owners—shrinking the PROs’ licensable repertory, increasing costs to music users, and reducing royalties for songwriters and publishers.

Requiring ASCAP and BMI to offer “100% licenses” to all music users also would create significant administrative burdens and expenses for ASCAP and BMI, neither of which is set up to account to non-member/affiliate songwriters or publishers who are co-owners of songs in their repertories. For example, while ASCAP knows and makes publicly available on its ACE database the fractional shares that ASCAP members control for each copyrighted work in the ASCAP repertory, ASCAP does not know for every co-written song in its repertory:

- The identity of all non-member co-writers and their respective fractional shares;
- The identity of all non-member publishers who co-own or co-control an interest in each song and their respective fractional shares;
- Which non-member co-writers may have transferred the right to receive performance royalties to someone else; and
- Where all of these individuals and entities are located and how to contact them.

This information is simply not available on an industry-wide basis, and it would be an extraordinarily expensive and time-consuming task for ASCAP to attempt to compile this information for each copyrighted work in its repertory, assuming that it were even possible to do so.<sup>14</sup> In the meantime, with respect to these works, if ASCAP were required to grant

---

<sup>14</sup> ASCAP is committed to providing transparency to music users and rightsholders as to the contents of ASCAP’s repertory. ASCAP recognizes that, particularly in a world of partial withdrawals, users and

100% licenses to music users, this lack of information would make it impossible to account to non-members for the respective shares of license fees that they are entitled to receive. And even if ASCAP were able to do so, it would be burdened with the added expense of identifying the scope of rights and restrictions among member and non-member co-owners, calculating and distributing each fractional payment, and resolving disputes with those non-members concerning the amount and accuracy of those payments, resulting in additional administrative costs and less money going to songwriters and publishers. ASCAP's proposal is intended avoid these adverse consequences.

The transition from the current practice of negotiating and pricing licenses based on fractional interest, to negotiating and pricing "100% licenses," would also substantially increase the transaction costs of all parties involved. Licenses that were previously renewed or renegotiated based on prior license terms would have to be adjusted to cover the full share of rights licensed. In order to negotiate and price those adjustments, ASCAP and BMI would need to understand what rights the music user has already licensed from others and for what time period. Moreover, because those other licenses are likely to have different expiration dates, the appropriate rate for each music user would effectively become a moving target. As a result, ASCAP and BMI would regularly need to renegotiate and readjust the rates for each one of their tens of thousands of licensees. ASCAP's proposal would avoid these additional transaction costs.

Finally, requiring ASCAP and BMI to offer "100% licenses" to all music users would deprive many of ASCAP's members (and BMI's affiliates) of the benefits of the

---

rightsholders need information about the ownership of works in the ASCAP repertory and the contents of members' catalogs. For these reasons, ASCAP is continuing to make improvements to its publicly available ACE database, most recently upgrading ACE to permit users to view or download the catalogs of any ASCAP writer or publisher member and displaying share information on ACE.

PRO of their choice, and force them instead to accept the terms and conditions of a different PRO with which they never intended to associate. For example, if an ASCAP member and a BMI affiliate are co-owners of a song, and BMI licenses 100% of that song to one or more music users, the ASCAP member will need to be paid for those performances according to the distribution rules and practices of BMI, even though the ASCAP member never chose to be affiliated with BMI. Thus, if BMI chose to license the work for less than ASCAP, the ASCAP member would have no choice but to accept that lower royalty payment. The ASCAP member would also bear the additional burden of monitoring the distribution procedures of an organization he or she has no relationship with, so as to determine how his or her distribution is calculated, whether it accurately measures all of the performances of the work during the period, and when he or she will be paid. And to the extent that the ASCAP member seeks to challenge the timeliness or the amount of a royalty distribution, he or she will have to figure out how to do so under BMI's rules and procedures, none of which the ASCAP member ever agreed to be bound by. These consequences will inevitably cause certain ASCAP songwriters to consider collaborating only with fellow ASCAP writers in order to keep their works entirely within ASCAP.<sup>15</sup> In other words, a decision that was once driven by creative choice and artistic chemistry will now be controlled by rules imposed by the DOJ. ASCAP's proposal will prevent such an unwarranted intrusion into its songwriters' creative process.

---

<sup>15</sup> Likewise, those songwriters who have chosen not to license their works through ASCAP or BMI, but who have co-written songs with ASCAP members or BMI affiliates, will be compelled to accept the licensing and distribution terms of a PRO they never elected to join, effectively eliminating their ability to control their property rights by deciding with whom they wish to license and on what terms.

#### **IV. CONCLUSION**

ASCAP thanks the DOJ for the opportunity to address these important questions, and for the DOJ's willingness to discuss much-needed consent decree reform that is vital to protect the continued viability of collective licensing through ASCAP and BMI.

Dated: November 20, 2015

Jay Cohen  
Andrew C. Finch  
PAUL, WEISS, RIFKIND, WHARTON  
& GARRISON LLP  
1285 Avenue of the Americas  
New York, New York 10019  
Phone: (212) 373-3000  
Fax: (212) 757-3990

Clara Kim  
Richard Reimer  
AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS  
One Lincoln Plaza  
New York, New York 10023  
Phone: (212) 621-6000

*Counsel for the American Society of  
Composers, Authors and Publishers*