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By email ASCAP-BMI-decree-review@usdoj.gov

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

Re: PRO Licensing of Jointly Owned Works

Dear Mr. Kully:

I appreciate this opportunity to participate in your review of the ASCAP and BMI consent decrees and commend you for undertaking your review.

By way of background, I am an attorney in private practice in Austin, Texas. I have represented clients in the music and "music tech" areas for over 25 years in Austin, Los Angeles, New York and Palo Alto.

In addition to traditional music clients, I also have represented music users and struggled along with everyone else during the digital transition that is still ongoing. I worked on early licensing breakthroughs in videogames and CD Plus titles 1994 and some of the first digital music entrants starting in 1997. This comment is written from my own perspective as an observer of the songwriter market the government regulates and not on behalf of any client.

I am concerned about the questions presented by the Department of Justice regarding PROs licensing more than the contributory share of compositions written by their affiliates. I find the DOJ's premise is so far removed from any rate court decision, industry practice or general sense of the rights of songwriters that I fear the U.S. government is about to lose the respect of many if not most songwriters, not just in the U.S. but around the world.

The 100% licensing issue reminds me of reactions to the Fairness in Music Licensing Act in 1998. That wrong turn resulted in a WTO arbitration that the U.S. lost—with U.S. taxpayers subsidizing royalty payments to foreign writers.

Songwriters have traditionally been free to associate with co-writers without regard to PRO affiliation. 100% licensing would necessarily limit co-writing partners out of concern that any revenue earned by the co-write could be lost in what will almost surely be a licensing and collection morass. It is out of step with the long-standing practices in the music industry.

A recent post on a popular artist rights blog sums it up[1]:

> The Department of Justice is attempting to change the rules of the road to something manufactured out of thin air and then pretending those new rules were there all along. Songwriters must ask why?

I respectfully suggest that it is a point of view that the Department should take into account.

1. The Default Position

The reason the questions presented by the Department of Justice for public comment are concerning to so many songwriters is better understood in the context of the what I call the "default position" for co-writers:

(1) Absent an agreement to the contrary, (2) each co-writer (3) administers their contributory share of copyright in a song (4) including the right to have their respective share administered by their PRO to the extent of that share. For more sophisticated songwriters, I would add (5) no co-writer can bind them to license terms the writer does not accept.

This "default position" is the deal songwriters assume will be in place unless they agree otherwise.[2] The Department's position is controversial—so controversial, in fact that a recent proposed resolution supporting 100% licensing in a bar association intellectual property group failed to pass and was withdrawn.

While the rates for particular revenue streams may be affected by promises that an artist co-writer made to their record company, the collection and payment of those revenue streams is nevertheless determined by fractional ownership.

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[1] The Trichordist, "Call to Action: The Department of Justice is Assaulting Songwriters Yet Again", available at http://thetrichordist.com/2015/11/18/call-to-action-the-department-of-justice-is-assaulting-songwriters-yet-again/

[2] See paragraph 4 below for discussion of common songwriter agreements.

Having said that, as a matter of business practice *performance* royalties and collection rights are ***never*** subject to such third party agreements. Performance royalties are uniquely protected from reductions or redirection in the music industry. This includes both the writer's share of performance royalties (paid through to the songwriters directly) and the publisher's share of performance royalties (paid to a writer's "music publishing designee," often a publisher and often subject to recoupment of a pre-payment of royalties (i.e., "advances") paid to the songwriter by the publisher).

Even when a composer is hired to compose a score and gives up copyright ownership to the commissioning film studio, the writer's share of performance royalties is still paid through to the composer directly by the composer's PRO. The composer may retain the publisher's share on songs derived from the score (e.g., the Bryan Adams hit "Everything I Do, I Do It For You" was from a melody in the score of *Robin Hood, Prince of Thieves*). Depending on negotiations, the composer could expect that she would be paid the publisher's share as well as her writer's share for performances of that song to the extent of her contributory share. In any event, the composer would be paid performance income by her PRO.

2. 100% Accounting for Independent Songwriters

We have many independent songwriters in Austin.[3] Independent songwriters, i.e., songwriters not signed to a music publisher or administrator, lack the infrastructure to bear the newly created burdens that would be placed on them in a 100% licensing environment. The Department of Justice would do well not to fall into the common perception of the "Big Tech" companies who seem to think that every songwriter is signed to a publisher if not a major publisher.

If the Consent Decrees suddenly imposed a 100% licensing burden on ASCAP and BMI songwriters, independent songwriters (a sizeable number of the voting members of each government-regulated PRO) could suddenly bear the accounting obligation. As I understand it, the entire 100% licensing theory is based on the government being able to create a new burden on *co-owners* of copyright, not on the PROs themselves that *own nothing*. This burden will include tax reporting, payments and accountings for unrelated third parties.

But first it will require *educating* the independent songwriters of the contours of this new burden. It is highly unlikely that songwriters would have a reason to

[3] See City of Austin, *Austin Music Census and Needs Assessment Survey*, available at http://www.austintexas.gov/department/atxmusic-census-and-needs-assessment-survey

know of tenants in common doctrines, much less that these doctrines apply to songwriters or to copyright.

As someone who talks to independent songwriters and their managers frequently, I assign a 95% probability that no one will have any idea what they are supposed to do, or will even notice that it happened unless their income drops even further than it already has.

The regulated PROs could no doubt offer handling this newly created administrative burden, but will do so for a fee. I would assume that fee will be paid on a cash and carry basis and not on an administrative fee structure—that is, songwriters will have to come out of pocket to pay for services either by their PRO, accountant or lawyer, and perhaps all three.

Of course, this all assumes that the songwriter has not signed a song split agreement (discussed further below) of one type or another that would actually prohibit them from licensing 100% of performance income and collecting all the money for the song themselves.

Of course, the government could decide to treat major publishers differently than independent songwriters to avoid the grassroots political backlash, but such an action could likely be challenged as violating equal protection of the law. So equal protection could be then added to the litany of potential Constitutional violations that government mandated 100% licensing would fall afoul of.

3. Questions for Comment

(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)?**

Music users I am aware of understand that they need to obtain PRO licenses from ASCAP, BMI and SESAC because of fractional ownership and affiliation of songwriters individually and as co-writers. The licenses issued by all the PROs are limited to the rights controlled by the applicable PRO.

(b) **If the blanket licenses have not provided users the right to play the works in the repertories, what have the licenses provided?**

Respectfully, the question is ambiguous and a complex question. As noted above, the blanket licenses provide users the right to play the works in the respective ASCAP or BMI repertories *to the extent of the contributory share of an*

affiliated co-writer or in its entirety if the work is 100% written by an affiliated songwriter. As is quite well known in the relevant market, blanket licenses provide users the right to publicly perform the subject works as a necessary but not always sufficient condition as other PRO licenses may be required.

(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?**

What motivates PRO licensing is the *music*. I have never encountered or heard of a user who would only get one PRO license. There is no "ASCAP format" or "BMI genre".

Attempting to use songs represented by one PRO would be ill-advised as such a practice would require someone at the user to monitor songs being performed with 100% accuracy, probably *before* their performance. I've never known or heard of a user who *wanted* to do this or who viewed it as an opportunity to be sought out. If this is a question based on a real event in the marketplace, I would appreciate being told how it arose.

If a user adopted such an ill-advised scheme, then they would be assuming the risk that they would make a mistake and perform works represented by another PRO for which the user had no license. Those works would be then unlicensed and leave the user open to potential infringement claims.

Events might occur that would make a single license appropriate, such as a Broadway show that was written entirely by an ASCAP songwriter or team, but even so, as a matter of business practice theaters would typically obtain licenses from all three societies.

(d) **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?**

Respectfully, if the Consent Decrees *required* ASCAP and BMI to offer full-work licenses, i.e., if the government currently forced ASCAP and BMI writers to permit the other society to grant licenses for their works, I would be willing to bet that would be news to everyone in the music business around the world, including heirs.

As noted above, in my experience the default position is that all songwriters license through their PRO to the extent of their share only. It is also the expectation of music users that they need to obtain licenses from all three PROs in order to have full coverage. To my knowledge, this issue has never arisen before in any licensing negotiation with a PRO, nor has it *ever* been raised by *any* rate court. Given the way songwriters are frequently treated by the government's rate courts, it seems unlikely that they would have missed an opportunity to impose even greater burdens on songwriters if they thought that was a possibility.

If the Consent Decrees are this out of step with the long-standing expectation of songwriters, music publishers and PROs, including ex-US songwriters and music publishers, then respectfully this previously unknown ambiguity in the Consent Decrees should be clarified to conform to reality and not the other way around.

(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?**

It is axiomatic that under the 1976 Copyright Act, copyright is a bundle of rights.[4] Copyright owners are largely free to exploit their rights or subdivisions of copyright in whole or in part or to withhold the exploitation of those rights.[5] This is arguably the fundamental reason why PROs exist—to administer the performance right[6] subdivision of the bundle.

Methods of monetizing songs have evolved with technology as the marketplace identifies previously unknown methods of exploitation by previously unknown users. Some songwriters may not wish to do business with some users who have a bad commercial reputation in the marketplace, are widely perceived to not

[4] See 17 U.S.C. Sec. 106.

[5] See 17 U.S.C. Sec. 201(d)(2) ("...Any of the exclusive rights comprised in a copyright, *including any subdivision of any of the rights specified by section 106*, may be transferred...and owned separately"(emphasis added)); see also *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) ("The 1976 [Copyright] Act recast the copyright as a bundle of discrete 'exclusive rights,' § 106, each of which 'may be transferred...and owned separately....' § 201(d)(2)," at 484.)

[6] See 17 U.S.C. Sec. 106(4) ("[T]he owner of copyright under this title has the exclusive rights to do and to authorize...in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly".)

respect the rights of creators, or who are known to leverage their dominant or monopoly positions in the marketplace in ways that are perceived by particular songwriters as unfair or untrustworthy. A brief article search online will provide the Department with ample evidence of how songwriters perceive certain music users.

The implication of the question is that songwriters should be denied their right to decide who they want to associate themselves with by means of a performance right license. Unlike the government's compulsory license under Section 115 of the Copyright Act, collective licensing is not a suicide pact.

I would also point out that the question is miscast slightly, but in important ways. ASCAP and BMI have always offered licenses that allow users to play the works these PROs represent to the extent of the ownership share of their respective affiliated songwriters. The premise of the question assumes facts not in evidence, that is, that ASCAP and BMI currently are authorized by their affiliated songwriters to offer a license of *more* than the songwriter's contributory share of particular works.

Therefore, the long-standing practice has been that ASCAP and BMI (and every other PRO) can only license partially owned works. So while the antecedent condition is not necessarily false, it states in a kind of tautology the condition that is the only possibility, i.e., "If ASCAP and BMI were to offer the only licenses they are capable of offering...."

(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?

Again, there is an unhelpful ambiguity in the compound question. ASCAP and BMI license all available repertoire to the extent of the contributory share of their affiliated writers. This is no secret to any music user I have ever encountered or heard of.

A music user lacking appreciation of the creative process or the administration of rights in the music business may find it inconvenient that they have to get multiple licenses. It certainly is true that getting three licenses is a greater inconvenience than getting one, just like it would be easier if Lennon-McCartney were just Lennon or McCartney.

However, it is arguably most likely to be the greatest inconvenience to a user who intends to take the regulated PROs through the vastly expensive rate court over each license. Given the relatively recent explosion of rate court cases, we know that these users are frequently well-heeled public companies with multi-billion dollar market caps like Google, Pandora or SiriusXM who know full well what the licensing requirements are in the music business.

4. Common Practical Applications

You may wish to consider the following non-exhaustive examples of common fact patterns that routinely arise in the music industry that could be negatively affected by a change to 100% licensing by PROs.

In my view, it is common practice for attorneys representing songwriters to recommend that the songwriter client at least attempt to obtain some form of agreement documenting the contributory share of each writer and establishing the administration rights of each writer. One of those rights is each writer's ability to collect their contributory share of each song directly from the applicable PRO. I will leave it to others to determine whether failing to advise clients of the need to obtain these agreements amounts to negligence, but it is very, very common.

It is hard to know how many written contracts exist regarding all compositions currently in copyright, but a reasonable estimate would be hundreds of thousands and an untold number of oral agreements. All of these agreements would be affected by a change in the default position.

(a) Separate Administration Agreements: Probably the most common arrangement, songwriters who write together frequently sign a one or two page "split agreement" which is essentially the default position. A split agreement at a minimum memorializes their respective (1) contributory share of (2) particular songs plus their (3) PRO affiliation, (4) contact information and (5) a simple statement that they each will administer their respective shares of the song (6) including registering the song with their PRO reflecting the applicable song splits and the right to collect monies directly from their PROs.

(b) Artist/Writer Administration Agreements: A joint administration agreement usually provides the same basic terms as the separate administration agreement in 4(a), but instead of the separate administration rights in (5) the artist/writer may ask for the non-artist co-writer (or "outside writer") to pre-approve certain common marketing type uses (such as free licenses for a

"download of the week" or performance video) but still taking a hands-off approach on PROs as in 4(a)(6) so that co-writers and their publishers can authorize their PRO to collectively license the co-writer's contributory share of the song and collect applicable monies.

(c) Leaving Members: It is common for group artists to also be self-contained songwriting teams. When groups break up or members leave, there is typically either a settlement agreement or a self-executing "buy-sell" type agreement in place through a group partnership or shareholder agreement. The leaving member may then be treated similarly to the "outside" co-writer. When groups break up, like any other partnership dissolution there may be bad blood, so the fewer loose ends the better.

Given the inability of any government to stop massive piracy, performance royalties have become even more important revenue sources to songwriters so a leaving member may be able to use 100% PRO licensing to gum up the works thus handing the leaving member potentially significant leverage. Alternatively, the remaining members could use 100% licensing to the disadvantage of the leaving member.

(d) Bank Loans, Tax Liens and PRO Advances: Songwriters may use their PRO payments to collateralize loans. This usually results in the songwriter directing the songwriter's affiliated PRO to make payments to the lender. If the debtor songwriter's catalog is subject to 100% licensing by a PRO that the songwriter is not affiliated with, then those payments might trigger an event of default under the applicable loan documents.

Similarly, if the Internal Revenue Service or a state tax authority places a lien against a songwriter's public performance income, if the tax debtor songwriter's catalog is subject to 100% licensing by a PRO that the songwriter is not affiliated with, any payments might escape the lien and trigger a tax penalty or other action by the governmental entity concerned.

Songwriters frequently are paid a prepayment of performance royalties ("advance") by their PRO. PRO advances are then recouped from PRO payments (either the writer's share or the publisher's share or both). These advances are often part of a songwriter's financial planning and are calculated by reference to past performance and future activity based on timing and contributory share of the songwriter's compositions.

It is unclear what affect 100% licensing would have on these payments, but if there is a risk that otherwise dependable cash flow would be interrupted then PROs will be less likely to pay advances to their affiliated songwriters. If that were the result, it would be very unfortunate for songwriters.

(e) Parodies: Major parodists often negotiate a stand-alone deal with the owner of the parodied composition rather than rely on the fair use defense. Such an agreement quiet's title to the parody and gives comfort to the parodist who may be investing significant sums in videos, marketing and other promotion. These agreements allow the parodist to collect their share of performance royalties directly from the parodist's PRO. In a 100% PRO licensing structure, the owner of the underlying composition may be reluctant to grant such a license. Alternatively, the parodist may not find it attractive to create the parody.

(f) Samples: It is common for owners of sampled material to exhibit hold out behavior. 100% PRO licensing will hand the owner of the sampled material the opportunity to use their (usually small) share of the interpolating song to collect 100% of the revenue.

(g) Hold Outs: If the government forces PROs to collect 100% on co-written songs, each co-writer will have to rely on the other to actually pay through the monies owed for the co-writer's share. Even if the co-writer receiving the monies actually intends to pay over the other writer(s) share(s), it is unlikely that the collecting PRO will take responsibility for making that payment and each writer will have to bear the responsibility and the cost of making these payments.

(h) Co-Writer Selection: It is likely that songwriters will start leaving ASCAP and BMI to avoid 100% licensing interfering with their contracts and business practices, and will also start selecting their co-writers based on their PRO. This has never before been an issue, but the 100% licensing model will be so horrendously confused and disruptive that no songwriter who could get away from it will fail to do so. If a songwriter can leave ASCAP or BMI, they would not then co-write with an ASCAP or BMI member in order to avoid getting dragged right back into the mess.

(i) Writers Share/Publisher Share: It is unclear whether the DOJ is anticipating 100% licensing applying to both the writer's share and the publisher's share of public performance revenue. This is important because the writer's share is typically paid through to the songwriter directly by the writer's

PRO, unless there is a loan, tax lien, advance or other reason to redirect the payments.

If the intention is to for the 100% licensing to truly be 100%, that might require every PRO to pay back up withholding to the IRS for the writer's share as well as the publisher's share. My guess is that at a minimum all PROs would find their administrative costs would at least double overnight and the PRO would likely have no contractual basis to deduct the administration costs they would be forced to incur from revenues paid to unaffiliated writers.

(j) Valuations: It is difficult to say how 100% licensing would affect the valuation of music publishing companies. In theory, the earnings should not change, but the transaction costs involved can reasonably be anticipated to go through the roof. This increase in costs would have the effect of decreasing net publisher's share, which is the cornerstone measurement of publishing catalog valuation.

(k) Duplicative Transaction Costs: To conclude with what is the most important reason to leave the status quo alone, 100% PRO licensing would necessarily create new and duplicative accounting and transaction costs that will ultimately be passed along to the songwriters. For example, in order to make payments for the share of the song that the co-writer does not own, the co-writer will have to obtain W-9s, file tax documents and potentially have to set up an entirely new business organization.

Realize that these will be *new* costs, not a transfer of the user's administrative costs as noted above. The new costs will be from reprogramming accounting systems that will essentially require producing a manual statement to confirm the accuracy of the 100% license, and then incurring the new cost of matching 100% payments collected. This is all assuming that there is some knowable choice made regarding which PRO does the collecting and which one does the receiving and that no disputes arise.

I appreciate the opportunity to participate in the Department's fact finding regarding this critical issue. I hope I have helped to persuade you that this 100% licensing is a wrong headed idea that could have disastrous effect on the music industry that is already suffering a massive decline in revenue from unstopped piracy.

Sincerely,

Chris Castle /s/

Christian L. Castle

CLC/ko