Public Comments of Broadcast Music, Inc.
U.S. Department of Justice, Antitrust Division
Review of Consent Decree in United States v. Broadcast Music, Inc.

November 20, 2015

Broadcast Music, Inc. ("BMI") submits these public comments in response to the September 21, 2015 solicitation of public comments by the Antitrust Division of the U.S. Department of Justice concerning fractional licensing of public performance rights in co-owned musical works as a part of its review of the consent decrees in *United States v. Broadcast Music, Inc.*[1] and *United States v. American Society of Composers, Authors and Publishers*[2] (the "Public Notice").[3] BMI will continue its ongoing dialogue with the Department concerning fractional licensing and other topics in the hope of soon reaching an agreement on a set of necessary changes to the BMI consent decree. BMI submits these comments to state publicly its position on fractional licensing for the benefit of other interested parties.

As we described in BMI's August 6, 2014 public comments, the advent of digital processing and Internet streaming has revolutionized the way that the public hears music performances. The Department's ongoing review of the consent decree must address the current and foreseeable future marketplace and make the changes necessary to bring the consent decree into the 21st Century. In the 15 months since BMI previously provided public comments, the demands of larger publishers to take control of their catalogs and license directly to Internet

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1. 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), amended, No. 64-CIV-3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

2. No. 41 Civ. 1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

3. As a party to the decree in *United States v. Broadcast Music, Inc.*, BMI stands on unique legal ground, not shared by any other members of the public, concerning the decree in that case. *See, e.g.*, *United States v. Am. Soc'y of Composers, Authors and Publishers*, 341 F.2d 1003, 1007 (2d Cir. 1965) (non-party to decree lacks standing to move in antitrust action against defendant). In submitting these comments, BMI reserves all of its rights as co-equal party to the decree with the Department.

users in order to negotiate royalties in a free market have become even more insistent. Certain songwriters formerly affiliated with BMI and ASCAP have signed with a new, unregulated performance rights organization, Global Music Rights ("GMR"), and terminated their relationship with the regulated PROs presumably in the hope of achieving greater royalties.

At the same time, unregulated, for-profit SESAC, through its recently acquired Harry Fox Agency ("HFA")[4] and RumbleFish, offers mechanical and synchronization rights (including micro-sync rights for high-volume, uniform-value synchronization largely for user-generated content) that BMI is not currently providing.[5]

If the uncertainty created by the Department's continuing review of the consent decree persists, it will place challenges on BMI's ability to compete and respond in this dynamic and rapidly evolving landscape. Equally, BMI's songwriters and publishers remain in a limbo of uncertainty concerning the performance rights that are typically their primary source of income. There is an urgent need for modification of the BMI consent decree without further delay, and to modify the decree in such a way as to permit BMI to compete under the same rules of play as these current (and future) unregulated entities.

To the extent that recent court decisions and the Department's Public Notice have drawn into question BMI's right to accept fractional interests from songwriters and publishers or issue fractional licenses to music users, the meaning of the decree should be clarified so that BMI may license on a fractional basis if it and its affiliated songwriters and publishers want it to do so. There is no reason to compel BMI to grant greater rights than music users have paid for,

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4. SESAC acquired HFA in September of 2015, thereby adding to its ability to bundle licensing for digital services that require performance rights as well as synchronization and/or mechanical rights. *See* Ed Christman, *SESAC Buys the Harry Fox Agency*, Billboard (July 7, 2015), http://www.billboard.com/articles/news/6620210/sesac-buys-the-harry-fox-agency.

5. BMI continues to rely on the language of its decree, which does not prohibit it from licensing rights in addition to the public performing right.

or to act contrary to the preferences of its affiliates. Indeed, requiring BMI to license on a 100% basis would only increase its purported market power, a result hardly reflecting the purpose of the BMI consent decree.

Fractional licensing – where BMI represents only the interests of its writers and publishers – is the efficient, common-sense way to deal with the longstanding fact that many songs are co-written by BMI affiliates and non-BMI affiliates ("split works"). In fact, fractional pricing and distribution by BMI and ASCAP have been the indisputable norm among all the stakeholders for decades for compelling reasons:

- Fractional licensing makes sense for **music users** that want blanket access to all the works in the BMI and ASCAP repertoires but don't want to pay the PROs in full – twice – for the right to play jointly-authored works.

- Fractional licensing makes sense for **publishers** who don't want to account to other publishers for partial interests across their catalogs, co-owned by those other publishers.

- Fractional licensing makes sense for **songwriters** who want to have performances of their works valued by the PRO of their choice, want to be paid by the PRO of their choice, and want to choose their collaborators in a new song based on creative considerations, not the PRO affiliation of the other songwriters.

- Fractional licensing makes sense for **PROs** that need to collect fees and pay royalties that are fair for their songwriters but have no way to collect for, or to pay, the collaborators of their songwriters who have chosen a different PRO to represent them.

- Fractional licensing makes sense for **rate courts** that would otherwise have to deal with competing claims to license the same copyright interests and which (under mandatory 100% licensing, discussed below) would otherwise be challenged to value two independent PRO repertoires each of which would contain works whose performance could be licensed by either PRO.

By contrast, mandatory 100% licensing, whereby a music user holding either a BMI or ASCAP blanket license would obtain the right to perform all co-written songs without obtaining permission to perform those songs from the other PRO or any other non-affiliated co-writer or publisher, would inject great inefficiency and confusion into the pricing, collecting, and distribution of performance rights royalties. It would also have the perverse effect, from an antitrust policy point of view, of undercutting an individual publisher's ability to license their catalogs directly to music users (because the PROs will have already licensed any split works, which now make up a large portion of most publishers' catalogs), thereby shoring up and increasing the bargaining power of the collective licensing organizations. At the same time, mandatory 100% licensing by PROs would encourage opportunistic gamesmanship by any music user seeking to avoid paying the full value of all the rights it acquires.

Requiring BMI to license not only the interests of its own affiliates, but also the partial interests of unaffiliated co-songwriters and co-publishers, would impose an unworkable and unwarranted change to the existing and longstanding understanding by which both music users and music creators have operated for jointly-written songs. As the Public Notice states, "the historical practice" has been that "ASCAP and BMI have made and accepted payments . . . based on the fractional interest each copyright owner holds in works."

Pursuant to this practice, music users have obtained permission from the representatives of *all* co-owners of the songs they play – typically BMI, ASCAP, and SESAC. Songwriters have been able to look to *their own* trusted PROs and publishers for payment for *their* contribution to jointly-written songs.

Until now, there has never been any reason to consider whether BMI licenses that include split works, in the abstract, also cover the interests of ASCAP and SESAC writers and publishers in those same works. It is indisputable, however, that the market has consistently embraced a fractional-licensing model.

Basic Principles

Several basic principles underlie BMI's view on fractional licensing and are the foundation on which the remainder of the points addressed in these comments lie.

1. Requiring BMI to provide 100% licensing will undermine the copyright owner's right to license directly, thus contradicting the procompetitive goals of antitrust law and the fundamental purpose of the consent decree.

The BMI consent decree is not intended to regulate individual publishers or regulate the prices that they may charge. Rather, the fundamental purpose of the consent decree is to ensure that *BMI* does not exercise its alleged market power *as a result of its own collective licensing activity*.[6] Preserving the incentives of music users and individual copyright owners to enter into direct licenses in the free market has been consistently recognized as a check on any incremental market power that *BMI* could exercise through the pooling of performance rights in

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6. *See, e.g.*, Brief for the United States as Amicus Curiae at 11, *Broad. Music, Inc. v. DMX Inc.*, No. 10-3429, 2011 WL 1462242 (2d Cir. Apr. 11, 2011) ("[T]he modifications sought are procompetitive" and would serve the "key purpose of the Consent Decree – limiting any alleged market power BMI may have.") (internal citations omitted); *United States v. Am. Soc'y of Composers, Authors and Publishers*, 157 F.R.D. 173, 193 (S.D.N.Y. 1994) ("The Consent Decree was 'designed to limit ASCAP's ability to exert undue control of the market for music licensing rights through its control of a major portion of the music available for performance and its use of the blanket license as a means to extract non-competitive prices.'") (internal citations omitted).

its control.[7] The consent decree was not intended to limit the "bargaining capital"[8] of copyright owners acting independently of the collective licensing pool.[9] Instead, as the Department has acknowledged, "the language and context of the decree show it was intended to promote competition."[10]

As we urged in BMI's August 2014 public comments, the BMI consent decree should be modified to permit music publishers to withdraw their catalogs from the BMI repertoire as to certain digital uses so as to seek unregulated, free-market prices in that important and growing music segment. Such a modification is consistent with the consent decree's overarching purpose. However, among contemporary pop songwriters a substantial – and increasing[11]– proportion of songs are written by two or more songwriters, and those writers often work through different publishers and different PROs. This recent trend toward even greater collaboration reflects a cultural shift in the craft of songwriting:

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7. *See, e.g.*, Brief for the United States as Amicus Curiae at 10a, *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, No. 77-1578, 1978 WL 223155 (U.S. Nov. 27, 1978) ("Although bulk licensing must thus be tolerated, the opportunity to make separate arrangements directly with the individual copyright holder should also be preserved for those who might be able to take advantage of it."); Memorandum of the United States in Response to Motion of Broadcast Music, Inc. to Modify the 1966 Final Judgment Entered in this Matter at 10-12, *United States v. Broad. Music, Inc.*, No. 64 CIV. 3787 (S.D.N.Y. June 20, 1994) (attached as Addendum B to Brief for the United States as Amicus Curiae, *Broad. Music, Inc. v. DMX Inc.*, No. 10-3429, 2011 WL 1462242 (2d Cir. Apr. 11, 2011) ("The Judgment already contains important provisions to assure that music users have competitive alternatives to the blanket license, including direct and per-program licensing, and source licensing for prerecorded programming. Under the Judgment, BMI may obtain only nonexclusive licenses from composers, thereby leaving the composers free to license any of their works directly to any music user who chooses to negotiate with them. . . . Thus, the Judgment provides important protections against supracompetitive pricing of the BMI blanket license for those music users wishing to explore competitive licensing alternatives.")

8. *Stewart v. Abend*, 495 U.S. 207, 229 (1990) ("The limited monopoly granted to the artist is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use.").

9. *Columbia Broad. Sys., Inc. v Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 936 (2d Cir. 1980) ("[I]f copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to deal with them, the blanket license is not a restraint of trade.").

10. Brief for the United States as Amicus Curiae at 9, *Broad. Music, Inc. v. DMX Inc.*, No. 10-3429, 2011 WL 1462242 (2d Cir. Apr. 11, 2011).

11. As of November 10, 2015, all ten songs in the top 10 on the Billboard Hot 100 were co-written. Billboard Hot 100, (Nov. 10, 2015), http://www.billboard.com/biz/charts/the-billboard-hot-100.

> BY THE MID-2000S the track-and-hook approach to songwriting— in which a track maker/ producer, who is responsible for the beats, the chord progression, and the instrumentation, collaborates with a hook writer/ topliner, who writes the melodies— had become the standard method by which popular songs are written. The method was invented by reggae producers in Jamaica, who made one "riddim" (rhythm) track and invited ten or more aspiring singers to record a song over it. From Jamaica the technique spread to New York and was employed in early hip-hop. The Swedes at Cheiron industrialized it. Today, track-and-hook has become the pillar and post of popular song. It has largely replaced the melody-and-lyrics approach to songwriting that was the working method in the Brill Building and Tin Pan Alley eras, wherein one writer sits at the piano, trying chords and singing possible melodies, while the other sketches the story and the rhymes. In country music, the melody-and-lyrics method is still the standard method of writing songs. (Nashville is in some respects the Brill Building's spiritual home.) But in mainstream pop and R&B songwriting, track-and-hook has taken over . . .[12]

Because joint authorship is so common, this needed reform would be rendered largely futile for those publishers that wish to explore direct licensing outside BMI and ASCAP if all their co-written songs were licensed in full by the regulated PROs.[13] This would happen whenever any interest in a withdrawn song remained with BMI because that interest would remain subject to BMI's mandatory licensing. 100% licensing makes partial digital withdrawal all but meaningless.

Instead of promoting competition, requiring 100% licensing by BMI would promote collective licensing over free-market negotiation. It would severely limit the number of works that can be licensed freely and exclusively by publishers that withdraw from or terminate their affiliation with BMI.

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12. John Seabrook, *The Song Machine: Inside the Hit Factory* 200 (Kindle ed. 2015).

13. While we primarily discuss BMI in this Comment, all statements concerning the impact of a mandatory 100% licensing rule apply with equal force to ASCAP.

Moreover, requiring BMI to license on a 100% basis would be contrary to the desires of the publishers and songwriters. The galvanized response by thousands of songwriters and publishers to the mere suggestion that BMI may be required to license on a 100% basis is a strong indicator that they will respond with action if a 100% licensing rule were imposed. Some publishers would no doubt find it more advantageous to remove their works from BMI altogether than to subject themselves to a 100% licensing model that effectively thwarts direct licensing, and makes tracking and payment of royalties significantly more complicated and costly. Large publishers withdrawing entirely from BMI will adversely affect both digital users and traditional media users that rely on blanket licenses as an efficient and desirable way to secure music performing rights.

Faced with the departure of BMI's larger publishers, small co-publishers may be incentivized to leave BMI and perhaps allow themselves to be absorbed by the major publishers in order to enjoy free market licensing of their works. Publisher withdrawals would place the operational-cost burden on a smaller base of BMI affiliates, making affiliation with BMI that much less a competitive choice. The publishers that chose to remain with BMI would thereby be harmed by the cumulative impact of a requirement of 100% licensing, making it even more difficult for them to compete with larger publishers for songwriters. Music users, small publishers, their songwriters, and the public at large would then lose the efficiency benefits of blanket licensing.

2. The consent decree should conform to commercial and economic reality. The performance rights marketplace has, in practice, always operated on a fractional basis.

As the Public Notice accurately states, BMI has "made and accepted payments" fractionally. In other words, BMI pays its writers and publishers on a fractional basis (a writer

with a 50% interest gets a one-half credit when the song is performed) and does not pay ASCAP writers. Likewise, BMI has negotiated and priced its licenses to music users on a fractional basis, and assumes that music users will also obtain licenses from the non-BMI participants, who will in turn pay their own interest holders.

Participants in the performance rights marketplace, including music users, have always assumed that performance rights organizations were licensing on a fractional basis and, acting on that assumption, obtained blanket licenses from all PROs.

With a single *de minimis* exception, explained below, music users have not relied on the BMI blanket license to the exclusion of the ASCAP license for works with split-PRO representation. Any claim that they in fact relied on their BMI license to cover performances of split works is wholly disingenuous. Their practice has consistently been to obtain blanket licenses from all PROs. The consent decree should not abruptly be construed in a way that will change longstanding practices and relationships. The marketplace has developed and functioned under the consent decrees for the last 50 years with common understandings that should not now be upended.

3. From the songwriters' perspective, the freedom to team up with other songwriters in varying combinations is integral to the creative process.

The creative process of songwriting and composition should remain unaffected by a songwriter's PRO affiliation. Songwriters' freedom to choose and change collaborators whenever they are inspired to do so is a source of innovation, productivity, product quality, and output enhancement – all positive contributions to the market from an antitrust perspective.

Today, as always, songwriters freely choose collaborators without any regard for who their co-writers' publishers or PROs might be. Songwriters collaborate as they see fit, secure in the knowledge that *they* will be paid by *their own* publishers and *their own* PROs for

their own contribution to a co-written work. A regime in which BMI is required to pay non-BMI writers and non-BMI publishers for those performances of split works licensed by BMI, while BMI writers receive "accountings" from other PROs and publishers for that PRO's licensed performances of those same songs, would profoundly upset the relationship between songwriters and their trusted representatives.

It would also chill the creative process. Suddenly, without precedent, songwriters who wish to control the licensing of their interests by the PRO of their choice would be pressed to choose their collaborators based not on chemistry or complementary talents, but rather by the PRO affiliation of that collaborator (and even then, their collaborators could change their affiliation, thus upsetting even such careful plans to work within consent decree mandates).

The prospect of missing and delayed payments and lack of true accountability under a 100% licensing regime is all too plain. Songwriters should not be put to this choice. Above all else, the Department must preserve the songwriters' freedom to collaborate and receive payment for their joint works from their chosen PRO in a *pro rata* fractional way.

4. For the market to operate efficiently, the rules of the road must be clear. The current perceived ambiguity concerning the consent decree's position on 100% licensing must be remedied.

Prior interpretation of the PRO consent decrees never addressed the issue of whether the marketplace is or is not licensing on a 100% basis. Nonetheless, it has since been suggested that the reasoning of those decisions dictates that BMI also must license *all* interests in a song even though it has always accepted and made payments fractionally. While the BMI and ASCAP consent decree courts decided that under the existing decrees a publisher must grant the PROs rights to license a "composition" or a "work" to *all* public performance music users or

none,[14] those courts never addressed the issue of whether the marketplace is or is not licensing on a 100% basis. The decree courts gave no consideration to any antitrust rationale with regard to fractional licensing.

That said, given the questions raised by the Department and the insertion of perceived ambiguity into long-settled practices, the BMI consent decree now must be clarified so as to allow for fractional licensing as well as digital rights withdrawal more generally.

The marketplace would not be disrupted by making explicit that BMI may continue to accept and grant fractional rights in split works. To the contrary, such clarification would conform the language of the decree to existing practices and allow BMI to respond to current market forces. The decree was not intended to create inefficiencies or prevent competition in the marketplace, as would be the result of 100% licensing. Nor was it intended to limit competition by individual publishers and songwriters or limit their rights under copyright law. Of course, if BMI's songwriters and publishers (and their co-owners) want BMI to issue 100% licenses, and if BMI at that point wishes to do so, that too should be permitted. Simply put, BMI should be able to follow the market wherever it goes and allow its affiliates to compete fairly with unregulated entities.

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14. "The BMI Consent Decree requires that all compositions in the BMI repertory be offered to all applicants," but "[i]f BMI cannot offer those compositions to New Media applicants, their availability does not meet the standards of the BMI Consent Decree, and they cannot be held in BMI's repertory. Since they are not in BMI's repertory, BMI cannot deal in or license those compositions to anyone." *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 CIV. 4037 (LLS), 2013 WL 6697788, at *3-4 (S.D.N.Y. Dec. 19, 2013), *appeal docketed*, No. 15-2060 (2d Cir. June 26, 2015). The Second Circuit, affirming the ASCAP consent decree court, stated that "[t]he licensing of works through ASCAP is offered to publishers on a take-it-or-leave-it basis. As ASCAP is required to license its entire repertory to all eligible users . . . ." *Pandora Media, Inc. v. Am. Soc'y of Composers, Authors and Publishers*, 785 F. 3d 73, 77 (2d Cir. 2015).

Discussion

The Performance Rights Marketplace has Always Operated on a Fractional Share Basis.

Before digital rights withdrawal was first suggested, virtually all song co-owners were affiliates of one PRO or another, and virtually all music users held licenses from all PROs covering all of the fractional shares of each composition. What mattered to music users was: (a) whom do we pay; and (b) what are we paying for? To those questions, the answer was unequivocal. The performance rights marketplace operates on a fractional share basis: PROs price and pay royalties to their members or affiliates on their own fractional share of the copyrights; PROs do not account to affiliates of other PROs; and music users obtain a license from each co-owner of the copyright or their respective PRO in order to publicly perform music. A modification to the consent decree to expressly clarify that BMI may offer fractional licenses would be consistent with market practice and avoid the massive disruption that would occur if that practice – and the whole ecosystem that has grown around it – were turned upside down.

Payments To and From BMI are Fractional.

As the Public Notice accurately states, PROs "have made and accepted payments . . . based on the fractional interest each copyright owner holds in works." In negotiations with music users and their joint negotiating agents, such as the Radio Music License Committee, BMI's fractional-share-adjusted proportion of music performances (as compared to ASCAP's and sometimes SESAC's) in a given medium is virtually always one of the principal topics of debate in determining a fair price for the BMI license. This is also true when negotiations fail and the rate court or the Copyright Royalty Board must determine a reasonable fee.

In all but an isolated case (discussed further below), it has been the uniform practice of BMI and the music users in negotiations and in court, to present evidence of music use on a fractional basis only. If a song has two songwriters – one BMI-affiliated and one ASCAP-affiliated – BMI would be credited with only a one-half interest in the work. Music users have never paid BMI for 100% of the value of works co-written by ASCAP or SESAC writers.

By the same token, BMI only pays its publishers and writers on a fractional basis. If there are two BMI writers with 50% shares, each gets half credit for a performance. If there is a BMI co-writer who holds a one-third interest in a song along with two ASCAP writers, BMI only gives the BMI writer a one-third royalty credit for the performance. BMI affiliation agreements with writers and publishers contain standard provisions incorporating this payment system.[15]

BMI Does Not Account to Co-Owners.

A critical component of the default rule in copyright law of tenancy-in-common is that a copyright owner of a co-owned song who licenses the song on a 100% basis bears the

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15. The BMI Publisher Affiliation Agreement provides in paragraph 5(A)(3) that:

> In the case of Works which, or rights in which, are owned by Publisher jointly with one or more other publishers, the sum payable to Publisher under this subparagraph A shall be a pro rata share determined on the basis of the number of publishers, unless BMI shall have received from Publisher a copy of an agreement or other document signed by all of the publishers providing for a different division of payment.

> The BMI Writers Affiliation Agreements provides in paragraph 6(a)(ii) that:

> In the case of a Work composed by you with one or more co-writers, the sum payable to you hereunder shall be a pro rata share, determined on the basis of the number of co-writers, unless you shall have transmitted to us a copy of an agreement between you and your co-writers providing for a different division of payment.

concurrent obligation to account to its co-owner for the co-owner's share of the royalties.[16] However, as the Public Notice makes clear, BMI does "not 'account' to members of other performing rights organizations." Similarly, the BMI affiliation agreements do not impose an obligation on BMI to account to non-affiliated publishers and writers. Instead, they only impose on BMI the obligation to make payments to publishers and writers *pro rata* "determined on the basis of the number of" co-writers or co-publishers, as the case may be.

We expect that many publishers and writers would be astonished to learn that BMI and they themselves had been granting any rights on behalf of their co-owners, and in particular their non-BMI co-owners. After all, not only do their BMI affiliation agreements *not* provide for accounting to co-owners, but (i) the publishers and writers never actually receive money from BMI with which to account *to* their non-BMI-affiliated co-owners; and (ii) they never receive any money *from* their ASCAP-affiliated co-owners.

Music Users Have Acted on the Understanding that Works Were Licensed Fractionally and Did Not Rely on the BMI License or ASCAP License Exclusively.

Music users, like songwriters and publishers, necessarily have understood that the market in which they were operating was organized in a fractional manner. For example, last year, Spotify, a leading music streaming service, in a submission to the United States Copyright Office, explicitly acknowledged this fact:

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16. *Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007) ("[A]s described in the House Report accompanying passage of the Copyright Act, [co-owners of a copyright in a work] are to 'be treated generally as tenants in common, with each co [-] owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co[-]owners for any profits.'" (quoting H.R. Rep. No. 94–1476, at 121 (1976))); *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998) ("Joint authorship entitles the co-authors to equal undivided interests in the whole work—in other words, each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made.").

> [C]ustom and practice in the music industry has developed such that each co-author of a musical work only licenses its proportionate share in the underlying work.[17]

In accordance with this understanding, music users do not rely solely on their BMI licenses for the right to perform split works co-owned by ASCAP members. Instead music users have invariably purchased both BMI and ASCAP licenses. (The one exception to this practice is with respect to performances of co-owned songs on local television stations and a cable network holding per program licenses.)[18] We are not aware of any music user that has purchased a license only from BMI and did not purchase one from ASCAP on the premise that split works were covered by its BMI license. Nor are we aware of any music user that has refused to obtain a BMI license, or sought an adjustment of the scope of its BMI license because split works were purportedly covered by its ASCAP license.

Even more tellingly, to our knowledge, no music user has ever contended in negotiations or in the BMI rate court – where their incentive to minimize payments to BMI is most clear – that the BMI license fee should be discounted because the music user already held, or would hold, an ASCAP license that granted 100% rights to co-written songs. Most recently, after obtaining a favorable rate in the ASCAP/Pandora rate court, Pandora did not take the position in the subsequent BMI/Pandora rate court case that Pandora only needed to secure a

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17. Comments of Spotify USA Inc. dated May 23, 2014, In Response to Copyright Office Notice of Inquiry at 4, http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Spotify_USA_Inc_MLS_2014.pdf (last visited Nov. 19, 2015).

18. As a result of a decision in the ASCAP rate court, when a local television station holding a per program license broadcasts a song co-owned by BMI and ASCAP publishers in one of its programs the station may pay only BMI for that program and the co-writer affiliated with ASCAP is uncompensated. *United States v. Am. Soc'y of Composers, Authors and Publishers*, 157 F.R.D. 173, 193 (S.D.N.Y. 1994) ("[T]here is no legal basis in this circumstance to hold a broadcaster who holds a license from BMI for the use of a given work also liable for fees to the ASCAP copyright owner, there is no need to impose a per program fee for such use."). While this is unfair to the affected songwriters, this situation arises in only approximately 0.1% of programs. The overwhelming majority of this small universe of per program licensees never had such a situation arise and have never been able to rely on one PRO license to cover works co-written by affiliates of the other.

license for works held 100% by BMI. Rather, consistent with historical practice, Pandora sought a full blanket license for the entire BMI repertoire, and its license proposal to the Court (including its adjustable fee blanket license proposal) did not seek a credit for split works licensed from ASCAP.[19] Similarly, the BMI and ASCAP rate courts have assumed that fair market value for the licenses they were pricing would not provide any amounts to be paid over to songwriters affiliated with a different PRO. Nor have those courts, in pricing adjustable fee blanket licenses, ever provided 100% credits for split works.[20]

This consistent position of the music users has carried over to the current moment, where the issue of 100% vs. fractional licensing is top of mind for all parties. As recently as this summer, the Radio Music License Committee expressly agreed with SESAC that it would not seek any discount in license fees predicated on the argument that co-written songs with an interest licensed by BMI or ASCAP should be treated as fully licensed by those PROs.[21] Moreover, SESAC is not expecting an accounting from BMI and ASCAP for its writers.[22] This settlement agreement's prohibition of the radio industry from arguing for reduced rates on

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19. *See, e.g.*, *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037 (LLS), 2015 WL 3526105, at *21-24 (May 28, 2015) (addressing Pandora's numerous arguments in support of its proposed reasonable BMI license rates and never mentioning reduced rates due to co-owned works being fully licensed by ASCAP), *appeal docketed*, No. 15-2060 (2d Cir. June 26, 2015).

20. *See id*. at *25 ("BMI and Pandora agree that Pandora should receive a pro rata, performance-based credit to account for any BMI-affiliated composition that is either directly licensed by Pandora or withdrawn from BMI's repertory . . . . Under BMI's proposed crediting mechanism, Pandora would receive a partial share credit for all works co-owned by a BMI-affiliated publisher and a withdrawn publisher that Pandora continued to perform." The court adopted BMI's crediting mechanism, including the "partial share credit.").

21. Settlement Agreement entered into between Radio Music License Committee, Inc. and SESAC ¶ 10, http://imgsrv radiomlc.org/image/rmlc/UserFiles/File/Final%20SESAC%20RMLC%20Settlement%20Agreement.pdf (last visited Nov. 19, 2015).

22. *See id*. ("Neither the RMLC nor any Represented Station shall argue that the value to be ascribed to such works should be diminished (other than proportionately to the partial ownership interests they represent) on account of the fact that other rightsholders-in-interest not represented by SESAC also own percentages of the copyright interest in such works.").

account of split works being licensed by another PRO proves that music users do not expect to pay BMI or ASCAP for 100% licenses.

Consequently, none of the players in the PRO marketplace has operated under a 100% licensing model. To mandate this now would reverse decades of commercial practice and throw the songwriting world into chaos.

The Consent Decree Should Be Clarified to Expressly Allow BMI to License Fractionally.

The mandatory license provision of the BMI consent decree should be clarified to expressly allow BMI to license fractional interests in a work. Because of the *Pandora* "all-in/ all-out" decisions, the Department's present request for public comments, and statements by others, it is apparently unclear to some whether the decree permits BMI to accept and license fractional interests in compositions.[23] The issue of 100% licensing has also come to the forefront as larger publishers continue to pursue the direct licensing of digital users themselves, presumably intending to grant only fractional licenses themselves and not seeking to account to other publishers, as they plainly have the right to do. In light of these developments, preservation of the current decree language is not an acceptable course. Rather, the consent decree needs to be clarified so that BMI too is permitted to respond to the changing marketplace and meet the needs of music users, songwriters, and publishers.

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23. For example, at the BMI/Pandora rate trial, Pandora raised the prospect of future litigation on this point. Trial Tr. at 1842, *Broadcast Music, Inc. v. Pandora Media, Inc.*, No. 13 CV 4037 (S.D.N.Y. Mar. 3, 2015).

Requiring BMI to Provide 100% Licenses Would Obstruct Publishers' Lawful Division and Monetization of Their Copyright Interests.

The granting of 100% licenses by one owner (or its agent) is merely a default rule under copyright law.[24] As a default rule, its function is only to manage relations between joint owners who have failed to agree otherwise with each other. Like other default rules, it is not necessarily well-suited to most real-world situations, and is definitely not suited to the bulk licensing of music performance rights to high-volume music users seeking access to large numbers of co-owned songs.

Under the Copyright Act, publishers have the right to divide their interest in a co-owned work as they see fit.[25] Most specifically, copyright owners are free to agree with each other only to grant licenses that require the consent of all owners.[26] The divisibility of a copyright owner's interest is intended to give owners the flexibility to exploit their copyrights optimally and thereby realize their full value.[27]

A requirement placed on BMI to license all works on a 100% basis would take away this flexibility from publishers, since BMI, if it represented the interest of that publisher's

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24. 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 6.08 (2015) ("*In the absence of agreement to the contrary*, all joint authors share equally in the ownership of the joint work.") (emphasis added).

25. *Id*. at § 6.09 (stating that joint owners of a copyright may, by contract, vary from the default tenancy-in-common rule governing joint ownership).

26. *Clifford Ross Co., v. Nelvana*, *Ltd.*, 710 F. Supp. 517 (S.D.N.Y. 1989) (enforcing an agreement between co-owners limiting the right of each co-owner to grant a license to a work without the other's permission), *aff'd mem.*, 883 F.2d 1022 (2d Cir. 1989).

27. *See* 17 U.S.C. § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part . . ."); 17 U.S.C. § 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."); *Harper & Row, Publishers., Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985) ("Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright."); *see also* U.S. Copyright Office, *General Guide to the Copyright Act of 1976* (September 1977) at 5:4-5:5, http://copyright.gov/reports/guide-to-copyright.pdf (last visited Nov. 19, 2015) (noting the shift from pre-1976 Act understanding of a copyright as "a single, indivisible entity" to the current regime under the 1976 Act, which recognizes the importance of the divisibility of copyrights).

co-owner, would be required to license the interest of the publisher of a co-owned work who would otherwise directly license its works. BMI should be permitted to offer fractional licenses to support the decisions and agreements of publishers and co-writers with respect to their copyright interests, instead of restricting them.

In particular, requiring BMI to provide 100% licenses would frustrate any publisher's effort to partially withdraw from BMI in order to take advantage of the free market to license digital users. So long as the music user had obtained 100% blanket licenses from BMI and other PROs, the only songs the publisher would have the exclusive right to offer would be those in which it had a 100% interest. Because leading contemporary songwriters mostly work in ever-shifting teams, such a publisher would be unable to bring to market most of its current catalog and much of its back catalog as well. As *Billboard in Brief* reports, "roughly 90 percent of Billboard Hot 100 top 10s in 2014 were written by two or more writers, and nearly half were by at least four."[28] Even if the publisher went so far as to withdraw from BMI altogether and gave up all of the efficiencies of BMI blanket licensing, that publisher would *still* be subject to BMI's court-set prices (or licenses entered into in the shadow of the rate court) for every split work in which BMI had a fractional interest.

Even if publishers and writers, relying on the PROs' and the music users' uniform practice of paying fractionally, have not previously contracted out of the default rule with each other, they would work to do so if BMI and ASCAP were required hereafter to issue 100% licenses. Rather than enter a world of 100% licensing by their co-owners with all its complications and uncertainties, publishers and writers would opt to codify their rights to license

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28. Gary Trust, *Why Solo Songwriters Are No Longer Today's Hitmakers*, Billboard in Brief, 6 (Oct. 23, 2015), http://www.billboard.com/articles/news/6738318/why-solo-songwriters-are-no-longer-todays-hitmakers. This author states that ten years ago "single writers (or singularly-credited entities) wrote only 14 titles" on the Billboard Hot 100 and twenty years ago "32 such songs" were written by single writers.

their own interests for themselves and to memorialize their existing understandings under a fractional licensing regime.

It is hardly surprising that the PROs, the music users, the songwriters, and publishers have all organized their economic relations with each other according to the far more intuitive and practical fractional model, rather than the 100% licensing model. Writers and publishers will not subject themselves voluntarily to 100% licensing. They have the right to contract away from tenancy-in-common and they will exercise their rights to license fractionally even if BMI is not permitted to do so.

This restriction on publishers is not at all what the consent decree was intended to accomplish. The only way for publishers to truly exercise their copyright rights in the free market would be to effect a complete restructuring of the long-standing relationships between collaborating songwriters and music publishers, and to avoid affiliation with BMI altogether despite the benefits of blanket licensing for a wide range of uses.

From an antitrust point of view, it makes no sense for the Department to seek to force publishers to license collectively through the PROs. The BMI consent decree was certainly not intended to favor collective licensing over individual free market negotiations. The intended effect of a mandatory 100% licensing rule would be to strengthen BMI's role in the market at the expense of individual publishers, by limiting the direct licensing any publisher would do on its own.

Finally, one brief but highly significant point: The tenancy-in-common rule has no application in most foreign countries, where fractional licensing is the norm. Accordingly, a rule of mandatory 100% licensing for BMI would also run into conflict with co-written foreign songs where BMI represents the interest of less than all the writers. We believe any

consideration of the issues outlined in the Department's notice must take into full account the impact on the worldwide rights marketplace of a decree modification requiring 100% licensing by BMI.

Requiring BMI to Provide 100% Licensing Would Create an Incentive for Music Users to Game the System and Unjustifiably Disadvantage BMI's Ability to Serve its Affiliates.

Requiring BMI to provide 100% licenses in a licensing landscape that is organized fractionally would create an opportunity for music users to game the system. Instead of obtaining licenses from all owners of co-owned compositions as they have historically and consistently, music users could seek out minority co-owners who might have little incentive to maximize the value of the copyright.[29] A music user might try to rely on a PRO blanket license to avoid paying free-market prices to a withdrawing co-publisher. The user could argue that the blanket license of one interest in a composition gave it all rights necessary to perform the composition.[30] It could then pick which co-owner it wished to pay on the basis of its fractional share, thereby devaluing the work. Such a scenario is the exact opposite of the competitive free market that is desirable and that the consent decree is intended to foster.

The risk of such gamesmanship could not be mitigated by BMI simply continuing the practice of collecting from music users and paying publishers and songwriters on a fractional

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29. There is no antitrust purpose served in having co-owners of a given song copyright compete with each other in licensing that song to music users. Like other co-venturers, they have duties to each other (including a duty to protect the property of their co-venturers), *Maurel v. Smith*, 271 F. 211, 216 (2d Cir. 1921) ("[w]here two or more persons have a common interest in a property, equity will not allow one to appropriate it exclusively to himself, or to impair its worth as to others"), and it would make no sense for them to undercut each other's efforts. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) ("[A] joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells . . . it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful.").

30. Pandora made this argument to BMG Rights Management (US) LLC ("BMG") in 2014, when BMG was attempting to negotiate a direct licensing deal. Pandora argued to BMG that all co-written songs were covered by blanket licenses and did not want to pay BMG (or the BMG writers) for their interests.

basis even if the licenses themselves hereafter grant 100% rights. If 100% license grants are deemed mandatory, there is no reason to assume that music users will pay BMI 100% of the value of the performances licensed. Even if some music users might refrain from exercising their new-found rights, others would take the opportunity to avoid paying full value.

Requiring BMI to Provide 100% Licensing Would Create a Complex and Unnavigable Licensing Landscape.

If music users are going to rely on 100% licenses from BMI to discharge their duty to non-BMI co-owners, BMI could not continue to price its license on a fractional basis. BMI would have to seek compensation for the full value of the work being licensed, not just the BMI-affiliated share. At the same time, ASCAP would of course seek to price its license to reflect the 100% value of the split works it licenses. The result: two PROs each selling 100% rights to the same split works. In effect, music users seeking blanket licenses would be purchasing (and paying for) duplicative permission to play the split works as well as the many other works that are solely in the repertoire of one PRO.

A 100% licensing rule would also put a cloud over existing BMI licenses, which have been priced on a fractional basis without any allowance for accounting to non-BMI songwriters. There are hundreds of thousands of BMI licenses outstanding that have been priced by BMI with the understanding that BMI would not be accounting to non-affiliates.

In sum, BMI would have to navigate an untenable licensing landscape if it were not permitted to license fractionally. It would also fall completely out of sync with the manner by which rights are licensed in the free market; withdrawn or terminated publishers as well as unregulated PROs would have the ability to license their works fractionally, but BMI would not be able to follow suit.

BMI provides an important service to songwriters and publishers as their licensing, collecting, and distributing representative, and if BMI were unable to license fractionally, this would have an adverse impact on them. The BMI consent decree needs to be flexible enough to be responsive to the evolution of the market and make clear that BMI may license based on fractional interests if that is the desire of its publishers and songwriters.

Requiring BMI to Provide 100% Licensing Would Be Grossly Inefficient and Rate-Setting Would Break Down.

The Impact on BMI:

Requiring BMI to provide a 100% license in a market that, in practice, has been fractional would be burdensome and inefficient. The market would lose the efficiencies that BMI's blanket license provides, not only with respect to digital uses but also for traditional media that today still account for the large bulk of public performance royalties.

Because of the market's organization around fractional payments, neither BMI nor the publishers have developed a process or infrastructure for accounting to co-owners. To the extent the Department is concerned with changing the rules of a marketplace that has evolved with certain expectations, that concern should apply equally to the impact that mandatory 100% licensing would have on long-established PRO processes.

Imposing on BMI the burden of creating a mechanism for properly accounting to the hundreds of thousands of co-owners with whom it currently has no relationship, including procuring and maintaining contact and other confidential personal information, would be grossly inefficient. BMI already has an effective process for collecting royalties, counting performances, and matching the royalties to the performances for its affiliates, but has never had a reason to keep track of royalties for non-BMI songwriters and publishers. Mandating a 100% license

would create a huge and costly new burden on the equitable and transparent distribution of royalties.

The Impact on the Rate Courts:

Rate court proceedings would be enmeshed in a paradox. If there were simultaneous 100% licensing by BMI and ASCAP, there would be no way to determine whether split works were to be deemed licensed under a BMI blanket license or an ASCAP blanket license. Or, to put it more precisely, the courts would be asked to deal with the irrational scenario in which the licensee would be obtaining two licenses for many of the same rights. BMI's share of performances would be indeterminate and there would be no obvious way to use an ASCAP license agreement or even a prior BMI agreement as a benchmark for determining a future BMI license fee. Music users' historic concerns about conflicting fee demands from BMI and ASCAP and conflicting claims of market share would be vastly amplified. Instead, as stated above, at least some would likely seek to avoid paying in full for the rights they were acquiring from both BMI and ASCAP.

ASCAP and BMI would also need to adjust their distributions to avoid double payments. BMI would be forced to monitor non-affiliated co-owners or PROs to ensure that shares were properly accounted for and to ensure that the license governing the work was adequate. Opportunities for misrepresentation, misinformation, and confusion would be rife. We would expect that such a licensing environment would produce substantial litigated demands for audits as well as litigation between co-owners and PROs regarding the adequacy of the payment received from other co-owners licensing their fractional interests. If the PROs themselves evolved a process to assist each other in accounting to non-affiliates, a second layer of expense would need to be imposed on these royalties.

The Impact on Songwriters:

Imposing a 100% blanket license requirement on BMI would change the rules of the game radically for songwriters. Songwriters maximize their productivity by handing off their licensing and royalty collection efforts to a PRO. This choice has tangible consequences. BMI and ASCAP use different formulas for distributing royalties and often charge different prices to music users.

Working songwriters *choose* their publisher and PRO based on such factors as personal rapport, the publisher or PRO's sympathy and enthusiasm for the writer's work and potential, superior service and attention, a better monetary opportunity, better rates achieved by one PRO or the other, and personal trust. These relationships typically last for many years and often span whole careers.[31]

Conversely, while some songwriter teams last for decades, it is quite common for songwriters to team up on particular occasions or projects as serendipity and inspiration dictate. To cite an example, although Bob Dylan is ordinarily thought of as a songwriter who mostly composes alone, he jointly wrote the song "Steel Bars" with Michael Bolton, and Bolton recorded it. At that time, Dylan was affiliated with ASCAP, Bolton with BMI.[32] As Bolton told the story, the collaboration happened out of the blue:

> Someone who works with Dylan called me up and said, "Bob Dylan would like to write with you" . . . I was awed. I told him, "I don't even know how I could write a lyric when working with you . . . I'm too intimidated." But then we started messing around with some chords and wrote "Steel Bars," a song about obsession. It

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31. For example, Mac Davis, recognized as a BMI Icon at the 2015 BMI Country Awards and a member of the Songwriters Hall of Fame for songs such as "Memories" and "A Little Less Conversation," has been a BMI affiliate since the 1960s. He is not only a prolific songwriter but also a frequent co-writer. Over the decades, he has co-written songs with more than 40 different songwriters.

32. The song is now co-published by Mr. Bolton's Music Inc. (a BMI publisher) and Special Rider Music (a SESAC publisher), as Dylan is now a SESAC affiliate.

> took us two sessions to write, and when I left, I was told, "Bob likes you and he wants you to come back."[33]

Under the fractional payment system, songwriters have never had to concern themselves with each other's choice of publisher or PRO and have never had to question where their royalty check would be coming from, when it would be coming, or who to call in case of a discrepancy.

100% licensing would change *everything*. Songwriters could no longer rely on *their* PRO to look out for *them* and, given the impact of such a rule on their relationships and bottom line, would have reason to think twice about working with songwriters belonging to a different PRO. Songwriters have already expressed alarm at the prospect that they might be forced to look to collecting agents they have not chosen and who are not truly accountable to them for the royalty checks that make up their livelihood. Indeed, nearly 13,000 BMI writers and publishers have expressed this alarm by signing joint letters voicing their objections to a 100% mandatory licensing requirement.

Michael Bolton and Bob Dylan should not have to understand (or indeed, care about) each other's current or future PRO affiliation before they enter the studio and start "messing around with some chords." It would be the height of folly, and an immeasurable loss for the listening public, if the Department were to take away the creative flexibility that the divisibility of copyrights mandated by Congress, and the fractional practice, have allowed to flourish.

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33. Andy Greene, *Bob Dylan's Greatest Collaborations*, Rolling Stone, 5 (May 1, 2009), http://www rollingstone.com/music/news/together-with-bob-dylan-his-greatest-collaborations-20090501.

The Impact on Publishers:

This problem cannot be solved by one publisher acquiring the other interests in a song so as to eliminate split ownership of particular songs, since it would impact, ultimately, the songwriter's choice of PRO affiliation as well. One of the creator-friendly aspects of the music world is that it is the songwriters who get to choose which PRO (and publisher) they want to affiliate with. Publishers typically organize subsidiaries affiliated with BMI, ASCAP and, often, SESAC. By doing so, publishers are able to honor each songwriter's PRO preference, placing a songwriter's interest into the catalog of the publisher subsidiary affiliated with the songwriter's PRO of choice. It would be a great disservice to the songwriters if the Department were to seek to disrespect their wishes. Not incidentally, such a means of ensuring control over catalog would have the additional consequence of creating a universe of more and more copyrights held by fewer and fewer publishers.

The Impact on Other Market Participants:

In addition to the impact on PROs, the rate courts, songwriters, publishers, and the public interest, requiring the PROs to engage in 100% licensing would grant unregulated publishers and unregulated PROs a powerful advantage over BMI in signing and retaining the best, most productive songwriters.

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The chilling effect of 100% licensing on songwriter collaboration would therefore be bad antitrust policy, and bad copyright policy. By contrast, explicitly permitting fractional licensing by BMI would allow collaborations among songwriters to continue unfettered, thereby fostering output and quality competition. The consent decree should not be used as a mechanism (intentionally or otherwise) for inhibiting the creative process and restructuring creative

relationships. It would also be strange antitrust policy to encourage buy-outs of fractional interests, as the most likely buyers would be those with the most ready access to capital – the larger publishers – and would, no matter the purchaser, further consolidate the parties in the marketplace owning copyrights.

Permitting Fractional Licensing Should Not Result in "Excessive Pricing" by Publishers.

Antitrust law does not police prices charged by copyright owners acting individually. As Assistant Attorney General Baer recently stated concerning patents:

> We don't use antitrust enforcement to regulate royalties. That notion of price controls interferes with free market competition and blunts incentives to innovate. For this reason, U.S. antitrust law does not bar "excessive pricing" in and of itself.[34]

As noted at the outset, the BMI consent decree is not intended to address how (and how much) individual publishers charge for permission to perform their songs when they license directly. It follows that the Department should not use the BMI consent decree as an instrument for regulating the publishers.

BMI has advocated a modification to the consent decree that would effectively overrule the "all-in/ all-out" decisions and expressly permit publishers to partially withdraw from the price-regulated BMI copyright pool in order to exercise their copyrights and to seek free market prices from digital streaming services. As the Assistant Attorney General said, there are no antitrust policy considerations that weigh against efforts by the holders of intellectual property rights to seek what they think are the appropriate prices for their works. This is as true of jointly-authored songs as it is of songs written by a single songwriter.

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34. Assistant Attorney General Bill Baer, Reflections on the Role of Competition Agencies When Patents Become Essential at the 19th Annual International Bar Association Competition Conference 10 (Sept. 11, 2015) (transcript available at http://www.justice.gov/opa/file/782356/download).

It would be radically inconsistent with positions the Department has taken since the BMI consent decree was first entered for it now to apply the BMI consent decree for the purpose of regulating the pricing of individual publishers and the "bargaining capital" their catalogs possess.[35]

Even if "excessive pricing" by individual publishers for direct copyright licenses were a legitimate concern of the Department in the context of reviewing the BMI decree, there is no reason to believe that fractional licensing by BMI will confer improper negotiating power on directly licensing publishers, or otherwise impact the prices publishers can charge for their direct licenses to digital streaming services.

First, publishers have a great incentive to license their catalogs to these services rather than withhold access to their catalogs. Simply put, if publishers did not license their catalogs, they would not get paid and neither would their songwriters. Publishers representing co-writers would be under even greater pressure to license their catalogs and pay their writers; if a writer's publisher was not exploiting her copyright interest while her co-writer was receiving payments, the writer would be incentivized to leave her publisher for her co-writer's. Publishers would not want to diminish their catalogs by losing writers, and correspondingly, songs in their catalogs to other publishers.

Second, only a handful of music streaming services garner almost all the revenues for that sector. They possess substantial bargaining power of their own, which no publisher could ignore. It would be self-defeating if publishers withheld their catalogs from those dominant streamers – they would effectively be denying themselves virtually the entire digital music market.

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35. If, as we anticipate, the actual effect would be an exodus of the large publishers from the regulated PROs, this unjustified goal would be entirely frustrated.

Moreover, these music users and publishers are dealing with one another repeatedly. Maintaining good relationships is essential to their repeated business dealings. If one publisher held out, music users would be less inclined to deal with them in the future and might choose to go forward without that publisher's catalog.

Perhaps most telling, to date no one has suggested that fractional licensing has in practice resulted in outsized pricing or market failure where and when it has occurred. For instance in Europe, fractional licensing is the norm for publishers who license directly to music streamers such as Spotify, Apple Music, Google Play, and YouTube. We are not aware of any actual or even claimed unfair behavior in those negotiations, any failure of those services to get access to the music they want, or of "excessive prices" completely dissimilar to what is paid in the United States.

We also see, in practice, that free market negotiations have led to voluntary, reasonable deals. In the case of Pandora, a series of publishers' direct licenses with Pandora that occurred both before and after the consent decree courts' "all-in/all-out" decisions in this country was recently found to be reasonable by the BMI rate court.[36] To boot, the recently announced direct licensing deal between Sony/ATV and Pandora illustrates that appropriate market-priced transactions between digital music users and large publishers are taking place in the absence of mandatory 100% licensing by PROs.[37]

In any event, ultimately, copyright owners have the right to divide their copyrights as they see fit in order to seek fair value for their works. The indisputable

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36. *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 CIV. 4037 (LLS), 2015 WL 3526105, at *26 (S.D.N.Y. May 28, 2015), *appeal docketed*, No. 15-2060 (2d Cir. June 26, 2015).

37. Ben Sisario, *Pandora and Song/ATV in Deal on Songwriter Payments*, N.Y. Times (Nov. 5 2015), http://www nytimes.com/2015/11/06/business/media/pandora-and-sony-atv-in-deal-on-songwriter-payments.html?_r=0.

inefficiency and severe departure from ordinary antitrust principles entailed in trying to force copyright owners to license collectively all of their co-owned works surely must outweigh any theoretical and abstract concern about "excessive pricing."

Any such concern about the unilateral and lawful conduct of individual publishers should not be the basis for radically upending established industry practice upon which writers, publishers, and music users have relied for decades, and certainly the bilateral consent decree between BMI and the U.S. should not be the vehicle for such radical change.

The BMI Blanket License Will Continue to Serve an Invaluable, Pro-competitive Function in a Fractional-Licensing World.

The Public Notice asks the question why BMI should be "joint price setting" (presumably meaning, issuing blanket licenses for its affiliated publishers and songwriters) at all if it will not provide 100% licenses to music users. The short and plain answer is that BMI provides immediate access to millions of songs outright and also necessary permission to perform millions of other songs on behalf of the fractional owners it represents – whether its licenses hereafter are fractional or 100% in nature. An even shorter and plainer answer is that BMI has, in fact, been effectively licensing on a fractional basis for its entire history.

At the same time, BMI is the trusted bargaining and paying representative on behalf of many thousands of songwriters and publishers as to songs they own in whole or in part.

As previously noted, songwriters and publishers want to be, and have the right to be, paid by and through their own representatives, not accounted to by others. Those wishes should be honored. Moreover, BMI's hard-won reputation as the trusted representative of songwriters and publishers, and its ability to provide its invaluable services, will be jeopardized if it is forced to provide 100% licenses against the wishes of the publishers and songwriters.

The benefits of blanket licensing, recognized time and again by the Department and the courts, have never been predicated on a 100% licensing regime.

Conclusion

The BMI consent decree should be amended to explicitly permit BMI to issue fractional licenses for co-owned works in its repertoire. Fractional licensing is pro-competitive and in line with decades-old market practice. By contrast, requiring BMI, to provide 100% licensing would be wholly disruptive to the market and to the creative relationships that have given birth to the music the public enjoys today.