

Via Electronic Mail (ASCAP-BMI-decree-review@usdoj.gov)

November 20, 2015

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

Re: *ASCAP/BMI Antitrust Consent Decree Review*

Dear Mr. Kully:

On behalf of the Computer & Communications Industry Association (“CCIA”),¹ we write in response to the Justice Department’s second inquiry in relation to its review of the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) Consent Decrees, responding to questions 1-5 on the matter of fractional licensing.²

I. Introduction

Fractional licensing increases costs in music licensing, which impedes more viable options for music delivery by increasing gridlock and inefficiency. While market inefficiencies are not necessarily *competition* issues, one federal court has already observed the anticompetitive use of fractional licensing to extract supra-competitive prices.³

Fractional licensing produces this result by reversing copyright’s default rules.

Copyright’s general rule where multiple authors have a claim in a particular work is that each is

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.ccianet.org/members>.

² Available at <http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015>.

³ *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 357 (S.D.N.Y. 2014).

empowered to license full, but not exclusive, use of that work to others. As copyright scholar Bill Patry explained in his Copyright treatise,

“As a co-owner in the whole, each joint author may utilize the work him- or herself without the other’s permission and indeed over the other author’s objection. . . . The only obligation of a co-owner is to account for any profits earned from the exploitation.”⁴

Similarly, the House report on the 1976 Act explained that co-owners of 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.” H.R. REP. NO. 94-1476, at 121 (1976).

According to Patry, “[t]he economic underpinnings of copyright’s joint ownership rules are sound.”⁵ Should a half-dozen co-authors lay claim to a work, a potential licensee need not negotiate six individual deals to use that work non-exclusively. Similarly, a licensee need not track the litigation fate of every work he has licensed to ensure that subsequent litigation over authorship has not, for example, introduced five new “authors” to the equation.⁶ The license can be struck with one co-author, and then the co-authors can decide amongst themselves how money is distributed.

When implemented on a sector-wide scale, contractual terms that require fractional licensing have the effect of unwinding Congress’s anti-gridlock rule. These contractual provisions between multiple co-rightsholders purport to deprive one another of the ability to authorize the full use of the work. Thus, in the case of multi-author works, a potential licensee may be compelled to strike 10 contracts with 10 co-authors to use one individual work.

⁴ 2 PATRY ON COPYRIGHT § 5:7 (2015).

⁵ *Id.*

⁶ Ben Sisario, *Mark Ronson’s Hit ‘Uptown Funk’ Adds Five Writers*, N.Y. TIMES, May 1, 2015, <http://artsbeat.blogs.nytimes.com/2015/05/01/mark-ronsons-hit-uptown-funk-adds-six-writers/>.

Whether licensors can coordinate and collectively flip copyright's default rule on an industry-wide basis is a significant issue since a large percentage of songs have multiple composers. According to Billboard, 93 of the top 100 songs last year had co-writers, and 68 of them were registered with more than one performing rights organization ("PRO").⁷ Moreover, compositions "add" authors over time. For example, the recent hit "Uptown Funk" already had six credited songwriters before it became embroiled in a rights dispute, such that there are now 10 credited songwriters/publishers for this one song.⁸

The effect of fractionally licensed compositions (sometimes referred to as "split works") creates various problems. First, the practice of granting licenses to works that remain encumbered by a third (or fourth) party's claims necessarily increases transaction costs. Fractional licensing vests veto power in numerous rightsholders, each of whom may have relatively small interests in the work. When every co-author can unilaterally veto a use, but no individual co-author can unilaterally authorize that use, gridlock and uncertainty reign. When each co-author can say "no," but no one co-author is empowered to provide a meaningful "yes," it is far easier to hold up progress than to achieve it. Fractional licensing also enables licensors to hold hostage prior expenditures on transaction costs.

Second, and more important from an antitrust perspective, sophisticated licensors can "weaponize" these defects due to the notoriously disorganized nature of our nation's copyright records, holding songs hostage despite owning or administering only small shares of them.⁹

⁷ Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, BILLBOARD, July 30, 2015, <http://www.billboard.com/articles/business/6649208/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for>.

⁸ Ed Christman, *Inside the New Royalty Split for 'Uptown Funk': Who Gets Paid What*, BILLBOARD, May 4, 2015, <http://www.billboard.com/articles/business/6553861/uptown-funk-royalties-who-gets-paid>.

⁹ Matt Schruers, *On Weaponized Uncertainty, Transparency, and Bringing Music Licensing in From the Cold*, DISRUPTIVE COMPETITION PROJECT, Jan. 22, 2015, <http://www.project-disco.org/intellectual-property/012215-weaponized-uncertainty-transparency-bringing-music-licensing-cold/>.

With rights spread across multiple music publishers, the possibility of coordinated refusals to license certain works is a greater risk, in an industry where one federal court has already found “troubling coordination” among publishers intent on “extract[ing] supra-competitive prices.” *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 357 (S.D.N.Y. 2014).

II. Responses to Questions 1-5

1. 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)?

While the PROs are most likely to possess records documenting historical licensing practices, ASCAP and BMI’s *existing* licenses make no distinction between works that are wholly and partially administered, as the Division’s request for comments makes clear. As the joint comments of the Media Licensees (RMLC et al.) exhaustively document in their contemporaneously filed response to Question 1 (which CCIA endorses), it is abundantly clear that the ASCAP and BMI licenses provide the right to publicly perform all works in the PRO repertories. ASCAP states that “the ASCAP license . . . gives you the right to perform ANY or ALL of the millions of the musical works in our repertory.”¹⁰ BMI represents that its “Music Licenses offer copyright clearance to use all of the works in the BMI repertoire in a variety of ways.”¹¹ Similarly, ASCAP’s submission in the previous round of comments to the Justice Department on the ASCAP/BMI Consent Decrees explained that its decree compelled it to grant a blanket license that allows that user “to perform all of the works in the ASCAP repertory”.¹²

¹⁰ See <http://www.ascap.com/licensing/licensingfaq.aspx#general> (last visited Nov. 20, 2015) (all caps in original).

¹¹ See <http://www.bmi.com/licensing> (last visited Nov. 20, 2015).

¹² See Public Comments of the American Society of Composers, Authors and Publishers Regarding Review of ASCAP and BMI Consent Decrees, Aug. 6, 2014, *available at* <http://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307803.pdf>, at 11. It bears noting that while ASCAP and BMI also offer per-work-per-segment licenses, blanket licenses remain far more popular. Scholars have previously characterized per-segment licenses as prohibitively expensive and therefore infrequently used. WILLIAM W. FISHER, PROMISES TO KEEP 50 (2004). One scholar observed that when individual songs were licensed

2. If the blanket licenses have not provided users the right to play the works in the repertoires, what have the licenses provided?

This inquiry identifies a possible inconsistency in how PRO licenses have been characterized in relation to this investigation: if blanket licenses presently authorize a licensee to use “all of the works in the [PRO’s] repertoire” (as PROs have represented and the Consent Decrees require), PROs cannot limit their licenses to the fractional shares they administer without running afoul of these contractual obligations, and the Consent Decrees themselves. Under the proposal to only license the “share” of the work that PROs individually administer, PROs would not only put licensees at risk of infringement liability due to an illusory contract, but PROs would also be violating court orders.

3. 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?

Due to uncertainty surrounding music rights, there is a limited universe of businesses publicly performing music that can realistically limit the number of PROs with which they deal. Businesses publicly performing music at scale (that choose to secure licenses from all rightsholders who purport to own a “share” of a work) cannot plausibly choose either segment licensing or licensing from just one PRO. This is because information regarding fractional ownership is not readily available, with the exception of ASCAP’s recent decision to provide fractional ownership.¹³ Beyond this recent development, most rightsholders do not disclose share information regarding what they do or do not own or administer.

for use in the (famously gridlocked) *WKRP in Cincinnati* over 30 years ago, the rate was already approximately \$1,000 for a single broadcast and a “handful” of reruns. See BILL IVEY, ARTS, INC. 86 (2008).

¹³ Press Release, ASCAP, ASCAP Adds Licensable Share Information to Promote Greater Transparency in Public Performance Rights (Nov. 10, 2015), <http://www.ascap.com/press/2015/11-10-ascap-adds-licensable-share-info.aspx>.

Even outside the context of fractional ownership, uncertainty surrounding music licensing frequently catches paying licensees unaware. In April 2014 a Colorado bar owner who had secured licenses from both ASCAP and SESAC but was behind on payments to BMI was sued by the latter PRO after servicemen returning from Afghanistan sang Toby Keith songs, and ultimately owed BMI a 5-figure sum.¹⁴ As another business owner sued by ASCAP complained following a suit, “I also subscribe to an online music-use service, and I’m also paying the cable company for the same thing. I don’t know how many times we have to pay for a song.”¹⁵ Media accounts reflect numerous instances of venues that attempted to avoid PRO licenses by featuring artists who play their own original music, but which nevertheless receive threats from a PRO.¹⁶

4. 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?

No. CCIA cautions against assuming without examination that contractual agreements between rightsholders and PROs that institute fractional licensing are enforceable vis-à-vis third parties not privy to the original contract.¹⁷ Not only would it be bad policy to modify the Consent Decrees such that PROs could only license works for which they control 100% of the rights, such an order may be subject to challenge due to its overturning the Copyright Act’s existing language.

¹⁴ Ned Hunter, *Colorado Springs bar owner fined \$21,000 over karaoke*, THE GAZETTE, Apr. 21, 2014, <http://gazette.com/colorado-springs-bar-owner-fined-21000-over-karaoke/article/1518541>.

¹⁵ Kristi Helm, *Music licensing group’s targets include local restaurants*, THE SEATTLE TIMES, Aug. 2, 2007, <http://www.seattletimes.com/business/music-licensing-groups-targets-include-local-restaurants/>.

¹⁶ See, e.g., Ally Schweitzer, *ASCAP To St. Stephen’s Church: Pay Up*, WAMU, June 11, 2014, <http://bandwidth.wamu.org/ascap-to-st-stephens-church-pay-up/>; Mark Northam, *California Nightclub Ordered to Pay ASCAP \$85K For Copyright Infringement*, FILM MUSIC MAGAZINE, Oct. 2, 2006, <http://www.filmmusicmag.com/?p=155>; Steve Jansen, *License to Kill the Music: ASCAP & BMI Bullying Local Music Venues*, PHOENIX NEW TIMES, Oct. 14, 2008, <http://www.phoenixnewtimes.com/music/license-to-kill-the-music-ascap-and-bmi-bullying-local-music-venues-6590267>.

¹⁷ The federal Courts of Appeal have not reached consensus on this point, and moreover the extant precedent has not been applied in the antitrust context. To the extent that some circuit decisions may support this conclusion, this reasoning may not prevail in other circuits.

In the event that the Department of Justice were to authorize PROs offer licenses for works that are “encumbered” by claims from authors whom the PRO does not represent (notwithstanding the existing terms of their licenses and the language of Title 17), sound competition policy would require that licensees *at the least* be permitted to secure a license consisting only of *unencumbered*, non-split works. This would enable licensees who are interested in dealing with only one PRO to compare lists of identifiable, unencumbered works. In such a case, a licensee could compare which non-split works it could secure from ASCAP and BMI and elect whichever repertory is more attractive for its needs. In no event should the Consent Decrees be modified in a manner that permits licensors to “extract supra-competitive prices”, as the district court observed in the *Pandora* case. *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 357 (S.D.N.Y. 2014).

5. 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?

Modification of the Consent Decrees to formally permit partial licensing has several implications. First, it would institutionalize the high transaction-cost environment that presently exists. These high transaction costs create barriers to entry, which mean that fewer licensees are in the market, to the detriment of competition, consumers, and artists. Second, it would formally invite more of the strategic games described in the *Pandora* case. Finally, and most importantly, it would contravene Congress’s policy choice to allow a single rightsholder to license all of a work, subject to a duty of accounting. While individual authors may presently attempt to contract around this rule, an Executive Branch policy choice to reverse the rule across an entire industry is inconsistent with Congress’s intent.

Respectfully submitted,

Matt Schruers, VP, Law & Policy

Ali Sternburg, Policy Counsel

Computer & Communications Industry Association

900 Seventeenth Street NW, 11th Floor

Washington, D.C. 20006

(202) 783-0070

mschruers@ccianet.org