

BEFORE THE  
ANTITRUST DIVISION  
U. S. DEPARTMENT OF JUSTICE  
WASHINGTON, D.C.

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The ASCAP and BMI Consent Decrees  
Request for Public Comment  
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**COMMENTS ON MODIFICATIONS OF THE  
ASCAP AND BMI CONSENT DECREES**

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**1. INTRODUCTION**

I have worked as an economic consultant to clients in media, entertainment, and technology since 2001. Prior to this point, I was employed as an economist at the Antitrust Division (1991-1997) and at BMI (1997-2000). I am the author of the book **Media, Technology, and Copyright: Integrating Law and Economics** (Edward Elgar Publishers, 2004), and 38 professional articles in the area of law, economics, and intellectual property. Three of these works dealt with the Consent Decrees now under consideration by this department. I have submitted these comments as an independent party in response to the department's request for comments regarding modification of the present Consent Decrees

between the Department of Justice and ASCAP and BMI, particularly in so far as these agreements implicate music in New Media services.<sup>1</sup>

As a professional economist active in the concerns of the music industry, I advance to this Department the following recommendation. **To ensure the fullest potential for innovation, feedback, response, and realignment in the market for digital music services, music publishers in New Media markets must be free to innovate, interact, negotiate, contract, and design cooperative agencies without impairment from ASCAP and BMI, the Rate Court administration, and all strictures thereof.** *In so far as its concerns regarding present behavior at ASCAP and BMI can be resolved,* the Department should then extend its analysis beyond price effects that are fully presented elsewhere in the present debate, and move to allow partial withdrawal of publisher rights for New Media services.

Outside of the potential for price rationalization, markets present two critical benefits to investors, rights owners, and users of new technologies and intellectual property. First, music publishers and service providers in bilateral market arrangements may more broadly implement contracting processes that enable incremental learning, risk balancing, mutual problem-solving, and adaptation. Second, music publishers may respond to emerging opportunities through new organizational modes that are more administratively efficient and more adaptive than predecessor regimes at ASCAP and BMI.

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<sup>1</sup>New Media includes those music services that now implicate a digital performance right in a composition that may be listed in a PRO catalog. Such digital uses would appear to implicate coincidental performance rights in sound recordings, reproduction rights in compositions, synchronization rights in videos, and/or transmission rights for cloud services.

## 2. EFFICIENT CONTRACTING

**Bilateral contracting between music publishers and service providers presents the best system for accommodating mutual concerns, balancing risks, and promoting market adaptation.**

Music publishers and service providers in a flexible market may more fully learn in the negotiation process what issues are specific to one another's position. Through communication and negotiation, the engaged parties have the opportunity for mutual accommodation; a "win win" outcome.

In the end, market parties may deploy in each contract a slate of instruments – e.g., sales dollars, number of plays, number of subscribers, and advertising revenues -- in a manner that can more effectively promote growth and balance risks between one another. In this regard, contract instruments may also include advances, options, or equity shares, inter alia.

Contract flexibility is now found in the recording industry, where labels and artists have come to negotiate "360 deals" that share revenues from product sales, royalties, concerts, and merchandise, to varying levels in each. Multi-level monetization in these arrangements protects the label from the risk of fluctuations in product sales now affected by online infringement, album disintermediation, and migration to subscriptions. It also gives the label more incentive to invest in many activities – e.g, tour promotion – knowing that a direct share of publishing and concert revenues will be recouped. *There is no higher level of government oversight here.* It is critical to allow music publishers the same flexibility to vary their agreements as circumstances may fit.

There is no reason why one size should fit all. One publisher may seek to generate more cash flow with a negotiated advance,<sup>2</sup> a second may prefer a revenue balance that involves number of plays, advertising, and/or subscriptions,<sup>3</sup> while a third may wish to seek long term growth and acquisition potential with a percentage equity share in the music service.<sup>4</sup>

Parties to a contract may more broadly promote growth and share market risks if they can make some portion of payments *contingent* upon the achievement of certain revenue targets or circumstances. For example, a percent pureplay streaming royalty may vary depending on whether the listener comes to buy the track, view an advertisement, or sign up for a subscription service. Moreover, if 17 U.S.C. 115 can be relaxed for publisher royalties, the payment terms for mechanical royalties at a download service can depend on other contingencies as well.

A compelling feature of any publisher contract with a digital service is the possible *sharing of personalized data* regarding a listener's online activity or geographic location. Depending on a listener's use profile (and willingness to share some information), publishers and

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<sup>2</sup>The music service provider DMX paid to Sony/ATV Music Publishing a royalty advance of \$2.4 million and an administrative payment of \$300,000 pursuant to an agreement. *Broadcast Music, Inc. v. DMX Inc.*; *American Society of Computers, Authors and Publishers v. THP Capstar Acquisition Corp.*, (2<sup>nd</sup> Circ.), Docket Nos. 10-3429-cv, 11-127-cv, at <http://law.justia.com/cases/federal/appellate-courts/ca2/10-3429/10-3429-2012-06-13.html>

<sup>3</sup>Apple iTunes Radio now compensates record labels based simultaneously on a pureplay rate per stream (.13 cents per stream) and a percent of net advertising revenue (15%). The negotiated solution system differs from the formula in 17 U.S.C. 114, where the Copyright Royalty Board must base due payments on an "either or" system. E. Christman, *Publishers to Get Bigger Payday From Apple Thanks to Direct Licensing Deals*, *Billboard Magazine*, June 5, 2013, at <http://www.billboard.com/biz/articles/news/digital-and-mobile/1565762/publishers-to-get-bigger-payday-from-apple-thanks-to-direct-licensing-deals>.

<sup>4</sup>Record labels now have an 18 percent share in Spotify. **"The shift is a result of some re-engineering by the major labels on how they profit from streaming services.** In the older model, labels focused more on large, upfront guarantees in exchange for the rights to use their valuable catalogs. Rhapsody, for example, has bitterly complained about that approach in the past, but according to a pair of sources close to those deals, that has shifted considerably over the past few years. '[The big recording labels] decided they want equity more than payments, because there's a market [for acquisition] now,' one source relayed.'" [emphasis mine] P. Resnikoff, *The Major Labels Are Trying to Sell Spotify for \$10 Billion, Sources Say*, June 11, 2014, at <http://www.digitalmusicnews.com/permalink/2014/06/11/major-labels-trying-sell-spotify-10-billion-sources-say>

service providers can jointly promote works or playlists through a digital interface. The powerful capabilities of interfacial organization cannot be made fully effective if the publisher cannot engage the service provider directly on the widest terms possible.

Not often found in New Media markets, some publishers may come to “*pass through*” *composition rights* by licensing works direct to the recording label. This allows the label to be the collecting agent of royalties due, and may be preferred if the administrative process at the label proves to be more efficient than elsewhere. Pass-through licensing to record labels has always been found in physical product where labels collect sales revenues and pay to publishers their contracted royalty share. It may reemerge if publishers are freed from the licensing terms of 17 U.S.C. 115.

*Practically speaking, contract specificity can happen only if each publisher is free to recognize its own circumstances, assert its own interests, and negotiate its own terms with any service provider.* The resulting terms are efficient in the sense that participants have the opportunity to resolve issues through negotiation to the mutual benefit of both parties – i.e. “win win”. It is difficult to see how such accommodations can arise when service providers have access to the same musical works through a fallback arrangement licensed through ASCAP or BMI and channeled by a restrictive Rate Court process.

The Department will need to put in place restrictions on a publisher’s right to re-catalog its rights with ASCAP and BMI after some period of withdrawal. The purpose of this restriction is to prevent any strategic repositioning of catalog by removal and re-entry, possibly with lower administration costs negotiated between the PRO and its publisher. The most direct course of action here is a presumption of permanent withdrawal. The matter can be revisited.

### **3. AGENT REALIGNMENT**

**Markets allows rights holders more opportunity to realign their operations and market interfaces through new agencies that are more administratively and transactionally efficient.**

Outside of administration of the licensing and collection process at ASCAP and BMI, music publishers that control New Media rights may come to design or realign cooperative agencies to order to negotiate licenses and administer collection and distribution of their copyright royalties. While larger publishers would predictably come to negotiate their own contracts, smaller publishers may come to negotiate rights collectively through the National Music Publishers Association (as was done with YouTube in 2012) or to put in place an independent licensing agency similar to Merlin, the licensing agency of independent labels.

From a vantage of scale economies owing to shared overhead costs, integrated data bases, and fewer transactions, integrated licensing of a full catalog of works through a small publishers' collective seems more administratively efficient than vesting ASCAP and BMI parallel roles in licensing the same collection of works through two interfaces that implicate their largely distinct residual catalogs. In addition to fully integrated performance rights, alternative licensing interfaces would allow publishers to present to music services an additional slate of mechanical and synchronization rights, now disallowed at ASCAP and not found at BMI.

#### 4. COLLECTION AND DISTRIBUTION

Whatever the outcome of new licensing arrangements, some music publishers may prefer to vest some cooperative agency with back office roles for collection and distribution. Three options are possible.

First, the ASCAP Board has recently approved its willingness to perform back office roles of collection and distribution. This is a plausible but difficult proposition. Overhead costs at ASCAP and BMI are considerable, and well above ratios known for agencies (such as Sound Exchange) that are less engaged in litigation.<sup>5</sup> With fiduciary responsibilities to recover costs from all members or affiliates, each PRO may need to present to its collections an additional cost burden that might otherwise be skirted through an alternative arrangement.

Second, publishers may assign collection rights for performance royalties to a licensing interface of the Harry Fox Agency, which has acted as a publishers' administrator of mechanical and synchronization royalties. Publishers here would face major songwriter concerns for balanced representation and treatment in the administration of the agency and the distribution of collected royalties.

Third, publishers and songwriters may vest their trust in an independent collection agency, such as Music Reports Inc., that has lower administration costs and the presumed ability to act as a credible fiduciary for publishers and songwriters alike. If other agency

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<sup>5</sup>Upon information and belief of this writer, ASCAP and BMI have overhead ratios between 11 and 12 percent of collected revenues in each year. Without the ongoing burdens of litigation costs, SoundExchange had an administrative fee of 4.5%, which it claims to be the lowest administrative fee of any major performance rights organization in the world. At <http://www.soundexchange.com/generalfaq/#sthash.dLki8Svn.dpuf>

interfaces are not appropriate, this realignment is an option that rights owners may wish to consider.

## **5. ANTI-COMMONS AND HOLDUP**

The author is aware that several critics may voice concerns that disaggregated publisher rights may lead to an anti-commons for any service provider that seeks to put together rights for an entire catalog of works. In an anti-commons, a provider will presumably face holdups from one or several publishers seeking to extract disproportionate payments for some rights in their catalogs.

This concern is admissible, but not one for the Department of Justice to resolve. The Department is confined in its mission to enforce the nation's antitrust laws, and so oppose *coordinated actions* that are harmful to the market. If acting in an uncoordinated and otherwise legal fashion, any owner of intellectual property may restrict or disallow the licensing of its works to any party. Other means of restricting the anti-commons are at the government's disposal.

## **6. CONCLUSION**

If and when its present competitive concerns can be resolved, the U.S. Department of Justice should adopt the following course:

1. A category of music services should be designated New Media.



2. Publishers should be allowed to withdraw from ASCAP and BMI catalogs all rights related to the presentation of musical compositions in New Media services. A restriction should be placed on a publisher's ability to reenter rights into a PRO catalog.
3. Large publishers may license works for New Media service directly to the service provider. Smaller publishers should be allowed to license their works through a designated licensing collective other than ASCAP or BMI.
4. Rights holders may appoint agencies for collection and distribution of royalties. ASCAP and BMI may be considered as candidates for such a role.

\_\_ Michael A. Einhorn /s/ \_\_

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