Public Comments of SESAC

U.S. Department of Justice, Antitrust Division

PRO Licensing of Jointly Owned Works

November 20, 2015

SESAC respectfully submits the following in response to the Antitrust Division of the U.S. Department of Justice's ("DOJ's") September 22, 2015 request for public comments relating to performing rights organizations' ("PROs'") licensing of jointly represented works.

DOJ suggests in its request for comment that ASCAP and BMI have the right and obligation — under DOJ's consent decrees with those PROs — to license the performance of entire works in which they represent only a fractional ownership interest.[1] This is often referred to as 100% licensing. SESAC respectfully submits that DOJ's suggestion, if adopted, would:

- Conflict with the language of the ASCAP and BMI consent decrees (*see, e.g.*, Section XI.B.3 of the ASCAP consent decree and Section V.C. of the BMI consent decree);
- Disrupt decades of industry practice, under which PROs license works only for the percentage of rights held by their members in those works;
- Undermine the intent of the consent decrees to foster competition among PROs to attract songwriters and publishers and thus encourage monopolization of the licensing of public performance rights; and
- Harm third parties specifically by disrupting reasonable expectations about how the decrees would be applied to fractional licensing,[2] and harm the licensing of public performance rights generally by creating disarray and uncertainty over the scope of licenses and payment of royalties to songwriters and publishers.

SESAC is convinced that the Department has misapprehended how the industry works and the negative real world implications of the position it articulated. Accordingly, we urge the Department not to offer interpretations of its consent decrees with ASCAP and BMI that would disrupt relationships and commercial activity outside of those decrees. If anything, to the extent the Department believes that the decrees might be misconstrued to impose an obligation on ASCAP and BMI to issue 100% licenses, the Department should re-affirm that the decrees do not impose such an obligation.

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[1] *See* http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015.

[2] "Fractional licensing" refers to the practice of the PROs to license works only for the percentage of rights held by their affiliates in those works. This permits the licensee to use the licensed performance rights without fear of a copyright challenge from the issuing PRO for its represented share of works. Other owners or administrators of rights in the licensed works not represented by that PRO retain an independent right to receive a royalty in return for issuance of a license with respect to their share of the same work. In contrast, if a PRO representing a fractional ownership was legally entitled to and did issue a 100% license, the PRO would be granting the licensee the right to use the work free from threat of an infringement claim from all owners of the copyright.

I. The Language of the Consent Decrees

The ASCAP and BMI consent decrees allow fractional licensing. The ASCAP decree, for example, clearly contemplates that ASCAP need not issue 100% licenses once a co-author resigns from its membership and joins another PRO:

> [A]ny writer or publisher member who resigns from ASCAP and whose works continue to be licensed by ASCAP by reason of the continued membership of a co-writer, writer or publisher of any such works, may elect to continue receiving distribution for such works on the same basis and with the same elections as a member would have, *so long as the resigning member does not license the works to any other performing rights licensing organization for performance in the United States.*[3]

This provision references explicitly the continued membership of "a co-writer," when a writer or publisher resigns from ASCAP and addresses the rights and obligations of ASCAP regarding payment with respect to the fractional interest of the resigning member. The initial clause protects the freedom of choice of resigning members by protecting their economic interest in co-authored works, assuring them that they can continue to receive their share of distribution. The concluding clause, however, contemplates termination of those distributions if the "resigning member . . . license[s] the works to any other performing rights licensing organization. . . ." If, as DOJ has suggested, the decree requires that all ASCAP licenses are 100% licenses, then the concluding clause is surplusage — the decision of a resigning member to authorize another performing rights organization to license their share of the co-authored works would have no impact on ASCAP licenses and would not provide a reason for ASCAP to terminate distributions to the resigning member. Quite to the contrary, under the DOJ's suggested interpretation, ASCAP would continue to collect a 100% royalty for the co-authored work and would have an obligation to account to the departing member, making the above provision superfluous. Moreover, the songwriter's share of the work would have no economic value to a new PRO because ASCAP licensees would have all the rights they need. In short, the decrees already address whether ASCAP and BMI may issue fractional licenses and allow that.[4]

The history of the decree and industry confirms that it does not direct 100% licensing. Because at the time of the original ASCAP consent decree ASCAP was realistically the only PRO available to writers, the drafters did not need to consider how royalties should be paid for fractional rights in works in the ASCAP repertoire and could not have intended to require 100% licensing. Of course, the decree has been amended over time. At the time of the 1960 Order, multiple PROs did exist and the United

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[3] *United States v. American Soc'y of Composers, Authors & Publishers (AFJ2)*, No. 41-1395 (WCC), 2001 U.S. Dist. LEXIS 23707, at *27 (S.D.N.Y. June 11, 2001) (emphasis added) (section XI.B.3). The BMI decree has a similar provision. *United States v. Broadcast Music, Inc. (BMI Decree)*, No. 64-civ-3787, 1966 U.S. Dist. LEXIS 10449, at *4 (S.D.N.Y. Dec. 29, 1966) (section V.C).

[4] The relevant AFJ2 language cited in footnote 3 first showed up – identically – in ASCAP's 1960 Order at Section I, *United States v. American Soc'y of Composers, Authors & Publishers (1960 Order*), No. Civ. 13-95, 1960 U.S. Dist. LEXIS 4967, at *9 (S.D.N.Y. Jan. 7, 1960). Thus it has been a provision of the decree for over a half-century and is consistent with decree policy to promote competition between PROs.

States inserted references to co-writers into the ASCAP decree. No amendments suggest that they add a requirement of 100% licensing; instead, the language discussed above reflects an opposite intent. That language has been a part of the decree since. The decree was again amended on June 11, 2001 by the Second Amended Final Judgment ("AFJ2").[5] By 2001, fractional ownership was more common and multiple PROs operated. The DOJ, however, did not choose to suggest that either the ASCAP or BMI decree requires 100% licensing. Quite to the contrary, as discussed below, public policy positions of the Department supporting the 2001 amendments are contrary to a requirement of 100% licensing.

We do not believe that the language quoted in the Department's request for comments from ASCAP's and BMI's website is a particularly relevant or precedential source for interpretation of the decrees.[6] Even if it were, the quoted language is equally consistent with an intention on the part of ASCAP and BMI to assure users that they have freedom to use all works in those PROs' repertoires (not just some of the works) free from copyright threat from the PRO granting the license. The quoted passages make no reference to rights held in those works by writers who are not members of the PRO. Quite to the contrary, some of the quoted language directly implies that the PROs do not grant 100% licenses. For example: "Without ASCAP and other PROs, music users that perform more than a handful of musical works would face the prohibitive expense of countless negotiations with a multitude of copyright owners." A license by ASCAP alone would grant much more than the right to perform a "handful of musical works," if the license were 100% licensing. This passage thus implies a need for a license from "ASCAP and other PROs" to obtain rights to perform more than a handful of musical works. By pointing to this passage and its more logical reading, we do not mean to suggest that the passage is a paragon of clarity or particularly important. Quite to the contrary, our point is that DOJ should not read ambiguous language not intended to address the issue of fractional ownership to suggest extinguishment of the rights of third parties implicitly. Indeed, given the language of the decrees and the facts of how fractional interests in works are actually licensed, discussed below, the better reading of the quoted language is that it is limited to a representation regarding the potential for copyright challenge by each PRO issuing the license.

II. PROs In Fact Today License Only the Fraction of Works They Represent

It has long been quite common for fractions of joint works, whether resulting from collaboration or sampling, to be represented and licensed by different PROs, perhaps even from the time that songwriters could realistically first choose among PROs to represent their interests. Certainly since

[5] *AFJ2*, 2001 U.S. Dist. LEXIS 23707.

[6] 5-40 Federal Antitrust Law § 40.27 (2015)*; United States v. Atlantic Refining Co.,* 360 U.S. 19, 23-24 (1959) (holding "that where the language of a consent decree in its normal meaning supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place.").

SESAC began signing songwriters in the 1970s, joint works in its repertoire have been represented by more than one PRO and licensed fractionally.[7]

That overlapping representation has likely increased with the dramatic surge in co-authorship and sampling. While some number of songs have always been co-written, co-authorship is extraordinarily common today. A recent article — looking only at the Billboard Hot 100 — reports that, in one week in October 1975, 49 works were co-written; in 1985, 59 works were co-written; in 1995, 68 works were co-written; but in 2015, 98 of the 100 songs were co-owned works.[8]

In SESAC's experience, every PRO has always charged fees and distributed royalties based on its respective percentage of rights in the musical works represented in its repertoire, whether that percentage is 100% or, as is common, something less. Put another way, all PROs expect and receive a royalty for their fractional shares of music in their repertories even if another PRO has already granted a license for use of a share of the same work based on its fractional ownership. While licensees have on occasion raised the question of whether they might avoid paying royalties for SESAC's partially owned works on the basis of a license to the works from some other PRO, SESAC has consistently rejected that position. Licensees have consistently reached agreement with SESAC to pay for all shares of the music in our repertoire. For example, after the DOJ began suggesting to industry participants that the decrees may require 100% licensing, SESAC reached an agreement with a major music licensing organization, the Radio Music License Committee (RMLC), that explicitly recognizes that the blanket license fee for SESAC's repertoire would include the value of all of the music in SESAC's repertoire, "including the contribution to that value of works in which SESAC affiliates own less than 100% of the copyright interest."[9] The agreement specifically provides that the value shall include the full proportion of the ownership interest SESAC represents:

> 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-

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[7] This follows the industry practice where all parties retain the right to administer their own share of a joint work. *See infra* Part IV; *e.g.,* Donald Passman, All You Need to Know About the Music Business 329-30 (9th ed. 2015) (explaining that co-administration deals are among the most common arrangements for songs co-owned by publishers of approximately equal status, and under a typical co-administration deal no one can use the song without getting a license from all co-owners); SESAC, *Frequently Asked Questions: General Licensing*, http://www.sesac.com/Licensing/FAQsGeneral.aspx ("SESAC, ASCAP, and BMI are three separate and distinct Performing Rights Organizations. . . . Each organization represents different copyright holders. . . and licenses only the copyrighted works of its own respective copyright holders. . . . Since a license with ASCAP and/or BMI does not grant authorization to publicly perform songs in the SESAC repertory, most businesses obtain licenses with all three to obtain proper copyright clearance. . . .").

[8] Gary Trust, *Why Solo Songwriters Are No Longer Today's Hitmakers*, Billboard Bulletin, Oct. 23, 2015, at 6. Indeed, during 2014, of the Hot 100 Top 10, seven percent of songs were credited to ten or more writers, five percent each to eight writers and seven writers, ten percent to six writers, fourteen percent to five writers, eight percent to four writers, nineteen percent to three writers, and twenty percent to two writers. HitSongsDeconstructed.com, Who's Writing the Hits? 13 (2015).

[9] RMLC-SESAC Settlement Agreement para. 10 (July 23, 2015).

> interest not represented by SESAC also own percentages of the copyright interest in such works.

RMLC, an organization formed to serve licensees' interests under the ASCAP and BMI consent decrees, has licenses from those organizations, and we understand that fractional works in SESAC's repertoire are also represented by ASCAP and BMI. Our agreement with RMLC establishes that RMLC does not have a 100% license from any performing rights organization. Additional examples of our past licensing activity on this topic involve proprietary and confidential business information that we can supply the Department on a confidential basis.

We believe the approach of SESAC and the other PROs is consistent with the approach to fractional licensing taken by the ASCAP and BMI rate courts in numerous decisions determining the value of a blanket license from those organizations. Despite our attention to court decisions involving licensing by those organizations, we are not aware of any decision that reduced the royalty due one PRO because its fractional shares of works had been licensed by the other organization on a 100% basis. Quite to the contrary, the Second Circuit explicitly affirmed Judge Cote's opinion that accounted for fractional ownership in setting the DMX rate:

> The direct license ratio was set as the total number of ASCAP works transmitted by DMX's off-premise service for which DMX has a direct license with at least one publisher of the work (pro-rated to reflect the ownership shares of the directly-licensed ASCAP-affiliated publisher), divided by the total number of ASCAP works transmitted by DMX's off-premise service (*pro-rated to reflect the share of the song's ownership affiliated with ASCAP*).[10]

Judge Cote in the rate court accepted a share-weighted music fee for DMX, "meaning that it accounts for the fact that certain works are only partially controlled by ASCAP."[11] If the consent decree required 100% licensing, the Court should either have (a) not pro-rated the amount ASCAP received for its partial works, or (b) given ASCAP no value for the partial works because they were covered by a license issued by some other party or parties holding the remaining fractional interests.

SESAC's and the other PROs' approach to fractional ownership is reflected in the manner in which each PRO distributes royalties to its affiliates or members. SESAC makes that distribution proportional to the fraction of ownership rights in songs an affiliate owns or controls, with minor exceptions. SESAC understands that the other PROs also distribute royalties to their members or affiliates on the basis of the fraction of rights in compositions that the member or affiliate represents in the PROs' repertoires. For example, ASCAP distributes to its members "in accordance with the shares indicated . . . in the ASCAP Title Registration for the particular work."[12] These distributions reflect the

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[10] *Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32, 42 (2d Cir. 2012) (Chin, J.) (emphasis added).

[11] *THP Capstar Acquisition Corp. v. American Soc'y of Composers, Authors, & Publishers*, 756 F. Supp. 2d 516, 548 n.46 (S.D.N.Y. 2010) (Cote, J.).

[12] ASCAP, Compendium of ASCAP Rules and Regulations, and Policies Supplemental to the Articles of Association at § 3.4.1 (Sep. 19, 2014) [hereinafter ASCAP Rules].

PROs' belief that they are not collecting royalties for the use of 100% of those partially owned works. Moreover, none of the U.S. PROs has ever accounted to the others for split works. For example, if ASCAP were collecting a 100% royalty based on a fractional ownership, it ought to account to the other owners for their share of that revenue. Indeed, under copyright law, a tenant-in-common to a joint work must make such a distribution in those circumstances where it has issued a 100% license.[13] But no mechanism exists to make that distribution and neither does any mechanism to distribute royalties to non-members.

III. DOJ's Interpretation Undercuts the Goals of the Consent Decrees and Fosters Monopolization of the Music Licensing of Public Performance Rights

DOJ's consent decrees with ASCAP and BMI are intended, among other things, to facilitate songwriter freedom of choice, allowing their exit without penalty from those PROs, and thus to promote entry of and competition among PROs. We are concerned that this point has been lost in DOJ's recent consideration of the decrees with a focus narrowly on the protections that the decrees afford music users.

One of the original, consistent and subsequently strengthened purposes of the decrees was to protect songwriters from the exercise of monopsony power by ASCAP and BMI and to afford songwriters the ability to choose other options, including other PROs such as SESAC, to represent them. The ASCAP decree provides explicitly that "ASCAP shall not restrict the right of any member to withdraw from membership in ASCAP. . . ."[14]

When the ASCAP decree was first entered in 1941, ASCAP was the only realistic choice for users and writers:

> At the time the 1960 Order was entered, most songwriters had no alternative to ASCAP in administering performance rights. Although BMI and SESAC existed, each collected less than 15 percent of performance rights licensing fees, and neither provided a strong alternative to ASCAP.[15]

Since then, new firms have entered the market, and other firms have grown at the expense of ASCAP. The Department has supported this development and cited it to the rate court as a positive improvement in urging acceptance of decree modifications:

> Moreover, the market for administering performance rights on behalf of writers and publishers has changed significantly since the 1960 Order was entered. BMI now has a market share roughly equivalent to ASCAP's and provides rights holders with a

[13] 1-6 Nimmer on Copyright § 6.12 (2015).

[14] AFJ2, § XI.B.3.

[15] Mem. of the United States in Supp. of the Joint Mot. to Enter Second Am. Final J. at 41, *United States v. American Soc'y of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. Sep. 4, 2000) [hereinafter US AFJ2 Memo].

> significant competitive alternative to ASCAP. SESAC, although still substantially smaller than the other two PROs, has been growing rapidly and has succeeded in attracting a number of well-known songwriters. Competition from BMI and SESAC is likely to be far more effective in disciplining ASCAP's distribution practices than regulation by the Department or the Court. If a member becomes dissatisfied with the way ASCAP distributes its revenue, it can move to one of the other PROs. *The AFJ2 thus focuses on ensuring that ASCAP cannot impede its members' ability to move to a competing PRO.*[16]

Based on a four-year investigation of the industry, the DOJ previously concluded that "competition to attract and keep composers and songwriters presently exists among ASCAP, BMI, and SESAC."[17]

The benefits of encouraging entry are obvious as a matter of antitrust enforcement policy and are delivering real benefits to writers and publishers and the market generally. SESAC has spurred technological advances in PRO administration time and time again. For the past twenty years, SESAC has been at the technological forefront of this marketplace, constantly innovating for the benefit of its affiliates (many of whom are small businesses) as well as for the benefit of its music-user customers. For example, SESAC was the first to develop state-of-the-art performance monitoring, it was the first to introduce more frequent payments to affiliates, and it is on the cutting edge of micro-sync licensing. DOJ has explicitly acknowledged SESAC's impact on the industry:

> The United States believes that SESAC's use of technology has pushed ASCAP to improve its music tracking systems. Moreover, the new provisions allowing easier exit for ASCAP members will provide additional incentives for ASCAP to improve its technology for music tracking and royalty distribution so as to retain members.[18]

Today, the market is composed of at least four PROs, and many publishers and writers who direct license their works. ASCAP went from controlling 100% of the writers to half of that. Writers' and publishers' competitive choices include ASCAP, BMI, SESAC, and Global Music Rights, which all offer performing rights services in the U.S., and Kobalt, which offers digital performing rights services globally.

DOJ has repeatedly emphasized that a critical goal of the consent decrees was to establish this competitive marketplace among PROs for writers and publishers. For example, "The AFJ includes numerous provisions that were intended to promote competition between ASCAP and other PROs . . . ."[19] And, "the proposed AFJ2 would further the public interest by encouraging competition among PROs to serve both copyright holders and music users . . . ."[20] Indeed, "AFJ2 is intended to

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[16] *Id.* at 42 (emphasis supplied).

[17] Mem. of the United States in Resp. to Public Comments on the Joint Mot. to Enter Second Am. Final J. at 39, *United States v. American Soc'y of Composers, Authors & Publishers*, No. 41-1395 (S.D.N.Y. Mar. 16, 2001) [hereinafter US AFJ2 Resp.].

[18] *Id.* at 41.

[19] US AFJ2 Memo at 15.

[20] *Id.* at 4.

provide those unhappy members with the option to leave ASCAP for a competing PRO [SESAC or BMI]."[21]

The suggested new interpretation of the decrees would hamstring the goal of fostering songwriter choice of PRO, rolling back the achievements thus far, and substantially weakening the ability of ASCAP's and BMI's smaller rivals to compete in the marketplace for performing rights. Presumably, ASCAP and BMI would seek to comply with the decree, regardless of the market forces that currently constrain them, ignoring as well the negative consequences for songwriters and the market. Thus ASCAP and BMI would be required by the decrees to assert that for fractional works in their repertoires, licensees do not need to pay royalties either to co-owner direct licensors or to other PROs representing such partial works. In this upended world of music licensing, music users would presumably seek a blanket license from the still dominant PRO, ASCAP, or its near rival BMI. Any songwriters who had previously left ASCAP with partial works (even partial works where they are the majority owner) would lose control over the licensing and value of their work to ASCAP and their co-authors.[22] Similarly, members of ASCAP who wished to directly license their works would have a strong incentive not to do so, because they could not expect to obtain any value for the partial works in their personal catalog. This runs directly counter to DOJ's prior positions and reforms that it urged upon the rate courts and that those courts adopted.

In considering how these incentives will play out, DOJ should take note of the existing impediments to composer exit from ASCAP and BMI. ASCAP's rules illustrate the barriers. We understand that ASCAP members cannot withdraw only a portion of their catalog, leaving for example their fractional works with ASCAP and distributing their 100%-owned works through another PRO. Similarly, ASCAP apparently would not allow a co-owner of works to register only their 100% works with ASCAP but license their fractional works outside of the PRO. ASCAP's rules, rather, appear to require exclusive distribution of all of a writer's works through ASCAP:

> **Dual Affiliation Generally Prohibited**. As a general rule, a Writer may not, simultaneously, be a Member of ASCAP and an affiliate member of another United States performing rights licensing organization, or, simultaneously, license performances in any territory through more than one performing rights licensing organization.[23]

Accordingly, to avoid the consequences of the new regime, writers would either have to leave their current PRO and join ASCAP or take all their works from ASCAP to join another PRO. But the latter is not an easy option because ASCAP's rules appear to prevent a departing member from bringing their entire catalog of works to the new PRO:

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[21] US AFJ2 Resp. at 42.

[22] This is an economic incentive for writers to stay with or join ASCAP.

[23] ASCAP Rules, *supra* note 12, at § 1.3. In practice, a writer can have works at multiple rights organizations in the following situation: a writer has a catalog of works at ASCAP, the writer leaves ASCAP for SESAC but ASCAP licenses-in-effect rules prevent the writer's catalog from transferring to SESAC, the writer composes new songs and those are represented by SESAC. *See infra* note 24.

> Any resignation from Membership shall (a) be subject to any rights or obligations existing between ASCAP and its licensees under any 'Licenses-In-Effect' . . . and (b) not affect in any manner any of the rights and/or obligations of ASCAP, or its licensees, relating to the resigning Member's works under such Licenses-In-Effect. . . .[24]

Whatever the reasonableness (or not) of these licenses-in-effect rules, they make withdrawal more difficult and thus would contribute to the negative incentives resulting from a 100% licensing requirement. The relevant licenses are long-term licenses. For example, the latest RMLC-ASCAP license covers 7 years. The long tail of this rule thus already creates a significant impediment to songwriters leaving ASCAP because they cannot take their works fully with them for many years. A 100% license requirement would magnify this incentive by creating an additional impediment to leaving ASCAP unless all co-writers leave and until the licenses-in-effect expire. As Don Henley sang in Hotel California, "you can check out any time you like, but you can never leave."

DOJ would make the market for representation of songwriters less competitive if it were to adopt (successfully) its new interpretation of the consent decree. The most likely immediate result of DOJ's action would be for users to contract with just the largest PRO – ASCAP. ASCAP would grow larger, other PROs would shrink, and future PRO entry would be impeded. Ultimately, such action would reduce competition and foreclose entry or expansion of rivals that would otherwise compete.

It is no answer to these concerns to suggest that it is acceptable to force songwriters to stay in ASCAP and BMI because they are regulated monopsonists. The reforms cited above were made because it was quite clear that the availability of alternatives for writers in the competitive marketplace would best "prevent[] ASCAP from exercising market power over members."[25] DOJ affirmatively recognized that it was a poor alternative to leave songwriters captive to ASCAP or BMI with the thought that somehow its regulatory role would protect them.[26] In fact, in its 2001 revision, DOJ eliminated some regulatory parts of the AFJ in favor of the market solution that competing PROs provide.

The Department should, accordingly, adopt interpretations of the decree that go in the other direction — i.e, those that foster entry and thus competition. Competition as an antidote to monopoly remains the preferred solution to dominance of ASCAP and BMI today as much as it was at the time of earlier revisions to the consent decrees. The decrees are properly intended to restrain the anticompetitive conduct of ASCAP and BMI by fostering entry (not impeding it): "To economists, the fear of entry is a significant restraint on anticompetitive practices."[27] It would, of course, be ironic that if at the very time when DOJ is asserting that increased barriers to entry imposed by a monopolist violate

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[24] *Id.* at § 1.11.3.

[25] US AFJ2 Resp. at 36.

[26] US AFJ2 Memo, *supra* note 15, at 42 ("Competition from BMI and SESAC is likely to be far more effective in disciplining ASCAP's distribution practices than regulation by the Department or the Court.").

[27] Steven C. Salop, Measuring Ease of Entry, The Antitrust Bulletin 551, 553 (Summer 1986).

Section 2 of the Sherman Act,[28] it were to adopt a new interpretation of the consent decrees that further entrenches and enlarges the dominant players in the industry.

IV. Forcing ASCAP and BMI to Attempt to Issue 100% Licensing Would Unreasonably Harm Third Parties and Throw Into Disarray the Licensing of Performing Rights

The music licensing industry has achieved a market solution for the licensing of fractional works. Recall that PROs arose to address the market failure of music users to pay royalties to copyright owners.[29] Today, PROs obtain and distribute royalties to all of the dispersed co-owners of a work: co-writers register with the PRO of their choice; bulk users purchase a license from each of the PROs; and royalties are distributed on a prorated basis. This industry solution is simple to apply and is working. Radio stations purchase a license from each PRO and pay each one only the fractional share of royalties owed to the joint copyright holders represented by each PRO. Co-writers are assured that they will directly receive their share of royalties for the work from the PRO of their choice, and there is competition among PROs for writers. We are not aware of any significant administrative or other reason to criticize this structure, and DOJ cited none in its request for comment. Quite the contrary, as reflected in our recent agreement with the RMLC, the users find this an acceptable approach.

SESAC has relied upon the understanding that PROs only license their fractional share of musical compositions in growing its songwriter base and making significant investments in its business. If DOJ were to adopt a new reading of the decrees to require ASCAP and BMI to attempt to issue 100% licenses, that would needlessly disrupt the existing equilibrium and undermine the reasonable reliance that SESAC, songwriters and others have placed on the neutrality of the decrees. The harm flowing from undercutting that reasonable reliance is, in itself, sufficient reason not to adopt the suggested new interpretation of the decrees. We described above our understanding of the language, interpretations, history, and purposes of the decrees, which we believe shows the reasonableness of our and other parties' reliance on the neutrality of the decrees. Indeed, given that the rate court has directly ruled in the DMX matter that partial works are to be valued proportionately, we are at a loss to understand how a contrary interpretation is plausible. As DOJ itself has recognized, deference normally should be given to the judge who authored the DMX decision cited above: "[D]eference is especially appropriate to the interpretation of the district judge who enters and oversees a consent decree."[30]

Further, it would be unreasonable to suggest that the proposed interpretation and the changes it would cause in the industry is not a departure from practice and precedent. Jointly owned works have always existed. And, this year, the U.S. Copyright Office wrote in an influential report "Notwithstanding

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[28] *United States v. United Cont'l Holdings*, No. 2:33-cv-00001, (D.N.J. filed Nov. 10, 2015).

[29] *Broadcast Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 4-5 (1979) ("those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses.").

[30] Brief for the United States as Amicus Curiae at 7-8, *In re Application of THP Capstar Acquisition Corp.*, 683 F.3d 32 (2d Cir. 2012) (No. 11-127) (citing *Doe v. Pataki*, 481 F.3d 69, 76 (2d Cir. 2007) ("Often deference is given to the interpretation made by the district judge who approves the decree . . . .")).

the default rules of joint copyright ownership, publishers and songwriters frequently have understandings that they are *not free to license each other's respective shares*."[31] As discussed above, the ASCAP decree discusses that co-writers belong to different PROs, and allows two PROs to license the same work. The suggested interpretation, however, leads to the absurd proposition that ASCAP and BMI for decades have been acting in violation of the decrees by issuing fractional licenses. Requiring 100% licensing is inconsistent with the language of the ASCAP and BMI consent decrees and with industry practice. No basis exists to assert that the decrees even implicitly intended to impose this requirement.

Nor should a new interpretation of a decree be adopted where it will impose costs and harm on third parties, regardless of whether they explicitly or implicitly relied on the decree.[32] The disruption is readily described.[33] Under copyright law, users have the obligation to obtain licenses (i.e., pay royalties) before publicly performing works.[34] PROs only have the right to license a musical work to the extent of the member's or affiliate's entitlement to license. Many jointly-owned works are not tenancies-in-common.[35] For example, where samples are employed or in instances where the joint owners had no intention to create a tenancy-in-common, co-owners are not entitled to license the share of the work controlled by the other co-owners. Even where a joint work is a tenancy-in-common, a co-owner may not license 100% of a work without protecting the interests of other co-owners and accounting to them for their share of the royalties.[36] Moreover, through explicit or other agreement, as well as equitable doctrines of reasonable reliance, co-tenants may alter their rights to license the entire work without consent of the co-owners.[37] If today, ASCAP or BMI were to attempt to issue 100% licenses for all fractional works without addressing these limitations, they would likely exceed their rights under the copyright laws and related contractual and equitable laws, thus violating the rights of SESAC and other

[31] The Register of Copyrights, U.S. Copyright Office, Copyright and the Music Marketplace 163 (Feb. 2015) (emphasis added).

[32] In case after case the Supreme Court has refused to grant the government's decree interpretation where it results in modifying a decree under the pretense of construction. *See* 5-40 Federal Antitrust Law § 40.27 (2015).

[33] The entire industry -- individual songwriters, independent publishers, major publishers, performing rights organizations, radio stations, television stations, various music services, etc., -- relies on the current simple and efficient system.

[34] *Broadcast Music, Inc. v. Columbia Broad. Sys.,* 441 U.S. at 18 ("Those who would use copyrighted music in public performances must secure consent from the copyright owner or be liable at least for the statutory damages for each infringement . . . .").

[35] *See supra* note 31.

[36] 1-6 Nimmer on Copyright § 6.12[B] (2015) ("The courts have uniformly recognized that one joint owner is accountable to the others for their ratable share of the profits that he has realized from licensing of the work.") (collecting cases).

[37] *Id.* at § 6.11 ("In the absence of an agreement to the contrary, one joint owner may always transfer his interest in the joint work to a third party, subject only to the general requirements of a valid transfer of copyright.")

songwriters in the commonly owned or represented fractional works.[38] Imposing an obligation on them to take such unlawful action is obviously unreasonable.

Nor is it reasonable to expect that ASCAP and BMI will have the ability to sort out these rights and obligations. They would need to determine for each fractional work whether their member retained the right to license 100% either at the time of co-authorship or later.[39] For each fractional work, they would have to determine a reasonable manner to protect the interests of each co-author who is not a member of their organization and has chosen not to become a member. They would need to identify and make arrangements to remit to those members (or their PROs) their share of the royalties. Presumably, SESAC and other PROs would be entitled to negotiate those royalty shares and the reasonableness of ASCAP's and BMI's licensing approach. Otherwise, ASCAP and BMI might be caught between a choice of violating the new interpretation of the decree or violating the rights of non-member copyright holders and their representatives.[40] Finally, the new approach would lead to an insolvable dilemma for ASCAP. Under 100% licensing, ASCAP would not be able to accept any members who did not have the contractual right to license their co-writers' portion of works represented by other organizations, and would have to expel any current members with the same issue. To do that, however, would appear to violate Section XI.A of ASCAP's decree, which requires them to admit all writers.

Whether and when a new workable equilibrium would be reached is impossible to predict. Simply achieving disbursement of royalties (assuming they were lawfully collected and reasonably determined) is not plausible. The infrastructure simply does not currently exist to overcome the information gap to pay writers with no connection to a PRO. SESAC, for example, lacks any readily available information about non-affiliated rights-holders. There is no mechanism for SESAC, or other PROs, to know who the other rights-holders are (especially since rights can be transferred), where they can be reached, or what percentage of a work they own or represent. Additionally, PROs do not have information on "Letters of Direction" regarding the redirection of royalties to third parties for garnishments, settlements, or entitlements. PROs do not track the sales and/or transfers of copyrights of non-affiliated writers or publishers. In SESAC's opinion, it would take many years and a massive infusion of resources to create a database sufficient to track the various circumstances that influence payments of royalties to non-affiliates.[41]

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[38] Contrary to the suggested interpretation of the decree, we would have expected DOJ to view an attempt by ASCAP and BMI to engage in 100% licensing as infringing at least the spirit of the consent decrees, if not the letter. Section IV.B of the ASCAP decree prohibits "[i]nterfering with the right of any member to issue, directly or through an agent other than a performing rights organization, non-exclusive licenses to music users for rights of public performance."

[39] An added difficulty is that "the 'share picture' is not static, but continually changes over time." Commission Decision (EC) C (2015) 4061 of June 16, 2015, Case M.6800 – PRSfM/STIM/GEMA/JV, at 8 n.28.

[40] We would, of course, expect DOJ to provide assurances that such negotiations would not draw an antitrust objection from the Department.

[41] We believe it also potentially harmful to competition among PROs for SESAC to be put in the position of disclosing to the dominant PRO or the second-leading PRO, information about SESAC's affiliates' copyright

In contrast to the disarray the new interpretation threatens, the current approach works well. The industry practice is for each co-writer to rely on registration with their chosen PRO to receive royalties for public performances of a song to the extent of their interest in the song.[42] If a publisher represents two co-writers of a work, one who belongs to ASCAP and one who belongs to BMI, the publisher registers the song twice – once with ASCAP and once with BMI; each writer also registers their ownership interest in the song with their affiliated PRO. This simple and efficient system allows all writers and publishers to get paid for their respective shares of the creative work. Conversely, music users also rely on this system to fulfill their obligation to pay all owners of a copyright.

V. CONCLUSION

DOJ's key objective in interpreting the consent decrees should be to substantially improve the competitive functioning of the market.[43] There is ample evidence that the market works well with regard to fractional works. There is no actual problem being addressed by the proposed change. Indeed, the notice seeking comment is devoid of mention of any real world concern giving rise to the suggested new interpretation. In contrast, the new interpretation would likely impose substantial harm, by, among other things, abandoning competition for regulation, fostering a monopoly, and harming third parties that have relied on the decrees' neutrality with regard to fractional rights. If anything, DOJ should be articulating its support for an interpretation of the decree as being neutral on the issue of fractional ownership.

We expressed earlier our concern that DOJ has lost sight of the fact that a significant goal of the ASCAP and BMI consent decrees is to protect copyright holders, fostering their choice of PROs and licensing options. Certainly, before it offers a novel interpretation harming copyright holders, DOJ should consider that doing so intervenes in the market in a manner that cuts against protecting the economic interests of the creators of copyrighted music. At a broad level, DOJ should move in the other direction given the constitutional protections intended to provide the legal foundation for creators to earn the economic fruits of their work.[44] As the Supreme Court has said, "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[45] DOJ

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ownership and location. What business discloses its customer-specific, competitively sensitive information to its largest rivals?

[42] *See, e.g.,* Frequently Asked Questions About Copyright Law, NewMediaRights.Org, http://www.newmediarights.org/business_models/artist/who_owns_copyright_song_i_wrote_someone_else (last visited Nov. 10, 2015); Gary Stiffelman, Comment to *Music Royalties*, Quora.Com, https://www.quora.com/Music-Royalties/If-you-are-co-writing-a-song-with-an-ASCAP-member-and-you-are-a-BMI-member-does-the-publisher-have-to-register-with-both-agencies ("If a song is written by members of different PROs, each writer will register their respective share and the PROs will separately collect and pay.") (last visited Nov. 10, 2015).

[43] And, where the remedy involves restructuring a market to subject more of it to judicial price controls, as seems the likely result here, it is particularly important to correctly identify the harm to be remedied. DOJ has not yet identified any harm it is attempting to remedy.

[44] U.S. Constitution Art. I, § 8, Cl. 8.

[45] *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) (O' Connor, J.).

should not interpret the ASCAP and BMI consent decrees in a manner that restricts the market choices of music creators and pushes them into the arms of dominant players, regulated by DOJ and the courts.