November 20, 2015

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

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

RE: PRO Licensing of Jointly Owned Works – Likely Reporting and Payment Issues

Dear Mr. Kully:

I appreciate this opportunity to participate in your review of the ASCAP and BMI consent decrees. It is a critical issue and I applaud your efforts to assess the need for change.

For your reference, I am the CEO of Royalty Review Council[1] and Founder of Crunch Digital[2] with over 25 years of experience processing record label and music publisher statements, royalty statements for digital services, Music Apps, and YouTube Multi-Channel Networks. I would estimate that I have been a part of the processing of over 3 million royalty statements – which includes the ingestion and processing of related income files. In addition, my experience includes music licensing, and our firm is the leader in specialized audits of digital services that exploit music. Lastly, I have been involved in the design and implementation of some of the existing royalty systems used in the marketplace.

Although there was not a question presented about the potential impact on the processing and distribution of income to royalty payees from PROs licensing and collecting more than their contributory share of musical works written by rights owners they do not represent, I am concerned that the U.S. government may be assuming that when 100% of the money is collected that it will somehow flow seamlessly to unaffiliated parties for their share. I believe that should 100% licensing actually occur, the amount of money that will get stuck in royalty systems and that cannot be processed timely (or at all) will reach an all-time high. I have a unique blend of knowledge and experience in this area and I believe that I am qualified to raise the issues below.

[1] http://www.royaltycouncil.com
[2] http://www.crunchdigital.com

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Royalty Reporting and Royalty Systems

100% licensing has never been the practice in the music industry. When income is received by a licensee and processed by a music publisher and PRO, it is for their share only. There has never been a practice that I am aware of that such entities will process their share, plus the share of someone else whom they have no administrative rights or direct relationship with. Therefore, there currently is no need to set up the ownership and payment details of other parties in a royalty system when you do not process income for them. When the publishers receive the publisher's share, they will account to their affiliated co-publishers in accordance with the terms of their co-publishing agreements and their accounting systems will assume that 100% of the income belongs to either the publisher or the co-publisher (usually owned by the songwriter).

How will a music publisher process 100% of the income through their royalty system if they do not have 100% of the details in their system to process the income for the shares they do not own or control? The money will not flow. It will get stuck and take a long time, maybe years before it is paid. Allowing 100% licensing will create an immediate flow restrictor on the money to its ultimate destination – the *right* owner (not just *any* "rights owner").

Assume that multiple rights owners could simultaneously collect 100% of the revenue for a song (which itself is a difficult concept). Then assume that the royalty systems of all interested parties that could receive and process 100% of the income actually did contain the complete ownership information and payment information for the money to be paid timely and to the accounting system operator and unrelated third parties.

For such an unlikely scenario to happen, there will be a high cost of updating royalty systems to handle such payments and update payment information, not to mention the ongoing administrative cost to process the income for the contributory share that you collected on behalf of unrelated (and perhaps unknown) third parties. I don't believe a publisher can charge an administrative fee to the payee for the processing of income that was collected on their behalf when they do not represent them or have an agreement that would allow them to charge a fee. So, the costs of administration will escalate from 100% licensing and there is no means to offset the cost.

If the Department of Justice wishes to require the PROs to grant 100% licenses it should be apparent that the complexities of reporting musical composition interests will lead to confusion and almost certainly a massive number of incorrect payments (or misdirect payments).

How will 100% licensing work when a co-publisher agrees with the other co-publisher of a song that the neither party has the right to license their share – which is not uncommon? Will there be a list of songs made available that cannot be licensed 100% for this reason? How will a publisher or writer know who to contact for missing income if they do not who licensed their interests where there is no pre-existing administrative relationship? How will existing royalty systems that contain the historical details to direct payments to non-owners of a musical copyright that have an ownership interest in the royalty income stream be shared among all PROs and publishers (such as divorce settlements that direct portions of income to a spouse, payments to heirs, payments toward bank loans, and tax liens)? In addition, who will bear the costs of all the 1099s that publishers will now be required to prepare for the share of income they were required to process for unrelated third parties?

As you can see, what the industry would need to undertake to attempt to manage a required change in reporting and payment processing from 100% licensing is remarkable. The cost to essentially every songwriter, PRO and music publisher to update their accounting system will be extraordinary. This does not even take into account the ongoing burden to be placed on licensors. The financial damage and chaos such a requirement would do to an area of the U.S. music industry that has been operating pretty effectively could be significant. It is not clear to me how such a requirement is beneficial to music users, the creators or the owners of the compositions and why such a requirement would continue to be considered once the likely detrimental results are reviewed.

Sincerely,

Keith L. Bernstein
CEO, Royalty Review Council