<u>SONY/ATV MUSIC PUBLISHING LLC</u>

COMMENTS SUBMITTED TO THE DEPARTMENT OF JUSTICE

IN CONNECTION WITH ITS REVIEW OF THE ASCAP AND BMI CONSENT DECREES

"SPLIT WORKS"

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Sony/ATV Music Publishing LLC submits this memorandum in response to the Department's request for comments in connection with its review of the consent decrees, as amended, in *United States v. ASCAP*[1] and *United States v. Broadcast Music, Inc.*[2] In particular, this memorandum addresses the questions posed in the request for comments regarding ASCAP's and BMI's licensing practices related to split works.

Summary

The long-standing trade custom and practice in the licensing of public performance rights has been to license only the fractional share of a jointly owned copyright. Songwriters, music publishers, PROs, music users, and rate courts universally understand this, and all have acted and performed as if public performance licenses only protect the licensee from infringement of the licensing fractional owner's rights and not those of its co-owners. There is no basis in trade custom or practice to conclude that public performance rights have ever been licensed on a 100% basis.[3]

ASCAP and BMI have followed the historical custom and practice and have only issued fractional licenses. PROs negotiate their license fees, collect their payments, and make distributions to the copyright owners they represent based only on the fractional ownership of their members or affiliates. The license fees ASCAP and BMI negotiate with their licensees, the monies they collect in royalty payments, and the distributions they make do not include—and have never included—amounts to be paid to co-owners of the songs in the PRO's catalog that are

1 No. 41 Civ. 1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) ("ASCAP AFJ2").

2 1966 Trade Cas. (CCH) ¶ 71 941 (S.D.N.Y.1966), *amended*, No. 64–CV–3787, 1994 WL 901652 (S.D.N.Y. Nov.18, 1994) ("BMI Consent Decree"). The ASCAP AFJ2 and the BMI consent decrees are collectively the "Consent Decrees."

3 There may be the occasional exception where the licensor and the licensee bargained for a 100% license, but they are so rare that they prove the rule that the historical trade custom and practice has been to license on a fractional basis.

not members or affiliates of the PRO. Indeed, neither ASCAP nor BMI has ever made any effort to determine whether an accounting to non-members or non-affiliates was required because of its licenses. Copyright owners, for their part, have not acted as if they have granted ASCAP and BMI the right to provide a 100% license based on their fractional ownership. Nor have they demanded protection in their PRO membership and affiliation agreements for any duty to account to their co-owners, sought an accounting, or tried to determine whether they have in fact any obligation to account due to their delegation of authority to their PROs—protections they surely would have demanded if they thought they were delegating their right to issue 100% licenses of their jointly owned works to their PRO. Similarly, music users understand and perform as if their licenses are only fractional. No music user has defended an infringement action on the ground that it has a 100% license from ASCAP or BMI based on a fractional interest or sought to obtain a "carve-out" adjustment in the fees it pays to one PRO based on a claim that it has a 100% license from another PRO. Even the ASCAP and BMI "rate courts" set the effective rates for the two PROs based on their fractional shares of ownership in the songs they each represent—not on the basis that they are licensing 100% of the works in their respective repertories.

License agreements, however, are often silent on whether they are providing fractional or 100% licenses. Under the well-accepted rules of construction, this ambiguity can be both identified and resolved by evidence of long-standing trade practice and custom. Given the history of industry practice, public performance licenses, including the blanket licenses issued by ASCAP and BMI, are properly construed as being fractional licenses unless there is no ambiguity that they are intended by the contracting parties to be 100% licenses. Neither the Consent Decrees themselves nor the *Pandora* decisions dictate a different result. The Consent

Decrees are silent on whether the mandatory licenses they require are fractional or 100%, and this ambiguity should be resolved by interpreting them according to historical trade custom and practice in the same way as licenses. The *Pandora* decisions are inapposite, since they only addressed what constitutes a "work" in the ASCAP and BMI repertory and whether some works in a PROs repertory, available to certain categories of users, could be excluded from the repertory as to other categories of users. These decisions provide no guidance whatsoever as to whether the licenses that the Consent Decrees require ASCAP and BMI to issue are fractional or 100% licenses. It is also telling that, when the *Pandora* courts determined the rates ASCAP and BMI could respectively charge, both courts—as have rate courts historically in the past—calculated the royalty rates based on the fractional shares represented by each PRO and not on the basis that the PROs were issuing 100% licenses.

Permitting, much less requiring, 100% licensing by ASCAP and BMI is not only contrary to the historical trade custom and practice, it is contrary to sound public policy. First, the historical experience in the United States when Sony/ATV's and EMI's catalogues were partially withdrawn from ASCAP and BMI, and in Europe, where fractional licensing is not only the norm but legally required, demonstrate that there is no need for 100% licensing by the PROs to ensure that the market clears at workably competitive royalty rates. Second, 100% licensing would eliminate the competition between ASCAP and BMI (and with other PROs) for songwriters and publishers, since a PRO could 100% license the rights as long as some fractional owner—no matter how small—is a member/affiliate. Third, 100% licensing by ASCAP and BMI would eliminate any possibility of significant direct licensing of withdrawn rights because prospective licensees, if able to obtain a license from the PRO, would simply license the whole from the PROs. As a result, the significant benefits of direct licensing will be lost. These benefits include:

- Providing more flexibility in setting licensing terms to meet the licensee's specific needs
- Fostering the development of new sources of music distribution
- Licensing services more quickly
- Reducing administrative costs in public performance licensing
- Providing better administrative solutions
- Reducing the costs and uncertainty of rate disputes
- Allowing greater transparency and efficiency in royalty distributions to songwriters
- Creating increased competition among publishers to sign songwriters

Finally, 100% licensing by ASCAP and BMI would require a significant and inefficient restructuring of industry relationships, impose new material administrative burdens, and result in substantial litigation. Requiring 100% licensing by the PROs could change the songwriter's calculus in deciding with whom to work, with more consideration given to collaborating with co-writers who are affiliated with the same PRO and correspondingly less to co-writers with whom they are likely to produce the best songs. This in turn is likely to increase the costs of switching PROs and thus reduce the competition among PROs for songwriters. These effects will impede the production of the best songs and reduce the efficient operation of the marketplace. Moreover, a 100% licensing requirement will produce significant new administrative burdens on copyright owners and PROs, which in turn will result in higher costs and less revenues to be distributed to songwriters and music publishers. All of this is likely to result in substantial litigation among all involved as the rights and responsibilities of PROs, fractional owners, co-owners, publishers, and music users are being sorted out. The increased costs from increased litigation will be priced into the royalty rates and administrative fees, resulting in a significant and unnecessary deadweight loss.

Some background and terminology

Terminology can be troublesome in this area. For the purpose of this memorandum, we will use the following nomenclature.

A *split work* is a musical composition in which multiple persons have an undivided interest in the associated copyright. A special case of split work is a *joint work*, that is, a work "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[4] The authors of a joint work are the initial *co-owners* of copyright in the work, and, in the absence of an agreement among the authors to the contrary, the authors own the copyright work in equal undivided shares regardless of their relative contribution to the creation of the work.[5] A split work may be created by other means, including the transfer by an author of a work of a fractional undivided interest in the copyright to a third party, such as a music publisher. A co-owner can transfer or assign the rights to its ownership interest in the jointly owned copyright, but this will not affect the ownership

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4 Copyright Act of 1976, 17 U.S.C. § 101.

5 *See id*. § 201(a); *see* United States ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama, 104 F.3d 1453, 1461 (4th Cir. 1997); Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1068 (7th Cir. 1994); Childress v. Taylor, 945 F.2d 500, 505 (2d Cir. 1991); Weinstein v. University of Illinois, 811 F.2d 1091, 1095 (7th Cir. 1987). Though eventually codified in Section 201(a) of the Copyright Act of 1976, the doctrine of joint ownership has a longer history in the United States, and was originally a doctrine "of judicial creation, which was imported wholesale from English Law by Judge Learned Hand." Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640, 645 (S.D.N.Y. 1970) (citing Maurel v. Smith, 220 F. 195 (S.D.N.Y. 1915)).

rights of its other co-owners.[6] In the case of a complete transfer, the new fractional owner will have all of the rights of the original owner, but no more and no less.[7]

However a split work is created, in the absence of an agreement by the co-owners to the contrary, courts will treat co-owners of a copyright as tenants in common, with each owning a share of the undivided whole[8] and each having the right to exercise any or all of the exclusive rights inherent in the joint work, including the right to license on a nonexclusive basis.[9] The concept of split works, where the copyright ownership interests are part of an undivided whole, is uniquely American. In most countries, co-owners of a copyright each own a *divided* interest in the work. These countries do not treat co-owners as tenants in common and a fractional owner by law cannot license more than its own divided interest.[10]

A *license* is a grant of permission by a copyright owner to exercise a copyright right, such as the right to publicly perform a musical composition for profit. A license protects the licensee from infringement of the licensor's rights (and, depending on the circumstances, perhaps the rights of other co-owners of the copyright), provided the licensee stays within the bounds set by the license.[11] A license is enforced under the principles of contract law to the extent that the

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6 *See, e.g.*, Brownstein v. Lindsay, 742 F.3d 55, 68 (3d Cir. 2014); Davis v. Blige, 505 F.3d 90, 99-100 (2d Cir. 2007).

7 *See, e.g.*, *Davis*, 505 F.3d at 100 ("[A] transfer of one co-owner's copyright interest to another person . . . conveys only the co-owner's share of that interest.").

8 *See, e.g.*, *Davis*, 505 F.3d at 98; Cmty. for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498 (D.C. Cir. 1988); COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 121 (1976); COPYRIGHT LAW REVISION, S. REP. NO. 94-473, at 104 (1975).

9 *See, e.g.*, Thomson v. Larson, 147 F.3d 195, 199 (2d Cir. 1998); Erickson v. Trinity Theatre Inc., 13 F.3d 1061, 1068 (7th Cir. 1994); Richlin v. Metro-Goldwyn-Mayer Pictures, Inc., 531 F.3d 962, 968 (9th Cir. 2008).

10 An important consequence is that PROs that obtain the right to license foreign works from foreign societies can only license those fractional divided interests, since the foreign societies themselves can only convey the right to license a divided interest.

11 *See, e.g.*, Graham v. James, 144 F.3d 229, 236 (2d Cir. 1998); Jacob Maxwell, Inc. v. Veeck, 110 F.3d 749, 753 (11th Cir. 1997); Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1338-39 (9th Cir. 1990); Oddo v. Ries, 743 F.2d 630 n.6 (9th Cir. 1984) (holding that a license is a defense to infringement and must be affirmatively pleaded).

terms of the license satisfy the requirements of a valid contract under the applicable state law and the contract is not preempted by the Copyright Act or other federal law.[12] A license may be *exclusive*, which precludes the licensor from granting other parties rights that overlap with those of the exclusive licensee or from exploiting any overlapping rights itself, or *non-exclusive*, in which case the licensor may grant overlapping rights to third parties or exploit those rights itself. A license can include *conditions* or *covenants*. A *condition precedent* must be satisfied for the license to be initially effective, that is, for the licensor's grant of permission to be operative. Once a license is effective, the later occurrence of a *condition subsequent* will terminate the license, that is, end the grant of permission by the licensor so that the further exercise of the right by the licensee will be an infringement.[13] In most instances, a licensee's breach of a covenant will not affect the permission granted by the licensor, but will subject the licensee to the usual contractual remedies for breach.[14]

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[12] *See, e.g.*, Gary Friedrich Enters., LLC v. Marvel Characters, Inc., 716 F.3d 302, 313 (2d Cir. 2013) (construing agreement "according to state law principles of contract interpretation, even though the subject matter of the Agreement concerns issues of federal copyright law"); Sun Microsys., Inc. v. Microsoft Corp., 188 F.3d 1115, 1122 (9th Cir. 1999) (holding that courts "rely on state law to provide the canons of contractual construction provided that such rules do not interfere with federal copyright law or policy") (internal quotation marks and citation omitted)); Jacob Maxwell, Inc. v. Veeck, 110 F.3d 749, 752 (11th Cir. 1997) ("As a general rule, state law governs the interpretation of copyright contracts, unless a particular state rule of construction would "so alter rights granted by the copyright statutes as to invade the scope of copyright law or violate its policies.") (citation omitted); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450-55 (7th Cir. 1996); Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1198 (7th Cir. 1987) (holding that disputes over compliance with the terms of a licensing agreement are common law breach of contract claims that properly belong before a state court); Fantastic Fakes, Inc. v. Pickwick Int'l, Inc., 661 F.2d 479, 483 (5th Cir. 1981) ("While the context of copyright law in which the agreement exists cannot be overlooked, application of Georgia rules to determine parties' contractual intent is not preempted by either copyright act nor does their application violate federal copyright policy.").

[13] *See, e.g.*, DuVal Wiedmann, LLC v. InfoRocket.com, Inc., 620 F.3d 496, 501-02 (5th Cir. 2010).

[14] *See, e.g.*, *Graham*, 144 F.3d at 236-37. Under both federal and state law, however, a material breach of a licensing agreement gives rise to a right of rescission, which allows the nonbreaching party to terminate the agreement. *See* Rano v. Sipa Press, Inc., 987 F.2d 580, 586 (9th Cir. 1993); Costello Publishing Co. v. Rotelle, 670 F.2d 1035, 1045 (D.C.Cir.1981). *See generally* MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 939 (9th Cir. 2010) ("We refer to contractual terms that limit a license's scope as 'conditions,' the breach of which constitute copyright infringement. We refer to all other license terms as 'covenants,' the breach of which is actionable only under contract law. We distinguish between conditions and covenants according to state contract law, to the extent consistent with federal copyright law and policy.") (internal citations omitted).

A co-owner's fractional copyright interest is *covered* by a license if the license protects the licensee from infringement of that co-owner's copyright interest. A *100% license* is a license that (a) grants permission to the music user to exploit a copyrighted musical composition based on one co-owner's fractional interest (the *licensing co-owner*), and (b) covers the fractional interests of all co-owners in that copyright. In other words, a 100% license protects the music user from infringement of a copyright interest of any co-owner of the copyright, including a co-owner who is a stranger to the license in question (a *non-licensing co-owner*).[15] By contrast, a *fractional license* is a license that protects the music user operating within the bounds of the license from an infringement action solely by the licensing co-owner, but does not protect he music user from infringing the copyright interest of any non-licensing co-owner.[16]

A licensing co-owner must account to other non-licensing co-owners for any profits it earns from licensing or use of the copyright to the extent that it licenses more than its own

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[15] A non-licensing co-owner may be completely unaware of the license, may be aware of the license and support it, or may be aware of the license and oppose it. In the context of this memorandum, a non-licensing co-owner may also grant its own license to the music user.

[16] A fractional license could come about by an explicit limitation in the license stating that the licensor is only licensing to the extent of its own fractional interest and not providing any protection against the infringement of the rights of other co-owners in the split work. In this construction, the license is essentially a covenant not to sue binding only on the licensor and not its co-owners. *Cf.* Transcore LP v. Electronic Transaction Consultants Corp., 563 F.3d 1271, 1275 (Fed. Cir. 2009) (explaining that a patent license "passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee" and "[t]o like effect, this court and its predecessors have on numerous occasions explained that a non-exclusive patent license is equivalent to a covenant not to sue") (first phrase quoting De Forest Radio Tel. & Tel. Co. v. United States, 273 U.S. 236, 242 (1927)); Metabolite Labs., Inc. v. Laboratory Corp. of Am. Holdings, 370 F.3d 1354, 1369 (Fed. Cir. 2004) (observing that license in essence is a covenant not to sue); Ortho Pharm. Corp. v. Genetics Inst., Inc., 52 F.3d 1026, 1031 (Fed. Cir. 1995) (noting that a license may amount to no more than a covenant by the patentee not to sue the licensee for making, using, or selling the patented invention). Alternatively, a fractional license could be subject to a condition precedent that the licensee obtain the consent of all co-owners. In either case, the licensee would have to obtain the consent of all co-owners before it would be completely protected against all infringement actions. Nothing in the Copyright Act preempts or precludes the issuance of a fractional license, since, among other things, such a license does not implicate any "legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." 17 U.S.C. § 301(a) (setting forth the scope of preemption by the Copyright Act); *see* Ryan v. Editions Ltd. W., Inc., 786 F.3d 754, 760 (9th Cir. 2015) (holding that "claims are not preempted if they fall outside the scope of § 301(a)'s express preemption and are not otherwise in conflict with the Act"). A fractional license only addresses the scope of the permission a copyright co-owner grants to use its Section 106 rights. *See* Foad Consulting Group, Inc. v. Azzalino, 270 F.3d 821, 827 (9th Cir. 2001) ("Congress did not choose to regulate the conditions under which a copyright holder can grant a nonexclusive copyright license to another.").

fractional share.[17] A failure to account is redressable through a state law accounting claim.[18] The duty to account is personal to the licensing co-owner; an accounting cannot be sought from the licensing co-owner's licensee.[19] The duty to account comes not from the Copyright Act itself, but rather from "equitable doctrines relating to unjust enrichment and general principles of law governing the rights of co-owners."[20] Normally, one fractional owner does not owe a fiduciary duty to its co-owners when exercising its ownership rights in the copyright,[21] because the law presumes that the interests of all co-owners to exploit the copyright are congruent.[22] However, given the equitable foundations of a fractional owner's duty to account, in "special circumstances"—especially when the facts indicate that the licensing co-owner is reducing the value of the copyright and affirmatively harming the interests of its co-owners—a quasi-

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17 *See, e.g.*, Davis v. Blige, 505 F.3d 90, 100 (2d Cir. 2007) ("[A] co-owner who grants a non-exclusive license is accountable to his co-owner for income gained by the grant of the license."); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569, 571 (2d Cir. 1955), *modified*, 223 F.2d 252 (2d Cir. 1955) (holding that the defendant was "entitled to an accounting . . . of the proceeds received from the exploitation of the copyright").

18 *See* Gaiman v. McFarlane, 360 F.3d 644, 652 (7th Cir. 2004) ("When co-ownership is conceded and the only issue therefore is the contractual, or in the absence of contract the equitable, division of the profits from the copyrighted work, there is no issue of copyright law and the suit for an accounting of profits therefore arises under state rather than federal law.").

19 *See Davis*, 505 F.3d at 100 ("[A] licensee is not liable to a non-licensing co-owner for use authorized by the license, because the licensee's rights rest on the license conveyed by the licensing co-owner."); Piantadosi v. Loew's, Inc., 137 F.2d 534, 537 (9th Cir. 1943) (holding that a third party granted a non-exclusive copyright license by one co-owner had no duty to the other co-owner); McKay v. Columbia Broad. Sys., 324 F.2d 762, 763 (2d Cir. 1963) (observing that a licensee is immunized from liability to the other co-owner).

20 Oddo v. Ries, 743 F.2d 630, 633 (9th Cir. 1984); *see* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 223 F.2d 252, 254 (2d Cir. 1955) ("As to the scope of the accounting it is clear that each holder of the renewal copyright on the joint work should account to the other for his exploitation thereof, not as an infringer but as a trustee."); Siegel v. Warner Bros. Entm't Inc., 581 F. Supp. 2d 1067 (C.D. Cal. 2008) ("While the interests plaintiffs have recaptured are based in copyright, it is the nature of the resulting relationship between plaintiffs and defendants that gives rise to their accounting claims, a relationship grounded in state common law principles of tenancy in common and the duties of a trustee.").

21 *See, e.g.*, Margo v. Weiss, No. 96 CIV. 3842(MBM), 1998 WL 2558, at *9 (S.D.N.Y. Jan. 5, 1998).

22 *See, e.g.*, GOLDSTEIN ON COPYRIGHTS § 4.2.2.2 (noting that "[a] co-owner is not likely to exploit a work at less than its market value since, under the rule requiring accountings, he will be entitled to no more than his fractional share of whatever proceeds the license or his own exploitation generates—thus giving him every incentive to produce as much revenue as he possibly can").

fiduciary duty, constructive trust, duty not to waste, or some other equitable obligation can arise.[23]

We now turn to the questions posed in the Department's request for comments.

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)?

The simple answer is no: ASCAP and BMI do not issue 100% licenses. Our response proceeds in three parts: (a) a description of how the long-standing and consistent historical trade custom and practice by the PROs, songwriters, publishers, and music users is to treat performance licenses as if they are fractional licenses, not 100% licenses; (b) a response to arguments that the current norm is 100% licensing, notwithstanding the historical custom and practice; and (c) an analysis of whether a fractional owner, consistent with the copyright law and the fractional owner's duties to its co-owners, could authorize ASCAP or BMI to include a 100% license for the jointly-owned work in the PRO's blanket license even if the fractional owner so desired.

[23] *See* Universal-MCA Music Publishing v. Bad Boy Entm't, Inc., No. 601935/02, 2003 WL 21497318, at *4-5 (N.Y. Sup. Ct. Jun 18, 2003) (unpublished) ("Though co-authors of a copyright generally do not owe a fiduciary duty, the existence of 'special circumstances' and conduct may be sufficient to transform the parties' otherwise ordinary business relationship into a fiduciary one.") (citing L. Magarian & Co. v. Timberland Co., 245 A.D.2d 69, 69-70 (N.Y. App. Div. 1997)). Courts also find constructive trusts where one fractional owner acts to the detriment of the other co-owners in a split work. Where, for example, one fractional owner renews the original copyright solely in its own name, that renewal is held upon a constructive trust for the other co-owners. *See, e.g.*, Shapiro, Bernstein & Co. v. Jerry Vogel Music. Co ., 223 F.2d 252, 253 (2d Cir. 1955) (per curiam); Edward B. Marks Music. Corp. v. Jerry Vogel Music. Co., 140 F.2d 266, 267 (2d Cir. 1944); Swan v. EMI Music Publ'g Inc., No. 99 Civ. 9693(SHS), 2000 WL 1528261, at *3 (S.D.N.Y. Oct. 16, 2000). To be clear, this limited duty between co-owners arises only because of the tenancy in common relationship between joint owners. Though some might describe this equitable duty as "quasi-fiduciary," it is probably more akin to a duty not to waste or destroy the jointly owned work. This duty thus has no implications for the contractual relationships within the music publishing business.

a. The long-standing trade custom and practice has been and continues to be fractional licensing

The long-standing historical trade custom and practice in the United States has been for public performance rights to be licensed only on a fractional basis. While an owner of a fractional interest in a copyright in the United States may have the right to grant a license for 100% of the copyrighted composition, as a matter of practice, owners historically do not license more than their fractional share. As a result, a prospective licensee has to secure a license from each of the co-owners (or their respective licensing agents) individually in order to perform the song. PROs, copyright owners, music users, and rate courts have all followed this historical practice.

PROs. ASCAP and BMI have followed the historical practice. In particular, they have:

a. priced their respective licenses based on the fractional shares in their respective repertories;

b. paid their respective members/affiliates on that same basis; and

c. have taken no steps to track whether co-owners who are not members or affiliates are being compensated and have not accounted (or assisted their members or affiliates to account) to these non-member/affiliate co-owners.

In other words, ASCAP and BMI (as well as all other PROs) negotiate their license fees, collect their payments, and make distributions to the copyright owners they represent based only on the fractional ownership of their members or affiliates in the songs in the PRO's catalog. The negotiated license fees with music users and the royalties to members have never included amounts to be paid to non-member co-owners. Indeed, neither ASCAP nor BMI has a process or mechanism in place that would allow it to make distributions to co-owners who are not members or affiliates of that PRO.[24]

[24] More to the point, ASCAP's own rules prohibit ASCAP from making distributions to songwriters who are affiliated with another PRO. *See* ASCAP Compendium §§ 3.4.1; 3.4.2; *see also* BMI Consent Decree art. V(C)

Copyright owners. ASCAP and BMI are not copyright owners, so any right they may have to grant a 100% license to perform a copyrighted composition must result from a legally permissible delegation of the authority from an owner of at least a fractional interest of the copyright.[25] Sony/ATV is unaware of any fractional owner that is a member of ASCAP or an affiliate of BMI that believes it has, contrary to the long-standing historical trade practice and custom, authorized its PRO to issue 100% licenses based on fractional interest. Sony/ATV is also unaware of any fractional owner that has accounted to another co-owner because of a 100% license issued by a PRO based on the fractional owner's interest. Indeed, we are unaware of any fractional owner that believes that it owes a duty to account to its co-owners because it has delegated the authority to the PRO to issue 100% licenses based on the fractional owner's interest.

Authorizing a PRO to issue a 100% license would create a significant liability on the part of a fractional owner, since it creates a *personal* duty to account on the part of the licensing fractional owner that cannot be shifted to the PRO.[26] A fractional owner that has delegated its authority to ASCAP or BMI to issue 100% licenses surely would demand appropriate protections in its agreement with the PRO. We are unaware of any agreement with a PRO that provides any protections in connection with the fractional owner's duty to account. In particular, we are unaware of any ASCAP membership or BMI affiliation agreement with any of the following types of protections that one would expect a fractional owner licensing through ASCAP or BMI to demand:

(prohibiting BMI from making distributions to a writer or publisher who has terminated her or its affiliation with BMI once such writer or publisher has affiliated with another PRO).

[25] Sony/ATV believes that the law does not permit a fractional copyright owner to delegate its right to issue a 100% license in the copyrighted composition to a PRO for inclusion in the PRO's blanket license. We address this *infra* in Section 1.c.

[26] See the authorities cited in note 19, *supra*.

a. A provision obligating the PRO to collect royalties owed by the member or affiliate under the duty to account to its co-owners for any license granted by the PRO covering the jointly owned work (and probably a provision obligating the PRO to administer the payment of royalties on behalf of the member/affiliate).

b. A provision obligating the PRO to maximize the value of any 100% license based on the member/affiliate's fractional interest. A failure of the PRO to maximize value—or at least not to reduce the value of the associated copyright—would expose the member/affiliate to potential litigation from its co-owners. Neither the ASCAP nor BMI agreements contain such a provision.[27]

c. A provision obligating the PRO to indemnify the member/affiliate for any damages or liabilities incurred resulting from the PRO's 100% licensing based on the member/affiliate's fractional interest.

The absence of any of these types of provisions in the ASCAP membership and BMI affiliation agreements is telling evidence that ASCAP members and BMI affiliates did not intend to authorize their PRO to issue a 100% license based on the member/affiliate's fractional interest. Sony/ATV would have insisted on these types of provisions if it believed that it was authorizing ASCAP or BMI to issue 100% licenses based on its respective fractional ownership of a copyright interest.[28]

Music users. Music users, like the PROs and copyright owners, also follow the historical practice of fractional licensing. In particular, licensees of ASCAP and BMI do not act as if their licenses were—and therefore presumably have not interpreted them as being—100% licenses:

a. If music users believed that they had a 100% license from one PRO, there would be no need to pay another PRO for another 100% license covering the same work. Especially after *DMX*[29] established that music already licensed by a music user should be "carved out" of the PRO license and the license rates adjusted accordingly, one would expect that music users would use *DMX* if they believed that ASCAP and BMI issued 100% licenses. Even now, with Pandora's BMI rate

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[27] *See* United States v. ASCAP (*In re* Application of AOL, RealNetworks, and Yahoo, Inc.), 559 F. Supp. 2d 332, 343 (S.D.N.Y. 2008) (noting that "BMI's agreements with its songwriters and publishers contain no contractual obligation for BMI to represent the interests of songwriters and publishers in BMI's license negotiations with third parties"), *aff'd in part, vacated, and remanded in part*, 627 F.3d 64 (2d Cir. 2010).

[28] For the reasons explained *infra* in Section 1.c, Sony/ATV submits that it could not have delegated this right to a PRO even if it so desired.

[29] Broadcast Music, Inc. v. DMX Inc., 683 F.3d 32 (2d Cir. 2012).

35% higher than its ASCAP rate (2.5% vs. 1.85%), Pandora has not sought to take advantage of the lower ASCAP rate on all songs in which both ASCAP and BMI represent a fractional interest.

b. We are not aware of any instance where an ASCAP or BMI licensee sought to defend an infringement action on the basis that the licensee had a 100% license from one of these PROs.

c. Given the extent to which today's musical compositions are co-written, in a world of 100% licenses music users could take only an ASCAP or a BMI license and perform only those compositions in that catalog with full protection from infringement actions by co-owners who are not represented by that PRO. But we do not see this behavior by music services that otherwise appear to be aggressively pursuing their profit-maximizing interests.

d. It is significant in assessing the historical practice that neither Pandora nor ASCAP and BMI ever argued, in connection with the motions before Judges Cote and Stanton, that partial withdrawals were irrelevant because ASCAP and BMI had the right to license 100% of all co-owned songs in any event. On the contrary, it is our understanding that, in the rate proceedings, the direct licenses issued by Sony/ATV, EMI and UMPG for their percentage share of compositions were taken into account in determining the amount due and payable to ASCAP and BMI.

Notably, in the recent settlement between the Radio Music License Committee (RLMC) and SESAC, the settlement agreement provided for arbitration of fee disputes and explicitly instructed the arbitrators to value the SESAC license on a fractional basis for all works in the SESAC catalog:

> **Split Works.** Without intending to affect the manner in which copyright law deals with joint copyright owners' licensing of so-called "split works," in adjudicating license fees and terms under paragraphs 4 and 9, the arbitrators shall determine and award the value of all music in SESAC's repertory, including the contribution to that value of works in which SESAC affiliates own less than 100% of the copyright interest. 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.[30]

[30] A copy of the settlement agreement may be found at http://imgsrv.radiomlc.org/image/rmlc/UserFiles/File/Final%20SESAC%20RMLC%20Settlement%20Agreement.pdf.

In other words, the arbitrators are to value works in which SESAC represents only a fractional interest at that fractional interest, even if an interest in those works is also represented in an ASCAP or BMI blanket license that the radio station has.

Likewise, DMX's Music Composition Catalog License ("MCCL") was a fractional license, paying publishers a share of a $25 per location royalty pool prorated by the number of times that the publisher's works were performed by DMX as a fraction of the total number of performances on the DMX service. But "[i]f a publisher owns less than the entirety of a given composition, it will only be entitled to royalties based on the percentage of the work it controls. Thus, the numerator of the above-described fraction is adjusted to reflect the publisher's actual ownership interest in a given work."[31]

Rate courts. The Consent Decrees provide for mandatory licensing by ASCAP and BMI. If a PRO and a licensee cannot agree on the royalty rate, the Consent Decrees provide for a proceeding before the district court supervising the decree (the "rate court") to determine a "reasonable fee" retroactive to the date of the beginning of the license.[32] The Consent Decrees do not state a standard for determining a "reasonable fee," but courts have held a reasonable fee is an approximation of the "fair market value" of the license, that is, "what a license applicant would pay in an arm's length transaction" in a competitive market.[33]

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31 *In re* THP Capstar Acquisition Corp., 756 F. Supp. 2d 516, 530 (S.D.N.Y. 2010) (ASCAP/DMX) (describing MCCL license), *aff'd*, 683 F.3d 32 (2d Cir. 2012); *see also* Brief For Respondent-Appellee at 15 n.4, Broadcast Music, Inc. v. DMX, No. 10-3429 (2d Cir. Apr. 6,. 2011) ("Like BMI's own distributions, the publisher's pro rata share is adjusted (or "share weighted") to account for situations where the publisher owns or controls less than a full 100% share of any of the works performed.). Under the MCCL, DMX paid only the publisher, which then had an obligation to distribute the writer her share of the royalty under the terms of their publishing agreement . *THP Capstar*, 756 F. Supp. 2d at 530.

32 *See* ASCAP AFJ2 § IX; BMI Consent Decree § XIV.

33 *See, e.g.*, ASCAP v. MobiTV, Inc., 681 F.3d 76, 82 (2d Cir. 2012); United States v. Broadcast Music, Inc. (*In re* Music Choice), 316 F.3d 189, 194 (2d Cir. 2003); ASCAP v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 569 (2d Cir. 1990); *In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 354 (S.D.N.Y. 2014), *aff'd per curiam*, 785 F.3d 73 (2d Cir. 2015); Broadcast Music, Inc. v. Pandora Media, Inc., No. 13 Civ. 4037 (LLS), 2015 WL 3526105, at *1 (S.D.N.Y. May 28, 2015), *appeal docketed*, No. 15-2060 (2d Cir. June 26, 2015).

When the courts determine ASCAP's or BMI's royalty rate in a rate court proceeding, they do so on the basis that the blanket license is a fractional license, not a 100% license. The *ASCAP/DMX* rate court proceeding provides a good example.[34] Judge Cote started with a total unbundled music fee pool of $22.50 per location for public performance rights, whether obtained from ASCAP, BMI, a direct license from a publisher, or anywhere else. Judge Cote then prorated this fee according to ASCAP's share of total performances on the DMX network, which she found to be 48% (without accounting for any direct licensing). Accordingly, she found that share of the total unbundled music fee pool for ASCAP-affiliated music should be $22.50 times 48% or $10.74 per location.[35] Significantly, as Judge Cote noted, "*[t]his figure is 'share-weighted,' meaning that it accounts for the fact that certain works are only partially controlled by ASCAP*."[36] That is, in calculating the share of the total unbundled music fee pool to which ASCAP-affiliated works would be entitled, Judge Cote used only the fractional interest of ASCAP members in any split works in the ASCAP repertory and made no provision for any compensation to the co-owners who were not members of ASCAP. Likewise, to account for direct licenses of ASCAP-affiliated music in paying ASCAP itself for performance rights, the $10.74 per location was to be discounted by the "direct license ratio," that is the ratio of DMX's performance of directly licensed ASCAP-affiliated songs and DMX's performance of all ASCAP-affiliated songs. Both the numerator and denominator of the direct license ratio are to be "weighted/pro-rated as necessary to reflect the ownership share" of the directly-licensed

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[34] *In re* THP Capstar Acquisition Corp., 756 F. Supp. 2d 516 (S.D.N.Y. 2010) (ASCAP/DMX), *aff'd*, 683 F.3d 32 (2d Cir. 2012).

[35] Again, this would be the ASCAP fee in the absence of any direct licensing. Judge Cote also adopted a $3 per location "floor fee" to compensate ASCAP for its expenses associated with ASCAP's expenses in serving locations performing background/foreground commercial music services. *Id*. at 548.

[36] *Id*. at 548 & n.46 (emphasis added).

ASCAP-affiliated publishers and ASCAP itself.[37] Judge Cote's rate formula for compensating ASCAP and directly-licensed ASCAP-affiliated publishers would make no sense unless the licenses are fractional.

In sum, the PROs, copyright owners, music users, and rate courts all follow the historical custom and practice of licensing public performance rights on a fractional basis, and their course of performance belies the notion that they believe that they have a 100% license.

b. Arguments that 100% licensing is the norm are unavailing

Sony/ATV understands that, notwithstanding the longstanding trade custom and practice of the fractional licensing of public performance rights, three arguments have been made that ASCAP and BMI in fact issue 100% licenses: (1) the text of the ASCAP and BMI licenses, web sites, and other materials indicate that the PROs are offering 100% licenses; (2) the Consent Decrees, and judicial decisions interpreting these decrees, describe ASCAP's and BMI's licenses as 100% licenses; and (3) the fact that there is no accounting is irrelevant, since music users obtain licenses from ASCAP, BMI, and SESAC and pay royalties directly to all co-owners of the works they perform under these three licenses. None of these arguments is availing.

Textual arguments. In its request for comments, the Department quotes from ASCAP and BMI licenses and web sites to suggest that these PROs issue 100% licenses. For example, the Department notes that "BMI's model license for bars and restaurants promises '[a]ccess to more than 7.5 million musical works' and grants to the user 'a non-exclusive license to publicly perform . . . all of the musical works of which BMI controls the rights to grant public performance licenses during the Term.'" Similarly, the Department notes that ASCAP's Business Blanket License grants a "[license to perform] . . . the right to perform 'non-dramatic

[37] *See* Judgment Order ¶ 4, *In re* THP Capstar Acquisition Corp., No. 41 Civ. 1395 (DLC) (S.D.N.Y. Dec. 20, 2010).

renditions of the separate musical compositions now or hereafter during the term of this Agreement in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights.'"[38] Language of this type might suggest that ASCAP and BMI issue 100% licenses, but only if the consistent long-standing historical custom and practice of fractional licensing is ignored.

But the historical custom and practice cannot be ignored—no one in the music world today believes that the PROs issue 100% licenses. To the extent there is commentary on the topic, it is to the contrary.[39] Sony/ATV's experience is that most professionals in the music business advise that establishments publicly performing music for profit obtain licenses from ASCAP, BMI, and SESAC not only because the establishment may play a song represented in only one of these PRO catalogs (i.e., where there is only one copyright owner) but also because co-owners may be represented by different PROs. SESAC's web site is illustrative of this view. Much like the language the Department quotes in its request for public comments, SESAC says that "[o]n behalf of many thousands of songwriters and music publishers, SESAC offers blanket license agreements that authorize the performance of all the compositions in the SESAC repertory."[40] But then SESAC addresses the following question:

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38 The quote in the Division's request for public comments does not include the words "license to perform" and instead describes the license as granting a "right to perform." As we will see below, the difference in language is important.

39 *See, e.g.*, Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing, Billboard*, BILLBOARD.COM, July 30, 2015; Chris Cooke, *Music Publishers Set to Hate At Least One DOJ Reform to US Collective Licensing, Complete Music Update*, Completemusicupdate.com, July 31, 2015; Susan Butler, *Risky Business: Songs in Fractions* (Part 1 of 2) MUSIC CONFIDENTIAL, Sept. 4, 2015 ("[T]he entire North American music publishing industry has been built upon–and has now become internationally financially and operationally dependent upon–licensing shares of songs rather than licensing a single product/unit called 'a song' or a copyrighted 'musical work' that happens to have multiple creators/owners.").

40 SESAC, Frequently Asked Questions: General Licensing, http://www.sesac.com/Licensing/FAQsGeneral.aspx.

> **Q: If I have licenses with ASCAP and/or BMI, why do I need a license with SESAC?**
>
> A: SESAC, ASCAP, and BMI are three separate and distinct Performing Rights Organizations (PRO). Each organization represents different copyright holders (songwriters, composers, publishers) and licenses only the copyrighted works of its own respective copyright holders. *Licenses with ASCAP and BMI DO NOT grant you authorization to use the copyrighted music of SESAC represented songwriters, composers and publishers.*
>
> 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 for virtually all of the copyrighted music in the world.[41]

What SESAC describes is fractional licensing.

The significance of the language the Department quotes in its request for comments turns on the meaning of the term "license." Is a license (a) a permission to perform the work that covers the fractional interests of all co-owners in that copyright, protecting the music user from an infringement action by any co-owner of the copyright, including any non-licensing co-owner (a 100% license), or (b) a permission to perform the works that protects the music user from infringing the rights of the licensing co-owner, but does not protect the music user from infringing the rights of any non-licensing co-owner (a fractional license)? In Sony/ATV's experience, the common practice for decades has been for publishers to include language in their licenses that makes clear the license is only a fractional license and only covers their fractional shares. Sony/ATV, for example, has always defined "compositions" in our licenses as the fractional interests that it controls.[42]

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[41] *Id*. (emphasis added).

[42] Sony/ATV has consistently used the following language in its licenses to define "Publisher Composition": "Publisher Composition means any Composition in which the rights that are the subject of this Agreement are owned, controlled or administered by Publisher, in whole or in part, *solely to the extent of Publisher's ownership*, control or administration thereof, and subject to any restrictions or limitations thereon imposed pursuant to songwriter agreements or other applicable license, administration or similar agreements with rightsholders, rights societies or any similar collective, agency, affiliation, organization or group that administers rights in Compositions (each, a "Rights Society")." (emphasis added). The emphasized test makes explicit that Sony/ATV is only licensing a fractional share.

Admittedly, some licenses may not as explicit as the Sony/ATV licenses and may be facially ambiguous as to whether they are fractional licenses or 100% licenses. Although an unambiguous contract must be enforced according to its terms, under the usual rules of contract construction, trade custom and usage can create a "latent ambiguity" in the contract and be used to construe the terms of an agreement: "[L]atent ambiguity exists even where a term 'is clear and intelligible . . . [if] some extrinsic fact or some extraneous evidence creates a necessity for interpretation or a choice between two or more possible meanings.'"[43] In determining whether such a latent ambiguity exists, courts may rely on "objective" extrinsic evidence. As Chief Judge Posner explained in *AM Int'l, Inc. v. Graphic Mgmt. Assocs., Inc.*:[44]

> We use these terms [objective and subjective] informally, rather than with any approach to philosophical precision. By "objective" evidence we mean evidence of ambiguity that can be supplied by disinterested third parties: evidence that there was more than one ship called *Peerless, or that a particular trade uses "cotton" in a nonstandard sense*. The ability of one of the contracting parties to "fake" such evidence, and fool a judge or jury, is limited. By "subjective" evidence we mean the testimony of the parties themselves as to what they believe the contract means. Such testimony is invariably self-serving, being made by a party to the lawsuit, and is inherently difficult to verify. "Objective" evidence is admissible to demonstrate that apparently clear contract language means

[43] Kerin v. U.S. Postal Serv., 116 F.3d 988, 992 n.2 (2d Cir. 1997) (quoting Ballato v. Board of Educ., 33 Conn. App. 78, 633 A.2d 323, 328 (1993)); *accord* Coffin v. Bowater Inc., 501 F.3d 80, 97 (1st Cir. 2007) ("However, in the exceptional case, a latent ambiguity in seemingly clear contract language may require us to consider extrinsic evidence to determine the actual object of the parties' agreement."); Moore v. Pa. Castle Energy Corp., 89 F.3d 791, 796 (11th Cir. 1996) ("An ambiguity is latent [and so allowing extrinsic evidence to be considered] when the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings."); Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1192 (2d Cir. 1996) (holding that contracts are ambiguous when "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business"); AM Int'l, Inc. v. Graphic Mgmt. Assocs., Inc., 44 F.3d 572, 575 (7th Cir. 1995); RCI Ne. Servs. Div. v. Boston Edison Co., 822 F.2d 199, 202 (1st Cir. 1987) ("[I]n the exceptional case, a latent ambiguity in seemingly clear contract language may require us to consider extrinsic evidence to determine the actual object of the parties' agreement."); St. Paul Fire & Marine Ins. Co. v. Balfour, 168 F. 212, 216 (9th Cir. 1909) ("A latent ambiguity arises when the writing upon its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain. And it is so well established as to be beyond all possible dispute that parol or other extrinsic evidence is always admissible to explain a latent ambiguity in any written instrument. The reason given for the rule is that, as the ambiguity is raised by extrinsic evidence, the same kind of evidence must be admitted to remove it.").

[44] 44 F.3d 572 (7th Cir. 1995).

something different from what it seems to mean; "subjective" evidence is inadmissible for this purpose.[45]

As the passage suggests, trade usage that departs from the common understanding of a term is one of the principal types of objective extrinsic evidence to establish a latent ambiguity.[46]

Although not directly applicable to the licensing of public performance rights, the Uniform Commercial Code, which "embodies the foremost legal thought concerning commercial transactions" and has been applied to non-sale transactions by analogy,[47] states that one of its central purposes is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."[48] Section 2-202 of the UCC provides that trade usage may be used to interpret a contract: terms "may be explained or supplemented by course of dealing or usage of trade or by course of performance."[49] Similarly, Section 2-208 provides that where the contract "involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of

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45 *Id*. at 575; *accord* Coffin, 501 F.3d at 97-98; Evergreen Invs., LLC v. FCL Graphics, Inc., 334 F.3d 750, 756-57 (8th Cir. 2003); *Kerin*, 116 F.3d at 992 n.2; Galardi v. Naples Polaris, LLC, 301 P.3d 364, 368 (Nev. 2013).

46 *See, e.g.*, *Kerin*, 116 F.3d at 992 ("This is particularly so where the extrinsic evidence pertains to trade use, because Connecticut courts have noted that a "technical or special meaning" should be honored where it is clearly intended."); *Nowak*, 81 F.3d at 1192 (noting the need to assess evidence of the "customs, practices, usages and terminology as generally understood in the particular trade or business"); Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin., 169 F.3d 747, 751 (Fed. Cir. 1999) (holding "that this court may consult evidence of trade practice and custom to show that 'language which appears on its face to be perfectly clear and unambiguous has, in fact, a meaning different from its ordinary meaning'") (citing Gholson, Byars, and Holmes Constr. Co. v. United States, 351 F.3d 987, 999 (Ct. Cl. 1965)).

47 "[T]here is a strong tendency for courts to apply the UCC to non-UCC situations 'because it embodies the foremost legal thought concerning commercial transactions.' Although a particular transaction may be outside of the UCC, the court may make a selective application of those principles expressed in the UCC that reasonably would govern situations to which the statute does not explicitly apply." 1 ANDERSON ON THE UNIFORM COMMERCIAL CODE § 1-101:35 (3d ed. database updated Dec. 2014) (footnotes omitted) (quoting Vitex Mfg. Corp. v. Caribtex Corp., 377 F.2d 795, 799 (3d Cir. 1967)); *see* JAMES J. WHITE, ROBERT S. SUMMERS & ROBERT A. HILMAN, UNIFORM COMMERCIAL CODE § 2:3 (6th ed.) (observing that courts "determine what policy objectives the particular Code section implicates and then, in light of those policies, determine whether the particular facts of the transaction invite the application of the section by analogy.") .

48 U.C.C. § 1-102(2).

49 *Id*. § 2-202(a). "A 'usage of trade' is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." *Id*. 1-303(c).

performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement."[50] Moreover, where the express terms of an agreement are contradicted by the course of performance, "such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance."[51] The Restatement (Second) of Contracts expresses a similar view of the significance of trade custom and practice.[52]

In music publishing, there is no dispute that the practice—revealed by how the contracting parties actually behaved—has been and continues to be to give fractional licenses, not 100% licenses. Royalties have been negotiated based on fractional shares; there has been no accounting or even efforts to track whether an accounting was required; and there has been no expectation, much less reliance, that the PROs were licensing 100% rights based on the fractional interests they each represented. Songwriters, publishers, the PROs, music users, and the rate courts all understood and followed this practice. This interpretation is not preempted by the Copyright Act. The Copyright Act exists to define and protect the rights of copyright owners, and a license that limits the permission granted to the licensee to only cover the rights of the licensing fractional owner but not its co-owners is consistent with both the flexibility that the Copyright Act sought to provide and the "freedom of contract" that forms the basis of modern state contract law. Under the normal rules of contract construction, the language quoted by the Department and other similar language should be construed accordingly.

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[50] *Id*. § 2-208(1).

[51] *Id*. § 2-208(3). "A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement." *Id*. § 1-305(d).

[52] "A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement . . . a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement." Restatement (Second) of Contracts § 222 (1981).

The Consent Decrees. The Department's request for public comment notes that "[t]he Consent Decrees themselves describe ASCAP's and BMI's licenses as conveying the rights to play all works in each organization's repertory." This characterization is not quite correct. The Consent Decrees speak to granting a *license* to perform the works in the PRO's repertory, not a *right* to perform these works.[53] The language of the Consent Decrees raises the same latent ambiguity as do the license agreements.

The *Pandora* rate cases did not address, much less resolve, this ambiguity in the Consent Decrees of what permission the licenses must grant.[54] The *Pandora* cases addressed whether a work in the PRO repertory available to be licensed to certain categories of users could be excluded from the repertory as to other categories of users. To answer this question, they focused on the use of the term "works" in the consent decree and found that the Consent Decrees unambiguously require each PRO to license its entire repertory to any qualified user seeking a license. The courts reasoned that this requirement precluded ASCAP and BMI from permitting publishers to limit the PROs from licensing of their songs to a defined set of otherwise qualified licensees. The publishers had to be "all in or all out" as to the licensees ASCAP and BMI could license. But critically, the *Pandora* decisions did not address whether the PRO had the obligation to license 100% of the works in its repertory even if its members only owned a fractional interest

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53 *See, e.g.*, ASCAP AFJ2 § VI (requiring ASCAP to grant a "non-exclusive license" to perform all of the works in the ASCAP repertory); BMI Consent Decree § VIII(B) (requiring BMI to "license the rights publicly to perform its repertory by broadcasting on either a per program or per programming period basis"), § IX(C) ("Defendant shall not, in connection with any offer to license by it the public performance of musical compositions by music users other than broadcasters, refuse to offer a license at a price or prices to be fixed by defendant with the consent of the copyright proprietor for the performance of such specific (i.e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.").

54 *See In re* Pandora Media, Inc., Nos. 12 Civ. 8035(DLC), 41 Civ. 1395(DLC), 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013), *aff'd per curiam*, 785 F.3d 73 (2d Cir. 2015); Broadcast Music, Inc. v. Pandora Media, Inc., No. 13 Civ. 4037 (LLS), 2015 WL 3526105 (S.D.N.Y. May 28, 2015), *appeal docketed*, No. 15-2060 (2d Cir. June 26, 2015).

in such works. Both a fractional license and a 100% license are fully consistent with the language and the logic of the *Pandora* opinions.

As a result, the Consent Decrees, and the judicial interpretations of these decrees in the *Pandora* cases, having left unaddressed nearly all salient issues concerning what rights these licenses confer, are inapposite to support that argument that 100% licenses are the norm. The Consent Decrees, which are to be construed using the normal rules of contract construction,[55] should be interpreted to require no more than a fractional license, consistent with the historical custom and practice.

Moreover, even if *arguendo* the Consent Decrees were read to require 100% licenses, they still cannot give ASCAP or BMI the ability to issue licenses with rights greater than the rights that their members and affiliates delegate to them. If the agreements between ASCAP and its members, or BMI and its affiliates, only convey a right to issue fractional licenses and not 100% licenses, the Consent Decrees cannot alter those agreements. The Consent Decrees are not the source of authority by which the PROs are able to license on behalf of copyright owners—that authority derives solely from the contractual relationship between the PRO and its members or affiliates. The PROs can at most license only those rights they have been given by their contracts with their members and affiliates, and those contracts only give the PROs the right to issue a fractional license to any split work.

The lack of accounting is not inconsistent with 100% licensing. There is a suggestion that the lack of accounting to co-owners is not inconsistent with 100% licensing since all music users

[55] Consent decrees should be construed using the same rules as contracts. *See, e.g.*, United States v. ITT Cont'l Baking Co., 420 U.S. 223, 238 (1975) ("Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include . . . any technical meaning words used may have had to the parties."); United States v. Asarco Inc., 430 F.3d 972, 980 ("Without question courts treat consent decrees as contracts for enforcement purposes. A consent decree, like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree.").

obtain licenses from each of the three major PROs—ASCAP, BMI, and SESAC—and that all co-owners will be paid their share by the PRO that represents them, eliminating any need for accounting. This is much too glib for three reasons.

First, not every co-owner is a member of ASCAP, BMI, or SESAC. New PROs, such as Global Music Rights, are emerging, and licenses from all three major PROs do not guarantee that all co-owners of a 100%-licensed split work will be compensated. For instance, GMR represents members of bands like Fleetwood Mac, Journey, Foreigner, Soundgarden, the Eagles, and Van Halen. To the extent that songs by those GMR members have co-owners that are not members of GMR, the songwriters will not be adequately compensated by a music user that only licenses from ASCAP, BMI and SESAC.[56]

Second, even if all co-owners were represented by one of ASCAP, BMI, or SESAC, surely not all music users obtain licenses from all three PROs. If a co-owner is a member of SESAC, but the music user only licensed from ASCAP and BMI, then that co-owner is due compensation from its co-owners who are represented by ASCAP or BMI.

Finally, and perhaps most tellingly, there is no effort whatsoever being undertaken by ASCAP or BMI or their members or affiliates to even determine if there are co-owners who are not otherwise being compensated and to whom a duty to account is owed. It strains credulity to believe that liabilities are being accrued due to 100% licensing and nothing is being done about it by those who would be owed royalties. The reason, of course, is that the licenses are not 100% licenses but rather fractional licenses, so no one believes that liabilities are being generated.

The absence today of any accounting to co-owners—or any indeed effort to determine even when an accounting might be required—far from being an inconvenient fact to be explained

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56 *See* Ben Sisario, *New Venture Seeks Higher Royalties for Songwriters*, N.Y. TIMES, Oct. 29, 2014, *available at* http://www.nytimes.com/2014/10/30/business/media/new-venture-seeks-higher-royalties-for-songwriters.html.

away, is a key part of the trade custom and practice that shows that ASCAP and BMI only license public performance rights on a fractional basis.

d. As a matter of law, a fractional owner cannot delegate its authority to issue a 100% license to a PRO

Sony/ATV further submits that, as a matter of copyright law, a fractional owner cannot delegate its authority as a tenant in common to a PRO to issue a 100% license even if the fractional owner so desired. The authority of a co-owner to issue a 100% license is a consequence of the co-owner's status as an *owner* and of its *special relationship* with its other co-owners that created the tenancy in common in the first instance. A PRO has no ownership interest in the copyright, does not have any relationship—special or otherwise—with non-affiliated co-owners, and is not a tenant in common with these other co-owners. To permit a PRO to exercise a delegation of authority from a fractional owner to issue a 100% license is to place the PRO "in the shoes" of fractional owner as if the PRO possessed a copyright interest. But a PRO is only a non-exclusive licensee or licensing agent of the affiliated fractional owner, and courts have held that non-exclusive licensees or licensing agents are *not* owners and cannot exercise rights as if they were.[57]

Moreover, a fractional owner owes a tenant-in-common duty to account to its co-owners, and in special circumstances owes its co-owners a quasi-fiduciary duty or other equitably-imposed duty not to exercise its tenant-in-common rights in a way that reduces the value of the jointly-owned copyright and materially harms its co-owners.[58] This is apparent in the language

[57] *See, e.g.*, Minden Pictures, Inc. v. John Wiley & Sons, Inc., 10 F. Supp. 3d 1117, 1127-29 (N.D. Cal. 2014); Premier Tracks, LLC v. Fox Broadcasting Co., No. 12-cv-01615 DMG, 2012 U.S. Dist. LEXIS 189754 (C.D. Cal. Dec. 18, 2012).

[58] *See* note 23 *supra* and accompanying text.

of the court's opinion in *Jerry Vogel Music Co. v. Miller Music, Inc.*,[59] one of the first decisions to recognize a duty to account among copyright co-owners:

> It does not seem right that such extended use through strangers may be made of the copyright at a profit solely to the owner conveying the license, to the exclusion of an equal owner. Such a rule, if adopted, would also lead to the unseemly result, evidenced in this case, of co-owners competing with each other and finessing against each other in licensing the work. Such a rule would encourage the very waste of a work which is claimed to have taken place here by licensing the song for motion picture use of $200. *We do not pass upon the claim of waste thus made because we adopt a rule of accountability which should promote sound and orderly marketing of a work and a fair division of profits on the basis of mutual interest, rather than a rule which sets owner against owner in the exploitation of common property.*[60]

In other words, the court imposed a duty to account on co-owners precisely to achieve fairness and prevent setting co-owner against co-owner. Whether couched in terms of a quasi-fiduciary arising in special circumstances, a constructive trust,[61] waste,[62] or some other equitable notion, this is an obligation of the tenant in common. But a PRO is not an owner, is not a tenant in common with the other co-owners of the split work, and owes these co-owners no duty, much less a heightened duty not to act in ways that reduces the value of the copyright to them.

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[59] 74 N.Y.S.2d 425 (N.Y. App. Div. 1947), *aff'd*, 299 N.Y. 782 (1949).

[60] *Id*. at 427-28 (emphasis added).

[61] *See*, *e.g.*, Pye v. Mitchell, 574 F.2d 476, 480 (9th Cir. 1978); Richmond v. Weiner, 353 F.2d 41, 46 (9th Cir. 1965); Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944); Maurel v. Smith, 271 F. 211, 215-216 (2d Cir. 1921); Schmid Bros. v. W. Goebel Porzellanfabrik KG., 589 F. Supp. 497, 500 (E.D.N.Y. 1984); Edward B. Marks Music Corp. v. Wonnell, 61 F. Supp. 722, 727 (S.D.N.Y. 1945).

[62] Though the issue has not been definitively litigated, co-owners of a copyright may owe each other a duty not to commit waste, stemming from the equitable underpinnings of their relationship. In *Jerry Vogel*, a co-owner of a musical composition licensed the work to a motion picture for $200, despite his co-owner previously quoting the film studio a price of $1,000. This, plaintiff argued, "was a waste of the copyrighted property and amounted to a conversion to [the defendant's] own use of mutually owned property." 74 N.Y.S.2d at 426. Other cases also suggest that a fractional owner of a copyright may not, consistent with its duties to its co-owners, materially reduce the value of the split work to its co-owners. *See* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 165, 168 (S.D.N.Y. 1947) ("The use of one owner, by license or personally . . . can destroy, practically, the copyright so far as the other is concerned . . . broad use by an active publisher can so far exhaust the popularity of a song or any other musical composition as to destroy its value after that use has ended."); Crosney v. Edward Small Prods., Inc., 52 F. Supp. 559, 561 (S.D.N.Y. 1942) ("Defendant as a cotenant has so used the res, i.e. the motion picture rights of the play, that the value of the use of such rights by the plaintiff has been destroyed. It presents a clear case for an accounting.").

In light of these requirements of copyright law, there are strong public policy reasons why a non-exclusive licensee or licensing agent should not, as a matter of law, be allowed to issue 100% licenses as if it were a fractional owner. These reasons are especially strong when the licensee is a PRO and the 100% sublicensed work is included in the PRO's blanket license of its entire repertory.

First, the permission to include a jointly-owned work in the ASCAP or BMI blanket license involves the licensing of hundreds of thousands of music users, ranging from restaurants, bars, grills, hotels and motels, retail stores, shopping centers, airports, bowling alleys, concert venues, dance studios, gymnastics competitions, ice skating rinks, theme and amusement parks, and music on hold to television and radio stations to digital music services such as Spotify, Pandora, Apple iTunes and Apple Music, and Google Play Music.[63] This is a far cry from the types of single licenses contemplated in the cases on the tenant-in-common duties of co-owners, and is much more akin to giving a license to the world. Given the ubiquity and blanket nature of ASCAP and BMI licenses, if a fractional owner authorizes ASCAP or BMI to issue a 100% license for a joint work, the fractional owner has effectively preempted—or at least severely limited—its co-owners from licensing on their own behalf.

Second, co-owners of a split work may be entitled to different levels of compensation depending on the PRO which represents them. For example, consider two copyright owners of a split work, each with an undivided 50% interest, one of which is represented by ASCAP and the other represented by BMI. The *Pandora* rate court decisions set different rates for ASCAP and BMI: Pandora's rate for an ASCAP license is 1.85%, while Pandora's rate for a BMI license is

63 For a partial list of the types of music users ASCAP license, see Get an ASCAP License, http://www.ascap.com/licensing/licensefinder. BMI's list is as extensive, but is not as easy to obtain an overview of the types of music users BMI licenses. *See* Music Users: Apply for Your BMI License, http://www.bmi.com/licensing/#licensetools.

2.5%, or 35% higher than the ASCAP rate.[64] If the ASCAP member authorizes ASCAP to issue a 100% license on the jointly owned copyright, it knows that will be depriving its BMI-affiliated co-owner of a higher royalty rate. A court of equity should not permit a fractional owner to affirmatively harm a co-owner by delegating a right to its PRO to issue a 100% license. This problem will only become more pronounced as non-regulated PROs, such as SESAC and GMR, gain more affiliates.

Third, even if the rates charged by the licensing PRO are the same as the rates charged by the non-member co-owner's PRO, the formula each PRO uses to distribute its revenues to its members may significantly differ for the song and the use in question, resulting in different payouts to equal co-owners belonging to different PROs.[65] A delegation of authority by a fractional co-owner to its PRO to issue a 100% license of the split work effectively deprives its co-owners that are not members of the same PRO of the benefits of their choice of a different PRO, again without any gain to the licensing fractional owner.

Fourth, the licensing PRO will commingle the license to the split work in a blanket license of its entire repertory. ASCAP reports that it has more than 10 million musical compositions in the ASCAP repertory and represents 555,000 members,[66] while BMI reports that it has more than 10.5 million works in its repertory and represents more than 700,000

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[64] *In re* Pandora Media, Inc., 6 F. Supp. 3d 317, 372 (S.D.N.Y. Mar. 18, 2014), *aff'd per curiam*, 785 F.3d 73 (2d Cir. 2015) (setting ASCAP rate at 1.85% of Pandora's revenues); Broadcast Music, Inc. v. Pandora Media, Inc., No. 13 Civ. 4037 (LLS), 2015 WL 3526105, at *26 (S.D.N.Y. May 28, 2015) (setting BMI rate at 2.5% of Pandora's revenues), *appeal docketed*, No. 15-2060 (2d Cir. June 26, 2015).

[65] "In addition, ASCAP, BMI, and SESAC have different payment formula schedules, thereby producing different payments for the same type of music use, depending on whether you are a member of ASCAP or an affiliate of BMI or SESAC. Further, these payment and distribution schedules can frequently change, sometimes without notice to writers and publishers." JEFFREY BRABEC & TODD BRABEC, MUSIC MONEY AND SUCCESS 31 (7th ed. 2011). For a description of the ASCAP and BMI formulas for distributing revenues, see ASCAP Payment System, http://www.ascap.com/members/payment/royalties.aspx, and BMI, General Royalty Information, http://www.bmi.com/creators/royalty/general_information.

[66] *See* ASCAP, Press Release, ASCAP Adds Licensable Share Information to Promote Greater Transparency in Public Performance Rights (Nov. 10, 2015).

songwriters, composers, and music publishers.[67] Rather than license individually the jointly owned work, as the cases envision a tenant in common doing, the fractional owner would be submerging the split work in a blanket license with more than 10 million other works.

Fifth, the licensing PRO is responsible to a board of directors that has the interests of multiple stakeholders in mind and not just the interests of the licensing fractional owner and its co-owners. In setting the terms of its blanket licenses, ASCAP at least has a contractual duty to represent the interests of its 555,000 members in its license negotiations with third parties. BMI's agreements, on the other hand, contain no contractual obligation for BMI to represent the interests of writers and publishers in BMI's license negotiations with third parties. A fractional owner, consistent with its duties to its co-owners, should not be permitted to delegate its authority as a tenant in common to grant 100% licenses to the jointly owned work to a licensing agent that will not necessarily act in the interests of the non-represented co-owners.

Sixth, the licensing PRO may charge excessive fees for administration (assuming that a PRO can charge any fees for the administration of rights by a non-licensing co-owner).

Equitable principles are designed to regulate opportunism and its effect of creating abuses of trust or confidence. These principles prevent the arbitrary abuse by a fractional owner by granting a 100% licensing right under its tenant-in-common authority to its PRO when such a grant is likely to reduce the compensation that its co-owners would otherwise obtain is precisely the situation that a court of equity should prohibit. This is not to say that the courts should impose on the fractional owner the full fiduciary duty to act in the utmost good faith for the benefit of its co-owners—that is what courts have generally resisted in the past—but only that the court should impose a much more limited duty that a fractional owner cannot exercise its

67 *See* BMI: What We Do, http://www.bmi.com/about.

tenant-in-common rights in a way that reduces the value of the jointly-owned copyright and materially harms its co-owners.

The fractional owner's PRO, on the other hand, owns no interest in the copyright, is not a tenant in common with other co-owners of the split work, and owes no duty to these the non-affiliated co-owners. In these circumstances, the law should not permit a fractional owner to delegate its tenant-in-common authority to issue a 100% license to a PRO. The fractional owner, given its duty to account, gains nothing (since it can only keep its prorate share), yet its co-owners may be preempted in their ability to grant non-exclusive licenses to the split work, denied greater compensation that they would otherwise obtain, and be forced to work with a PRO with which they have affirmatively chosen not to affiliate. Equity created the ability of a fractional owner to license 100% rights in a split work by recognizing the fractional owner as a tenant in common with its co-owners, and equity should prevent this ability to be delegated to a non-co-owner PRO.

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

For the reasons explained in response to Question 1, the blanket licenses issued by ASCAP and BMI are fractional licenses, not 100% licenses. The long-standing trade custom and practice in the licensing of public performance rights in musical compositions, accepted by all participants in the industry, has been fractional licensing. The blanket licenses issued by ASCAP and BMI have always been treated by the PROs and the industry as if they were licensing only fractional rights. Moreover, ASCAP and BMI cannot issue licenses for more than the rights they have been given, and their respective members and affiliates only empowered the PROs to issue fractional licenses. Finally, Sony/ATV contend that as non-copyright owners—licensees or licensing agents vested solely with non-exclusive rights—ASCAP and BMI cannot, as a matter of law, grant anything but fractional licenses.

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?

Sony/ATV is not aware of any instance 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.

More importantly, Sony/ATV does not know of any instance where a music user claimed that a blanket license it obtained from one PRO provided the music user with protection from an infringement action by a co-owner, regardless of whether the co-owner was represented by the PRO that issued the license. One would expect that this would be a common practice if anyone believed that the PROs issued 100% licenses. Indeed, we suspect that there would be a significant business opportunity for firms to create playlists that were specific to the ASCAP and BMI repertories so that their clients would only have to pay one license fee. But Sony/ATV has seen no indication of any firms doing so, again confirming that the ASCAP and BMI licenses are regarded in the industry as fractional licenses.

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?

For the reasons given in response to Question 1, Sony/ATV does not believe that the Consent Decrees, or the judicial interpretations of the Consent Decrees in the *Pandora* cases, require PROs to issue 100% licenses. Nor does Sony/ATV believe that the Consent Decrees could do so in a manner consistent with copyright law. After decades of consistent practice, it is well-understood and accepted in the industry that ASCAP and BMI issued only fractional licenses. Indeed, the question of whether the PROs issued 100% licenses has only been raised over the last several months. Given that the issue has been raised, however, the Consent Decrees should be modified to eliminate any uncertainty and to clarify that the Consent Decrees do not purport to change or interfere with the long-standing industry custom and practice of fractional licensing and that neither ASCAP nor BMI is required by their respective consent decree to issue 100% licenses.[68]

This clarification would be in the public interest. As noted in the response to Question 1, 100% licensing by the PROs would be a dramatic and unwelcome change from the well-established historical custom and practice in the music publishing industry. In addition, 100% licensing by the PROs (a) is unnecessary for markets to clear at workably competitive royalty rates, (b) would eliminate vital competition between ASCAP and BMI (and with other PROs) for members and affiliates, (c) would force copyright owners to effectively “license” their interests through PROs of which they are not members or affiliates, and (d) result in a significant and inefficient restructuring of industry relationships and in substantial unnecessary litigation.

a. 100% licensing by the PROs is unnecessary for the markets to clear at workably competitive rates

Markets in the licensing of performance rights will continue to clear at workably competitive rates without 100% licensing by the PROs. The historical experience in the United States and Europe demonstrates that there is no need for 100% licensing by the PROs to ensure that the markets clear, even if some copyright owners partially or even fully withdraw from the

[68] The question is slightly awkwardly worded. A license from ASCAP or BMI should not “require” a music user to do anything. A license is simply a grant of permission that immunizes the music user from infringement in the licensed use to a greater or lesser extent depending on the nature of the license. If the PRO license is a fractional license, then the immunization extends only to an infringement action by members or affiliates of the licensing PRO and not to co-owners represented by other PROs.

PROs. Markets for public performance rights clear in jurisdictions where co-owners do not have the right to issue 100% licenses and the music user must obtain consent from all co-owners before it can publicly perform a work.

The European experience. The experience in Europe provides a prime example. In most (if not all) European countries, music users must obtain a license from each co-owner in order to reproduce or publicly perform (as the case may be) a co-authored work. Historically, European copyright owners have delegated to national societies the right to license their copyright interests within that society's territory, which the societies usually did through a blanket license. Notwithstanding this common practice, the right of copyright owners to limit the scope of the rights granted to collection societies (including on a partial basis by excluding certain categories of uses from the mandates of those societies) is a long and well-established legal principle and one that is considered to be an important procompetitive prerequisite to ensuring the proper functioning of the upstream market.

These principles were confirmed in the so-called "GEMA Categories" decisions[69] and subsequently reaffirmed in the 2005 Recommendation on Collective Cross Border Management of Copyright and Related Rights issued by the European Commission.[70] The Recommendation once again confirmed the right of copyright owners to partially withdraw their rights from the national societies, this time in the context of licensing compositions for digital and mobile uses. It recommended such flexibility as the preferable option for the regulation of the collective management of rights in the context of pan-European digital services (the so called "Option 3").

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[69] *See* Case No. IV/26.760, GEMA I, Commission Decision 71/224/EEC of 20 June 1971, O.J. (L 134) 15; Case No. IV/26.760, GEMA II, Commission Decision 72/266/EEC of 6 July 1972, O.J. (L 166) 22; Case No. IV/29.971, GEMA III, Commission Decision 84/204/EEC of 4 December 1981, O.J. (L 94) 12.

[70] *See* Commission Recommendation 2005/737/EC of 18 May 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, 2005 O.J. (L 276) 54; *see also* Study on a Community Initiative on the Cross-Border Collective Management of Copyright (Eur. Comm'n Staff Working Document July 7, 2005).

The Recommendation coincided with some publishers considering the withdrawal of certain categories of rights from the national European collection societies, and in the wake of the Recommendation all major publishers withdrew their digital rights from the national societies.

Today, the major publishers in Europe each license their withdrawn rights on a repertory-specific basis to digital services in Europe, which is the basis on which all major pan-European digital services are licensed today. The flexibility available with regard to these mandates also allows those partially withdrawn publishers to not only license major pan-European digital services on a repertory-specific basis but also to reaggregate their rights into certain national collection societies to license small national services on a blanket basis. In addition, smaller independent publishers have aggregated their rights to license on a repertory-specific basis into Option 3 licensing platforms (often operated by a specific society) to reduce transaction costs. This system of licensing involves no 100% licensing.

The principles underpinning the GEMA Categories decisions and the Option 3 Recommendation have been most recently affirmed in the so-called Collective Rights Management Directive. The Directive further confirms the requirement that collective rights management organizations must allow right-holders to exercise not only the choice of which collective rights management organization to appoint but also the choice of the categories of rights and copyrighted works that they mandate to such organizations. Such flexibility (including partial grants of rights to collective rights management organizations) is afforded in a context where (i) there are many more collective rights management organizations across the European Union than there are in the United States of America, (ii) publishers had already elected to partially withdraw, and (iii) there is no 100% licensing. In theory, these factors should create more risk that the market would fail to clear, but in fact there has been no failure of the market to clear.

Under this regime, which remains fully in effect today, digital music services have grown enormously. All the major digital music services—including Apple, Spotify, Amazon, Google and Deezer—plus hundreds of smaller providers have flourished. There has been no failure of the markets for licensing of copyrights (including rights under all necessary fractional interests) to clear—and hence no need for 100% licensing. Indeed, to our knowledge, there has never been an effort to replace fractional licensing with 100% licensing in Europe, precisely because there is no market problem for 100% licensing to solve.

The U.S. experience. The U.S. market for public performance rights experienced no difficulty in clearing during the period of time when some publishers had withdrawn their rights to license digital music services from the PROs.

Effective January 1, 2013, Sony/ATV withdrew its new media rights from ASCAP and BMI pursuant to the respective PRO rules then in effect. Over the course of 2013, Sony/ATV entered into four significant direct licensing deals for performance rights in its share of the compositions it owns and/or administers: YouTube, iTunes Radio, Pandora and Google Play. Sony/ATV observed no problems in the functioning of the market during this time. Each music service that wished to play Sony/ATV music knew that it needed to obtain a license from Sony/ATV (in the event it did not already have a license) as well as separate licenses from the co-owners (or their PROs) of the fractional interests in the songs in the Sony/ATV catalog that were not represented by Sony/ATV. Sony/ATV had an interest in licensing its repertory to generate income for itself and for its authors and composers. License negotiations followed in the normal course on an arm's-length basis. In every case, the market cleared and no music service that desired to obtain a license from Sony/ATV failed to get one.

EMI's experience was similar. EMI withdrew its digital performance rights from ASCAP in May 2011. In June 2011, EMI licensed the performance and mechanical rights in its interests in its songs to Apple for use in Apple's iCloud locker service for a one-year term with automatic one-month renewals. In March 2012, EMI negotiated a digital performance license to Pandora that ran through December 31, 2013 and covered all of its rights in all works owned or controlled by EMI that were formerly licensed through ASCAP. In both cases, license negotiations followed on an arm's-length basis, and in each case the parties reached an agreement on a license arrangement. No intermediation by ASCAP was necessary in either case for the market to clear.

The reason why markets for public performance rights will clear in the absence of 100% licensing by PROs is straightforward: in the downstream market, songwriters and their publishers make money only when their songs are licensed; while in the upstream market, songwriters will not sign with a particular publisher if the publisher will not efficiently license the songwriter's songs and will sign with some other publisher instead. If a publisher or other copyright owner believes that it can more efficiently license some or all of its songs outside the PROs, it will withdraw to that extent from the PRO; if the PRO is more efficient, the publisher or other copyright owner will remain a member or affiliate. In either case, the market will clear.[71]

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[71] Any savings in transaction costs from 100% licensing will be de minimis, part of the price that market participants pay to operate in competitive, multisupplier markets, and likely to be vastly outweighed by an increase in costs associated with litigation as well as the added administrative costs associated with the obligation imposed on co-owners to account to and pay their nonconsensual co-owners plus the additional risk of loss. We know that the savings in transaction costs are de minimis because the empirical evidence shows that markets clear even in the absence of 100% licensing and that licensors engage in collective licensing when transaction costs become meaningful. We know that it is the normal course because in most markets companies have to deal with multiple suppliers, even when supply contracts are negotiated. Finally, the transaction savings only deal in gross with savings in negotiation costs; it does not take into account what is likely to be a much more significant increase in costs in litigation associated with 100% licensing.

Not only do markets clear in unregulated markets with fractional licenses, they clear at workably competitive royalty rates. For example, some of the U.S. rates during the period of partial withdrawal were discussed by Judge Stanton in his BMI/Pandora rate decision.[72] Judge Stanton found that when the Sony/ATV and EMI catalogs were withdrawn from BMI in 2013, Pandora and Sony/ATV entered into a license agreement covering "both the Sony/ATV and EMI catalogs, at industry-wide rates of 5% of gross revenue (2.25% of revenue adjusted for BMI's market share for EMI)."[73] Similarly, when UMPG withdrew its new media licensing rights from ASCAP, Pandora and UMPG entered into a license agreement "at an industry-wide rate of 7.5% of gross revenue, or 3.38% at a BMI-adjusted rate."[74] As Judge Stanton noted, both Sony/ATV's 5% rate and UMPG's 7.5% rate are "indices of competitive market rates."[75]

b. 100% licensing would reduce or eliminate competition between ASCAP and BMI (and with other PROs) for members and affiliates

ASCAP and BMI today compete with one another for songwriters and publishers. 100% licensing would reduce or eliminate this competition, since a PRO could license the rights as long as any fractional owner—no matter how small—is a member/affiliate, even if the other co-owners are not members/affiliates.

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

73 *Id*. at *9. An "industry-wide rate" or a "publisher pool rate" would be the rate if the music user performed only songs of the licensor and then only songs in which the licensor controlled 100% of the copyright interest. If the music user performs songs licensed by third parties or the licensor holds less than a 100% interest in all of its songs, the rate at which the licensor actually will be paid will be adjusted prorated by the percentage of plays of its songs against the total number of plays and by the fractional interest it holds in its catalog. The rates can be confusing. For example, the Pandora rates of 1.85% for ASCAP and 2.5% for BMI set by the rate courts are not industry-wide rates but rather PRO-specific rates. To compare the ASCAP and BMI rates to the Sony/ATV 5% rate, one would have to add the ASCAP rate of 1.85%, the BMI rate of 2.5%, and the SESAC rate.

74 *Id.* at 10.

75 *Id.* at 15.

PROs compete with one another in the upstream market in the provision of licensing and administration services to songwriters and publishers. This competition is evidenced by PROs vying against each other to sign songwriters as members or affiliates and by songwriters switching between PROs at the end of their membership or affiliation contracts. A number of web sites offer comparisons of PRO offerings to songwriters to assist them in choosing a PRO.[76] In addition to competition for new songwriters, the PROs compete for more established songwriters as well. The competition between the PROs for members and affiliates is pronounced and reflected in the switching behavior of songwriters across genres. Some recent examples include:

- Jerry Leiber and Mike Stoller left ASCAP and joined BMI in 2009 (Pop)
- Linda Perry left ASCAP and joined BMI in 2011 (Pop)
- Ryan Tedder left ASCAP and joined GMR in 2014 (Pop)
- Pharrell Williams left ASCAP and joined GMR in 2014 (Pop)
- Christopher Bridges (Ludacris) left ASCAP to join BMI in 2014 (Hip Hop)
- Mathew Koma left BMI and joined ASCAP in 2013 (Pop)
- All four members of the band System Of A Down (Daron Malakian, Serj Tankian, Shavo Odadjian and John Dolmayan) left ASCAP and joined BMI in 2005 (Rock)
- Kenny Chesney left ASCAP and joined BMI in 2011 (Country)
- Liz Rose left SESAC and joined BMI in 2009 (Country)
- Claudia Brant left ASCAP and joined SESAC in 2006 (Latin)
- Mikky Ekko left ASCAP and joined BMI in 2013 (Pop)
- Paul Jenkins left ASCAP and joined BMI in 2009 (Country)

76 One good example is *ASCAP -v- BMI: The Big Difference*. http://home.earthlink.net/~deankay/TheBigDifference.html.

- Brandon Heath left ASCAP and joined BMI in 2012 (Contemporary Christian)

PRO competition is also demonstrated by the emergence of new PROs that are taking songwriters away from the more established PROs. The most prominent among these is Global Music Rights, which was created in 2013 by Azoff MSG Entertainment, a joint venture between Irving Azoff and Madison Square Garden Entertainment.[77]

If a single co-owner can enable a PRO to grant a license covering all of its other co-owners, co-owners not only will be denied choice in their licensing agent but competition among the PROs for songwriters will significantly diminish. The objective of the PROs would change from competing for all songwriters to competing for just enough fractional owners to provide the PRO with the ability to grant broad 100% licenses.[78] The interest in increasing competition in the upstream market is one of the primary reasons the EC recommended Option 3 to give copyright owners the choice of authorizing new collective rights managers to license online rights in the EU or even license directly on their own.[79]

c. 100% licensing would force copyright owners to effectively "license" their interests through PROs with whom they are not members or affiliates

A songwriter can be a member or affiliate of only one PRO at any time. The songwriter's publisher on a given work almost always has the same PRO affiliation as the songwriter, although co-writers of the same song may belong to different PROs. Typically, the songwriter picks the PRO and its publisher follows with respect to that song. During the time of

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77 *See* Ben Sisario, *New Venture Seeks Higher Royalties for Songwriters*, N.Y. Times, Oct. 29, 2014, at B4.

78 This assumes that the PRO can charge an administrative fee for all of the monies it collects, including monies due non-affiliated co-owners.

79 *See* Study on a Community Initiative on the Cross-Border Collective Management of Copyright 35 (Eur. Comm'n Staff Working Document July 7, 2005) (noting that Option 3 encourages competition, for example, on different elements of the management services they provide for right-holders, the methods applied in monitoring use made of licensed works, accurate monitoring and distribution statistics, the speed with which royalties are remitted to right-holders, the level of detail in which a right-holder is informed of the different uses made of his protected works, and innovation as to the methods by which copyright fees are determined).

membership or affiliation, the songwriter will depend on her PRO for generating much if not all of her income from the licensing of public performance rights in her songs. PROs negotiate blanket licenses with major music users or their representative organizations, such as the Radio Music License Committee and the Television Music License Committee, and different PROs may negotiate different terms in their licenses and hence generate different revenues for their members and affiliates. Even the rate courts may award different rates to different PROs, as we have seen in the *Pandora* rate cases. PROs also differ in the formulas they use to pay members and affiliates or in the administrative fees they charge, so that the songwriter may earn different amounts on the same song depending on which PRO she affiliates. PROs also differ in their governance structures. While half of ASCAP's board consists of songwriters (and the other half of publishers), BMI has no songwriters (or publishers) on its board.

The songwriter's choice of a PRO is a personal one that 100% licensing by ASCAP or BMI threatens to undermine. When a 100% license is given by a PRO with which the songwriter is not a member, the songwriter must now depend on a PRO she did not chose, in order to collect her share of compensation and see that she is paid. Compared to her own PRO, she might be paid less because of differences in royalty rates, distribution formulas or administrative fees, she might be paid later because of differences in distribution schedules, or she might not be paid at all because of a failure of the licensing PRO to collect the monies due the songwriter or of her co-owner to account.

Permitting a PRO to issue 100% licenses is equivalent to forcing non-affiliated co-owners to license through a PRO that they have affirmatively chosen not to represent them. Such a requirement is fundamentally unfair to songwriters and, as argued below, is likely to lead to an inefficient restructuring of the industry and substantial litigation.

d. 100% licensing by the PROs would result in a significant and inefficient restructuring of industry relationships, new administrative burdens, and substantial litigation

Permitting, much less requiring, the PROs to issue 100% licenses would not only subvert the longstanding understanding that PRO licenses are only fractional, but also would result in an inefficient restructuring of the industry. To maintain control over their fractional rights, songwriters going forward might decide to collaborate only with co-writers with the same PRO affiliation and not necessarily with those co-writers with whom they can produce the best product. An increased resistance to working with writers affiliated with a different PRO could also increase the costs of songwriters switching among PROs and reduce the effectiveness of competition among PROs for the signing of songwriters. All of these effects are harmful to the production of the best songs and sound recordings for consumption by the public and to the efficient operation of the marketplace.

Moreover, a 100% licensing requirement would introduce significant new cost dynamics in the industry, both through a newfound duty to account, as well as through substantial amounts of litigation. Because the industry practice is fractional licensing, there is not currently a recognized need to account between co-owners. However, if any one fractional owner could provide a 100% license, then a new administrative burden would be created in having to account to non-licensing co-owners. The PROs and the rate courts will have to find ways to adjust license fees in light of the ability and the limitations on the PROs to grant 100% licenses for various compositions in their respective catalogs. They will also have to adjust their license rates when a music user elects to license the maximum rights available from one PRO and only the missing rights from the other PROs. PROs and their members/affiliates will have to adopt new provisions in their contracts to ensure that the duties of co-owners to account are both identified and satisfied on a timely basis, and PROs will probably have to create systems to perform the accounting on behalf of their members or affiliates (which, even assuming it can be done, might still not avoid subjecting the nonconsensual co-owners to credit risk). These burdens will result in additional costs, which in turn will reduce the revenues available to be distributed to songwriters and publishers from the licensing of public performance rights.

All of this is likely to be accompanied by significant amounts of litigation among all involved as the rights and responsibilities are being sorted out. In the first instance, there should be substantial litigation over the adequacy of compensation non-licensing co-owners receive from the licensing of their fractional copyright interests. Additionally, any time a song that has been licensed by a PRO is alleged to have infringed another's copyright, the PRO is likely to be named as a defendant in any action seeking to enjoin the infringement and obtain damages. Because the PRO will not have indemnification agreements with the non-member co-owners, it would have to sue them for contribution. The increased costs from increased litigation will be priced into the royalty rates and administrative fees, resulting in a significant and unnecessary deadweight loss.

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?

For the reasons explained in response to Question 1, Sony/ATV submits that ASCAP and BMI do not and cannot offer licenses that entitle users to play partially owned works without additional licenses from the non-affiliated co-owners. But in any event Sony/ATV submits that the Consent Decrees should be amended to clarify that each copyright owner may, in its discretion, designate particular types of users or uses that the owner will authorize ASCAP or BMI (as the case may be) to include in their respective collective licenses, with the copyright owners exclusively reserving the right for themselves to license such rights to all other users or uses.[80] ASCAP and BMI also should be required, on a nondiscriminatory basis, to accept these limited grants of public performance rights from copyright owners. This arrangement will ensure the availability of multiple independent sources to license performance rights while still preserving the essential role for which ASCAP and BMI were created: servicing those markets that continue to be best served by collective licensing. Moreover, Sony/ATV expects a number of tangible benefits to result from clarifying the Consent Decrees to confirm each copyright owner's right to designate which public performance rights it may retain for exclusive licensing to specific types of users or uses, which we will discuss in detail below.

In 2000, when ASCAP and the Department jointly moved to amend the ASCAP consent decree to its current form,[81] the Department summarized the substantive changes in the decree in its memorandum urging the court to adopt the proposed second amended judgment:

> The proposed modifications would make a number of significant substantive changes to the current [decree]. First, the [amended decree] expands and clarifies ASCAP's obligation to offer certain types of music users, including background music providers and Internet companies, genuine alternatives to a blanket license, *and strengthens certain provisions intended to facilitate direct licensing by ASCAP's members*. Second, it streamlines the "rate court" provisions of the [current decree] in order to facilitate faster and less costly resolution of rate disputes between ASCAP and various music users. Third, the [amended decree] modifies or eliminates many of the detailed restrictions governing ASCAP's relations with its members.[82]

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[80] In this memorandum, we refer to designations of limited grants of rights to ASCAP and BMI, but we could have referred to limited withdrawals of rights from ASCAP and BMI. Since one is the complement of the other, either formulation could have been used. Indeed, EMI originally contemplated fully withdrawing from ASCAP and then providing ASCAP with only a limited grant of its public performance rights. When ASCAP promulgated its rules, it wrote them in terms of withdrawing partial rights.

[81] Notice of Joint Motion to Enter Second Amended Final Judgment, United States v. ASCAP, No. 41-1395 (S.D.N.Y. filed Sept. 1, 2000).

[82] Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment at 3-4, United States v. ASCAP, No. 41-1395 (S.D.N.Y. filed Sept. 1, 2000) (emphasis added).

Indeed, since the first consent decree was entered in 1941 against a PRO, the Department and the courts have sought to encourage direct licensing by copyright owners to improve the performance of the market. Notwithstanding the considerable benefits for both music users and music owners provided by ASCAP and BMI in the licensing of performance rights, the Consent Decrees have ended up significantly burdening the income payable to songwriters, composers and copyright owners by imposing substantial costs not replicated in a free market. In addition, at least in the view of copyright owners, the rate court process has not successfully resulted in license rates and terms that realistically correspond to what would be produced in a free market. Finally, the strictures of the Consent Decrees, which limit the differentiation in license terms, have stifled the ability of copyright owners to experiment with new delivery systems for music and to support the growth of competition in the delivery of music to consumers.

As a consequence, whenever it is possible for licensing sources to operate in the market independently of ASCAP and BMI, it is in the public interest to permit and encourage them to do so. The Department recognized this in its memorandum in support of the 2001 amendment to the ASCAP consent decree:

> Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of the justifications for collective licensing of performance rights by PROs. The Department is continuing to investigate the extent to which the growth of these technologies warrants additional changes to the antitrust decrees against ASCAP and BMI, including the possibility that the PROs should be prohibited from collectively licensing certain types of users or performances.[83]

[83] Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment 9 n.10, United States v. ASCAP, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

Sony/ATV respectfully submits that the technological developments that the Department anticipated in 2001 are here today. In the areas of interactive and non-interactive streaming, music video streaming, and satellite-based radio, for example, providers are small in number (but large in both revenue base and subscriber usage), can programmatically track every performance of every song they play, and can—and have during the time when digital rights had been withdrawn from the PROs by certain copyright owners—readily negotiate directly with music publishers to license public performance rights.

Unlike the geographically far-flung small businesses that have historically characterized the market for licensing public performance rights (and which precipitated the rise of the PROs to begin with), many media services today do not face the same insurmountable transaction, monitoring, and enforcement costs that have historically characterized the market for performing rights licenses. To the contrary, today's technology-driven music services operate nationally or even internationally from a single location while servicing hundreds of thousands or even millions of consumers. Unlike local bars and restaurants, many of these services are well-financed, having been acquired or developed by large public companies (such as Google, Clear Channel Communications, Amazon and Apple) or have become public companies themselves, thereby providing them with access to capital. These services also have detailed computer records that track every song performed on the service, so no sampling is required to determine usage. At least for some copyright owners, a well-functioning market can readily exist (under the proper regulatory framework) for the direct licensing of performance rights without the intermediation or other involvement of a PRO in licensing those rights.

Moreover, many technology-driven music companies are already effectively and successfully negotiating with many copyright owners for other rights—such as synchronization rights for music videos or print rights for lyrics—which further reduces the incremental costs of search and negotiation. For example, Sony/ATV has successfully negotiated directly with many of the most significant technology-driven music services in business today, including:

- Google Play Interactive Streaming
- Google Play Locker
- Apple iCloud Locker
- Amazon Locker
- Amazon Prime Music
- YouTube
- Pandora[84]

Technology-driven music companies operate services that are built almost entirely to exploit music on a concentrated basis even more so than terrestrial radio broadcasts. Music licensing is central to their existence and the need to negotiate directly with significant copyright owners as well as with the PROs would be a normal cost of doing business, just as in the case with any other business that must negotiate with multiple suppliers.

Further, the costs of monitoring and enforcement are low. Technology-driven music services are marketed and accessed nationally (or even internationally) over the Internet. They are readily and inexpensively identifiable by copyright owners and can be monitored for infringement through computer-driven programmatic means. Moreover, these services maintain digital data that track every song that is played, how often, by whom and when. Copyright

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[84] On November 11, 2015, Sony/ATV and Pandora announced another direct license deal. *See* Sony/ATV, Press Release, Sony/ATV and Pandora Sign Deal (Nov. 11, 2015). Although Sony/ATV has always been ready to negotiate direct licenses that provide our songwriters with fair compensation, the Pandora agreement is an almost unique example of a direct license when ASCAP and BMI can also include Sony/ATV's songs in their blanket licenses. For direct licensing to take place on any meaningful scale, the Consent Decrees must be modified to permit the partial withdrawal of rights.

owners can utilize these data, or can hire an administrator to utilize these data, to prepare accurate accountings to songwriters and other rights holders. This is in stark contrast to the situation with bars, clubs, and restaurants, which do not retain or provide such rich data and for which the PROs must resort to using complex, proprietary algorithms in order to estimate which songs are played and how often for the purpose of accounting and payment.

In light of the low transaction costs of licensing performing rights to technology-driven music services, as well as other music providers that certain music publishers believe they can effectively license and administer directly, a well-functioning and more efficient market in these rights would exist if copyright owners reserved the licensing of these rights exclusively to themselves, consistent with the rights granted to them under the Copyright Act.

Indeed, today it is even easier for music users to deal with Sony/ATV than it was in 2013, since a listing of Sony/ATV's global music catalog is now available online.[85] The company's entire music list, which contains more than two million songs (including those of the EMI Music Publishing companies, which Sony/ATV administers), can be viewed and downloaded at one time on the company's web site by music services and other interested parties. The list includes the titles, alternative titles, writer/composer country of origin and, to the extent available, ISRC codes, which enable users to match a musical composition to a particular master recording. This is an unprecedented level of transparency which gives current and prospective licensees a clear window into all of the compositions owned or controlled by Sony/ATV, thereby enabling licensees to make more informed licensing decisions. Similarly, Universal Music Publishing Group has made its catalog online, including song title, the percentage of the copyright interest UMPG owns or controls, the writers of the song and their PRO affiliation, the type of song, and,

[85] *See* Sony/ATV Music Publishing, Press Release, Sony/ATV Makes Entire Catalog Available Online (July 16, 2014).

if available, the International Standard Musical Work Code (ISWC).[86] And ASCAP recently announced a major improvement to its database, which now includes, among other things, the song title, the percentage of the fractional interest in the song represented by ASCAP as well as the writers of the song and publishers of the song and their respective PRO affiliations, the performers who have recorded the song, and the ISWC.[87]

Sony/ATV expects a number of benefits to come from enabling copyright owners to designate which public performance rights in their compositions they retain for exclusive licensing to specific types of licensees, including:

a. *Providing more flexibility in negotiating licenses*. The PROs are large organizations that license a large variety of music users, have demanding oversight over their licensing, and lack flexibility in the types of licenses they are willing (and permitted) to issue. For example, the PROs must license on an identical basis to "similarly situated" licensees, even though some similarly situated licensees (especially startups) may wish to be licensed in very different ways to satisfy their particular needs or work best with their individual business models. Sony/ATV believes that technology-driven music services will be the predominant means of music distribution in the future. But at the same time, new media services operate in a very competitive environment. Sony/ATV, and most likely other copyright owners that would engage in direct licensing, could negotiate licenses much better tailored to the specific requirements of these individual services—especially new entrants, encouraging the growth of additional users and fostering greater competition in the new media service marketplace.[88]

b. *Fostering the development of new sources of music distribution*. Songwriters and publishers want their compositions performed as many times as possible, as more performances, regardless of the rates being paid, equate to greater revenues for

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86 *See* UMPG, Song List, http://www.umusicpub.com/#contentRequest=repository&contentLocation=&contentOptions=. For press reports, see Ed Christman, *Sony/ATV Makes Organized Catalog Available Online*, BILLBOARDBIZ.COM (July 16, 2014); Ed Christman, *UMPG to Make Entire Database Easier for Licensees*, BILLBOARDBIZ.COM (June 27, 2014).

87 *See* ASCAP, Press Release, ASCAP Adds Licensable Share Information to Promote Greater Transparency in Public Performance Rights (Nov. 10, 2015). The ASCAP database may be found at https://www.ascap.com/Home/ace-title-search/index.aspx.

88 Most ASCAP and BMI licenses charge some percentage of the licensee's revenues or a flat dollar amount, and do not depend on the amount of PRO music played. A copyright owner licensing directly, for example, could charge on an entirely different basis, and could customize its fee arrangement depending on the particular needs and circumstances of each licensee.

songwriters and publishers than fewer performances. It is in the interests of songwriters and publishers to encourage the development of diverse, innovative music services in order to reach the largest audience. With more flexibility to negotiate license terms to meet a music service's specific needs, quicker times to contract signing, and lower administrative costs than ASCAP or BMI, publishers licensing directly have the ability and incentive to encourage and promote new sources and new models of music distribution, thereby providing greater income to songwriters and their heirs (many of whom are wholly dependent on such income).

c. *Reaching deals more quickly*. Sony/ATV believes that it—and other motivated publishers—can negotiate deals more quickly than can the PROs with all of their internal controls. This both saves costs and frees up management resources, especially for the licensee, which surely can be put to better use in running the music service. The ability to quickly come to closure on a license negotiation and the increased cost certainty, especially where the licensor also can be flexible in its terms and conditions, can be very valuable to all parties and especially valuable to startup music services. It also means songwriters can be paid more promptly.

d. *Reducing administrative costs*. The PROs have to levy a sizable administration fee to cover their operating costs, which includes the costs of negotiating and administering agreements, monitoring overhead, legal fees and other costs (especially high in the rate court context), and distributing revenues. ASCAP's and BMI's U.S. administration fees, for example, are effectively 17-18%. Sony/ATV believes that it can reduce administrative costs significantly below this level, thereby creating greater efficiency in licensing and greater net royalty income for songwriters, even without any rate change.

e. *Providing better and more efficient administrative solutions*. Dealing with a PRO gives the licensee only those administrative solutions that the PRO is offering. There are, however, third-party services in the market that offer alternative administrative services. If copyright owners license directly, they can choose the best among the available administrative solutions. Especially when these administrative solutions are outsourced, competition to provide better and more efficient administrative solutions will intensify among third-party providers as well as ASCAP and BMI (and also incentivize the PROs to improve their services to provide more cost-effective administrative solutions in order to compete with new market entrants), with the result that licensees, songwriters and music publishers will all benefit from better services.

f. *Reducing the costs and uncertainty of fee disputes.* When license fee disputes cannot be resolved with ASCAP or BMI, the recourse is lengthy and costly "rate court" litigation. Rate court proceedings can be years in duration and cost the parties millions, if not tens of millions, of dollars. These are costs that are passed through to and ultimately paid by the songwriters and publishers when incurred by the PRO and by users when incurred by a music service. In addition, there can be considerable uncertainty during the pendency of the dispute as to the licensing rate that will ultimately be charged. Even if an expedited arbitration is adopted as a dispute resolution mechanism—which should sharply reduce the massive costs of rate court litigation, resulting in far lower administration costs burdening the performance income payable to songwriters, composers and copyright owners—it is still in the interest of Sony/ATV to negotiate mutually agreeable deals.

g. *Allowing greater transparency in royalty distributions*. Contrary to the concerns that have been expressed by some, Sony/ATV believes that direct licensing offers greater transparency in how royalties are calculated, collected and distributed. While there are songwriters and songwriter associations that may believe that ASCAP and BMI's respective allocation and distribution methodologies for royalty payments are "transparent," in reality, the methods used by ASCAP and BMI to allocate payments to the various music publishers and songwriters are complicated and often opaque. The "transparency" of which some songwriters and writer associations speak is typically the division of royalties between publisher members and songwriter members; however, this division is only a small piece of the transparency equation. Direct licensing gives Sony/ATV and other copyright owners a better ability to demand detailed accountings, monitor payments, conduct audits, and provide more detail to their songwriters in regard to compensation.[89]

h. *Creating increased competition among publishers to sign songwriters*. Publishers that retain the exclusive rights to license will have an important new dimension in which to compete in the signing of songwriters. Today, the PROs conduct essentially all of the licensing of public performance rights for musical compositions. This homogenizes licensing as a service and removes it as a quality on which publishers compete. If publishers are permitted to designate uses or users to which they will have the exclusive right to license, publishers will begin to compete to attract and retain songwriters on the basis of their success not only in negotiating financially attractive direct licensing deals but also their success in supporting and nurturing new providers and models of music services, gaining broader and deeper penetration of their songs to wider audiences, reducing administrative costs, and providing better services to songwriters. This competition among publishers for songwriters is likely to intensify as technology-driven music services gain a greater share of the music marketplace and direct licensing becomes a more important element of music publishing. Moreover, since entry into music publishing is relatively easy—as demonstrated by the entry of over twenty significant new entrants since 2002 (including BMG, Kobalt, Imagem, Reservoir Media Management, Songs Music Publishing, and Primary Wave)—a significant dimension in which new entrants into publishing are likely

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[89] Again, as noted, because most technology-driven music services maintain and provide accurate digital data regarding which works have been transmitted and how often, no complex algorithms need to be used to estimate performances in order to allocate payments to songwriters and other rights holders, providing for greater transparency.

> to compete is the success that an entrant has in signing new media deals that both earn revenues and exposure for their songwriters.

Sony/ATV is also concerned that in today's regulated environment the fees paid to songwriters and publishers for public performance rights for musical compositions streamed over technology-driven music services do not reflect the value that a less regulated, more open market would produce. In assessing value, it is important to keep in mind that the performing right to a musical composition is an essential requirement for a music service to be able to perform a song on its platform. In the absence of a performing license to a composition, the service cannot play any recording of that composition by any performer. Yet under the ASCAP and BMI new media licenses, songwriters receive surprisingly little even for compositions that are performed millions of times.

While there is no dispute that copyright owners have an interest in increasing the income payable for the use of their compositions—it is a basic economic truth that all parties seek to maximize their returns when transacting in a market—they also need to ensure that their compositions are licensed and to maximize the number of prospective licensees to whom they license. Thus, it is important to emphasize that copyright owners have a substantial incentive to see that new media services not only succeed but that competition among such entities increases and to license them accordingly. While revenues from technology-driven music services may be comparatively small today, they are the most promising potential source of growth in the music industry as streaming music companies increasingly replace the prior business models that have existed in the music industry for decades. This is particularly the case given the increasing ownership and usage of smart phones and other Internet-enabled mobile devices that allow consumers to play music anywhere, even "on the go," either from a vast library offered by a streaming service, or from their own music collections digitally stored in "the cloud."

The Consent Decrees should be clarified to confirm that each copyright owner, in its discretion, has the right to designate particular types of uses or users that the owner will authorize ASCAP or BMI to include in their respective collective licenses. Moreover, to assure that ASCAP and BMI are prevented from discouraging owners from limiting their grant of licensing rights by penalizing those copyright owners that choose to engage in direct licensing (whether through surcharges or increased fees or otherwise), ASCAP and BMI should be required, on a nondiscriminatory basis, to accept these limited grants of public performance rights from copyright owners in their musical compositions.

6. What, if any, rationale is there for ASCAP and BMI to engage in joint price setting if their licenses do not provide immediate access to all of the works in their repertories?

Joint price setting is simply a consequence of blanket licensing. For long-standing and well-known efficiency reasons, ASCAP and BMI should be permitted to offer blanket licenses, which by their nature will require joint price setting. In this regard, it does not matter if the PRO license is a fractional license as opposed to a 100% license. Copyright owners who do not find it efficient or practical to engage in direct licensing (say, of their respective fractional interests) will continue to wish to have their interests licensed through blanket licensing by some collective licensing agent such as ASCAP or BMI.