BEFORE THE
UNITED STATES DEPARTMENT OF JUSTICE

In re: Antitrust Consent Decree Review	*United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.)

COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge appreciates the opportunity to comment on the above-captioned proceeding.

I. PROs play a critical role in the marketplace, but need guardrails to prevent abuses of market power.

A. Blanket licenses without a rate court would likely violate antitrust laws

The Supreme Court has noted that blanket licenses, absent a rate court, pose a high risk of violating antitrust laws. In the case of *Broadcast Music, Inc. (BMI) v. Columbia Broadcasting System (CBS), Inc.*,[1] the Supreme Court held that the blanket license used by the PROs was not *per se* illegal under the antitrust laws. However, that holding rested on the existence of the consent decrees, and the rate court they mandated.[2] Without the consent decrees in place, the system of PROs and blanket licenses may violate the antitrust laws.

The Department's assessment that ASCAP and BMI's use of the blanket license amounted to a violation of antitrust law holds as true today as it did in 1941. While the blanket license is clearly beneficial to save artists, rightsholders, and all types of consumers from the significant

[1] 441 U.S. 1 (1979).

[2] "But it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices. In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice. See id., at 694-695. That fact alone might not remove a naked price-fixing scheme from the ambit of the per se rule, but, as discussed infra, Part III, here we are uncertain whether the practice on its face has the effect, or could have been spurred by the purpose, of restraining competition among the individual composers." *Id*. at 13 (1979).

costs associated with negotiating licenses directly with each individual party, on its own, it would make competition difficult. If the only way to access *any* of the works is to pay for a license to *all* of the works, there's no longer competition between constituent works at all. ASCAP and BMI, as the PROs with the greatest repertory, would have significant market power that they could use to impose high prices and bad contract terms on licensees. More concerningly, they could demand other contract terms ranging from preferential placement in playlists, to platform ownership stakes. This would hurt both competition and music consumers.

B. Blanket licenses are hugely beneficial, but the consent decrees are the primary--and sometimes sole--wellspring of those benefits.

In a market as fragmented as music performance rights, "A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided."[3] Moreover, when properly implemented, they are rare examples of an economic win-win-win. Licensees enjoy lower transaction costs and legal indemnification that allows them to respond nimbly to changing consumer demands; similarly, blanket licenses reduce barriers to entry in an otherwise highly concentrated music delivery space. Venues can use blanket licenses to legally insulate themselves against liability, which in turn provides performing artists the freedom to play whatever they wish without taking on onerous *ex ante* research and clearance obligations. Smaller artists can extract greater rates from their performance rights than they would be able to secure in direct negotiations, and more well-known artists retain the right to negotiate directly with would-be licensees for higher rates or alternative modes of compensation. Through all of this, consumers benefit from being able to seamlessly experience a wide variety of music in a multitude of contexts.

Blanket licenses cannot, however, produce this kind of benefit in a regulatory vacuum. The very existence of a blanket license is an exercise of market power that not only invites but actively incentivizes rent-seeking. The model is functional precisely because of the guardrails imposed by the existing consent decrees. Moreover, there is no reason to doubt that these abuses would come roaring back in the absence of substantial government oversight; indeed, we enjoy the rare benefit of a counterfactual, merely by looking to SESAC and GMR.

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[3] *Id*. at 20.

Transparency

The fact that licensees can acquire any information at all about the contents of a PRO's repertory is a direct result of the consent decrees.[4] PROs have every natural incentive to obfuscate their holdings as a simple matter of negotiation. The advantage provided by nondisclosure is so potent that even *self-imposed* transparency mandates are shucked aside in favor of increased bargaining power; in 2011, ASCAP notably failed to follow its own internal transparency rules because a member publisher believed that the ambiguity would provide leverage in negotiating against a licensee.[5] This systematic lack of transparency (and PROs' opposition to even minimal transparency mandates) was well covered in the comments responding to this Department's 2014 inquiry.[6] We can merely look to SESAC, which is not under a consent decree, and was found by a magistrate judge to have "engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no real alternatives but to purchase their licenses"[7] as recently as 2013.

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[4] ASCAP AFJ2 § X(B)(2) requires that ASCAP disclose the contents of its catalog in a publicly accessible, machine readable format. This *ex ante* disclosure prevents the kind information asymmetry problems that would otherwise distort the market.

[5] *In re Pandora Media, Inc.,* 6 F. Supp. 3d 317, 345 (S.D.N.Y. 2014), *aff'd sub nom. Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers*, 785 F.3d 73 (2d Cir. 2015)

[6] *See, e.g.,* Comments of Future of Music Coalition at 12 ("Under the Consent Decrees, ASCAP and BMI have struggled with transparency in internal and external matters."); Comments of CCIA at 4-7 ("PROs should not simultaneously be empowered to control a large and economically significant swath of cultural works, and at the same time be permitted to obscure the boundaries of that dominion"); Comments of NCTA at 5 ("The lack of transparency in the current system is a significant impediment to concluding transactions; creating greater transparency in these respects would have significant efficiency benefits ... The existing ASCAP and BMI song databases are fundamentally inadequate for users seeking to identify, for example, the songs licensable on a publisher-by-publisher or writer-by-writer basis"); Comments of NAB at 4 ("Lack of meaningful access to [licensing] information has increased transaction costs and hindered licensing activities - both direct and collective."); Comments of Netflix at 17 ("the lack of transparency to users can lead to material information imbalances or asymmetries between licensors and licensees -- which render a marketplace setting demonstrably noncompetitive"); Comments of RMLC at 32 ("Currently, each of the three U.S. PROs maintains databases that identify the PRO affiliations of composers and publishers, as well as the music content of thousands of television and radio programs (and even some commercial announcements. … The PROs, however, have gone to great lengths to ensure that users do not have access to any of these databases."); Comments of National Religious Broadcasters Music Licensing Committee at 10 ("One issue on which the Consent Decrees fail, is in the requirements for disclosure by the PROs of their membership and repertories. The online databases made available by the PROs are difficult to use, allowing only single works to be searched at a time, and are unreliable. The PROs themselves disclaim the accuracy of their database.").

[7] *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5087 (Dec. 20, 2013) at *33. This lack of transparency also deprives licensees of the ability to directly license works in SESAC's repertory; the judge further notes that SESAC "do[es] not adequately disclose their repertory so that radio stations can know exactly who they need licenses from, to fully insulate themselves from copyright infringement." *Id.* at 29.

On the songwriter side, the decrees require PROs to disclose their payment formulas.[8] This provides a significant benefit for songwriters, who can use this information to hold ASCAP and BMI accountable for the amounts owed. Publishers, by contrast, engage in more opaque accounting practices, with less accountability:

> Songwriters trusted ASCAP to account reliably and fairly for the revenues ASCAP collected and to distribute the portion of revenues owed to writers promptly and fully. Songwriters were concerned about the loss of transparency in these functions if publishers took over the tasks of collection and distribution of licensing fees. They were concerned as well that the publishers would not manage with as much care the difficult task of properly accounting for the distribution of fees to multiple rights holders, and might even retain for themselves certain monies, such as advances, in which writers believed they were entitled to share.[9]

SESAC does not publicly disclose the percentage of its collections paid to members, or the formula by which it assesses royalties.[10]

Non-exclusivity

The consent decrees also prohibit ASCAP and BMI from demanding that songwriters license exclusively through the PROs.[11] This establishes the blanket license as a floor; songwriters will always have their works included in the blanket license, but also retain the right to negotiate direct deals for a higher rate or better terms. Similarly, licensees will always be able to obtain a blanket license at a predictable rate, but can also license directly with the songwriter on an ala carte basis. Prior to the consent decrees, ASCAP required that songwriters grant the PRO exclusivity, depriving them of the ability to directly license their works. SESAC, by contrast, has been found to discourage direct licensing by obscuring the contents of their repertory, depriving licensees of the information needed to even identify the SESAC members with whom they need to contract.[12]

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[8] BMI AFJ VII(A); ASCAP AFJ2 § XI(B)(1).

[9] *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 334–35 (S.D.N.Y. 2014), *aff'd sub nom. Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers*, 785 F.3d 73 (2d Cir. 2015)

[10] Paul Resnikoff, *A Comprehensive Comparison of Performance Rights Organizations (PROs) In the US*, Digital Music News (Feb. 20, 2018), https://www.digitalmusicnews.com/2018/02/20/performance-rights-pro-ascap-bmi-sesac-soundexchange/

[11] AFJ2 IV(B); AFJ IV(A).

[12] *RMLC v. SESAC* at *29.

II. The PROs are not competitive with one another, and rescinding the consent decrees would exacerbate existing competitive problems

A. Fractional licensing has eliminated the need for PROs to compete to attract licensees

PROs are two-sided markets, consolidating inputs from songwriters and providing outputs to licensees.[13] While it is indeed true that PROs compete to attract songwriters on the input side, fractional licensing has significantly diminished the incentive to compete to attract licensees.

Most modern songwriting is collaborative. In 2016, most "popular mainstream songs ha[d] (on average) at least four writers and six publishers each."[14] Thirteen of that year's top 100 hits had *eight or more* songwriter credits attached.[15] Fractional licensing requires licensees to obtain licenses sufficient to cover each separate songwriter's fractional interest in the final product. This Department correctly concluded at the conclusion of its 2014-2015 review that such a practice substantially undermines the benefits of blanket licensing, noting that "if the PROs were to offer fractional licenses, then a digital user would be unable to rely on a license from the PRO to perform any work in which a partially withdrawing publisher owned any fractional interest."[16] To assemble the full rights to even *one* song, a licensee may have to enter into licensing arrangements with two, three, or even all four PROs. After the Second Circuit held that such a practice did not violate

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[13] Although a full analysis of the anticompetitive effects is beyond the scope of these comments, it is important to note that even under the unified market theory proposed in *Ohio v. American Express Co.*, 585 U.S. __ (2018), it is almost beyond argument that substantial harms would fall on both sides of the PROs' market. Songwriters would become more susceptible to known and documented forms of disenfranchisement (arbitrary exclusion, de facto prohibitions on direct licensing, opaque accounting methods), and licensees would face higher prices, discriminatory licensing conditions, and weaponized information asymmetries. Even aside from these, it is important to note that, unlike the payment processor involved in the Amex decision--a relatively "thin" intermediary which served primarily to direct payments between merchants and consumers--PROs mediate complex transactions. Payouts are determined by equations with numerous compounding variables including the type of play, the method of accounting provided by the licensee, the frequency of payouts to the artist, the structure of the license involved, and more. A change to any part of this can have tremendous knock-on effects not only among the membership, but (thanks to an interconnected marketplace and the relative dominance of ASCAP and BMI in particular) across the entire market. PROs also provide a wealth of services to artists and licensees alike. Any one of these can become a potential vector for anticompetitive behavior in the absence of transparency and oversight.

[14] Daniel Sanchez, *The Average Hit Song Has 4+ Writers and 6 Different Publishers*, Digital Music News (Aug. 2, 2017), https://www.digitalmusicnews.com/2017/08/02/songwriters-hit-song/.

[15] Mark Sutherland, *Songwriting: Why it takes more than two to make a hit nowadays*, Music Week (May 16, 2017), https://www.musicweek.com/publishing/read/songwriting-why-it-takes-more-than-two-to-make-a-hit-nowadays/068478.

[16] Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (2016) 16, *available at* https://www.justice.gov/atr/file/882101/download.

BMI's consent decree,[17] that prediction has become a reality; with licensees legally obligated to secure licenses with all potential PROs, there is little to no incentive to compete on price, terms, or other licensee-facing features.

Moreover, it is important to remember that no consumer structures their consumption preferences around PRO affiliations. ASCAP and BMI represent a huge diversity of songwriters, many of whom hold only fractional rights in any given track. A listener's preferences are dictated by genre, recording artists, influences, and other factors--not which company manages the royalty streams for public performance rights. The Department would be extremely hard pressed to find a music fan who builds his playlists not as "classic country" or "alt-rock," but as "exclusively BMI-managed."[18] PRO affiliation is both invisible and irrelevant to end consumers, and as a result, it is irrelevant to the business needs of the services which seek to reach them. To meet consumer demand, services with any substantial catalog *must* secure the entire array of blanket licenses.

B. Eliminating the consent decrees would put increased control in the hands of publishers in an already-consolidated market

Three major publishers--Sony, UMPG, and Warner Chappell--together control approximately 60% of the market for musical works.[19] All three are owned by, or are sister companies to, the "big three" record companies which together control 70% of the global recorded music market.[20] The publishing market is not one of scrappy upstarts; it is dominated by massive multimedia conglomerates that exercise enormous power over licensees and artists alike. They are part of deeply vertically integrated conglomerates that control the supply chain from publishing, to recording, to marketing and promotion, and to film, television, and video game placement. In the absence of the consent decrees, these hugely powerful actors will likely attempt to take over the important components of the PROs' role, re-entrenching their dominant market power and allowing them to further exploit the artists and consumers who already heavily rely on them.

Publishers have, in fact, explicitly expressed their desire to exercise greater control over

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[17] *United States v. Broad. Music, Inc.*, 720 F. App'x 14 (2d Cir. 2017).

[18] Even if such a fan did exist, fractional licensing would likely leave that playlist anemic-to-nonexistent.

[19] *Global recorded-music and music publishing market share results for 2018*, Music & Copyright (May 8, 2019), https://musicandcopyright.wordpress.com/tag/market-share/.

[20] *Id*.

digital services by partially withdrawing performance rights for digital licensees. This push raised enough alarm among the market to spark this Department's 2014 review. Without the guard rails of the consent decrees, there is little to stop publishers from making good on their desire to bring greater negotiating power in-house, leaving the non-profit PROs to manage less lucrative terrestrial and venue licenses. Publishers are ready to reshape the market, and not in a way that will benefit artists or consumers of music.

III. Conclusion

The benefits of the current PRO system--for consumers, services, and songwriters alike--depend intimately on preserving (or even strengthening) the terms of the current consent decrees. The Department of Justice should refrain from changing them at this time.