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CONGRESS, NOT DOJ OR THE COURTS, SHOULD DECIDE WHETHER TO UPDATE MUSIC-COPYRIGHT FRAMEWORK

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INTRODUCTION

Tom Lehrer's famous recording of his song "New Math"[1] begins with the joke that, in teaching basic mathematics in the New Math way, "the important thing is to understand what you're doing, rather than to get the right answer." Lehrer's confusingly rapid, complicated rendition of the song winds up with the ominous pronouncement that, in his next evening's performance, "We're gonna do...fractions."

In the world of music licensing, getting the right answer—an answer that makes it easier to license music while preserving the rights of copyright-holders—seems not to be focus of U.S. Department of Justice's recent inquiry[2] into the consent decrees that govern how the two largest U.S. performance-rights organizations (PROs)–the American Society of Composers (ASCAP) and Broadcast Music Inc. (BMI)–license music copyrights to restaurants, bars and other businesses that play music in their venues. In fact, the DOJ's proposals appear to stir more anxiety in a broader variety of stakeholders than the New Math ever did.

One may wonder what "consent decrees" are and how the Justice Department got into the job of licensing music copyrights. The short answer is that, for 75 years, both ASCAP and BMI have operated under structured, ongoing court settlements that resolved the DOJ's antitrust lawsuits against both PROs. We call these settlements "consent decrees" because parties on both sides of the cases have "consented" to the settlement, which requires ongoing court administration. Despite frequent invocations of "free-market" principles by music companies and PROs, it's a simple fact that there's been nothing like a free market in music copyrights for at least 75 years. The period arguably is even longer, if one looks back further to the Copyright Act of 1909 and its creation of compulsory licenses for mechanical recordings (later known as "phonorecords") of copyrighted musical works without the consent of the copyright holders.

Predating the consent decrees are the two major American PROs themselves, which, as the Copyright Office puts it in its 2015 report, are viewed as both as "a blessing and a threat":

> Licensees laud the efficiencies of the blanket licenses they offer while at the same time bemoaning the societies' perceived bargaining position as a result of that very breadth. Songwriters, for their part, are deeply concerned about the potential loss of transparency in reporting and payment, should major publishers opt to withdraw from the PROs and license performance rights directly—as some publishers have suggested

1. Tom Lehrer, "New Math," disc 3, track 10 of *The Remains of Tom Lehrer*, Rhino/Warner Archives, May 23, 2000. See https://www.youtube.com/watch?v=UIKGV2cTgqA

2. U.S. Department of Justice, "ANTITRUST CONSENT DECREE REVIEW - ASCAP AND BMI 2014," last updated Dec. 16, 2015. https://www.justice.gov/atr/ascap-bmi-decree-review

they may do in a quest for higher rates than those set by the rate courts under the consent decrees.

The PROs are in the odd position of receiving praise for the predictability and efficiency they bring to rate-setting in music copyrights, while simultaneously being suspected or accused of lacking transparency and true understanding of what market prices for blanket licensing should be. They're in the uncomfortable position of trying to find a middle ground—one that isn't restricted by the consent decrees but in which they're deemed sufficiently necessary that the music publishers will want them to continue to play some role, either under modified consent decrees or under an end to consent decrees altogether.

The key thing to remember, if you like the predictability of the consent-decree rates and potential for transparency that the PROs provide under the consent decrees, is that for consent decrees to work, music copyright publishers—and not just the PROs—have to actually *consent* to them. And this is something some music publishers increasingly are disinclined to do, either because they believe they can get more revenue from direct licensing to internet companies or because they believe their catalogs are so artistically necessary to the general public that they can pull **all** their music rights for internet and non-internet licensees alike from the PRO/consent-decree licensing regime.

As a result of recent consolidation among music publishers, the top three music publishers now hold more than 73 percent of music-composition copyrights for physical plus digital distribution. It's thus possible for any of the top three publishers to withdraw their catalogs from the ASCAP and BMI consent-decree frameworks and, in doing so, affect the PROs' ability to function effectively as a way to ensure performance rights can easily be licensed.

The PROs' administrative costs don't decline when one or more of the big publishers withdraws its catalog, even if their revenues do. They thus have been eager to earn DOJ support for modifying the consent decrees to allow publishers to "partially withdraw" internet-related licensing rights. The combined result of the DOJ's inquiries and the U.S. Copyright Office's efforts to clarify what it thinks the DOJ may be getting wrong is that everyone steeped in these issues now must worry about what unintended consequences a new revision of the consent decrees might bring.

DOJ'S CONSENT DECREE REVIEW

There are two major issues with the reforms the DOJ has been proposing to stakeholders ever since the department began its review of the consent decrees in 2014. The first involves efforts by music publishers to execute "partial withdrawal" of the "digital" rights in song compositions. Some music publishers have argued they can use the PROs to gather revenues for traditional licensing (that is, licensing to bars, concert halls, restaurants and radio stations) while sidestepping the PRO framework when negotiating separately and directly with digital outlets, such as services offering internet radio.[3] Because they are "new media" – that is, internet-based companies – these digital outlets are presumed to be able to pay much higher royalty rates. The facts to date do not support this supposition; internet-based music services such as Pandora may not yet be profitable or may not become profitable anytime soon.[4]

The DOJ seemed to signal last year that it might be willing to amend the consent decrees to allow (or, as the music publishers might put it, "clarify") that a publisher can withdraw only the digital rights to a work (thus allowing separate negotiations for higher rates from internet companies) while preserving the rest of the rights within the consent-decree framework of ASCAP and BMI. In proposing this idea, the DOJ has relied on one part of the 1976 Copyright Act that allows a rights-holder to subdivide its copyright interests and license each of them differently. The U.S. Copyright Office concurred with this view in its February 2015 report, "Copyright and the Music Marketplace."[5]

But this interpretation of the Copyright Act runs counter to the actual jurisprudence interpreting the consent decrees. Consider, for example, U.S. District Judge Denise Cote's 2013 analysis of the consent decree governing ASCAP rate-setting:

> ASCAP's argument is predicated on the Copyright doctrine of "divisibility of rights" within a copyrighted work. It is true that "[t]he Copyright Act confers upon the owner of a copyright a bundle of discrete exclusive rights, each of which may be transferred or retained separately by the copyright owner." But while the Copyright Act allows rights within works to be alienated separately in general, [the consent decree] imposes restrictions beyond those imposed by the Copyright Act on ASCAP. [The consent decree denies] ASCAP the power to refuse to grant public performance rights to songs to particular users while, at the same time, retaining the songs in question in its repertory.[6]

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3. Ed Christman, "Universal Music Publishing Plots Exit From ASCAP, BMI," *Billboard*, Feb. 1, 2013. http://www.billboard.com/biz/articles/news/publishing/1537554/universal-music-publishing-plots-exit-from-ascap-bmi

4. Vikram Nagarkar, "Pandora vs. Spotify: Which Is the Better Investment Option for You?", *The Street*, Jan. 20, 2015. http://www.thestreet.com/story/13027011/1/pandora-vs-spotify-which-is-the-better-investment-option-for-you.html

5. Register of Copyrights, "Copyright and the Music Marketplace," U.S. Copyright Office, February 2015. http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf

6. Judge Denise Cote, "Opinion & Order," *In re Petition of Pandora Media Inc*., U.S. District Court for the Southern District of New York, Sept. 17, 2013. https://www.scribd.com/doc/169132192/Pandora

In addition to whatever the Copyright Act may be interpreted to say, Judge Cote determined the consent decree governing ASCAP, to which ASCAP remains a party, requires a rights-holder must be "all in" or "all out" regarding licensing by ASCAP. In other words, a rights-holder can't obtain "partial withdrawal" of its digital rights alone, but must either allow ASCAP to license all its rights or else opt out of the consent decree altogether. In a separate court decision regarding BMI, Judge Louis Stanton reached the same conclusion on this particular issue.[7]

If a music publisher opts out, it takes the risk that it may not be able to negotiate the guaranteed revenue that an ASCAP-administered rate might generate. Still, some of the top three music publishers, who collectively hold rights to more than 70 percent of the American market in music compositions, have signaled their predisposition to believe their market power could enable them no longer to rely on ASCAP or BMI; they're ready to withdraw their catalogs from the consent-decree framework altogether.

In spite of some publishers' apparent willingness to withdraw all their rights, the Copyright Office concluded in its 2015 report that this shouldn't be necessary. The USCO signaled its view that the big publishers deserve the break that partial withdrawal of digital rights would represent, despite the publishers' aggressive pursuit of remunerative licensing deals with companies like Apple and Pandora, even in the absence of such a break.

WORKING WITH FRACTIONS

During the inquiry the DOJ opened in 2014, the department seemed open to the publishers' and PROs' arguments that the consent decrees should be modified to make partial withdrawal possible. This undoubtedly led some to conclude the Justice Department was predisposed to take the music publishers' side on the full range of licensing issues. But then the DOJ threw a curve ball, which is where Tom Lehrer's scary fractions come in. In a communication to stakeholders that was part of its consent-decree inquiry, the Justice Department asked whether it would be a good idea to allow PROs to license 100 percent of musical compositions, even though each PRO might have rights to less than 100 percent of a work.

The difficulty of working with fractions underlies the DOJ's apparent readiness to get rid of what's called "fractional licensing"—the established norm in modern American music that different creators, through contracts with one another, can hold copyright interests in different fractions of a musical composition. It's true that fractional licensing creates a lot of uncertainty for music licensees, especially because there's no standard, transparent database that licensees can consult in order to ensure they have licensing of 100 percent of a work. In our current framework, music publishers have no obligation to provide or contribute to such a database. In fact, no one does.

Advocates of 100 percent licensing (as opposed to fractional licensing) point to the original understanding of the 1976 Copyright Act, which provided that each co-owner could license 100 percent of a work, provided certain conditions were met, including an accounting that there is an equitable split of the revenue with other co-owners. This would make licensees' job much simpler – just obtain a blanket license from one PRO and the deal for licensing would be done. Because statutory damages are quite high–even for unintentional infringement and even when a would-be licensee has done everything it can do to determine who has rights to each fraction of a song—100-percent licensing would be a one-stop-shopping opportunity with the extra added benefit that it would reduce or even eliminate the risk of having to pay such damages.

Of course, as the U.S. Copyright Office told Congress in a new report earlier this year,[8] a 100-percent-licensing proposal may generate far more problems than it solves. Worse, the Copyright Office complained, none of the stakeholders recently involved before the Copyright Office even raised fractional licensing as an issue worth discussing in the inquiry that led to the February 2015 report:

> Significantly, in the Office's recent study, the fractional licensing of jointly owned musical works—a longstanding practice of the music industry—went unquestioned as a background fact by the many stakeholders who participated, including both licensors and licensees.

The apparent unwillingness of stakeholders on both sides to drill down into the problems of and solutions to fractional licensing is entirely understandable. Most stakeholders have been working around fractional licensing—and the difficulty of managing this licensing scheme—for quite some time. But it's important that we continue to remember that Congress, in its last major revision of this substantive portion of the Copyright Act in 1976, tried to simplify the question. As a basic pillar of that act, Congress set out to recognize that a copyrighted work shouldn't be "indivisible" – that the bundle of rights we call "copyright" can be owned, in part, by creators working jointly. Congress also tried to establish a simple "default" understanding of how joint copyright owners

7. Judge Louis Stanton, "Opinion & Order," *Broadcast Music Inc. v. Pandora Media Inc.*, U.S. District Court of the Southern District of New York, May 28, 2015. https://www.scribd.com/doc/266951766/BMI-Pandora-Ruling

8. Maria A. Pallante, "Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works," U.S. Copyright Office, Jan. 29, 2016. http://copyright.gov/policy/pro-licensing.pdf

would be able to license their interests. The act sets out a "tenancy in common" interest, in which each partial rights-holder has some ability to license 100 percent of the work in question, liable to other rights-holders for an "accounting"—that is, a proportional payment on the assumption that each rights-holder gets an equal share. For example, a song written by two co-authors would see each assume a 50-50 share of the licensing revenues that one co-author might have negotiated; revenues from a song with four co-authors would be split with 25 percent going to each, and so on.

The tenancy-in-common sets out what Congress intended to be the general rule, but in industry practice, it has turned out to be the exception, because the 1976 Copyright Act has been interpreted to allow modification of this "default" through private contracts among creators. Would we all have been better off if 100-percent licensing had in practice been the general rule? Certainly, it would have been easier for new digital platforms to bring music to users through such a simple default for music licensing.

But the ease of licensees' dealing with a 100-percent-licensing paradigm (mediated by the PROs under modified consent decrees) is arguably more than offset by the disruptive aspect of blanket elimination of contract negotiations that, following industry understandings, allocate rights differently and shape creator incentives accordingly. The Copyright Office cites approvingly in this year's report on fractional licensing a treatise that summarizes collaborators' options by noting they are "free to alter this statutory allocation of rights and liabilities by contract." Building on this reading, the office outlines all the ways in which eliminating fractional licensing (or even trying to reduce it) may undermine both copyright law and contract law.

The Copyright Office makes some compelling points against 100-percent licensing – in particular, whether it makes legal sense for any PRO to be able to license rights it doesn't actually own. At the same time, the office has acknowledged downsides to fractional licensing that a more simplified, more transparent music-licensing system could address. Some of those downsides affect companies that are striving to make music more widely available, and more flexibly usable, on the internet. As the office's 2015 report states:

> Even when distributors are perfectly willing to pay licensing fees, they may find it difficult to identify the owners of the music they use. Those seeking to launch new delivery platforms are constrained—and sometimes even defeated—by the complexities and expense of convoluted clearance processes.

To some extent, the Copyright Office acknowledged this problem when it also proposed in its 2015 report to move music-composition rate-setting out of the New York federal courts in which it now resides and "migrate" such decisions to the Copyright Royalty Board, which already sets rates for sound recordings (which are a distinct intellectual-property interest from the music-composition copyrights under consideration here). But this would remove whatever market competition remains among PROs that could put downward pressure on licensing costs.

Although the Copyright Office doesn't much delve into it, there's the additional question of whether the interests of music fans themselves get taken into account. It's generally understood there is an underlying public-policy interest in ensuring that copyrighted music gets licensed simply and easily and, to the greatest degree possible, in a way that allows the general public to discover and enjoy. But uncertainty about the need to license—or about how to ensure a license is adequate with regard to music rights—can be a problem for restaurants and small businesses. A business may have paid for the rights to the songs on its jukebox or through its streaming service, but what is its financial obligation when an employee plugs in a smartphone or computer and treats the establishment to his Pandora or Spotify playlist?

CONCLUSION

The Copyright Office clearly thinks the Justice Department's decision even to broach a 100-percent-licensing rule was the wrong answer. It's equally clear that the office's 2015 report, with its detailed recommendations for "guidelines" in music-licensing reform, is meant to frame, broadly speaking, what it means to "understand what you're doing."

It's nonetheless fundamental that advocates of sound public policy keep their eyes, ultimately, on what they consider the "right answer" to be. The Copyright Office's gestures in the direction of a "free market alternative…in the form of an opt-out right to withdraw specific categories of rights from government oversight" appear aimed to enable the extraction of rents from digital services, rather than truly promoting a digital-service marketplace.

Given that Congress has decided in other contexts (notably with regard to taxation) to promote digital services rather than burden them, it is odd for the Copyright Office to argue (or at least strongly imply) that digital services need to pay more, and that copyright-holders can selectively withhold digital rights in order to negotiate higher licensing fees. That doesn't sound like moving in the direction of a free market—instead, it sounds like picking winners. The music publishers and PROs would get guaranteed rates for licensing music to traditional licensees but could negotiate separate, much higher rates for any interactive music service. Is it a free-market solution to burden internet music companies with higher rates than older, more traditional licensees?

In fact, the very broad range of guidelines and solutions to the "music marketplace" that the Copyright Office recommended in its 2015 report strongly suggest that seeking to fix that marketplace by modifying the consent decrees is going to be inadequate to bring about either the "right answer" for marketplaces or the "right answer" for the general public, for whose benefit the Progress Clause (Article I, Section 8) of the U.S. Constitution was written. In both its "Music Marketplace" report and its report to Congress on fractional licensing, the Copyright Office only hints at the complexities of integrating the American music-licensing scheme with international norms:

> Finally, it is important to recognize that the United States' rules on joint authorship differ from those of many other countries that require the consent of all co-owners for any license, not only an exclusive to rights in foreign works, foreign law may also govern the joint work of a U.S. and foreign songwriter. [Footnotes omitted.]

Reviewing both the Justice Department's inquiry into the consent-decree framework and the Copyright Office's reports on the music marketplace and on fractional licensing, it's hard to escape the conclusion that neither entity should have the final word on what a comprehensive reform of our music-licensing system should look like. The Copyright Office concedes as much in its 2015 report:

> The Office endorses [review of the consent decrees], and—in light of the significant impact of the decrees in today's performance—driven music market—hopes it will result in a productive reconsideration of the 75—year—old decrees. At the same time, the Copyright Office observes that it is Congress, not the DOJ, which has the ability to address the full range of issues that encumber our music licensing system, which go far beyond the consent decrees.

In effect, the Copyright Office admits that neither it nor the Justice Department is really the right entity to resolve the problems inherent in our vastly complicated music-copyright system. That means it's up to Congress to engage directly on music-copyright reform, rather than leave modification of these frameworks to the DOJ, the Copyright Office or the federal courts who administer the consent decrees. It's Congress – the body directly responsible not only to all the music-industry stakeholders but also to the general public – which not only can fully "understand what we're doing" but also can achieve "the right answer" through its own express power to create and alter our copyright system.

But what's "the right answer"? Perhaps it centers on one of the different models for modifying the consent-decree framework, although certainly not any model that burdens internet platforms more highly than other media. Perhaps Congress would determine that the consent-decree framework no longer is needed and would modify both copyright law and antitrust law to allow music publishers to set their own rates through private negotiations. ASCAP and BMI might reposition themselves under that model as collection services that hire themselves out to the music publishers.

It's hard to know for sure which direction Congress might choose when it comes to reforming the labyrinthine landscape for licensing music copyrights. But given the sheer complexity of music copyrights and the number of stakeholders involved—including the general public, which is not necessarily fully represented by the DOJ or in the Copyright Office proceedings—asking Congress to intervene and determine the right answer is the surest path we have to find it.

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