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COMMITTEE ON JUDICIARY
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REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON RULES

CO-CHAIRMAN OF THE CREATIVE RIGHTS CAUCUS

January 12, 2016

The Honorable Maria Pallante
Register of Copyrights
U.S. Copyright Office
Washington, DC 20559

Dear Register Pallante,

As you well know, over the past two years the House Judiciary Committee has conducted an extensive review of the Copyright Act to determine if it is working properly in the digital age. As the Vice-Chairman of the Intellectual Property Subcommittee, one area of particular interest to me during this process has been how statutory and other government regulations are preventing fair compensation to songwriters.

The increased scrutiny on the current music licensing system by Congress and executive branch entities has understandably raised many questions. Most recently, questions have been raised surrounding the scope of the rights granted by performing rights organizations (PROs) that license musical works subject to federal consent decrees. For my benefit as I continue to examine these issues, I would appreciate the Copyright Office's views regarding the licensing of jointly-owned works by the PROs, and, specifically, what issues lawmakers and regulators should consider to avoid further eroding the property interests of musical composition owners.

I appreciate your timely response to this inquiry.

Sincerely,

Doug Collins

Doug Collins
Member of Congress

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

January 29, 2016

Dear Vice-Chairman Collins:

On behalf of the United States Copyright Office, I am pleased to deliver the attached response to your letter of January 12, 2016 requesting the views of the Copyright Office regarding the licensing of jointly owned works by the performing rights organizations ("PROs").

We appreciate your continuing interest in the fair and efficient functioning of our music licensing system, which, as you know, was the subject of the Office's February 2015 report, *Copyright and the Music Marketplace*. Please do not hesitate to contact me should you require any further information on this subject.

Respectfully,

Maria A. Pallante

Enclosure

The Honorable Doug Collins
Vice-Chairman
Subcommittee on Courts, Intellectual Property and the Internet
United States House of Representatives
1504 Longworth House Office Building
Washington, D.C. 20515

Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works

In February 2015, the Copyright Office released a comprehensive report on U.S. music licensing practices, *Copyright and the Music Marketplace.*[1] The report surveys the current music licensing landscape—much of which is subject to government regulation, including the federal antitrust consent decrees that govern the performing rights organizations ("PROs") ASCAP and BMI[2]—and recommends a number of structural changes. The Office hopes that Congress will consider the Office's suggestions for reform of the music licensing system as it continues its review of the nation's copyright laws.[3]

The Office's report followed an extensive public process conducted in 2014 that included written submissions from interested parties—including songwriters, recording artists, music publishers, record companies, licensing entities, public interest organizations, and digital music services—and six days of hearings held in Nashville, Los Angeles, and New York.[4] Throughout the study, participants expressed concerns regarding fair compensation for music creators, the inefficiency of current licensing practices, the lack of authoritative data to facilitate the identification of music, and the need for greater transparency in usage and payment information. The Office's recommendations aim to address these concerns by ensuring a fair and efficient licensing regime.

In recent months, the Office has become aware that a new and significant issue has arisen under the PRO consent decrees regarding the scope of rights granted to licensees by ASCAP and BMI. More specifically, we understand that as part of an ongoing review of the decrees by the Department of Justice ("DOJ"), DOJ is considering whether the decrees may properly be interpreted to require ASCAP and BMI to license 100 percent of the rights required to publicly perform any musical work in their respective repertoires, regardless of whether the work is wholly or only partially owned by the member (or members) of the PRO in question.[5] We refer

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[1] *See generally* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE (2015), http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf ("COPYRIGHT AND THE MUSIC MARKETPLACE").

[2] *United States v. ASCAP*, No. 41–cv–1395, 2001–2 Trade Cas. (CCH) ¶ 73,474, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree"); *United States v. BMI*, No. 64–cv–3787, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), as amended, 1996-1 Trade Cas. (CCH) ¶ 71,378, (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree"), *available at* http://www.justice.gov/atr/case-document/file/489866/download.

[3] *See* 17 U.S.C. § 701(b)(1), (4) (providing that the Register of Copyrights shall advise Congress on issues relating to and conduct studies regarding copyright, other matters arising under Title 17 and related matters).

[4] COPYRIGHT AND THE MUSIC MARKETPLACE at 14-15.

[5] DOJ initiated a review of the consent decrees in June 2014. *See* Ed Christman, U.S. Dept. of Justice to Review ASCAP and BMI Consent Decrees, BILLBOARD (June 4, 2014), http://www.billboard.com/biz/articles/news/legal-

to the approach of granting full rights to use a co-owned work based upon a partial interest in the work herein as "100-percent licensing." A 100-percent licensing approach stands in contrast to the practice of licensing only partial interests in co-owned works, commonly referred to as "fractional licensing."

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.[6] As noted by the Office in the resulting report, "[n]otwithstanding the default rules of joint copyright ownership, publishers and songwriters frequently have understandings that they are not free to license each other's respective shares."[7] Despite the wide-ranging nature of the study and invitation to raise additional issues,[8] none of the participants identified fractional licensing of musical works by the PROs as a practice that needed to be changed.

On January 12, 2016, the Register of Copyrights received an inquiry from Representative Doug Collins, Vice-Chairman of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary, requesting the views of the Copyright Office "regarding the licensing of jointly-owned works by the PROs, and, specifically, what issues lawmakers and regulators should consider to avoid further eroding the property interests of musical composition owners."[9] In responding, the Office addresses here the issues surrounding

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and-management/6106492/us-dept-of-justice-to-review-ascap-and-bmi-consent; *Antitrust Division Review of ASCAP and BMI Consent Decrees 2014*, DOJ, http://www.justice.gov/atr/ascap-bmi-decree-review (last updated Dec. 16, 2015). On September 22, 2015, the DOJ's Antitrust Division requested comments on PRO licensing of jointly owned works. *Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works*, DOJ, http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015 (last updated Dec. 16, 2015) ("DOJ Request for Comments on Jointly Owned Works"). In its request, DOJ states that "ASCAP's and BMI's licensing practices suggest that each organization has historically provided licenses entitling users to play all works in their repertories, whether partially or fully owned," but also notes that "the historical practice by which ASCAP and BMI have made and accepted payments has been based on the fractional interest each copyright owner holds in works." *Id.* The request asks whether, notwithstanding that historical practice, the consent decrees are properly interpreted "to currently require ASCAP and BMI to offer full-work [*i.e.* 100-percent] licenses" to play all of the works in each organization's respective repertoire. *Id.* References to comments responding to the DOJ's request, available on the DOJ website at http://www.justice.gov/atr/ASCAP-BMI-comments-2015, are by party name (abbreviated where appropriate) followed by "Jointly Owned Works Comments" (*e.g.*, "ASCAP Jointly Owned Works Comments").

[6] *See, e.g.,* Spotify USA Inc., Comments Submitted in Response to U.S. Copyright Office's March 17, 2014 Notice of Inquiry at 4 (May 23, 2014) ("Although the Copyright Laws provide that a nonexclusive licensee of a co-author of a joint work may not be sued for copyright infringement, custom and practice in the music industry has developed such that each co-author of a musical work only licenses its proportionate share in the underlying work."); Tr. at 145:03-150:07 (June 24, 2014) (Chertkof, RIAA; Gibbs, Content Creators Coalition; Barker, Interested Parties Advancing Copyright) (discussing, *inter alia*, practice of fractional licensing between songwriter collaborators); *see also* Susan Butler, *Risky Business: Songs in Fractions* (Part One of Two), MUSIC CONFIDENTIAL (Sept. 4, 2015) (noting that "rights holders have been licensing only their rights/shares in songs in countless business deals for decades").

[7] COPYRIGHT AND THE MUSIC MARKETPLACE at 163.

[8] *See* Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14,739, 14,742-43 (Mar. 17, 2014); Music Licensing Study: Second Request for Comments, 79 Fed. Reg. 42,833, 42,834-35 (July 23, 2014).

[9] Letter from Rep. Doug Collins, Vice-Chairman, Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary, to Maria A. Pallante, Register of Copyrights and Dir., U.S. Copyright Office, at 1 (Jan. 12, 2016).

100-percent versus fractional administration of jointly owned musical works, in particular as these issues relate to the functioning of ASCAP and BMI. The Office believes that an interpretation of the consent decrees that would require these PROs to engage in 100-percent licensing presents a host of legal and policy concerns. Such an approach would seemingly vitiate important principles of copyright law, interfere with creative collaborations among songwriters, negate private contracts, and impermissibly expand the reach of the consent decrees. It could also severely undermine the efficacy of ASCAP and BMI, which today are able to grant blanket licenses covering the vast majority of performances of musical works—a practice that is considered highly efficient by copyright owners and users alike.[10]

Because the industry practice of fractional licensing of performance rights—as well as mechanical and synchronization rights, the other primary sources of licensing income for songwriters and music publishers[11]—has been amply documented in the submissions of commenting parties in the DOJ's pending review process,[12] the below analysis assumes that fact[13] and focuses primarily on the legal consequences that follow. In addition to relevant

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[10] COPYRIGHT AND THE MUSIC MARKETPLACE at 170 ("Throughout [the study], the Office . . . heard consistent praise for the efficiencies of blanket licensing by . . . the PROs . . . .").

[11] *See* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 329 (4th ed. 2010) ("Kohn") (stating that "[a]nyone who regularly seeks to clear licenses for the use of music in motion pictures, television programs, or advertisements should be quite familiar with . . . . one of the most frustrating barriers to clearing licenses: locating and obtaining permission from each of the several owners of the copyright"); *Frequently Asked Questions: Mechanical, Synchronization & Other Licensing*, SESAC, http://www.sesac.com/Licensing/FAQsOther.aspx (last visited Dec. 31, 2015) (stating that licensees need to contact all of the publishers or their administrators of a song in order to obtain a synchronization or mechanical license); *see also* National Music Publishers' Association ("NMPA") Jointly Owned Works Comments at 7 (stating that the "system of fractional licensing is consistent with how all music markets work, from synchronization rights to lyric rights to performance rights"); Donald S. Passman of Gang, Tyre, Ramer & Brown, Inc. on behalf of NMPA ("Passman/NMPA") Jointly Owned Works Comments at 3-4 ("[T]he reality is that licensees in every other endeavor (e.g., synchronization rights . . ., mechanical licenses . . ., and print licenses) live in a world of fractional licensing and have no problem securing licenses.").

[12] *See, e.g.*, ASCAP Jointly Owned Works Comments at 1 ("'[F]ractional licensing' is fully consistent with ASCAP's historical licensing practices . . . . ASCAP and music users have historically negotiated and priced blanket licenses based on the fractional interest of the works in ASCAP's repertory."); BMI Jointly Owned Works Comments at 3-5 ("It is indisputable . . . that the market has consistently embraced a fractional-licensing model."); NMPA Jointly Owned Works Comments at 6 ("ASCAP and BMI have historically licensed only the fractional shares of copyrights owned or controlled by their respective songwriter and music publisher members . . . and affiliates . . . ."); National Academy of Recording Arts & Sciences Jointly Owned Works Comments at 6 ("Although the consent decrees as originally written may be ambiguous, the current business practice is not. Fractional licensing is a practice accepted by both the PROs and their licensees and it is relied upon by the songwriters who depend on the PROs to represent their interests."); SESAC Jointly Owned Works Comments at 1 (arguing that 100-percent licensing would "[d]isrupt decades of industry practice, under which PROs license works only for the percentage of rights held by their members in those works").

[13] While fractional licensing is the industry norm, a few exceptions to the general rule have come to the Office's attention in preparing these comments. First, as noted below, as a result of a 1994 decision by the ASCAP rate court, *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, No. 13-95 (WCC), 1993 WL 60687 (S.D.N.Y. Mar. 1, 1993), *aff'd in part vacated in part*, 157 F.R.D. 173 (S.D.N.Y. 1994), ASCAP and BMI issue a small portion of "per-program" licenses on a 100-percent basis. BMI Jointly Owned Works Comments at 15 n.18. In addition, the Office understands that some digital services (perhaps aware of the issue raised under the consent decrees) have been seeking 100-percent licenses from publishers—a development that has generated concerns. *See* Matt Pincus, *SONGS Music CEO Matt Pincus: Why Music Publishing's Two-Class System Could Spell the End for New Indie*

statutory and decisional law, as explained below, the Office has reviewed representative contractual provisions between and among songwriters and music publishers in preparing these views.[14]

I. Background

A. Relevant Principles of Copyright Law

The exclusive rights of authors and owners in musical works are shaped by several important principles of copyright law.

1. Divisibility and Transferability of Copyright Interests

The 1976 Copyright Act (the "1976 Act" or "Act") grants authors of copyrighted works a bundle of exclusive rights, namely the rights to do and to authorize the reproduction, preparation of derivative works, distribution, public performance, and public display of those works.[15] Although copyright vests initially in the author or authors of a work,[16] the Act provides that it can be transferred to another person "in whole or in part."[17] The Act further specifies that the bundle of exclusive rights, including "any subdivision of any of the rights specified," may be divided and owned separately.[18]

It is well established that the Act gives copyright owners the right to transfer an ownership interest in all or part of one or more of their exclusive rights.[19] This principle of

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Firms, BILLBOARD (Oct. 29, 2015), http://www.billboard.com/biz/articles/news/publishing/6745985/songs-musics-matt-pincus-why-music-publishings-two-class-system (noting Apple's call for 100-percent licensing and predicting that this will lead to "[m]ore control to the bigger companies"). Finally, the Office notes that regulations governing the statutory license under 17 U.S.C. § 115 for making and distributing phonorecords of nondramatic musical works that date back to the 1970s allow service of compulsory license notices on and payment of royalties to a single co-owner. *See* 37 C.F.R. §§ 201.18(a)(6), 210.16(g)(1), 201.17(g)(1); *see also* Compulsory License for Making and Distributing Phonorecords, 42 Fed. Reg. 64,889, 64,891-92 (Dec. 29, 1977) (interim rule); Compulsory License for Making and Distributing Phonorecords, 45 Fed. Reg. 79,038, 79,045-46 (Nov. 28, 1980) (final rule). For decades, the section 115 compulsory license was rarely used, as licensees instead obtained voluntary licenses on a fractional basis through The Harry Fox Agency or from the publisher directly, and such voluntary licensing continues to be the dominant practice today. COPYRIGHT AND THE MUSIC MARKETPLACE at 30-31. In recent years, however, digital providers have invoked the compulsory process under section 115 to address licensing gaps. *See id.* As a result, the Office is now hearing of legal and administrative concerns arising from this aspect of the Office's regulations.

[14] Of course, the Office's review of industry contractual provisions could not be comprehensive. It is worth noting, however, that our examination of representative clauses in songwriter and publisher agreements from various sources revealed numerous references to fractional ownership and licensing and no provisions that appeared inconsistent with these practices.

[15] 17 U.S.C. § 106.

[16] *Id.* § 201(a).

[17] *Id.* § 201(d)(1).

[18] *Id.* § 201(d)(2) ("Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately.").

[19] *See Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1002-03 (9th Cir. 2015) ("[T]he Copyright Act permits the copyright owner to subdivide his or her interest in what otherwise would be a wholly owned 'exclusive right' by authorizing the owner to transfer his or her share, 'in whole or in part,' to someone else.");

divisibility in the current Act represents a departure from the 1909 Copyright Act, which provided that ownership of a copyright could only be transferred in whole.[20] In instituting this statutory reform, Congress intended that "[e]ach of the five enumerated rights may be subdivided indefinitely and . . . each subdivision of an exclusive right may be owned and enforced separately."[21] Accordingly, under the 1976 Act, "a copyright owner can freely transfer any portion of his ownership interests in that copyright . . . [as] the plain language of § 201(d) commands as much."[22]

The 1976 Act further provides that "[t]he owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title."[23] For example, "[i]t is established law under the 1976 Act that any party to whom such a right has been transferred—whether via an assignment or an exclusive license—has standing to bring an infringement action based on that right," even when that party has been transferred only "a share of such a right."[24]

A copyright owner may transfer a partial or entire ownership interest in one or more exclusive rights through a signed writing.[25] It should also be noted that fractional interests in copyrights can arise by other means, such as by bequest, state laws of intestacy, or laws governing the division of marital property.[26]

A copyright owner may also grant a nonexclusive license to use a work. A nonexclusive licensee, however, is not considered to have an ownership interest in the work and does not have

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Gardner v. Nike, Inc., 279 F.3d 774, 779 (9th Cir. 2002) ("Section 201(d)(1) enables the owner to transfer any fraction of his or her ownership interest to another party, thereby making that party a whole or joint owner.").

[20] 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.01[A] (Matthew Bender rev. ed. 2015) ("Because the 1909 Act spoke of a single 'copyright' to which the author of a work was entitled, and referred in the singular to 'the copyright proprietor,' it was inferred that the bundle of rights which accrued to a copyright owner were 'indivisible,' that is, incapable of assignment in parts." (citations omitted)); *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 495-96 (2001) (explaining that the "1976 Act rejected the doctrine of indivisibility, recasting the copyright as a bundle of discrete 'exclusive rights[]' . . . each of which 'may be transferred . . . and owned separately'").

[21] H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 ("1976 House Report").

[22] *Corbello v. DeVito*, 777 F.3d 1058, 1065 (9th Cir. 2015).

[23] 17 U.S.C. § 201(d)(2).

[24] *Minden*, 795 F.3d at 1002-03; *see also* 17 U.S.C. § 501(b) ("The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.").

[25] 17 U.S.C. § 204(a) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.").

[26] *See id.* § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part . . . by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession."); *see* 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 5.1.6.2 (supp. 2011) ("1 GOLDSTEIN ON COPYRIGHT") ("Copyrights, like other personal property, may constitute community property in states that have adopted a community property regime . . . . Outside the community property regime, copyrights may be subject to division between husband and wife in the increasing number of states that have adopted a rule of equitable allocation upon dissolution of a marriage.").

the ability to pursue an infringement action.[27] Unlike an ownership interest, a nonexclusive license need not be conveyed in writing.[28]

2. Joint Works

Under the Act, when a work is "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole," the resulting work is considered a "joint work."[29] Joint authors, in the absence of agreement to the contrary, share equal and undivided ownership of the joint work.[30] For example, where three songwriters intend to, and do, collaborate on a single musical work, copyright law vests each songwriter with an undivided one-third interest in the copyright for the entire work.

Co-owners of a joint work "[are] treated generally as tenants in common, with each coowner having an independent right to use [or] license the use of a work, subject to a duty of accounting to the other coowners for any profits."[31] Each co-owner may thus grant a nonexclusive license to use the entire work without the consent of other co-owners, provided that the licensor accounts for and pays over to his or her co-owners their pro-rata shares of the proceeds.[32] A co-owner of a joint work may also unilaterally assign or exclusively license his or her *own* interest in the copyright, in whole or in part, to a third party, because to do so will not impair the rights of the other co-owners.[33] But a co-owner may not transfer the entire copyright, or grant an exclusive license to the entire work, as that would affect the rights of the other co-owners; thus, a transfer of ownership or grant of an exclusive license can occur only through the signed, written agreement of all co-owners.[34]

While the 1976 Act establishes default rules for joint works, it must be remembered that they are subject to the Act's express provision that a copyright, and the exclusive rights thereunder, can be divided and separately owned.[35] As a leading treatise explains, the default rules within the Act are only a "starting point," with "collaborators . . . free to alter this statutory allocation of rights and liabilities by contract."[36] Examples of such agreements by copyright

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[27] *Minden*, 795 F.3d at 1002-03.
[28] *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).
[29] 17 U.S.C. § 101.
[30] *Id.* § 201(a); *see also Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 968 (9th Cir. 2008); 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.08 (Matthew Bender rev. ed. 2015) ("1 NIMMER ON COPYRIGHT").
[31] 1976 House Report at 121.
[32] *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988) ("Joint authors co-owning copyright in a work . . . 'each hav[e] an independent right to use or license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby.'" (quoting WILLIAM PATRY, LATMAN'S THE COPYRIGHT LAW 116 (6th ed. 1986))), *aff'd without consideration of this point*, 490 U.S. 730 (1989); *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007); U.S. COPYRIGHT OFFICE, JOINT OWNERSHIP OF COPYRIGHTS 93-96 (Comm. Print 1958) (prepared by George D. Cary), *available at* http://copyright.gov/history/studies/study12.pdf; *see also* 1 NIMMER ON COPYRIGHT § 6.11.
[33] *Davis v. Blige*, 505 F.3d at 99; 1 NIMMER ON COPYRIGHT § 6.11.
[34] 17 U.S.C. § 204(a); 1 NIMMER ON COPYRIGHT § 6.11.
[35] 17 U.S.C. § 201(d).
[36] 1 GOLDSTEIN ON COPYRIGHT § 4.2.

owners—particularly in collaborative industries such as music and book publishing—include arrangements to alter the presumptively equal undivided interests in the copyright to a work,[37] prohibit co-owners from independently licensing a work,[38] and waive accountings from co-owners.[39]

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 license.[40] In addition to rights in foreign works, foreign law may also govern the joint work of a U.S. and foreign songwriter.[41]

3. Derivative Works and Compilations

Under the Copyright Act, a work in which an author incorporates material from one or more already existing works may be a derivative work or a compilation. Works that incorporate preexisting material are eligible for copyright protection to the extent that the underlying material is used in a lawful manner.[42]

A derivative work is a creation based upon one or more preexisting works, in which the underlying work has been "recast, transformed, or adapted."[43] In such a case, the author of the original work (or the author's successor) continues to own the copyright in the preexisting work, while the creator of the derivative owns only the new contributions. The creator of the derivative therefore may not license the derivative work without the consent of the owner of the underlying

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[37] *Id.* § 4.2 n.5 (noting that "coauthors can contractually alter their equal undivided interests in the copyright to the work").

[38] *See, e.g.*, *Corbello v. DeVito*, 832 F. Supp. 2d 1231, 1244 (D. Nev. 2011) (explaining that "[j]oint owners may agree by contract that none of them shall independently license a work"); *see also* 1 GOLDSTEIN ON COPYRIGHT § 4.2 n.5 (stating that "the coauthors can contractually limit the freedom that each would otherwise enjoy to exploit the work without permission from the others").

[39] *Wilcox v. Career Step, LLC*, 929 F. Supp. 2d 1155, 1168 (D. Utah 2013) (holding that a co-owner of joint work can, through an express agreement, waive right to accounting from a co-owner).

[40] *See, e.g.*, 1 NIMMER ON COPYRIGHT § 6.10[D] (citing legal precedent from the United Kingdom, France, Italy, Japan, Mexico, and Canada to document that in many "foreign jurisdictions, a license will not be valid unless all joint owners are party to it . . . . [and thus], the licensee of a single joint owner will be unable to exploit his work [outside the United States]").

[41] There is no bright line rule for determining when to apply U.S. or foreign law to such a work. *See* 2 JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS § 20.40, at 1318-20 (2005) ("Ginsburg") (describing potential choice of law principles for determining joint ownership rights including "the law of the country in which a majority of the creators reside," or "the law of the country the creators designate by contract"); *cf. Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 (2d Cir. 1998) (suggesting that the law of the country with the "'most significant relationship' to the property and the parties" would govern ownership rights in the case of a conflict of laws (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222 (1971))).

[42] 17 U.S.C. § 103(a) ("[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

[43] *Id.* § 101 ("A 'derivative work' is a work based upon one or more preexisting works . . . [in] any . . . form in which a work may be recast, transformed, or adapted.").

work unless there is an alternative legal basis to do so, such as that the original has fallen into the public domain.[44]

A compilation is created when preexisting materials, which may constitute separate and independent works in themselves, are assembled into a new work of authorship.[45] As in the case of a derivative work, the copyright in a compilation extends only to the material contributed by the author of the new work, and does not include the underlying material.[46] Accordingly, the creator of a compilation needs permission to license use of the work's constituent elements (again, absent other legal authority).[47]

In sum, absent a collaboration in the new work, the author of a derivative work or compilation does not share a joint copyright with the author of the underlying work(s), or vice versa.

B. Ownership and Administration of Multi-Author Musical Works

Songs are frequently created by more than one author.[48] The archetypal image of two songwriters sitting together in a room with a piano and collaborating on music and lyrics exemplifies the concept of a copyrightable joint work.

That said, however, it is important to realize that many songs with more than one author are not actually written this way. A song may incorporate samples of, or remix, preexisting works. In such a case, the song could be a derivative work or compilation, rather than a joint work, for purposes of copyright law. Moreover, much contemporary music, particularly of the pop and urban genres, is created by assembling contributions from various sources—the "beats," "hook," instrumental track and melody or "topline" may be sourced from different creators

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[44] *Id.* § 103(b) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."); *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 930 (7th Cir. 2003) ("[I]t is a copyright infringement to make or sell a derivative work without a license from the owner of the copyright on the work from which the derivative work is derived."); *Cooley v. Penguin Group (USA) Inc.*, 31 F. Supp. 3d 599, 608-09 (S.D.N.Y. 2014) (holding that defendant who took photographs of plaintiff's sculptures infringed plaintiff's copyrights by licensing the photographs without plaintiff's permission because, although defendant owned valid copyrights in the photographs, owning copyright in a derivative work "does not confer the unfettered—let alone exclusive—right to reproduce the derivative work in a manner that would infringe rights of the holder of the copyright in the underlying work absent a license to reproduce or otherwise use the underlying work").

[45] 17 U.S.C. § 101 ("A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works.").

[46] *Id.* § 103(b).

[47] *See Tasini*, 533 U.S. at 497.

[48] 17 U.S.C. § 101 ("A 'joint work' 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.").

working independently, and combined by another author into a single work.[49] Whether the resulting work is a joint work as opposed to a derivative work or compilation cannot be determined without assessing the intent of the various authors involved in preparing their individual contributions, including whether they sought to merge them into "inseparable or interdependent parts of a unitary whole," as required under the Act.[50]

In the case of joint musical works, songwriters often enter into understandings to define their respective ownership shares and provide for separate licensing of what would otherwise be undivided interests in the whole work. Works that incorporate samples or are the product of multiple contributions are also the subject of agreements that specify the respective interests and rights of each creator. Music publishers' agreements with songwriters, in turn, typically reflect the songwriters' fractional and separately licensable shares.

It is important to understand that the impact of such understandings extends beyond the contracting parties themselves. A failure to abide by an agreement to divide and separately manage copyright interests in a work may affect not only the parties to that agreement, but anyone who uses the work at issue. This is because the Copyright Act provides that the owner of any share of any exclusive right in a copyright is "entitled . . . to all of the protection and remedies accorded to the copyright owner."[51] Thus, as further discussed below, if ownership of a copyrighted work is divided among multiple parties, with each agreeing to license only his or her own share, a third party may face infringement liability if it uses a work without obtaining permission from all of the owners.

1. Agreements Among Co-Writers

The co-authors of jointly created musical works often enter into agreements that define the percentages of copyright ownership of each co-author and provide that each will retain control over his or her "share" of the work. For example, a typical clause might stipulate that each contributor "shall administer and exploit only [his or her] respective ownership share" of the work.[52] The "administration" of the copyright is commonly understood in the music industry to encompass the right to issue licenses and otherwise exploit the song and collect royalties from those uses.[53]

As permitted under the 1976 Act, these contracts represent an agreement by the co-writers to divide and apportion as between themselves what would otherwise be the default equal and undivided interests in the copyright. As another illustration, a provision reviewed by the Office addressed the interests of three songwriters, one affiliated with ASCAP, who received a

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[49] Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, BILLBOARD (Jul. 30, 2015), http://www.billboard.com/articles/business/6649208/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for.
[50] 17 U.S.C. § 101.
[51] *Id.* § 201(d)(2).
[52] Passman/NMPA Jointly Owned Works Comments at Ex. A; *see also id.* at 2, Ex. B (providing a clause typical of major songwriter/producer agreements: "You shall have the sole and exclusive right throughout the universe to administer, exploit and to authorize the exploitation of only your respective ownership share of the Compositions.").
[53] Kohn at 164, 170.

50 percent share of the copyright, and two affiliated with BMI, who each received a 25 percent share.[54] This contract expressly stated that "the writers agree that they each shall separately administer their shares of the songs, [and] shall have the right to register the songs with their performing rights societies and to collect their writer's and publisher's shares of income directly from their respective performing rights society."

Some co-writer agreements limit the ability of co-writers to license even partial rights for use of the musical work. Our understanding is that this may occur when a major recording artist/songwriter brings in an "outside" writer to assist with a composition. For example, one contractual provision reviewed by the Office awarded one of three co-writers a one-third share of the copyright, but prohibited that co-writer from granting even a partial (*i.e.*, fractional) license in the work. Instead, that co-writer agreed to give his fellow co-writers, each of whom also had a one-third share in the work, the "exclusive . . . right in perpetuity" to "[i]ssue and approve licenses" for the song. Again, as clearly permitted under the Act, this agreement supersedes what would otherwise have been the co-writers' presumptive equal interests in the copyright; here the co-writer relinquished the default right to grant nonexclusive licenses.

Authors of musical works that incorporate already existing materials—which, as explained, may sometimes constitute compilations or derivative works rather than joint works—also commonly enter into agreements that define the percentages of copyright ownership for each contributor. An instrumental track—or "the background rhythm and instrumentation[] on which the melody and lyrics are laid"—is particularly important in rap, hip-hop, and other contemporary forms of music.[55] In such a case, the creator of the track may get a substantial share of the song, even though he or she did not contribute any part of later-added melody or lyrics.[56] Similarly, where a sample (*i.e.*, a portion of a preexisting song) is used, the copyright owner of the earlier work may receive a share of the new song, with the size of that share in "direct proportion to [the] bargaining power" of the sample owner.[57]

2. Agreements Between Songwriters and Publishers

Agreements between songwriters and music publishers also attest to the pervasive understanding in the music industry that copyright interests are split among co-owners and that

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[54] In the case of an agreement concerning a joint work where the percentage shares deviate from the default rule of equally divided shares, the agreement represents a transfer of ownership interests and, under section 204 of the Act, must therefore be in writing and signed by the owner of the rights conveyed or the owner's duly authorized agent in order to be valid. 17 U.S.C. § 204(a); *see also Lyrick Studios, Inc. v. Big Idea Prods., Inc.*, 420 F.3d 388, 391-92 (5th Cir. 2005); *Konigsberg Int'l Inc. v. Rice*, 16 F.3d 355, 356-57 (9th Cir. 1994). The Office has been unable to locate a case that addresses whether a writing is required under section 204 in the context of an agreement that maintains the equal default shares but limits each co-owner's rights to administration of only their respective share (*i.e.*, overrides the default rule that would permit a co-owner to grant a nonexclusive, 100-percent license). Some might consider this a matter of contract rather than copyright law. The Office does not offer an opinion on this issue.

[55] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 294 (8th ed. 2012) ("Passman").

[56] *See id.*

[57] *Id.*

the particular writer signed by a publisher typically is not in a position to grant 100-percent licenses for co-authored songs.

Under a classic publishing arrangement, the songwriter assigns the entirety of his or her copyright interest in a composition or catalog of compositions to a publisher in exchange for the publisher's administrative services and a share of revenues.[58] Under such a traditional agreement, the writer receives 50 percent of the proceeds for the so-called "writer's share," and the publisher keeps the other 50 percent.[59] A common variation is the "co-publishing agreement," where, in addition to the writer's share, the songwriter keeps a share of the publishing rights, typically half—so the writer receives 50 percent of the overall royalties as the "writer's share" plus an additional 25 percent representing half of the "publisher's share" (for a total of 75 percent).[60] In either case, the agreement will usually stipulate that the "writer's share" of public performance royalties is to be paid directly to the writer from the royalties collected by the PRO.[61] For example, a songwriting agreement may include language to the effect that the writer is not entitled to any monies received by the publisher "from any performing rights society. . . as the 'publisher's share' of. . . performing rights. . . , provided, however, that such organization makes direct payment to [the] songwriter[] of the 'songwriter's share' of such payments."

Both songwriting agreements and co-publishing agreements generally reflect the fact that, for co-written songs, the songwriter is granting the publisher rights only to the extent of the writer's fractional ownership of the work.[62] For example, one representative provision in a co-publishing agreement reviewed by the Office stated specifically that where the songwriter "writes, owns, and/or controls less than one hundred percent (100%)" of a musical composition, the songwriter was granting the publisher rights only to the writer's "fractional share" of the work. In another agreement, the songwriter granted rights to existing and future compositions only "to the extent written, composed, created, owned, controlled and/or acquired" by the songwriter.

Another type of arrangement between songwriters and publishers is an "administration agreement." Under such an agreement, rather than transferring the copyright to a song or catalog of works, the writer grants only an exclusive right to administer the song or catalog in exchange for a percentage of royalties, often ten to fifteen percent.[63] As with other types of agreements,

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[58] *See, e.g.*, Kohn at 330.
[59] 6 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 30.02[A] (Matthew Bender rev. ed. 2015) ("6 NIMMER ON COPYRIGHT") ("Publishing income from the exploitation of the musical composition has historically been divided into the 'writer's share' and the 'publisher's share.' Under this division, fifty percent of the income generated from the exploitation of the musical composition is payable to the writer(s) of the musical composition, irrespective of who owns the copyright in such musical composition, while the remaining fifty percent is allocable to the publisher (according to its percentage interest in the copyright in such musical composition).").
[60] *See, e.g.*, RANDALL D. WIXEN, THE PLAIN & SIMPLE GUIDE TO MUSIC PUBLISHING 175 (3d ed. 2014) ("Wixen").
[61] This system differs from the treatment of "mechanical" royalties paid for making and distributing downloads and CDs, which are typically paid to the publisher (rather than a PRO). The publisher in turn is responsible for paying the songwriter his or her share of the royalties received.
[62] *See generally* Kohn at 329-334; Passman at 300-01; Wixen at 122-28, 175.
[63] 6 NIMMER ON COPYRIGHT § 30.02[A]; Wixen at 27.

administration agreements typically provide that a writer grants the exclusive right to administer (*i.e*., license) the subject works only to the "extent of [the writer's] interest" in them.[64]

Also commonplace in the music industry are "co-administration" agreements, used to clarify the administrative rights as between songwriters and/or publishers.[65] Again reflecting industry custom, these agreements typically provide that each of the parties is entitled to administer only his or her respective share of the subject copyright.[66] For instance, one co-administration clause applicable to two songwriters reviewed by the Office provided that the parties would enter into agreements "solely with respect" to their respective interests and that all proceeds were to be paid "directly to [Party A] and [Party B] in the shares set forth [in the agreement]."

Although we were unable to locate any statistics concerning the prevalence of written agreements providing for fractional administration of songs, it appears that they are commonplace in the case of higher-profile artists and writers, who are more likely to engage attorneys and have greater economic incentive to control the licensing of their works. Presumably, then, many of the most popular and valuable works—and a correspondingly significant segment of the market—are subject to agreements that preclude 100-percent licensing. For example, it has been reported that in the year 2014, 93 of the top 100 charting songs had more than one writer.[67]

Finally on this subject, we do not see any reason under copyright or contract law why co-owners of musical works who adhere to but have not memorialized a practice of fractional licensing in a written document could not or would not do so—for both existing songs and new works—should they have concerns about the impact of a 100-percent licensing rule.[68]

C. PRO Consent Decrees and Practices

The ASCAP and BMI consent decrees were last reviewed and amended well after Congress adopted the 1976 Act—BMI's was most recently amended in 1994 and ASCAP's in 2001.[69] As explained above, with the enactment of the 1976 Act, which became effective on January 1, 1978,[70] Congress made clear its intent that copyright interests could be divided and separately owned.[71] The decrees must be interpreted to respect this fundamental principle, and

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[64] 6 NIMMER ON COPYRIGHT § 30.02[E]; *id.* Form 30.02E(1) (sample administration agreement).
[65] *See* Passman at 300; Wixen at 127-28.
[66] Kohn at 167; *see also* Passman at 304-05; Wixen at 127-28.
[67] Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, http://www.billboard.com/articles/business/6649208/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for.
[68] BMI Jointly Owned Works Comments at 19-20 (predicting that "[r]ather than enter a world of 100% licensing by their co-owners with all its complications and uncertainties, publishers and writers would opt to codify their rights to license their own interests for themselves and to memorialize the existing understandings under a fractional licensing regime").
[69] *See generally* ASCAP Consent Decree; BMI Consent Decree.
[70] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2598 (1976).
[71] 1976 House Report at 123. This change in the law also applies to pre-1978 works, as "[a]ny rights or remedies under the 1909 Copyright Act [have been] superseded by the rights and remedies under the current Copyright Act

indeed, as implemented, have accommodated the industry practice of fractional licensing for many decades.

1. Interpretation of Decree and Licensing Language

Under the ASCAP decree, the ASCAP repertoire is defined as "those works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time."[72] The definition in the BMI consent decree is nearly identical.[73] Although this language neither specifically embraces nor rejects the concept of partial interests, because the consent decrees were amended after 1978,[74] the definition of repertoire in each should be construed consistently with the 1976 Copyright Act, which allows for divided ownership of exclusive rights, including the right of public performance.[75]

Even setting aside the express mandate of the Copyright Act,[76] the decrees—like any contract—must be interpreted in light of the prevailing customs of the industry.[77] Thus, while the consent decrees require ASCAP and BMI to license users to publicly perform their respective "repertoires,"[78] each consent decree describes those repertoires in a manner that can, and should, be read consistently with the practice of fractional licensing.

Notably, at the time the decrees were last modified, fractional administration of musical work copyrights was already well defined as the industry norm. In the early 1970s, ASCAP and BMI changed their rules to allow for cross-registration of works, so that individual songs could be registered with both PROs.[79] This was done to "facilitate[] the performance rights

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with respect to causes of action arising on or after January 1, 1978. This is true even as regards to works that first became the subject of copyright before 1978 under the 1909 Act." 1 NIMMER ON COPYRIGHT § 1.01[D]; *see also Roth v. Pritikin*, 710 F.2d 934, 938 (2d Cir. 1983) ("Whoever holds an interest in a copyright on or after January 1, 1978, has a right to the protections afforded by the new statute, although the creative work may previously have been governed by the 1909 Act or the common law.").

[72] ASCAP Consent Decree at *1.

[73] The BMI consent decree defines repertoire as "those compositions, the right of public performance of which [BMI] has or hereafter shall have the right to license or sublicense." BMI Consent Decree § II(C), at 2.

[74] ASCAP Consent Decree at *1; BMI Consent Decree at 9.

[75] 17 U.S.C. § 201(d).

[76] *See id.* § 201(a), (d).

[77] *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236-37 (1975) (holding that "since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts" (footnote omitted)); *id.* at 238 n.11 ("Assuming that a consent decree is to be interpreted as a contract, it would seem to follow that evidence of events surrounding its negotiation and tending to explain ambiguous terms would be admissible in evidence." (internal quotation marks and citation omitted)); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 202(5) (1981) (stating the rule that "manifestations of intention of the parties to a promise or agreement are interpreted as consistent . . . with any relevant . . . usage of trade"); RESTATEMENT (SECOND) OF CONTRACTS § 222(1) ("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."); RESTATEMENT (SECOND) OF CONTRACTS § 222(3) ("Unless otherwise agreed, 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.").

[78] *See* ASCAP Consent Decree at *4; BMI Consent Decree § IX, at 5-6.

[79] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 236 (4th ed. 2000) ("Passman 4th ed.") ("Beginning about 1972, the societies allowed cross-registration of songs, meaning that a BMI publisher

administration of songs written by a writer affiliated with one society working in collaboration with a writer affiliated with another."[80] Prior to this change, "unless [both] writers of a particular song were affiliated with the same society, neither one could end up getting paid."[81] Under the new rules, each PRO paid their members for their respective shares of works,[82] so collaboration between differently affiliated writers was no longer an issue. ASCAP and BMI had thus been representing fractional interests for over two decades at the time of the most recent amendments to the consent decrees in 1994 and 2001. In light of this fact, one can only conclude that the parties and rate courts understood the language of the amended decrees (that is, the language as it exists today) to accommodate the practice.[83]

In sum, to the extent there is any ambiguity, the ASCAP and BMI "repertoires" must be understood to include partial interests in musical works. Indeed, given the definition of "repertoire" in the decrees ("those works the right of public performance [the PRO] has . . . the right to license"), to reject such an understanding would mean that the ASCAP and BMI repertoires must *exclude* any work for which the PRO could offer only a partial license, since there would be no "right" to license the entire work. As discussed below, such an "exclusionary" interpretation of the consent decree language—notwithstanding fifty years of contrary practice—would not only be highly disruptive, but could significantly undermine the continuing efficacy of blanket collective licensing by ASCAP and BMI.

The terms of the blanket licenses issued by ASCAP and BMI do not alter this analysis. As noted by the DOJ in its request for comments, ASCAP's general business blanket license grants the user the right to perform "musical compositions . . . in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights."[84] BMI's blanket

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and an ASCAP publisher could each register its portion of the composition with its society."); AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 874 (2d ed. 1996) ("Kohn 2d ed.") (noting that ASCAP and BMI began allowing "cross-registration" in "the early 1970's," under which each society paid its own member for their share of a given song).

[80] Kohn 2d ed. at 874.

[81] Passman 4th ed. at 236.

[82] Kohn 2d ed. at 874 (noting that, once the PROs started allowing cross-registration, "a song co-written by an ASCAP writer and a BMI writer, each having a 50% interest in the writer's share, would be paid as follows: ASCAP would pay to the ASCAP writer 50% of the writer's share of ASCAP collections derived from performances of the song and BMI would pay to the BMI writer 50% of the writer's share of BMI collections derived from such performances . . . .").

[83] *Compare United States v. ASCAP*, Civ. No. 13-95, 1941 U.S. Dist. LEXIS 3944, § II(5), at *8-9 (S.D.N.Y. 1941) (referring to a "catalogue of musical compositions"), *and United States v. BMI*, No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449, § IX(B), at *8-10 (S.D.N.Y. 1966) (same), *and United States v. ASCAP*, Civ. No. 13-95, 1950 U.S. Dist. LEXIS 1900, § II(D), at *2 (S.D.N.Y. 1950) ("ASCAP AFJ") (defining a new term, "repertory" as "those compositions, the right of public performance of which ASCAP has or hereafter shall have the right to license or sublicense"), *with* BMI Consent Decree § II(C), at 2 (same as ASCAP AFJ), *and* ASCAP Consent Decree at *1 (defining repertory as "those works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time").

[84] DOJ Request for Comments on Jointly Owned Works, http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015; ASCAP, MUSIC IN BUSINESS, BLANKET LICENSE AGREEMENT, http://www.ascap.com/~/media/files/pdf/licensing/classes/musicbsblank.pdf (last visited Jan. 6, 2016) ("ASCAP Blanket License Agreement").

license similarly covers only "the musical works of which BMI controls the rights to grant public performance licenses."[85] Looking to copyright law—as well as the societies' fractional administration of interests—these clauses must be understood as limiting the licenses to the interests that each organization actually represents. Put another way, a licensing entity has no "right" to license a copyright interest in a musical work without the authority of or accounting its owner.

2. Administrative Practices Under the Decrees

The PROs administer the public performance rights owned by songwriters and publishers through contractual agreements in which the writers and publishers become members or affiliates of the PRO. A songwriter may only be affiliated with a single PRO.[86] By contrast, because publishers often represent writers affiliated with both ASCAP and BMI (and perhaps other PROs)—and because writers can and do change their affiliations over time—publishers are typically affiliated with more than one PRO.[87]

The practice of fractional licensing is reflected in the payment practices of both ASCAP and BMI. As noted by DOJ in its request for public comment on the fractional licensing issue, "the historical practice by which ASCAP and BMI have made and accepted payments has been based on the fractional interest each copyright owner holds in works," and "ASCAP and BMI pay only their own members, and do not 'account' to members of other performing rights organizations."[88] For example, when a member writer collaborates with a writer who is a member of a different PRO, ASCAP and BMI generally make distributions only to their own member; ASCAP's internal rules state expressly that payment is made "in accordance with the shares indicated by the ASCAP Member(s) in the ASCAP Title Registration for the particular work, regardless of whether the collaboration was with another ASCAP Member or a non-ASCAP member."[89] Given that ASCAP and BMI do not ordinarily make distributions to non-

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[85] DOJ Request for Comments on Jointly Owned Works, http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015; BMI, BMI MUSIC LICENSE FOR EATING & DRINKING ESTABLISHMENTS, http://www.bmi.com/forms/licensing/gl/ede.pdf (last visited Jan. 6, 2016) ("BMI Eating & Drinking Establishment License") ("BMI grants you a non-exclusive license to publicly perform at the Licensed Premises all of the musical works of which BMI controls the rights to grant public performance licenses during the Term.").

[86] *See* ASCAP, ASCAP WRITER AGREEMENTS ¶A, at 1, http://www.ascap.com/~/media/files/pdf/join/ascap-writer-agreement.pdf (last visited Jan. 6, 2016) ("ASCAP WRITER AGREEMENTS"); ASCAP, COMPENDIUM OF ASCAP RULES AND REGULATIONS, AND POLICIES SUPPLEMENTAL TO THE ARTICLES OF ASSOCIATION, § 1.3, at 1 (2014), http://www.ascap.com/~/media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf ("ASCAP COMPENDIUM"); BMI, BMI Writer Agreement *in* WRITER KIT 10, http://www.bmi.com/forms/affiliation/bmi_writer_kit.pdf (last visited Jan. 6, 2016) ("BMI WRITER AGREEMENT").

[87] *See, e.g.*, ASCAP, ASCAP PUBLISHER AGREEMENTS ¶C, at 1, http://www.ascap.com/~/media/files/pdf/join/ascap-publisher-agreement.pdf (last visited Jan. 6, 2016) ("ASCAP PUBLISHER AGREEMENTS"); ASCAP COMPENDIUM § 1.3.2, at 2. Larger publishers typically have dedicated subentities that affiliate with individual PROs. *See* Wixen at 61; Passman at 238.

[88] *See* DOJ Request for Comments on Jointly Owned Works, http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015.

[89] ASCAP COMPENDIUM § 3.4.1, at 22; *see also BMI Royalty Policy Manual*, BMI, http://www.bmi.com/creators/royalty_print (last updated Jan. 5, 2016) ("BMI Royalty Policy Manual") (stating that BMI will not pay writer or publisher affiliates if they are receiving payment from another PRO for a period of time in which works

members, they do not collect or maintain the contact information for non-members that would be necessary to facilitate regular distributions to non-members.[90]

The practice of divided ownership and fractional licensing is also consistent with the ASCAP and BMI membership agreements and related documents. For example, the grant of rights by a writer or publisher to BMI extends only to rights "own[ed]" or "acquire[d]" by the member to perform "*any part or all* of the [member's] Works."[91] The BMI writer agreement further provides that, upon termination of the agreement, if BMI "continue[s] to license *your interest* in any Work," it will continue to make payments.[92] While the ASCAP membership agreements are less clear on these points,[93] ASCAP's title registration system is indicative of fractional administration of works. ASCAP asks members to list the known writers and publishers of each registered work, including non-ASCAP members, and "[t]he percentage/portion of a work that each party is entitled to collect."[94] BMI's registration system is similar.[95] ASCAP's *Compendium of Rules* elaborates that "[r]egardless of whether a work is the product of a collaboration with other ASCAP Members or with non-ASCAP members, the apportionment of shares of both the ASCAP Writer and Publisher Members' interest in collaborative works must be indicated at the time of Title Registration . . . ."[96] Other provisions of ASCAP's *Compendium* are to similar effect.[97]

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were being licensed by BMI for the affiliates). ASCAP does make payments to non-members under certain narrow circumstances. For example, ASCAP will make payments to members who have resigned from ASCAP if those member's works had been licensed for a term extending beyond the member's date of resignation. ASCAP COMPENDIUM § 1.11.5, at 8. ASCAP will also make payments to non-members who are unaffiliated with any PRO and whose works are published by an ASCAP publisher member. *Id.* § 3.4.2, at 22.

[90] *See* BMI Jointly Owned Works Comments at 23 ("BMI already has an effective process for collecting royalties, counting performances, and matching the royalties to the performances for its affiliates, but has never had a reason to keep track of royalties for non-BMI songwriters and publishers.").

[91] BMI WRITER AGREEMENT at 5 ("[Y]ou [writer] hereby grant . . . [a]ll the rights that you *own or acquire* . . . to perform . . . *any part of all* of the Works.") (emphasis added); BMI, BMI Publisher Agreement *in* PUBLISHER KIT 13, http://www.bmi.com/forms/affiliation/bmi_publisher_kit.pdf ("Publisher hereby sells, assigns and transfers . . . [a]ll the rights *which Publisher owns or acquires* . . . to perform. . . *any part or all* of the Works." (emphasis added)).

[92] BMI WRITER AGREEMENT at 8 ("In the event that we continue to license *your interest* in any Work, however, we shall continue to make payments to you . . . .") (emphasis added).

[93] ASCAP WRITER AGREEMENTS ¶1, at 1 ("Owner grants to the Society . . . [the public performance right] of each musical work . . . [i]n which the Owner now has any right, title, interest or control whatsoever, in whole or in part."); ASCAP PUBLISHER AGREEMENTS, ¶1, at 1 (same).

[94] *See* ASCAP, ONLINE TITLE REGISTRATION GUIDE 1, https://www.ascap.com/cwrreg/Web%20Registration%20For%20Members.pdf (last visited Jan. 6, 2016). The guide goes on to explain, "ASCAP cannot tell you how to divide your shares for a work. The shares are based on the agreements you and your co-writers decided upon." *Id.*

[95] BMI, WORK REGISTRATION FORM 1, http://www.bmi.com/pdfs/work-reg-e.pdf (last visited Jan. 6, 2016) (asking members to list the percentage share of all co-writers).

[96] ASCAP COMPENDIUM § 2.3, at 16-17.

[97] *Id.* § 1.11.8, at 8 (resigning members should provide a list "including the percentages of those parties' respective interests as writers and/or as publishers in such works, as reflected in ASCAP's records"); *id.* § 1.12.2(a), at 10-11 (members must warrant that member "has the right to license public performance rights *in its interest* in the works" (emphasis added)). The fractional licensing practice is also reflected by ASCAP's database of songs in its repertoire, which was recently made available to the public, and among other relevant information includes the total percentage of a work that is controlled by ASCAP. *See ACE Search*, ASCAP, https://www.ascap.com/Home/ace-title-search/index.aspx (last visited Jan. 6, 2016).

Consistent with their membership agreements and distribution practices, ASCAP and BMI negotiate with and collect from users only the percentage of royalties representing the aggregate shares of works in their respective repertoires, not 100 percent of all works or some works.[98] For example, in recent litigation with webcaster Pandora before the federal rate courts in New York, ASCAP's royalties were established based on an understanding that ASCAP represents a 45.6 percent "market share" of musical works, with the BMI rate court subsequently setting Pandora's rate according to Pandora's own evaluation that "ASCAP and BMI have roughly the same overall market share."[99] This is further evidence that ASCAP and BMI are licensing partial interests in works, as such an approach would make little sense if the organizations were licensing on a 100-percent basis. In the latter case, the respective "market shares" of ASCAP and BMI could only be ascertained by evaluating which entity had granted licenses for what works and uses, and would presumably continuously fluctuate as new licenses came into effect.

3. Legal Constraints on Rights Conveyed

The PROs' practice of fractional representation is consistent with the basic legal precept that one cannot validly convey rights to more than what one owns or controls.[100] A PRO's members cannot grant to the PRO the ability to license more than what they have, and the PRO, in turn, is not able to license to users more than what it receives. Accordingly, the ability of ASCAP or BMI to license public performance rights for their respective members' works is ultimately constrained by the terms of songwriter, publisher and administration agreements entered into by those members, which, as explained above, typically reflect understandings of divided ownership and fractional licensing.[101] Indeed, to ensure full coverage for their activities,

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[98] *See, e.g.*, *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 351, 361-62 (S.D.N.Y. 2014) (examples of licensing agreements that calculate the license rate based on the PRO's market share, and thus the writer or publisher members' share of works, and specifically excluding the shares of other PROs and non-member writers and publishers); *BMI v. Pandora Media, Inc.*, Nos. 13 Civ. 4037 (LLS), 64 Civ. 3787 (LLS), 2015 WL 3526105, at *8-15 (May 28, 2015) (providing examples of licensing agreements with withdrawing publishers where the license rates were calculated based on ASCAP and/or BMI's market share for those publishers, rather than on the number of the publishers' works that were in ASCAP or BMI's repertoires); *see also* BMI Jointly Owned Works Comments at 9 ("BMI has negotiated and priced its licenses to music users on a fractional basis, and assumes that music users will also obtain licenses from the non-BMI participants, who will in turn pay their own interest holders."); SESAC Jointly Owned Works Comments at 4 ("Licensees have consistently reached agreement with SESAC to pay for all shares of the music in our repertoire.").

[99] *In re Pandora*, 6 F. Supp. 3d at 351 (estimating a 45.6 percent market share for ASCAP); *BMI v. Pandora*, 2015 WL 3526105, at *18; *see also* Diane Bartz, *U.S. Considers Updating Music Licensing Accords with ASCAP, BMI*, REUTERS (June 4, 2014), http://www.reuters.com/article/us-usa-copyright-doj-idUSKBN0EF07H20140604 (noting that ASCAP and BMI "license about 90 percent of music heard on online services, in movies, televisions and restaurants" with the remaining percentage presumably representing the proportion of royalties payable to the smaller PROs, SESAC and Global Music Rights).

[100] *Davis v. Blige*, 505 F.3d at 99 (applying "in the copyright context[,] the venerable principle of the law of property that, while an owner may convey any of his rights to others permanently or temporarily, he may not convey more than he owns," and holding that "when the co-owners granted rights to a music publisher, they could but transmit what they had to part with, and they could not transfer what interest the other co-owner had" (internal citations omitted)).

[101] In the context of addressing per-program licenses, the ASCAP rate court once ruled, with respect to joint works in which one songwriter is a member of BMI and the other a member of ASCAP, that a licensee possessing a license

users commonly enter into blanket licenses with ASCAP and BMI, as well as with the smaller PRO SESAC, and may also require a license from the recently established Global Music Rights ("GMR"), which represents a modestly sized but selective catalog of works.

Reciprocal agreements between U.S. and foreign PROs—through which writers and publishers collect for the exploitation of their works in foreign territories—are also predicated on a system of fractional licensing. Outside of the United States, a single PRO may administer all rights necessary to authorize the public performance of a song throughout a particular territory.[102] Within the United States, however, it cannot be assumed that a single PRO has the rights to license use of an entire foreign work, because foreign writers individually designate which U.S. PRO will collect for their works or shares thereof.[103] The foreign writer is then paid for performances in the United States by the chosen U.S. representative via the writer's home PRO.[104]

Accordingly, in the case of foreign works licensed through reciprocal agreements, a PRO could not safely rely on the default joint authorship rule of U.S. law to issue 100-percent licenses. Ownership interests in such works—as well as some works jointly created by U.S. and foreign authors—will be governed by foreign law,[105] and, as noted above, many countries require the consent of all co-owners in order to obtain the right to publicly perform a work.[106]

II. Concerns Regarding 100-Percent Licensing

A. Copyright Law

As explained above, although the Copyright Act's default rule theoretically permits each co-owner of a joint work to authorize the public performance of a musical composition, the

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from BMI did not need to pay a second fee to ASCAP for use of such works under a per-program license, reasoning that "once a broadcaster has obtained a license from one of two joint copyright holders, he is immune from copyright liability to the other copyright holder." *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, 1993 WL 60687, at *79. But that decision was predicated solely on the default rules provided by copyright law and failed to examine the underlying agreements for the relevant works to determine whether BMI in fact had the right to license entire works without the consent of non-BMI represented co-owners. *See id.* In any event, such per-program licensing represents only a very limited segment of BMI and ASCAP's licensing activities, which do not otherwise embrace 100-percent licensing. BMI Jointly Owned Works Comments at 15 n.18 ("[T]his situation arises in only approximately 0.1% of programs."); *see also id*. at 15; ASCAP Jointly Owned Works Comments at 7 ("Licenses have historically been negotiated and priced based on each PRO's market share . . . .").

[102] Passman at 263; Wixen at 58; *see also* Performing Right Society Ltd. ("PRS") Jointly Owned Works Comments at 2.

[103] *See, e.g.*, PRS Jointly Owned Works Comments at 2 (explaining that "co-writers of any particular work or their publishers designate the affiliation to a US PRO *only in respect of their share* of any work" (emphasis added)).

[104] Foreign PROs can have reciprocal agreements with multiple U.S. PROs. *Id.* (noting that PRS "has a representation agreement with each of [the U.S. PROs]").

[105] *See Itar-Tass*, 153 F.3d at 88-91 (applying Russian copyright law to determine ownership interest in case concerning reprinting of Russian newspaper articles in New York because Russia had "the most significant relationship to the property and the parties" (internal quotation marks and citation omitted)); Ginsburg § 20.40, at 1318-20 (describing potential choice of law principles for determining joint ownership rights involving authors in different countries, including "the law of the country in which a majority of the creators reside").

[106] 1 NIMMER ON COPYRIGHT § 6.10[D].

common industry practice is for co-owners to divide ownership of the copyright and engage in separate licensing and collection of royalties for their respective shares of the work. An interpretation of the ASCAP and BMI consent decrees that would require those PROs to issue 100-percent licenses notwithstanding copyright owners' underlying agreements with each other would run afoul of the Copyright Act and the rights of foreign authors as well. The Office believes that the consent decrees should not be construed in a manner that annuls essential elements of copyright law.

1. Divisibility Principle

Mandatory 100-percent licensing of jointly owned works would contravene the basic rule adopted in the 1976 Act that ownership of copyright, and the exclusive rights comprised in a copyright, are divisible without limitation. The Act provides that a copyright may be transferred to another person "in whole or in part," and that exclusive rights, "including any subdivision of any of the rights," may be transferred and owned separately.[107] Thus, as one court has described it, a copyright may be "chopped up and owned separately, and each separate owner of a subdivided exclusive right may sue to enforce that owned portion of an exclusive right, no matter how small."[108]

To interpret the consent decrees as requiring ASCAP and BMI to license complete rights to publicly perform any jointly created work in their respective repertoires, regardless of whether that work is wholly or only partially controlled by that PRO's member(s), would effectively override copyright owners' choices to separately own and manage their copyright interests as they are entitled to do under the Act. By reconsolidating public performance rights that copyright owners have chosen to divide, it would effectively reimpose the indivisibility of rights that Congress rejected in 1976.

2. Other Types of Multi-Author Works

While as a theoretical matter one might assume that compositions with multiple authors always or almost always constitute joint works under the Copyright Act, this is not the reality. As described above, some musical works have multiple authors and owners because they build upon or incorporate preexisting material (*e.g.*, an earlier song); these works may instead be derivative works or compilations. In such a case, while each of the contributors may both have a copyright interest in the new work, no one owner has the right under the Copyright Act to license the whole work absent an agreement or other authority to permit it.

In some instances, it could be difficult to ascertain whether a particular musical work is a joint work versus a derivative work or compilation without a full understanding of how it came

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[107] 17 U.S.C. § 201(d).

[108] *Silvers v. Sony Pictures Entm't*, 402 F.3d 881, 887 (9th Cir. 2005); *see also Minden*, 795 F.3d at 1002-03; 17 U.S.C. § 201(d)(2) ("Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.").

to be created.[109] A 100-percent licensing policy that presumptively treated all works with more than one author as joint works would therefore be problematic and, as discussed below, could lead to infringement claims. At the same time, it would likely be extremely challenging (to say the least) to adopt a system that depended upon the ability of ASCAP, BMI and affected parties to render fact-dependent legal judgments as to which multi-author songs were joint works and which were not, and to apply different licensing protocols to individual works depending upon the answer.

3. Impact on Non-Members and Foreign Authors

A regime that compels ASCAP and BMI to issue 100-percent licenses when their songwriter and publisher members have transferred only partial rights to them would abrogate rights afforded to other authors under the Copyright Act, as well as rights of foreign authors under foreign law. The Copyright Act provides authors not only the exclusive right to exploit a work (*e.g.*, to publicly perform, reproduce or distribute it), but also the exclusive right to *authorize* others to do the same.[110] To require a single PRO to grant a 100-percent license to any work in its repertoire, irrespective of the underlying division of rights, would effectively eliminate the exclusive right of any non-member co-owner to authorize the public performance of his or her work.

The Copyright Act includes certain limitations on copyright owners' exclusive rights in the form of compulsory licenses, such as the section 115 license for the reproduction and distribution of musical works.[111] In accordance with its constitutional mandate to define the nation's copyright laws,[112] Congress established these compulsory provisions to address specific market conditions, and they are narrowly construed in their application.[113] Significantly, and problematically, a 100-percent licensing rule would operate as a *de facto* compulsory license by subjecting non-members of ASCAP or BMI to rates, terms, and distribution policies to which they never agreed. Moreover, such a requirement would be inconsistent with foreign law; as previously explained, many foreign jurisdictions require the consent of all co-owners to license jointly created works.

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[109] The practice of fractional licensing represents an efficient solution to this problem as it does not depend upon the factual or legal assessment of individual works.
[110] 17 U.S.C. § 106; *see also Minden*, 795 F.3d at 1003 ("The right 'to authorize' . . . is also an 'exclusive right' under the Act.").
[111] *See also* 17 U.S.C. §§ 112, 114 (additional compulsory licenses for certain uses of musical works and sound recordings).
[112] U.S. CONST. art. I, § 8, cl. 8.
[113] *See Fame Publ'g Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975) ("[T]he compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule."); *see also WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 281 (2d Cir. 2012) ("In 1999, Congress noted that in 'creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and that it therefore needs to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate.'" (quoting S. REP. NO. 106-42, at 10 (1999))).

The Copyright Office is aware of no authority by which the antitrust consent decrees governing ASCAP and BMI could operate to supplant Congress' constitutional prerogative to establish the nation's copyright law, or to override exclusive rights granted under that law or by foreign law.

4. Accounting Issues

As explained above, the default rule under copyright law requires a co-owner who has granted a nonexclusive license to use a jointly prepared work to account for and pay his or her co-owners their pro-rata shares of profits received for the exploitation.[114] Under current circumstances, it seems highly doubtful that ASCAP or BMI, or their respective members, could fulfill this legal obligation. As noted above, ASCAP and BMI's historical practice has been to accept and distribute royalties based on their members' fractional interests, and those PROs "pay only their own members, and do not 'account' to members of other performing rights organizations."[115]

Indeed, as mentioned above, it appears that neither ASCAP nor BMI has in place a mechanism that would allow the PRO to track and account for payments to non-members on a broad basis, and that there would be significant obstacles to achieving this. In many cases, the PRO may not have current or reliable information concerning the current co-owners of a particular song, including how to contact them—let alone heirs or assignees. As the Office explained in its recent report, the music licensing marketplace is characterized by a lack of uniform data concerning song ownership and licensing.[116] The ASCAP and BMI royalty payment systems presumably would need to be significantly enlarged (and largely cross-duplicated) to generate payments for a multitude of non-members. Equally if not more overwhelming would be a scenario whereby individual authors and publishers receiving 100-percent payments from ASCAP and BMI would need to track down and pay royalties to co-owners themselves.

Further complicating matters, ASCAP and BMI are not in contractual privity with non-members. This means that they have no legal basis to require non-members to furnish catalog, ownership or even basic contact information. Even in a case where ASCAP or BMI were in a position to pay a non-member, the deduction of a commission to cover the costs of processing that payment could be questioned. The distribution policies of ASCAP and BMI differ; accordingly, a writer paid through the other PRO's system would receive royalties according to an unfamiliar and potentially unwelcome formula.

On the flip side of such a system, a non-member of a licensing PRO would have no obvious means to confirm or track the exploitation of his or her song. In many cases, copyright

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[114] *See* 1976 House Report at 121 (stating that co-owners of a joint work are tenants in common who can independently license a work on a nonexclusive basis as long as they account to the other co-owners any profits received from such license).

[115] DOJ Request for Comments on Jointly Owned Works, http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015.

[116] *See* COPYRIGHT AND THE MUSIC MARKETPLACE at 123-32.

owners would have no reason to know that they were owed royalties. Given the lack of transparency, songwriter and publisher income could be significantly delayed or simply never received.

Finally, a non-member would have no obvious recourse (apart from legal action) in the case where the non-member believed he or she had not been paid, or correctly paid, for a particular use. While PRO membership agreements provide certain protections to member songwriters and publishers—such as the right to request an adjustment of royalties received in any given quarter[117]—non-members have no such contractual privileges.

5. Potential Infringement and Other Claims

A 100-percent license requirement could expose music users who obtain ostensibly "100-percent" licenses from ASCAP or BMI to copyright infringement claims by non-member co-owners. For example, a non-member co-owner might claim that a license was improperly issued because he or she has an exclusive right by contract to administer part of a song, or that a song is not a joint work (*e.g.*, because it incorporates a sample) and is therefore not subject to 100-percent licensing under the default copyright rule.

To exploit a song without obtaining all necessary rights could expose a putative licensee to infringement liability, regardless of whether the licensee believed it had obtained sufficient authorization from a licensing organization.[118] This is because "[s]omeone who infringes a copyright unintentionally, and even without reason to believe that he is infringing, will be liable nonetheless."[119] Thus, even if the consent decrees are read to require ASCAP and BMI to issue 100-percent blanket licenses for works they only partially control, it is not clear that this would shield music users who obtain such licenses from infringement claims based upon violation of non-members' exclusive rights.[120] By the same token, mandatory 100-percent licensing could

[117] ASCAP WRITER AGREEMENTS ¶8, at 3 (referencing the songwriter's right to appeal royalty distribution determinations); BMI WRITER AGREEMENT at 7 (referencing right to claim adjustment of royalty distributions); *see also* ASCAP, ASCAP'S SURVEY AND DISTRIBUTION SYSTEM: RULES & POLICIES § 5, at 17-18 (2014), https://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf ("ASCAP SURVEY AND DISTRIBUTION RULES & POLICIES") (detailing process for claiming adjustment to royalty distributions); *Miscellaneous Royalty Rules*, BMI, http://www.bmi.com/creators/royalty/miscellaneous_royalty_rules (last visited Jan. 6, 2016) (detailing process for claiming adjustment to royalty distributions).

[118] *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 828-29 (8th Cir. 1992) ("[T]he apparent authority defense . . . is generally unavailable in the context of copyright infringement."); *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1113 (2d Cir. 1986) (holding putative licensee liable for willful copyright infringement for printing books containing alterations that exceeded scope of the third party's grant from the copyright owner on the ground that "reliance [on terms in a third-party contract]—justified or otherwise—is irrelevant in determining whether [printer] infringed [publisher's] copyrights"); *cf.* Shyamkrishna Balganesh, *Copyright and Good Faith Purchasers*, 104 CALIF. L. REV. 1, 20, 23 (forthcoming 2016) ("While [copyright law] doesn't hold good faith purchasers liable for their purchase as such, it subject[s] their subsequent re-sale or alienation of the object (carrying infringing expression) to liability for infringement.").

[119] 1 GOLDSTEIN ON COPYRIGHT § 11.4; *see also* 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.08[B][1] (Mathew Bender rev. ed. 2015) (explaining that innocent intent is not a defense to copyright infringement).

[120] While ASCAP and BMI currently indemnify licensees with respect to the performance of works in their respective repertoires, it is unclear whether such indemnifications would be feasible if claims of unauthorized use

expose ASCAP and BMI, as the licensing parties, to claims asserting secondary liability for infringement.[121]

Finally, for the reasons described above, ASCAP and BMI, as well as their members, could be subjected to lawsuits asserting a failure properly to account to non-members. The risk of such claims would be heightened due to the significant obstacles in ascertaining payment data for non-licensing parties. A regime requiring entities and/or individual copyright owners to account to one another without the requisite information or processes would presumably generate a considerable number of such disputes.

6. Impact on Creativity

To require ASCAP and BMI to issue 100-percent licenses for works they only partially control would also work against the fundamental goal of the copyright system—to encourage creativity by ensuring that creators are paid for use of their works. As the Supreme Court has explained, "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[122]

To begin with, 100-percent licensing could hamper songwriters' ability to create works at all. In many traditional publishing deals, publishers contractually agree to pay advances against predicted royalties for the songwriter's catalog.[123] Advance monies may be critical for songwriters who lack a steady flow of income, allowing them to devote time to writing songs rather than engaging in other types of employment. While traditionally, advances have been recouped largely from mechanical royalties, such royalties have declined dramatically due to decreasing sales of CDs and downloads.[124] As a result, songwriters now sometimes agree to recoupment through their PRO under a letter of direction or similar accommodation.[125] In addition, ASCAP and BMI themselves occasionally offer loans and advances to songwriters to be repaid out of a songwriter's future royalty collections.[126] Such arrangements could be

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sharply increased. *See, e.g.*, ASCAP Blanket License Agreement art. 9 (indemnifying licensees "against all claims . . . brought against it with respect to . . . any compositions in [ASCAP's] repertory"); BMI Eating & Drinking Establishment License art. 4 (indemnifying licensee against "any and all claims . . . alleging copyright infringement . . . with respect to the public performance of any musical works which are licensed by BMI . . . .").

[121] The Second Circuit has explained that an "unauthorized licensor may be liable for infringement committed by his unauthorized licensees under a theory of contributory infringement as 'one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.'" *Davis v. Blige*, 505 F.3d at 105 n.13; *see also Venegas-Hernandez v. Asociación de Compositores y Editores se Música Latinoamericana*, 424 F.3d 50, 57-59 (1st Cir. 2005) (noting that a publisher may be held liable for contributory infringement when issuing an unauthorized license).

[122] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

[123] Kohn at 110-12.

[124] COPYRIGHT AND THE MUSIC MARKETPLACE at 71-72.

[125] *See* ASCAP COMPENDIUM § 4.6, at 27-28 (providing that ASCAP members may assign their royalties to another ASCAP member, such as a publisher, in order to repay an advance provided by that publisher); BMI Royalty Policy Manual (providing that BMI will recognize an assignment of royalties to a third party who "makes a bona fide loan of a specific sum of money to you which is intended to be repaid, in whole or in part, from your BMI royalties").

[126] *See* BMI WRITER AGREEMENT at 8; ASCAP COMPENDIUM § 1.11.7, at 8.

jeopardized if ASCAP and BMI are no longer able to reliably license and collect royalties on the shares of songs they separately represent.

Moreover, contrary to the copyright system's goal of encouraging creativity, 100-percent licensing could significantly constrain songwriters' artistic choices. As mentioned, modern music is often the product of collaborative efforts; many popular and commercially valuable songs have two or more co-writers. If the consent decrees were to mandate 100-percent licensing, a songwriter associated with one PRO (or an unaffiliated songwriter) would lose the ability to control the exploitation of a work co-written with a member of another PRO because the other PRO could set the licensing terms for use of the entire work. This would chill the highly collaborative atmosphere that characterizes modern songwriting. As evidenced by the PROs' move to cross-registration in the 1970s as well as recent comments submitted to DOJ, this is not a hypothetical concern: songwriters have expressed significant reservations about the prospect of collaborating with writers affiliated with a different PRO under such a regime.[127]

B. Additional Legal and Policy Concerns

1. Private Contracts

The consent decrees are aimed at regulating ASCAP and BMI's licensing practices. But to require ASCAP and BMI to engage in 100-percent licensing would reach well beyond those practices to interfere with private contracts entered into by songwriters and publishers—including songwriters and publishers who are unaffiliated with either of the regulated PROs—as well as reciprocal agreements between ASCAP and BMI and foreign PROs. These contractual arrangements are critical to the effective functioning of the music industry.

As explained above, while some multi-author U.S. works may be subject to default rules of joint authorship under the Copyright Act, others are not—whether as a result of contractual understandings or because they are derivative works or compilations rather than joint works. In addition, foreign works, and some works jointly authored by U.S. and foreign songwriters, are governed by foreign laws that generally require the consent of all co-owners to license the work. Such distinctions do not ordinarily interfere with the licensing process because the pervasive practice is to divide and separately license the interests in multi-author works, regardless of the precise type of work or ownership interest at issue. In this sense, the practice of fractional licensing provides an efficient solution to the management of multi-author works, as administering entities do not need to examine each work or the surrounding contracts to determine what licensing rule to apply.

[127] ASCAP Songwriters and Publishers Jointly Owned Works Comments at 1 (expressing that 100-percent licensing could result in an environment where it is "no longer . . . financially viable" or "creatively viable" for songwriters to "collaborate with a writer outside of ASCAP"); BMI Songwriters and Publishers Jointly Owned Works Comments at 1-2; Nashville Songwriters Ass'n Int'l Jointly Owned Works Comments at 2-3; Passman 4th ed. at 236 (noting that prior to the 1970s "[U]nless [both] writers of a particular song were affiliated with the same society, neither one could end up getting paid."); Kohn 2d ed. at 874 (explaining that the allowance of cross-registration (*i.e.*, fractional licensing) of split works in the 1970s "facilitated the performance rights administration of songs written by a writer affiliated with one society working in collaboration with a writer affiliated with another").

Interpreting ASCAP's and BMI's consent decrees to require 100-percent licensing would upend settled contractual expectations because, for instance: a PRO could be required to license rights it does not possess in violation of the PRO's membership agreement and/or rules of governance; songwriters and publishers could not be assured of payment for performances through a chosen PRO as contemplated by their agreements; publishers might be unable to recoup advances to songwriters as anticipated in songwriter agreements; agreements between writers and/or publishers to license only their own shares of a song would be abrogated with respect to performance rights; and ASCAP and BMI would be unable to honor their agreements with foreign writers and/or foreign PROs.

These possibilities raise fundamental questions about a rate court's authority to so drastically alter the legal and economic relationships of songwriters, publishers, foreign writers and PROs that are not party or subject to the consent decree it administers. At the very least, a 100-percent licensing mandate would likely destabilize the industry by generating uncertainty and disputes over the respective rights of songwriters, publishers, PROs, and licensees under the complex network of preexisting contractual arrangements, premised as they are upon the assumption of fractional licensing.

2. Choice in the PRO Marketplace

As chronicled in the Office's recent report, the performance rights marketplace is already skewed by the fact that it includes organizations that are subject to consent decrees as well as entities that operate free of such restrictions.[128] The imposition of 100-percent licensing on ASCAP and BMI alone as an additional government constraint would only further distort the market by undermining those entities' ability to compete against unregulated PROs (perhaps foreign PROs) and publishers that are themselves able to offer fractional licensing. Indeed, ASCAP and BMI predict that a 100-percent licensing rule would lead major publishers to wholly withdraw from those organizations in order to preserve their ability to license works on a fractional basis.[129]

Regardless of whether these predictions are accurate, as the DOJ has recognized, it is important to preserve choice and competition among the PROs.[130] For example, competition among PROs can yield more efficient methods for tracking performances and distributing royalties, as well as lower commission rates.[131] The savings from such competitive

[128] *See* COPYRIGHT AND THE MUSIC MARKETPLACE at 95.
[129] ASCAP Jointly Owned Works Comments at 16-17; BMI Jointly Owned Works Comments at 8.
[130] In supporting adoption of the Second Amended Final Judgment ("AFJ2") in 2000, the DOJ cited competition among PROs as the key reason why the AFJ2 did away with the previous requirement that changes to ASCAP's distribution methodology be approved by the DOJ or the rate court. *See* Memorandum of the United States in Support of the Joint Motion to Enter AFJ2 at 40, *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. June 11, 2001), 2001 WL 1589999, *available at* http://www.justice.gov/atr/case-document/file/485996/download ("U.S. Memo in Support of AFJ2").
[131] *See, e.g.*, Memorandum of the United States in Response to Public Comments on the Joint Motion to Enter AFJ2 at 41, *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. June 11, 2001), 2001 WL 1589999, *available at* http://www.justice.gov/atr/case-document/file/485971/download ("The United States believes that SESAC's use of technology has pushed ASCAP to improve its music tracking systems.").

improvements benefit everyone—songwriters, publishers, licensees and, ultimately, the public.[132]

Songwriters and publishers have highlighted the importance of the existence of multiple PROs in the music marketplace, indicating that they carefully choose the PRO with which they affiliate based on their perception of which organization will bring them the most benefit.[133] The PROs compete for songwriter members based on several criteria, including membership terms,[134] royalty calculation and distribution practices,[135] claim adjustment procedures,[136] training, networking, educational opportunities[137] and other benefits, such as potential provision of advances, loans or guarantees.[138] Although the licensing rates and commission structures may in some cases be roughly equivalent,[139] this is not inevitable and there is a possibility of greater differentiation in the future, especially if new entities are able to enter the PRO market.[140]

It seems that to require ASCAP and BMI to engage in 100-percent licensing could significantly inhibit such competition. To begin with, the ability of ASCAP and BMI to offer competing terms to songwriters and publishers would be questionable because there would be no way to guarantee that their members would in fact receive distributions based on those terms. It is also possible that 100-percent licensing could hamper the ability of smaller organizations—such as SESAC and GMR—to compete in the PRO marketplace. To the extent a smaller PRO controlled only partial rights to songs that were also represented by ASCAP or BMI, licensees

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[132] According to DOJ, competition among the PROs "is likely to be far more effective in disciplining [PRO] distribution practices than regulation by the Department or the Court," because "[i]f a member becomes dissatisfied with the way [a PRO] distributes its revenue, it can move to one of the other PROs." U.S. Memo in Support of AFJ2 at 40.

[133] *See* ASCAP Songwriters and Publishers Jointly Owned Works Comments at 1; BMI Songwriters and Publishers Jointly Owned Works Comments at 2.

[134] BMI Jointly Owned Works Comments at 6 n.7; *see also* ASCAP WRITER AGREEMENTS; BMI WRITER AGREEMENT.

[135] For example, ASCAP and BMI distribute royalties quarterly, according to separate formulas, whereas SESAC distributes royalties monthly according to its own formula. *See* ASCAP SURVEY AND DISTRIBUTION RULES & POLICIES §§ 2.10, 3.1.1, at 5-6; BMI Royalty Policy Manual; *About*, SESAC, http://www.sesac.com/About/About.aspx (last visited Jan. 6, 2016); SESAC Jointly Owned Works Comments at 7.

[136] *See* ASCAP SURVEY AND DISTRIBUTION RULES & POLICIES § 5, at 17-18; BMI Royalty Policy Manual.

[137] *See* ASCAP Songwriters and Publishers Jointly Owned Works Comments at 1; BMI Songwriters and Publishers Jointly Owned Works Comments at 1.

[138] *See* Todd Brabec Jointly Owned Works Comments at 2 (noting that one of the considerations for writers or publishers is which PRO "offers certain other benefits and incentives, such as advances, loans, or guarantees").

[139] Though similar, licensing rates and commissions are not identical. For example, the rates of ASCAP and BMI vary from year to year; in recent years they have ranged from roughly 11 to 13 percent. *See* COPYRIGHT AND THE MUSIC MARKETPLACE at 97; *Licensing Help*, ASCAP, http://www.ascap.com/licensing/licensingfaq.aspx#general (last visited Jan. 6, 2016). In addition, there may be differences in the licensing rates ASCAP and BMI negotiate or secure in court. For instance, the rate courts adopted materially different rates for Pandora's blanket licenses for the two PROs. *See In re Pandora*, 6 F. Supp. 3d at 353-55 (rate for ASCAP license for Pandora set at 1.85 percent); *BMI v. Pandora*, 2015 WL 3526105, at *15-26 (rate for BMI license for Pandora set at 2.5 percent).

[140] For example, GMR has explained that it aims to run a more data-driven PRO that "transform[s] the current model by eliminating inefficiencies . . . [to] align music creators' and music users' interests for mutually beneficial profitability." GMR, http://globalmusicrights.com/ (last visited Jan. 6, 2016); *see* Andrew Flanagan, *Global Music Rights, ASCAP, BMI, and Pandora Get Nitty and Gritty in CMJ Discussion*, BILLBOARD (Oct. 15, 2015), http://www.billboard.com/articles/business/6731054/cmj-global-music-rights-ascap-bmi-pandora.

might have little incentive to obtain licenses for those works from the smaller player.[141] And, knowing of that competitive disadvantage, individual songwriters might not risk the move away from ASCAP or BMI.

100-percent licensing could also make it difficult for publishers to enter into direct deals, since their shares of any partially owned works would potentially be subject to licensing by ASCAP or BMI. Such an outcome would run counter to a primary justification under antitrust law for allowing collective blanket licensing by ASCAP and BMI—that publishers are able to compete with these PROs by licensing works directly to users.[142]

3. Scope of the Consent Decrees

According to the Supreme Court, "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree."[143] Here, apart from the United States, the only parties bound to the consent decrees are ASCAP and BMI. One might also argue that songwriters and publishers who choose to affiliate with these PROs acquiesce in their terms.[144]

But, as explained above, the consequences of 100-percent licensing would not be limited to ASCAP and BMI or their respective members. Instead, a system requiring ASCAP and BMI to engage in 100-percent licensing would directly impact the rights of songwriters and publishers affiliated with other, unregulated PROs (*e.g.*, SESAC and GMR), foreign copyright owners, and parties who choose to remain unaffiliated with any PRO.[145] The Office does not understand what authority—antitrust or otherwise—could be invoked to support such a substantial encroachment on the copyright interests of non-parties to the consent decrees.

C. Alternative Reading to Exclude Partially Represented Works

As noted above, ASCAP's consent decree defines ASCAP's repertoire as "those works the right of public performance of which ASCAP has or hereafter shall have the right to license

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[141] *See* SESAC Jointly Owned Works Comments at 9 (noting that a 100-percent licensing requirement would "creat[e] an additional impediment to leaving ASCAP unless all co-writers leave").

[142] *See BMI v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23-24 (1979) (finding that blanket licenses are not *per se* violations of the Sherman Act because direct licenses were viable alternatives for potential licensees); *see also Columbia Broad. Sys., Inc. v. ASCAP*, 620 F.2d 930, 938-39 (2d Cir. 1980) (finding that blanket licenses did not unreasonably restrain competition because licensees such as CBS had a real choice in obtaining direct licenses from copyright owners as an alternative); *Buffalo Broad. Co., Inc. v. ASCAP*, 744 F.2d 917, 926-32 (2d Cir. 1984) (finding same because direct licenses, as well as per-program and source licenses, presented realistic alternatives to the blanket license).

[143] *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 529 (1986).

[144] *See* ASCAP WRITER AGREEMENTS ¶B, at 1 ("I have read the . . . Second Amended Final Judgment entered in U.S. v. ASCAP ('AFJ2'), and agree to be bound by them, as now in effect, and as they may be amended"); ASCAP PUBLISHER AGREEMENTS ¶A, at 1 (same).

[145] One prominent example of a songwriter that has deliberately chosen not to be affiliated with a PRO is Prince. Errin Whack, *Prince Calls for Artist Freedom, Ties Fight to Black America's Struggle*, NBC NEWS (Aug. 10, 2015), http://www.nbcnews.com/news/nbcblk/prince-calls-artist-freedom-ties-fight-black-americas-struggle-n407191 (noting Prince's decision to leave ASCAP in 2012).

at the relevant point in time,"[146] and the BMI decree includes analogous language.[147] Both decrees require the PROs to grant licenses to "all of the works in the . . . repertory."[148] As some commenters in the DOJ process have observed, drawing upon this language—and assuming a 100-percent licensing requirement—an argument could be made that any works as to which the relevant PRO could *not* grant full rights would be excluded from that PRO's repertoire.[149] Under such an interpretation, then, neither ASCAP nor BMI could license a co-owned work unless that PRO represented 100 percent of the ownership interests in the work or received an appropriate grant of rights from a represented co-owner who was not contractually or otherwise restricted in his or her ability to make such a grant.

In the Office's view, such an alternative reading of the consent decrees also suffers from significant defects. To begin with, as discussed above, it conflicts with longstanding interpretations of the decrees and industry practice and seems unsupportable for that reason alone. But it also seems to ignore important practical realities of the music industry.

Notably, for the year 2014, it has been reported that 93 of the top 100 charting songs had co-writers, and 64 or more of those songs were registered with more than one PRO.[150] It stands to reason, then, that many of the most commercially successful songs not only have multiple co-owners, but are represented as fractional interests through two or more PROs. This fact is compounded by the additional circumstance that of the 30 million plus tracks currently available through digital music services, the top 1 to 2 million account for almost 95 percent of usage and corresponding revenue.[151] In short, many of the most sought-after and valuable songs would be wholly excluded from licensing by either of the two largest PROs.

A question then arises as to whether the prospect of exclusion from ASCAP or BMI would force co-owners who had agreed not to license each other's shares to reconsider these understandings. In considering this issue, it must be remembered that the division of copyrights originates with the writing of the song and is reflected not only in co-writer relationships but in

[146] ASCAP Consent Decree at *1.
[147] The BMI consent decree defines repertoire as "those compositions, the right of public performance of which [BMI] has or hereafter shall have the right to license or sublicense." BMI Consent Decree § II(C), at 2.
[148] ASCAP Consent Decree at *4; *see also* BMI Consent Decree § IX, at 5-6 (requiring the licensing of "any musical composition in [BMI]'s catalogue of musical compositions").
[149] *See, e.g.*, ASCAP Jointly Owned Works Comments at 2 ("If ASCAP were required to offer '100% licenses' for all works to all music users, it would have to confirm with each of the thousands of members who co-own works with non-ASCAP members if there were any contractual bar to licensing those works by ASCAP . . . . [and] songs that are written jointly by ASCAP and non-ASCAP members would effectively be removed from the ASCAP repertory [and] . . . . would no longer be available under an ASCAP license unless and until ASCAP could confirm that it has the rights to license those songs on a 100% basis."); Passman/NMPA Jointly Owned Works Comments at 2 (noting that "unless all parties agree to one PRO licensing [a] song, which is not the norm in the industry . . ., the result would be that no one [including PROs] has the right to license the song" (emphasis omitted)).
[150] Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, http://www.billboard.com/articles/business/6649208/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for.
[151] *See* COPYRIGHT AND THE MUSIC MARKETPLACE at 194 ("As HFA reports, 1-2 million sound recordings account for almost 95% of usage in a typical digital music service." (citing NMPA & HFA First Notice Comments at 13)); *id.* at 163 (noting that "Spotify, for instance, reports that it offers some 30 million songs on its service").

writers' contractual relationships with their publishers, which provide that the publisher is only entitled to exploit the writer's fractional interests in the subject songs. Even if writers and publishers were inclined to relinquish their right of control to co-owners (a proposition that seems doubtful for high-earning creators and their publishers, especially if they have a strong preference for their own PRO), it would be no small task to renegotiate and document the countless relationships of the current and legacy writers who would be affected. The challenges of doing so would be multiplied by the fact that many successful writers do not work with just one or two regular partners, but may write songs with a shifting array of collaborators. Confronted with these issues, it seems that co-writers and their publishers might choose simply to move to an unregulated PRO, or to engage in direct licensing, and that many important works would simply fall out of the repertoires of ASCAP and BMI. It is hard to see how such a result would serve the interests of copyright owners or licensees.

At the other end of the spectrum, individual writers and publishers who were not properly advised might unwittingly grant 100-percent licensing rights to their PRO without the authority to do so, thus exposing themselves to liability. Or two co-writers with different affiliations might each grant 100-percent rights to their own PRO. Which PRO would then be granting the license, and which should be paid by the licensee? An added concern is that even in cases where such issues were resolved, for the reasons explained above, the licensing entity or co-owner might lack the wherewithal to properly account to other rightsholders.

Finally, it seems the administrative burdens and costs of such a system on ASCAP and BMI could be overwhelming. These two PROs presumably would be required to ascertain, song by song for millions of works,[152] whether they had the right to issue a 100-percent license.[153] In cases where the other PRO enjoyed the same rights to license a work, there would need to be coordination in licensing and collection processes so it was clear which PRO was issuing the license and to facilitate proper accounting to co-owners. Apart from the logistical challenges of such a system, it seems it could significantly increase the operational costs of these two entities, which presumably would be passed on as higher commissions to their members.

In sum, an interpretation of the consent decrees that would require 100-percent licensing or removal of a work from the ASCAP or BMI repertoire would appear to be fraught with legal and logistical problems, and might well result in a sharp decrease in repertoire available through these PROs' blanket licenses. It would seemingly punish copyright owners who have chosen to exercise their rights under the Copyright Act to manage their separate copyright interests through the PRO of their choice. And, at the very least, it seems inevitable that it would be extremely disruptive to the blanket licensing practices of ASCAP and BMI, upon which large segments of the music community—including songwriters, publishers and licensees—currently rely.

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[152] Both ASCAP and BMI have millions of songs in their repertoires. *See* ASCAP, 2014 ANNUAL REPORT, at 5 (2014), *available at* http://www.ascap.com/~/media/files/pdf/about/annual-reports/ascap_annual_report_2014.pdf; *What We Do*, BMI, http://www.bmi.com/about/ (last visited Jan. 26, 2016).

[153] It is this very type of song-by-song licensing effort that is the source of considerable angst under the section 115 compulsory license, which many stakeholders, as well as the Office, believe should be transformed into a blanket system like that of the PROs. *See* COPYRIGHT AND THE MUSIC MARKETPLACE at 169-70.

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CO-CHAIRMAN OF THE CREATIVE RIGHTS CAUCUS

February 4, 2016

The Honorable Loretta E. Lynch
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Lynch,

As you may know, the House Judiciary Committee has been engaged in an extensive effort to review the Copyright Act. As Vice-Chairman of the Subcommittee on Courts, Intellectual Property and the Internet, I have been integrally involved in this review and I have made it a priority to remain informed on the multitude of complex copyright issues before the Committee as we move toward potential legislation. Updating our music licensing laws is vitally important and terminating outdated consent decrees is a key part of such an update. For this reason, I wrote to the U.S. Copyright Office (USCO) earlier this year to request its views on a pertinent matter of music copyright law related to the licensing of the performance rights of jointly owned musical works by United States performing rights organizations (PROs).

In the enclosed January 29, 2016 letter responding to my request, the USCO addresses many aspects of this important music licensing issue. I am sharing the USCO's analysis with you since your Department's Antitrust Division is engaged in a review of the consent decrees governing two PROs, ASCAP and BMI, the outcome of which may directly impact this music copyright issue. While congressional action is not dependent on the Department's review, it certainly is relevant to our legislative discussions and plans for future action.

Specifically, I understand that the Antitrust Division recently requested public comment on the issue of whether the ASCAP and BMI consent decrees require the two PROs to engage in the licensing of one hundred percent (100%) of a jointly owned work, even where that PRO does not represent all joint owners of the musical work.

The USCO letter states clearly that it is the position of the Copyright Office that interpreting the two consent decrees in the manner proposed by the Antitrust Division would present "a host of legal and policy concerns" and "seemingly vitiate important principles of copyright law, interfere with creative collaborations among songwriters, negate private contracts, and impermissibly expand the reach of the consent decrees." USCO January 29, 2016 Letter at 3.

I hope that the Department will give the USCO's expertise on these copyright issues appropriate consideration and deference as the Antitrust Division continues its review. I also encourage the Department to conclude its review in a timely fashion. I request that your Department keep me updated on the progress of this review, particularly as it relates to any outcomes that may deviate significantly from the perspective shared by the USCO.

Sincerely,

Doug Collins
Member of Congress

Enclosure: January 29, 2016 Letter from the U.S. Copyright Office

Cc: Stuart Delery, Acting Associate Attorney General
Peter Kadzik, Assistant Attorney General for Legislative Affairs
Renata Hesse, Deputy Assistant Attorney General, Antitrust Division