MILBANK, TWEED, HADLEY & McCLOY LLP

28 LIBERTY STREET
NEW YORK, N.Y. 10005-1413

212-530-5000

FAX: 212-530-5219

LOS ANGELES
213-892-4000
FAX: 213-629-5063

WASHINGTON, D.C.
202-835-7500
FAX: 202-835-7586

LONDON
44-20-7615-3000
FAX: 44-20-7615-3100

FRANKFURT
49-69-71914-3400
FAX: 49-69-71914-3500

MUNICH
49-89-25559-3600
FAX: 49-89-25559-3700

BEIJING
8610-5969-2700
FAX: 8610-5969-2707

HONG KONG
852-2971-4888
FAX: 852-2840-0792

SEOUL
822-6137-2600
FAX: 822-6137-2626

SINGAPORE
65-6428-2400
FAX: 65-6428-2500

TOKYO
813-5410-2801
FAX: 813-5410-2891

SÃO PAULO
55-11-3927-7700
FAX: 55-11-3927-7777

Scott A. Edelman
Chairman
DIRECT DIAL NUMBER
212-530-5149
E-MAIL: sedelman@milbank.com

August 4, 2016

VIA ECF & HAND DELIVERY

Honorable Louis L. Stanton
United States District Court
Southern District of New York
500 Pearl Street, Courtroom 21C
New York, NY 10007

Re: *United States of America v. Broadcast Music, Inc.*, No. 64 Civ. 3787

Dear Judge Stanton:

We write on behalf of Broadcast Music, Inc. ("BMI") to request a pre-motion conference that is necessitated by a statement issued today by the Department of Justice (the "DOJ"), a copy of which is annexed hereto as Exhibit A (the "DOJ Statement"). In its statement, the DOJ attempts to construe the BMI consent decree (the "Consent Decree") in a manner that would, contrary to longstanding industry practice, require only "full work" or "100%" licensing, and thereby prohibit BMI's longtime practice of licensing "fractional" interests in works that are co-owned with other, non-BMI-affiliated rights holders.[1] The Consent Decree has never required full work licensing and to read it as doing so now would contradict decades of historical practice, undermine the purposes of the Consent Decree, and reduce the benefits of the blanket license.

[1] Fractional licensing is the practice whereby BMI licenses only the shares of a co-owned work that belong to its affiliates, as opposed to "full work licensing" or "100% licensing," which refers to the practice of granting full rights to publicly perform co-owned works, even if the co-owners are not BMI affiliates.

BMI's motion would seek: (1) a declaration that the Consent Decree does not require 100% licensing; (2) in the alternative (if the Court reads the Consent Decree to require 100% licensing), a modification of the Consent Decree to allow BMI to license on the basis of the fractional shares owned by its affiliates; and (3) in the event that the Court disagrees with BMI, an order providing BMI with the time necessary to transition to 100% licensing after the issuance of a final order.

Consent decrees are injunctions that must be clear and unequivocal about the conduct prohibited or required. They are not flexible instruments to be reread (as the DOJ seeks to do here) to impose new prohibitions or requirements that were never anticipated or considered by the parties when the consent decrees were negotiated and adopted. The Consent Decree was never intended to require 100% licensing and until now, the DOJ has never read it to do so.

The DOJ asserts that its interpretation is compelled by: (1) the language of the Consent Decree; (2) the Second Circuit's and this Court's decisions in the *Pandora* cases; and (3) the public interest. (DOJ Statement at 11-12.) As demonstrated below, none of the above supports the DOJ's position. First, the language of the decree must be considered in the context and market in which it was adopted, which included fractional licensing. Second, fractional licensing was not at issue before this Court or the Second Circuit, and the issue was not decided, in the *Pandora* decisions upon which the DOJ relies. Finally, the full work licensing requirement that the DOJ seeks to impose by fiat would be contrary to the public interest. It would reduce the benefits of the blanket license, disincentivize direct licensing, and increase transaction costs in the marketplace for licensing performances of musical works. Such results would be at odds with the antitrust laws and the purposes of the Consent Decree.

Factual background

Many musical works are the product of collaboration between two or more songwriters or composers, each of whom receives a partial, or fractional, interest in the work. In such cases, the songwriters typically agree among themselves as to the share of each contributor's ownership interest in the song. Under the default common law rule in the United States, unless the co-creators agree to the contrary, co-creators hold the copyright as tenants-in-common such that each is able to license the whole work (but must account to the other owners for their shares of the royalties). However, not all works are held by co-creators as tenants-in-common. In many instances, either foreign law[2] or a contract between co-creators provides that each co-creator has the right only to license his or her fractional interest in the work. Such a co-creator, when affiliating with BMI, can only grant to BMI, and BMI in turn (if the other co-creator is not affiliated with BMI) can only license to a music user, that co-creator's fractional interest in the work. Such co-created works where the co-creators are affiliated with two or more Performing

[2] In jurisdictions outside the United States, the default rule is that individual co-authors may license *only* their fractional share in a work (absent an agreement by all co-authors to the contrary). *See* 1 Nimmer on Copyright § 6.10 ("[I]n foreign jurisdictions, a license will not be valid unless all joint owners are party to it.").

Rights Organizations ("PRO") are referred to as "split works," as the fractional interests in the performing right are split between multiple PROs.[3]

As the DOJ recognizes, the PRO licensing market has developed and functioned efficiently for decades by pricing, collecting, and distributing fees and royalties for split works on a fractional basis. (DOJ Statement at 11, 20-21.) BMI prices its licenses based on its share-adjusted percentage of the market and negotiates with users on that basis. This Court, when evaluating the reasonableness of a rate, has consistently been presented (by both BMI and music users) with evidence of BMI's "share-adjusted"—meaning the aggregate of its fractional interests—market share and rates. Rates set by this Court have only ever been applied to the fractional interests of BMI's affiliates. BMI in turn makes royalty payments only to its own affiliates, on account of the fractional interests they hold in works performed. There is no accounting to other co-creators, who receive royalties from their own PROs (which also collect and pay on a share-adjusted basis).

Notwithstanding that fractional licensing has been the status quo for decades, at the behest of music users, the DOJ has now pronounced that the Consent Decree requires BMI to offer full work licenses and to exclude from its repertoire all works that BMI can license only on a fractional basis. This would be a reversal of established practice in the industry, which would deny those songwriters and composers the benefits of the blanket license and preclude BMI from offering ***any*** fractional interests it holds in split works to music users. Until now, music users have obtained the right to publicly perform split works for which BMI can only license a fraction by obtaining licenses from the other domestic PROs and effectively aggregating the fractional interests into a full work license. Not anymore. Under the DOJ's new would-be rule that precludes BMI from licensing fractional interests, BMI's fractions would become trapped, making the works unlicensable by BMI or any other PRO (because none hold the full right to license the composition). (DOJ Statement at 12.) Unless songwriters, composers, and publishers reorder their affairs, or music users identify and obtain direct licenses for each affected song or composition, these songs will be "stranded," incapable of being performed in this country. This is likely to impact a significant (although currently unknowable) number of works, including, in particular, foreign works which, in general, are not subject to the American default rule of tenancy in common.

The BMI Consent Decree does not require 100% licensing.

The Consent Decree is an injunction and any activity not expressly and unambiguously required or prohibited thereunder is permitted. *United States v. Armour*, 402 U.S. 673, 678-79, 682 (1971) (where a consent decree unambiguously "prohibits certain behavior" and not others, the other behavior is not prohibited); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1060 (2d Cir. 1995) (no obligation to take certain action where the decree "contain[s] a number of detailed provisions, [but did] not specifically require" such action). The Consent Decree does not

[3] The majority of works in BMI's repertoire are works either created by a single writer or composer or co-written by two or more creators who are all affiliates of BMI. Those works would not be affected by a full work licensing requirement. Increasingly, however, new music is created by multiple writers/composers only some of whom are BMI affiliates.

expressly require 100% licensing, and BMI has licensed fractional interests in split works for decades.

The Consent Decree does not unambiguously prohibit fractional licensing.

The Consent Decree provides that "'Defendant's repertory' means those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense."[4] (Consent Decree § II(C).) After a 15-month review, which prompted over 130 *conflicting* comments from stakeholders—including one submission from over 13,000 songwriters and composers—the DOJ has concluded that the term "composition" limits the licensed "repertory" to only works for which BMI is capable of granting 100% of the performance right and therefore precludes licensing of fractional interests in compositions. (DOJ Statement at 12.)

The DOJ's reading of the Consent Decree is far from clear and unambiguous. First, it is contrary to the understanding of the United States Copyright Office (the "CRO")—the U.S. government agency charged by statute with administering U.S. copyright law—which urged that the term "composition" in the BMI Consent Decree "***must be understood to include partial interests in musical works***." (CRO Views[5] at 13-14 (emphasis added).) Second, it is belied by the actual practice in the music industry for the last 50 years. BMI intends to present evidence that the term "composition" is commonly used in connection with music licensing to include fractional interests in musical works, as well as the works themselves. Such evidence of trade practice and custom is relevant in determining the meaning of the Consent Decree. As the Second Circuit has in the analogous context of contract interpretation: "[e]vidence of trade practice and custom may assist a court in determining whether a contract provision is ambiguous in the first instance." *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 180 (2d Cir. 2014). As the CRO noted, excluding partial interests from the BMI and the ASCAP repertoires would be a significant departure from "fifty years of contrary practice." (CRO Views at 14.) Finally, the DOJ's acknowledgement, after extensive review, that there is no consensus in the marketplace as to whether the Consent Decree requires 100% licensing[6] demonstrates that the BMI Decree does not clearly require 100% licensing.

The DOJ's interpretation of the Consent Decree is not required by the Second Circuit's holding in Pandora v. ASCAP *nor this Court's holding in* BMI v. Pandora.

The DOJ has asserted that its interpretation is compelled by the Second Circuit's (and this Court's) holdings in the *Pandora* cases. However, those cases did not speak to fractional licensing at all. The question in those cases was whether a regulated PRO could treat some users

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[4] The definition was added in 1994, when the practice of fractional licensing was already well established. It was not intended to, and does not, address the question of fractional versus full work licensing.

[5] In the course of the DOJ's investigation, the Copyright Office issued a 29-page report, entitled "Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works," http://www.copyright.gov/policy/pro-licensing.pdf (the "CRO Views"). The DOJ Statement quotes from that report, yet rejects its analysis and conclusions without addressing them. (*See* DOJ Statement at 8.)

[6] *See* DOJ Statement at 3, 4, 10, 16-17.

differently than other users by offering certain users licenses to only a subset of the PRO's repertory of works. The Second Circuit observed that: "As ASCAP is required to license its entire repertory to all eligible users, publishers may not license works to ASCAP for licensing to some eligible users but not others." *Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 785 F.3d 73, 77 (2d Cir. 2015). Similarly, this Court held that the Consent Decree strips from the BMI repertory any "compositions which [BMI] can no longer offer to the New Media Services." *Broad. Music, Inc. v. Pandora Media, Inc.*, No. 13 Civ. 4037 (LLS), 2013 WL 6697788, at *4 (S.D.N.Y. Dec. 19, 2013). This Court reasoned that whatever rights BMI holds must be made available to "all applicants." *Id*. at *3; *see also id*. at *5 (Consent Decree does not "allow one with BMI's market power to refuse to deal with certain of its applicants"). The decision did not consider, much less resolve, *what* rights BMI holds in compositions, nor what the terms "composition" and "repertory" mean in the Consent Decree. Neither decision addressed the question of whether fractional licensing is prohibited or full work licensing is required. Moreover, they did not determine whether BMI is obligated to license those interests owned by co-creators who specifically chose not to affiliate with BMI, and instead affiliated with ASACP or opted out of the regulated PROs entirely.

If the Court concludes that the Consent Decree unambiguously requires 100% licensing, the Consent Decree should be modified to allow fractional licensing.

In the event the Court concludes that the Consent Decree currently requires 100% licensing, BMI will ask the Court to modify the Consent Decree to conform it to longstanding efficient market practices, not force the market to conform to the Consent Decree—as the DOJ would require. As BMI will demonstrate in its motion, such a modification would be in the public interest. Likewise, should the DOJ seek to modify the Consent Decree to include a prohibition on fractional licensing (as it should do if it seeks to change the historical practice in the industry), then the DOJ's requested modification should be rejected.[7]

A new-found prohibition on fractional licensing by BMI (and ASCAP) would create enormous disruption and uncertainty because, as the DOJ acknowledges, it would require restructuring longstanding arrangements affecting millions of musical works globally. (DOJ Statement at Section VII; *see also id.* at 4.) At a minimum, it would result in a significant body of works (in particular foreign works) becoming "stranded" (*i.e.*, unlicensable by any PRO). Recognizing that this would not be in the public interest, the DOJ goes to unusual lengths in today's statement to propose "solutions" in which songwriters, composers, publishers, and PROs can reorganize their existing relationships to minimize the number of musical works that fall out of the PROs' repertoires. (*Id.*) However, the DOJ's proposed "solutions" would require songwriters and composers to abdicate their right to control their copyright interest in the work

[7] This case is dramatically different from the ordinary consent decree modification case, where a modification is proposed to adapt the decree to changed circumstances in law or fact. *See United States v. Eastman Kodak Co.*, 63 F.3d 95, 102 ("[W]hen time and experience demonstrate that [a] decree 'is not properly adapted to accomplishing its purposes,'" an antitrust defendant may be relieved of a consent decree's restrictions). If the DOJ's reading of the Consent Decree were correct, enforcement of that reading would require a significant shift in the status quo over the objection of the defendant, requiring the market to adapt to the DOJ's new reading of the Consent Decree instead of the opposite.

and/or to forego their choice of PRO in order to permit 100% licensing of the work. (*Id.* at 18-20.) Furthermore, even if some number of co-owners were willing to rearrange their existing contractual relationships, in many instances it will be very difficult to identify and locate all co-owners of a split work, much less bring them together under one PRO.

100% licensing would destroy the efficiencies of fractional payment and distribution.

The PRO licensing market is based entirely on fractional pricing, fractional collection, and fractional distribution of fees and royalties. All market participants—and the DOJ—agree that fractional payment and distribution of royalties is the most effective and efficient system, and should be preserved. The DOJ suggests that one way to preserve this status quo—one of the DOJ's "solutions" to its self-created problem—is for BMI to continue to price its licenses on a fractional basis, and collect and distribute royalties only to its affiliates on account of their fractional interests in the licensed works.[8] (DOJ Statement at 20-21.) This hypothetical solution works only if all music users continue to obtain licenses from all PROs. However, the DOJ acknowledges that some music users may elect to take a license from only one PRO and rely on that license for the right to perform all split works, (DOJ Statement at 22), in which case, other co-creators in the split work would never have the opportunity to negotiate or collect royalties for their shares. Regardless of whether this becomes the norm or the exception, BMI would be required to develop and maintain the systems, and collect vast quantities of new data, price licenses on a full-work basis, and collect and distribute royalties on account of songwriters, composers, and publishers affiliated with other PROs. The additional costs and burdens that would be borne by BMI—and ultimately by songwriters, composers, publishers, and music users—would be prohibitive.

100% licensing would expand the scope of the Consent Decree and inhibit free market transactions.

As noted above, the DOJ's proposed "solutions" to achieve 100% licensing of a work would require co-owning songwriters and composers to abdicate their right to control their own copyright interest in the work and/or forego their choice of PRO. If the songwriters and composers of a given split work were compelled to license through a single PRO, as proposed by the DOJ, BMI (or ASCAP) would obtain a larger position in the market not by competing to attract more talent, but simply by virtue of affiliates being forced to aggregate more rights with BMI than they would otherwise choose to do. It could also create a barrier to entry or expansion for new competitor PROs, as their ability to license any fractional interests in split works would be displaced by the 100% licenses granted by the regulated PROs. This would undermine the core purpose of the Consent Decree: to ensure the procompetitive benefits of BMI's blanket license are available to all music users while preserving access to competitive alternatives, including direct licensing by publishers and composers.[9] *See* Consent Decree §§ IV(A), XIV(A);

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[8] Maintaining such an incongruity between the legal rights granted and the economic interests at stake would not be tenable. BMI cannot be expected to grant full indemnified access to all works, while at the same time collecting royalties only for a fraction of the interest licensed.

[9] Large music users have advocated strongly in favor of 100% licensing by regulated PROs to achieve just that. Despite decades of complaining about the market power wielded by BMI and ASCAP, music users now seek to

Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers, 744 F.2d 917, 927 (2d Cir. 1984).

The effects of the DOJ's new requirement would be far-reaching. If the DOJ interpretation were to stand, a BMI songwriter—one who chose BMI for a variety of economic and professional reasons—could find his or her interest in a co-created work with ASCAP writers to be licensed in full by ASCAP, an organization with whom the writer has no relationship, contractual or otherwise. Facing such an abrogation of his or her choice of representative, and seeking to ensure control over his or her interest in the work, a BMI writer may be incentivized by the DOJ interpretation to collaborate only with fellow BMI songwriters in the future. Suddenly, a writer's choice of collaborator (and currently the norm in modern pop songwriting is to have many co-writers) would be a function of a writer's PRO affiliation rather than talent, personal chemistry, and artistic compatibility. In the world proposed by the DOJ, iconic songwriting teams like John Lennon and Paul McCartney might have worked with each other only if they agreed to join a single PRO. To impose these kinds of restrictions cannot be in the public interest.

In the event the Court determines that the Consent Decree requires 100% licensing, market participants should be allowed a reasonable transition period to conform their agreements and affiliations to meet a 100% licensing requirement.

Recognizing that its approach conflicts with current industry practice, and would require significant adjustment by market participants, the DOJ has announced that it will allow the parties a one-year transition period. (DOJ Statement at Section VI.) This puts BMI in an untenable position. The music licensing industry must choose between taking immediate steps to "come into compliance" with the DOJ's new "understanding" (and bear the massive costs and associated disruption) under threat of a DOJ enforcement action if it maintains the fractional licensing status quo, or challenge the DOJ's unilateral interpretation of the Consent Decree before this Court.

The law should not put the market to such a choice.[10] This Court should *first* decide the issues presented and only *then*, if the DOJ prevails, should the industry be required to take the expensive and disruptive steps needed to try to comply with a new 100% licensing regime.

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force as many interests as possible under the regulated umbrella. The transparent attempt to avoid paying free market rates to unregulated PROs, and to prevent new, unregulated licensing competitors from entering the market, should not be entertained. This is an inappropriate use of the BMI Consent Decree. Full work licensing would improperly expand the reach of the BMI Consent Decree to regulate the behavior of non-parties and constrict longstanding, legitimate licensing practices. The Consent Decree is not a hammer to squash the rights inherent in copyrights of third party copyright holders to license (or not license) their interests in musical works.

[10] *See, e.g.*, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 490-91 (2010) ("We normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law,' and we do not consider this a 'meaningful' avenue of relief.") (citations omitted); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat") (emphasis in original).

In conclusion, BMI seeks a conference at the Court's earliest convenience to discuss its intended motion.

Respectfully,

/s/ *Scott A. Edelman*
Scott A. Edelman

Enclosure

cc: Renata B. Hesse
Acting Assistant Attorney General
United States Department of Justice, Antitrust Division
(via email and FedEx)