Before the
UNITED STATES COPYRIGHT OFFICE
The Library of Congress
Washington, DC

In the Matter of **Issues Relating to Performance Rights Organizations**	Docket No. 2025-1

REPLY COMMENTS OF BROADCAST MUSIC, INC.

I. INTRODUCTION

Broadcast Music, Inc. ("BMI") appreciates the opportunity to submit these reply comments to the United States Copyright Office (the "Copyright Office") in connection with the notice of inquiry issued by the Copyright Office on February 10, 2025, 90 Fed. Reg. 9253, requesting stakeholder perspectives on various issues relating to performing rights organizations ("PROs") (Docket No. 2025-1) (the "Notice"). Nothing in the comments submitted by other industry participants[1] changes BMI's position, stated in its initial comments, that there is no need for further regulation of the public performance landscape, let alone the draconian measures (such as a compulsory licensing regime) proposed by certain stakeholders.[2] Nevertheless, BMI addresses herein certain issues raised in the comments relating to fractional licensing, selective withdrawal, and live performances.

[1] These reply comments refer to other comments by reference to the names of the organizations that submitted those comments.

[2] *See* American Hotel and Lodging Association ("AHLA") at 3.

The well-funded and influential industry organizations advocating for heavy-handed changes belie the true purpose of their advocacy—namely, to reduce licensing fees at the expense of songwriters, composers, and music publishers who depend on them.

II. FRACTIONAL LICENSING

Several commentors claim that fractional licensing is a relatively new practice that negatively impacts the music licensing market and suggest that PROs should be required to license all musical works on a "full-work" basis.[3] These arguments ignore long-standing industry realities, fundamental tenets of copyright law, and the significant efficiencies associated with fractional licensing.[4]

Many musical works are the product of collaboration between two or more songwriters or composers.[5] Songwriting partners can each separately own the underlying copyright in the song they have created.[6] Although the Copyright Act of 1976 (the "Copyright Act")[7] contains default rules that treat all co-owners as tenants-in-common such that any co-owner can grant non-

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[3] *See, e.g.*, American Beverage Licensees at 4; AHLA at 1; National Association of Broadcasters ("NAB") at 3-5; Radio Music License Committee ("RMLC") at 8-9.

[4] It is well-settled that the BMI and ASCAP consent decrees do not require licensing on a full-work basis. Nearly a decade ago, the U.S. Department of Justice (the "DOJ") posited in an official statement that the consent decrees do not permit fractional licensing. U.S. Dep't of Justice, Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees 8 (2016), https://www.justice.gov/atr/file/882101/dl. The DOJ's position, if enforced, would have required ASCAP to fully license the public performance of musical works co-owned by copyright holders who contracted with BMI or another PRO, rather than ASCAP, and vice versa. BMI challenged the DOJ's interpretation of the BMI consent decree, arguing in favor of fractional licensing. The district court agreed with BMI. *United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374, 376 (S.D.N.Y. 2016), *aff'd*, 720 F. App'x 14 (2d Cir. 2017). In affirming the judgment, the U.S. Court of Appeals for the Second Circuit reasoned that because the BMI consent decree does not specifically prohibit fractional licensing, "BMI may (and perhaps must) offer" fractional licenses. *United States v. Broad. Music Inc.*, 720 F. App'x 14, 16-17 (2d Cir. 2017).

[5] NOI at 9255 ("[M]usical works are frequently created by multiple authors.") (citing U.S. Copyright Office, Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works 8-9 (2016), https://www.copyright.gov/policy/pro-licensing.pdf ("Fractional Licensing Letter")).

[6] 17 U.S.C. § 201(d).

[7] 17 U.S.C. § 101.

exclusive licenses to the right of public performance in the full work,[8] co-authors are allowed to contract around those default rules.[9] In practice, songwriters and composers often do,[10] and for good reason. Music creators do not choose their creative partners based on PRO affiliation. Where co-authors agree to displace the default rule and associate with different PROs, this results in "split works"—*i.e.*, their respective fractional interests are "split" between multiple PROs. Each PRO can license only the fraction of the public performance right received from its respective member; neither can license the whole.[11]

Fractional licensing is not a new phenomenon: It is the long-standing, efficient, common-sense way to deal with the fact that many songs are co-written by multiple songwriters. The entire music licensing industry has built its practices on a fractional licensing model. For decades, BMI and other established PROs have: (1) priced public performance rights licenses based on their respective share-adjusted percentage of the market (rather than the number of works in their

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[8] 17 U.S.C. § 201(a); *see also Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007) (joint authors of a work "are to 'be treated generally as tenants in common, with each co[-]owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co[-]owners for any profits.'") (citing H.R. Rep. No. 94-1476, at 121 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736)

[9] *See, e.g.*, *Corbello v. DeVito*, 832 F. Supp. 2d 1231, 1244 (D. Nev. 2011) ("Joint owners may agree by contract that none of them shall independently license a work . . . ."); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 6.10 (Matthew Bender, rev. ed. 2025) (co-owners of copyrights are free to contract out of the default rule and divide up their interests as they see fit).

[10] *See* NOI at 9255 (citing Fractional Licensing Letter at 9). As the Copyright Office previously explained, "[t]he 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." Fractional Licensing Letter at 9. Some co-writers "might stipulate that each contributor 'shall administer and exploit only [his or her] respective ownership share' of the work." *Id*. Others agree that the consent of each co-owner is required in every instance in which a license is granted. *See* 1 Nimmer on Copyright § 6.10 [C]. BMI (and other PROs) also licenses foreign musical works through reciprocal agreements with non-domestic PROs. In this way, domestic music users can seamlessly secure the rights to foreign works through BMI, and foreign songwriters and publishers can collect royalties for the performance of their works in the United States. Notably, the tenancy-in-common default rule for jointly-created works has no application in many foreign countries, where separate ownership and alienation of interests in performance rights is the norm. Fractional Licensing Letter at 18 (BMI's agreements with foreign PROs are "predicated on a system of fractional licensing"). In many instances, a foreign PRO may only be capable of granting BMI the right to license one co-owner's fractional interest in the public performance right.

[11] As the Copyright Office has recognized, fractional licensing "is consistent with the basic legal precept that one cannot validly convey rights to more than what one owns or controls." *Broad. Music, Inc.*, 207 F. Supp. 3d at 375.

respective repertoires) and negotiated with users on that basis; and (2) made distributions to their respective affiliates and members based on the fractional interest of the works in their respective repertoires.[12]

Fractional licensing benefits: (1) songwriters and publishers who want performances of their works valued by the PRO of their choice, want to be paid by the PRO of their choice, and want to choose their collaborators in a new song based on creative considerations and not based on the PRO affiliation of the other songwriters; (2) PROs, by allowing each to freely license and efficiently administer the rights of its own songwriter and publisher affiliates (including by collecting fees and paying fair royalties to those affiliates) without interfering with the rights of, or assuming an obligation to, co-authors who are affiliated with a different PRO; and (3) music users, by providing them with access to all works in a PRO's repertoire without requiring them to pay multiple PROs in full for the right to publicly perform split works.

By contrast, full-work licensing, whereby a music user holding a PRO blanket license would obtain the right to perform all co-written songs in that PRO's repertoire without obtaining permission to perform those songs from any co-writer or publisher not affiliated with that PRO,

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[12] *See, e.g.*, Fractional Licensing Letter at 17 ("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 repertories, not 100 percent of all works or some works.") (citations omitted). In 2015, in connection with a review of the ASCAP and BMI Consent Decrees initiated by the DOJ, the DOJ solicited public comments concerning the fractional licensing of musical compositions. Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works, https://www.justice.gov/atr/ascap-and-bmi-consent-decree-review-request-public-comments-2015. In response, the DOJ received over 130 public comments from stakeholders across the music industry. The vast majority of public comments submitted by interested parties in the music-creating community revealed a broad agreement among copyright holders and licensors that the industry had always licensed on a fractional basis and any required change to that longstanding practice would have a negative impact on the marketplace. *See, e.g.*, Comments by the National Music Publishers' Association at 1-2, https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi22.pdf; Comments of Songwriters of North America at 1, https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi81.pdf; Comments of ASCAP at 9, https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi9.pdf; Letter from BMI Songwriter Affiliates to DOJ, https://www.justice.gov/atr/page/file/1091496/dl?inline; Letter from BMI Publisher Affiliates to DOJ, https://www.justice.gov/atr/page/file/1091496/dl?inline; Comments of SESAC at 3-4, https://www.justice.gov/atr/public/ascapbmi2015/ascapbmi20.pdf.

would impose an unworkable and unwarranted change to the existing and longstanding understanding by which music users, music creators, and PROs have operated for jointly-written songs. Among other things, the complexities associated with mandatory full-work licensing would: (1) disincentive music creators from partnering with creators associated with other PROs, thereby chilling the collaboration and innovation that has long been, and continues to be, a hallmark of the music-creation process;[13] (2) impose enormous costs on PROs (at the expense of their affiliates) by requiring PROs to, *inter alia*, develop and maintain systems necessary to collect and distribute royalties for songwriters, composers, and publishers affiliated with other PROs or engaged in direct licensing;[14] and (3) decrease consumers' access to music, as some works (including many foreign works) would be rendered unlicensable or "stranded."[15]

Some comments claim that fractional licensing results in music users paying more than 100% of the value of: (1) the musical works they perform;[16] or (2) the musical works licensed.[17] As an initial matter, the contention that some music users pay for more music than they *use* flies in the face of the well-established efficiencies of blanket licensing which, by definition, provide access to more music than an individual music user will ever use. Most music users strongly favor blanket licenses, including because they provide flexible, instant access to a vast repertoire of musical works and broad protection from copyright infringement liability.

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[13] *See, e.g.*, Fractional Licensing Letter at 8-9.

[14] Indeed, previously, the Copyright Office raised concerns that "[t]he administrative burdens and costs" of a full-work licensing regime "could be overwhelming." *Id.* at 29. Any such system might also raise antitrust concerns to the extent its implementation required PROs to exchange competitively-sensitive pricing information on co-licensed works to allow the PROs to calculate the amount owed to co-writers of songs affiliated with other PROs.

[15] *Id.* (noting that "many of the most sought-after and valuable songs" could be "wholly excluded from licensing").

[16] *See, e.g.*, International Association of Venue Managers at 21.

[17] *See, e.g.*, Television Music License Committee ("TVMLC") at 19-20; Music Innovation Consumers Coalition at 4.

In any event, as BMI explained in its initial comments, the vast majority of businesses do not need to obtain licenses from all four established PROs. Doing so is a business decision. Any commercial music user—such as the TVMLC—that believes a given PRO has overvalued its license (including by overestimating its market share), causing it to pay more than 100% of the value of the music licensed, likewise has options. That music user is free to: (1) forgo obtaining a license from that PRO and program around the catalog(s) that they would like to avoid; (2) directly license performance rights for music they perform in that PRO's repertoire;[18] and/or (3) in the case of BMI or the American Society of Composers, Authors and Publishers ("ASCAP"), litigate the price of the license (and related issues of market share) in rate court.

The RMLC erroneously argues that there is no realistic choice to forgo a PRO license because PROs wield complementary oligopoly power.[19] According to the RMLC, because PRO licenses are complements rather than substitutes, all PRO licenses are "must-haves" and, therefore, new PROs unconstrained by the consent decrees can obtain fractional ownership interests to "hold up" a licensee and command supracompetitive rates.[20] PROs, however, do not wield complementary oligopoly power.

As an initial matter, as the RMLC recognizes, the consent decrees require BMI and ASCAP to grant a license to any user that requests one (*i.e.*, mandatory automatic licensing), notwithstanding any disagreement about the fee or terms of that license,[21] thereby eliminating the

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[18] An increasing number of program producers are source licensing the public performance rights for music within their programs and embedding these public performance rights in the programs. For such programs, no additional license must be obtained for the public performance, either from a PRO or through a direct license with a music publisher.

[19] RMLC at 11-12.

[20] RMLC at 11; *see also* NAB at 7-9.

[21] ASCAP Consent Decree art. IX(E), *United States v. Am. Soc'y of Composers, Authors & Publishers*, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. Mar. 1950), *amended by* 2001-2 Trade Cas. (CCH) ¶ 73,474 (S.D.N.Y. June

"holdout right"—*i.e.*, the right to say "no" to a license request—otherwise granted to copyright owners under the Copyright Act.

Importantly, in a complementary oligopoly, removing one input renders the other input useless for the purposes of producing a downstream good. By contrast, any decision by a commercial radio broadcaster to forgo a license from a given PRO does not render the licenses it obtains from other PROs useless for the purpose of producing radio broadcasts. Commercial radio broadcasters, like other music users, are not required to obtain licenses from all PROs. They, too, have options, including programming selectively to avoid playing individual works for which they have not obtained all necessary performing rights, or seeking clearance via direct licenses from copyright owners. Obtaining licenses from all of the PROs is a business decision.

III. SELECTIVE RIGHTS WITHDRAWAL

Warner Chappell Music suggests that modifying the consent decrees to allow selective withdrawal of digital rights would allow songwriters and publishers to negotiate free-market direct deals with powerful digital music services, which it claims would lead to higher and faster royalty payments. While BMI submits that this is not the proper forum for addressing issues related to selective rights withdrawal, arguments in favor of this practice fail.

As an initial matter, the permissibility of selective rights withdrawal is not an issue of copyright law. It is a legal issue governed by the BMI and ASCAP consent decrees overseen by rate courts. Those rate courts and the U.S. Court of Appeals for the Second Circuit have rejected

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11, 2001); BMI Consent Decree art. XIV(A), *United States v. Broad. Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. Dec. 29, 1966), *amended by* 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. Nov. 18, 1994).

selective withdrawal as incompatible with the consent decrees.[22] Given that the consent decrees are subject to judicial oversight, modification of the decrees would require judicial action.

In any event, selective rights withdrawal is not necessary to allow music publishers to negotiate directly with digital music services. Music publishers currently have the right to directly license their works that are included in BMI's and ASCAP's repertoires.[23] Large music publishers frequently exercise this right to enter into direct licensing agreements with commercial music services, including, most significantly, digital streaming services.[24]

It is doubtful whether permitting large music publishers to selectively withdraw digital licensing rights would advance the interests of copyright-holding songwriters and composers that PROs exist to protect, or otherwise benefit the music industry at large. There is no reason to believe permitting selective rights withdrawal for digital services will materially improve the overall compensation received by the copyright holders whose musical works are withdrawn, even if music publishers are able to obtain higher public performance royalties in direct negotiations outside the shadow of the rate court.

Music creators receive compensation for the use of their copyrighted works by digital streaming services in the form of royalties associated with their public performance right *and* their mechanical right. By statute, the amounts digital streaming services pay in respect of public

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[22] *Broad. Music, Inc. v. Pandora Media, Inc.*, 2013 WL 6697788, at *1 (S.D.N.Y. Dec. 19, 2013); *In re Pandora Media, Inc.*, 2013 WL 5211927, at *1 (S.D.N.Y. Sept. 17, 2023), *aff'd sub nom. Pandora Media, Inc. v Am. Soc. of Composers, Authors & Publishers*, 785 F.3d 73 (2d Cir. 2015).

[23] ASCAP Consent Decree art. IV(B); BMI Consent Decree art. IV(A).

[24] *See, e.g.*, *Confirmed: Spotify and Universal Have a New Deal—Including a Direct Agreement with Universal Music Publishing Group in the US*, Music Business Worldwide (Jan. 26, 2025), https://www.musicbusinessworldwide.com/confirmed-spotify-and-universal-have-a-new-deal-including-a-direct-agreement-with-universal-music-publishing-group-in-the-us/; *see also Broad. Music, Inc. v. DMX Inc.*, 683 F.3d 32, 38, 42, 48 (2d Cir. 2012) (affirming the rate court choice to set the value of an adjustable fee blanket license between BMI and DMX by benchmarking it at the value of approximately 550 direct licenses between DMX and music publishers, as this "reflected the competitive market"; also noting that DMX secured a direct license with Sony/ATV Music Publishing—"one of the industry's largest music publishers").

performance royalties for musical works are deducted from or offset the funds otherwise allocated to the payment of mechanical royalties.[25] In other words, materially higher public performance royalties would only serve to reduce the pool from which available mechanical royalties are drawn; combined compensation would remain the same. Accordingly, even assuming a music publisher is able to negotiate and obtain a material increase in public performance royalties following a partial withdrawal, such increase is unlikely to materially increase the overall compensation received by songwriters and composers.

IV. LIVE PERFORMANCES

Certain commentors raise questions regarding the adequacy of compensation to rightsholders in connection with live performances, and oppose the practice of live concert promoters passing on their licensing costs to performers.[26] Although live performance venues and promoters are required to obtain a public performance rights license covering the songs performed, the vast majority do not assume responsibility for tracking and reporting live performances. While BMI welcomes additional reporting with respect to live performances, none of the concerns raised warrant the imposition of additional music monitoring costs on BMI at the significant expense of its affiliated songwriters, composers, and music publishers.

As noted in BMI's initial comments, BMI devotes considerable resources to live performance data collection and processing. With respect to concert performances in particular, BMI solicits setlists from headliners and opening acts for the largest concerts and events, purchases live performance data from Pollstar and Muzooka, and has otherwise developed systems to allow artists to report performance data through its BMI Live platform. BMI is constantly developing

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[25] 37 C.F.R. § 385.21(b).

[26] *See* National Independent Talent Organization ("NITO") at 2-3; Reporting Innovation in Touring Entertainment Royalties Coalition ("RITE Royalties Coalition") at 2-4.

and improving BMI Live. For example, BMI is working to significantly expand the reach of its quarterly "LivePop" distribution, which compensates affiliates for performances of popular music. BMI is also in the process of enhancing its technology to make it easier for affiliates to upload setlists. To improve transparency, BMI is also exploring options to provide additional details, such as venue and date of performance, on affiliates' quarterly royalty statement.

BMI welcomes and encourages detailed reporting from live performance venues and promoters to allow BMI to further ensure its affiliates are fairly compensated for the live public performance of their songs. The reality, though, is that the administrative costs and burdens to BMI associated with monitoring and tracking all live performances would outweigh the resulting incremental royalty distributions made to rightsholders. Promoters and venues are best suited to monitor—and bear the cost of monitoring—live performances, which, when provided to BMI, would create a more complete picture.

Certain commentors note that concert promoters and live music venues are passing on the cost of public performance license fees to performing artists by deducting the amount of fees from the artist's compensation. Certain stakeholders have questioned whether songwriters who, as performing artists, perform their own music can sufficiently recoup those fees from their respective PROs through royalty distributions.[27] As an initial matter, BMI notes that it is, at best, insincere for venues and promoters to: (1) make the business decision to obtain licenses from all PROs without regard to what music will be performed; (2) fail to report any data regarding the music actually performed (leaving PROs and their members or affiliates to bear the costs of tracking what is performed); (3) pass the costs of public performance licenses on to performing artists (who may be the writers of the songs they perform); and then (4) argue that the system is "broken." Although

[27] *See* NITO at 2-3; RITE Royalties Coalition at 2-3.

BMI lacks direct visibility into the relevant arrangements between venues and artists, BMI views the practice of passing on license fees to artists as unfair and improper and agrees with other commentors that venues and promoters, not artists, should bear the licensing costs for live concerts.[28]

[28] *See* NITO at 2-3.