

PUBLIC COMMENTS OF THE
NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES
RE: DEPARTMENT OF JUSTICE REQUEST FOR COMMENT ON
PRO LICENSING OF JOINTLY OWNED WORKS

I. INTRODUCTION

The National Academy of Recording Arts & Sciences (“The Recording Academy”) appreciates the opportunity to submit these additional comments to the Department of Justice on behalf of the creative music professionals it represents. Internationally known for the GRAMMY Awards, The Recording Academy is a trade association for music creators whose voting membership and board leadership consists of individual music professionals with creative and technical credits [e.g. songwriting, performing, producing] on commercially released recordings. There are no company or institutional members. The Academy is the only organization that advocates for all individual music creators: songwriters, performers and studio professionals.

The Academy previously submitted comments to the Department of Justice in August 2014 in support of reforming the consent decrees governing ASCAP and BMI. Subsequently, a representative of the Academy met in person with staff from the Department’s Antitrust Division in May 2015 to further discuss the review of the consent decrees.

In addition, The Academy is joined in these comments by the following individual members of The Recording Academy who are successful songwriters who have won numerous awards and have combined sales of millions of recordings of their compositions. These songwriters wish to ensure that a vibrant music marketplace will exist into the future, enabling the next generation of songwriters to earn a living from their craft.

Evan “Kidd” Bogart is a GRAMMY-winning songwriter/producer who has written songs recorded by Beyoncé, Rihanna, Jennifer Lopez, Demi Lovato, Madonna and many others. He also serves as a mentor to rising talent and has published several songwriters/producers who have written worldwide hits.

Jason Evigan is a songwriter/producer who has written songs recorded by Kelly Clarkson, Selena Gomez, Nick Jonas, and Demi Lovato, among others. He was previously the lead singer of the rock band After Midnight Project.

Wayne Hector is a songwriter who has written songs recorded by Rascal Flatts, Nicki Minaj, One Direction, Westlife, and many others. Among his numerous accolades he has been recognized with both a BMI Country Award and a BMI Pop Award, reflecting his work across multiple genres.

Rodney “Darkchild” Jerkins is a GRAMMY-winning songwriter/producer who has written songs recorded by Lady Gaga, Whitney Houston, Michael Jackson, and others. In 2015 he earned a GRAMMY for Record of the Year for producing Sam Smith’s “Stay With Me (Darkchild Version).”

Emanuel Kiriakou is a songwriter/producer who has written songs recorded by Jason Derulo, Celine Dion, Ne-Yo, Hot Chelle Rae, and many others. He also produced Demi Lovato’s recording of “Let It Go” from the soundtrack of the blockbuster movie *Frozen*.

Savan Kotecha is a GRAMMY-nominated songwriter/producer who has written songs recorded by Ariana Grande, Britney Spears, Usher, and The Weeknd, among many others. Through his role as a coach on Simon Cowell’s “The X-Factor,” he played a key part in launching global phenomenon One Direction.

Greg Kurstin is a GRAMMY-nominated songwriter/producer who has written songs recorded by Kelly Clarkson, P!nk, Sia, and others. He most recently co-wrote and produced Adele’s “Hello,” which has already broken numerous industry records since its release on October 23.

Luke Laird is a GRAMMY-winning songwriter/producer who has written songs recorded by Luke Bryan, Eric Church, Kacey Musgraves, and Carrie Underwood, among many others. In 2011 he co-founded Creative Nation, a Nashville-based music publishing and management company for songwriters.

Harvey Mason, Jr. is a producer/songwriter who has written songs recorded by Jennifer Hudson, Justin Timberlake, Mary J. Blige, Justin Bieber, Beyoncé, Chris Brown and others. He just finished producing the music for the blockbuster hits *Straight Outta Compton* and *Pitch Perfect 2* and is currently producing all the music for NBC’s upcoming production of *The Wiz Live!*.

Maureen “Mozella” McDonald is a songwriter and recording artist who has written songs recorded by Madonna, One Direction, and Rihanna, among others. She also co-wrote Miley Cyrus’ award-winning international hit “Wrecking Ball.”

Ricky Reed is a songwriter, producer, and recording artist who has written songs recorded by Will Smith, Jason Derulo, Pitbull, and Fifth Harmony, along with many others. In 2015 he was nominated for a Latin GRAMMY for Record of the Year for his work with Colombian band Bomba Estéreo. He also leads the electronic music group Wallpaper.

Ryan Tedder is a GRAMMY-winning songwriter, producer, and recording artist. He has written songs recorded by Adele, Maroon 5, and Taylor Swift, among others, and is the lead singer of the band OneRepublic. He is also a founding member of the GRAMMY Creators Alliance.

II. CREATIVITY DRIVES THE SONGWRITING PROCESS

As the Department continues to review the consent decrees governing ASCAP and BMI, it should keep the interests of songwriters first and foremost in its mind. The licensing framework for musical works is only truly effective if it effectively supports the songwriters who are the foundation of the music ecosystem. Songwriters must be allowed to let creativity drive the songwriting process.

Songwriting is often a collaborative activity. Beyoncé’s global hit song “Halo,” for example, was co-written by Evan “Kidd” Bogart and Ryan Tedder, both of whom have joined these comments. “Halo” was a GRAMMY-winning, chart-topping, international phenomenon, certified as double-platinum in the United States. It has become a signature song for Beyoncé (also a co-writer). The song was primarily written spontaneously in 2008 through the close friendship of Bogart (a BMI songwriter) and Tedder (then with ASCAP). One afternoon as Tedder was recuperating from surgery on an injured Achilles tendon, he invited Bogart to join him during some unexpected downtime to try to write a song together. The few hours they spent together that day led to “Halo.”

This iconic song exists because Tedder and Bogart were free to collaborate with each other and follow their creative instincts together, even though they were members of different PROs. Under the licensing scheme suggested by the Department of Justice, however, this might not have been possible. The Department posits that a Performance Rights Organization (PRO) should be able to license an entire song to a licensee, even if the PRO only holds a partial or fractional interest in the song. As explained in greater detail below, such a practice could incentivize songwriters to only collaborate with songwriters who are members of the same PRO.

Songwriters require the freedom to choose collaborators for creative reasons, not for business reasons. PROs facilitate this through partial or fractional licensing. Through this form of licensing, a songwriter can collaborate with whomever he or she chooses while secure in the confidence that the songwriter’s chosen PRO will continue to serve his or her interests. Requiring PROs to license an entire work, even when the PRO only partially has the rights to the work, means that a songwriter’s work could be licensed by another PRO with whom the songwriter has no relationship. This could incentivize songwriters to make decisions about who to collaborate with based on the PRO affiliation of the other songwriters.

Iconic songwriting collaborators such as Elton John (BMI) and Bernie Taupin (ASCAP); Carole Bayer Sager (BMI) and Burt Bacharach (ASCAP); James Horner (ASCAP) and Will

Jennings (BMI); Alan Menken (BMI) and Howard Ashman (ASCAP); and many others might have been discouraged from collaborating under a 100 percent licensing regime.

Perhaps even more critically, one can envision equally important songwriting collaborations that might be prevented from occurring in the future if 100 percent licensing becomes standard practice. While the songwriters who have joined these comments are among the most successful writers working today, they join on behalf of the thousands of songwriters who rely on royalties to pay their rent and grocery bills. Without changes to the process of licensing musical works, new songwriters will not be able to enter the field, while many current songwriters in genres outside of mainstream hits may be forced to leave the business. Modifying the consent decrees is necessary to improve the landscape for the future of songwriting, but requiring 100 percent licensing as part of this modification will be worse than the status quo.

Further, in the case of younger artist-writers trying to establish their career, members of the same band – who write songs together as a cohesive unit – are often not members of the same PRO. As an example, recently, the band American Authors was in Washington, D.C. for the annual GRAMMYs on the Hill event. As part of the presentation to the Congressional attendees, the lead singer, Zac Barnett, noted, “It really does mean a lot to us that we’re all working together to get the compensation to a fair place, and to keep musicians and *new* artists especially out there, keeping music at the forefront of our lives.” The members of American Authors belong to three different PROs (ASCAP, BMI and SESAC). Their creative choice to affiliate with different PROs should be respected, but 100 percent licensing would interfere with the cohesiveness of this band’s writing process if they could not be assured each would be paid by the PRO of their choice.

Additionally, young songwriters often have the opportunity to co-write with established artists from different PROs. A current example is the recent hit “I’m Comin’ Over,” performed by Chris Young. Young is a BMI writer who wrote the composition with Josh Hoge (SESAC) and Corey Crowder (ASCAP). The co-writing session was an important opportunity for the songwriters. A regime of 100 percent licensing could discourage artists from writing with new writers who may not be affiliated with the same PRO due to a concern that their share of the work would be licensed by a PRO other than their own.

Simply put, 100 percent licensing would create a marketplace that impedes and inhibits the creativity of songwriters. Business interests would dictate the creative process, rather than the creative process driving the business models to better serve songwriters. In effect, the tail would be wagging the dog.

III. THE DEPARTMENT SHOULD FOCUS ON SONGWRITERS AND THEIR ABILITY TO PARTICIPATE IN THE MARKET

To improve the musical works marketplace, the Department of Justice should focus first on the songwriters and their ability to successfully participate in the market. In its initial

announcement that it was undertaking a review of the consent decrees governing ASCAP and BMI, the Department stated its intent “to examine the operation and effectiveness” of the consent decrees and acknowledged that stakeholders had called on the Department “to account for changes in how music is delivered to and experienced by listeners.” The Department wants to ensure that the consent decrees provide for a modern, competitive music marketplace. To do so, the Department must understand how that marketplace is built.

The music publishers and PROs exist to serve the needs of songwriters and to support and monetize their creative contributions. Acting alone, an individual songwriter or composer lacks the leverage to negotiate fair licenses for his or her creative work. The individual also lacks the resources to collect the royalties for that work and to enforce the public performance right for that work. PROs provide a critical service to songwriters and composers through collective licensing that allow PROs to negotiate for royalties from licensees. PROs also have the infrastructure necessary to collect and distribute those royalties directly to the songwriter with transparency, and to monitor the use of the songwriter’s work for possible infringement.

A songwriter chooses a specific PRO for any number of reasons – because of a personal relationship, because of the financial terms the PRO offers, or because of the transparency the PRO provides, just to name a few examples. The relationship between a songwriter and a PRO is personal and consequential. The songwriter’s choice of a PRO is an important way in which that songwriter exercises autonomy in building a career. Requiring the PROs to provide 100 percent licensing would warp and distort that relationship.

IV. SONGWRITERS NEED PROS TO BE EFFECTIVE AND EFFICIENT

Songwriters depend on their PROs to collect and pay their royalties with speed and transparency. But requiring the PROs to provide 100 percent licensing would undermine both of these objectives. 100 percent licensing would require the PROs to operate in a way they are not prepared or equipped for. Both ASCAP and BMI have invested millions of dollars over the years to build administrative systems that collect royalties from millions of licensees and then accurately distribute royalties to their members. But the PROs have not developed the infrastructure to collect and distribute royalties for songwriters that are not affiliated with them.

Full song licensing would make the administration of royalties more complex and costly. A PRO would have the added administrative burden of tracking down songwriters with whom they have no relationship. This will take time, meaning that songwriters will have to wait even longer to get paid for their work. As The Academy discussed in its original filing, the current rate-setting process already results in long delays before songwriters are compensated for the use of their work. Licensees can use a songwriters’ works immediately, before a rate is agreed upon between the licensee and the PRO. This additional delay will further compromise their ability to make a living, adding insult to injury.

In addition, the new burden on the PROs will increase the administrative costs of distributing royalties as the PROs pay to develop the systems necessary to process payments for non-affiliated members. In fact, it's possible that the distribution of a royalty would run through multiple PROs before it ever reaches the songwriter. For example, ASCAP could fully license a work that also includes a BMI songwriter, but then funnel that songwriter's share of royalties through BMI to aid with the distribution. In such a scenario both PROs would incur administrative costs that would be deducted from the royalty. The net result is that songwriters will receive even less in royalties than they do now as both PROs seek to recover their administrative costs from the new requirement that they provide 100 percent licensing of works. Such an outcome flies in the face of providing an effective and efficient marketplace.

V. CONCLUSION

In conclusion, the Department's latest request for comments suggests a system that is at odds with how music licensing currently works in today's marketplace. 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. The Department should be forward-looking with a goal of providing for a vibrant and competitive marketplace for the licensing of musical works. This is the original stated purpose for commencing this review of the consent decrees. In this context, requiring the PROs to license 100 percent of a work when they only hold a fractional interest is anti-competitive, inefficient for the songwriter, and compromises the creative freedom that is the foundation of the songwriting.

Instead of focusing on fractional licensing, the Department should instead focus on revising the consent decrees in a way that give the PROs the flexibility to respond to the marketplace and change their business practices accordingly. In our comments submitted in August 2014, the Academy recommended three specific reforms that would serve this purpose. First, the publishers should be allowed to grant limited or partial licensing rights to the PROs. Second, an arbitration process should be established to streamline and expedite the rate-setting process. Finally, PROs should be permitted to bundle multiple rights related to the musical work, including public performance, mechanical, synchronization, and print reproduction. These three changes would not only create a more competitive and efficient market place that serves the interests of licensees and consumers, it would also allow PROs to better serve the interests of their songwriter members. Songwriters deserve a licensing system that rewards them with fair compensation for their work and delivers that compensation in a transparent and efficient manner.

Songwriters are the foundation of the entire music ecosystem. If they cannot continue to make a viable living from their creative work, the marketplace will disappear. As the Department completes its review of the consent decrees, it must be guided by the key principles that 1) songwriters should have the ability to receive fair market value for the public

performance of their work across all services; and 2) songwriters, licensees, and consumers are all served best when licensing is done in the most efficient manner possible. Constraining the PROs from providing fractional licensing will serve neither goal. Thank you for your consideration of these comments.

Respectfully submitted,

Daryl P. Friedman
Chief Member, Industry & Government Relations Officer
Todd Dupler
Senior Director of Advocacy & Public Policy
The Recording Academy
529 14th Street NW, Suite 840
Washington, DC 20045

Evan “Kidd” Bogart
Jason Evigan
Wayne Hector
Rodney “Darkchild” Jerkins
Emanuel Kiriakou
Savan Kotecha
Greg Kurstin
Luke Laird
Harvey Mason, Jr.
Maureen “Mozella” McDonald
Ricky Reed
Ryan Tedder

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Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 4000
Washington, DC 20001