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David Kully
Chief, Litigation III Section
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Dear Mr. Kully:

I am writing to you at the request of the National Music Publishers' Association ("NMPA") in connection with the Department of Justice, Antitrust Division's request for comments on PRO licensing of jointly owned works.

By way of background, I have been Professor of Law (1975-1985) and since 1985 the Lillick Professor of Law at Stanford Law School, where I regularly teach courses in U.S., foreign and international copyright law. I have also since 1988 been Of Counsel to the law firm of Morrison & Foerster LLP. I am sole author of the four-volume treatise, *Goldstein on Copyright*, (Aspen Publishers 3rd ed. 2005) updated semi-annually, and co-author with Bernt Hugenholtz of the one-volume treatise, *International Copyright* (Oxford University Press 3rd ed. 2013), as well as of law school casebooks on U.S. and international intellectual property law. A copy of my resume is enclosed.

The NMPA has asked me to provide my opinion on the following questions:

1. Do the United States Copyright Act, 17 U.S.C. §§ 101 *et. seq.* ("Copyright Act"), and judicial decisions under the Copyright Act, permit the co-owner of a jointly-authored work to include in its license of the work to a third party a condition that, before exploiting the work, the licensee first secure a license from the other co-owner or co-owners of copyright in the work?

2. If so, must this condition be explicit in the license, or has the consistent historical trade practice and custom of "fractional licensing" made the condition implicit and binding in the absence of language in the license that explicitly indicates that the license protects the licensee from infringement actions from any co-owner (*i.e.*, a 100% license)?

On the basis of my review of the applicable provisions of the Copyright Act, judicial decisions under the Copyright Act, and such other authorities as I deemed appropriate to consult, it is my opinion that United States copyright law permits a co-owner of the copyright in a joint work to require, as a condition to the grant of a 100% license to perform or otherwise exploit the copyrighted work, that the licensee also obtain a license from the other co-owner or co-owners of copyright in the work. Further, where an assumption of fractional rather than 100% licensing pervades the pricing and distribution activities of copyright licensors, courts could well find under well-accepted rules of contract construction that the grant in these licenses embodies such a condition in the absence of language to the contrary.

More specifically, and as further explained below:

A. The rules in the United States governing the rights and liabilities of copyright co-owners, including the right to license their works' exploitation to third parties, are default rules that the co-owners may completely or partially override by agreement among themselves.

B. Just as co-owners may consensually alter the default rules of copyright co-ownership, including the rules respecting the grant of licenses, so one co-owner may, through a condition or conditions imposed on a licensee, alter default rules, such as the rule that a license granted by one co-owner will privilege the licensee to exploit the entire work (*i.e.*, a 100% license).

C. If as a matter of common industry practice copyright co-owners, PROs and music users effectively treat their licenses as fractional rather than 100% a court adjudicating a license from a PRO could well construe the license as granting a fractional rather than a 100% interest in the co-owned work notwithstanding the absence of any explicit condition to this effect.

D. Many other countries with mature copyright laws and developed copyright industries require that, for a 100% license from a co-owner of a joint work to be effective, all co-owners must consent to the license, thus establishing as an international legal norm the same result that would be achieved in the United States by one co-owner's unilateral imposition of a condition that consent be obtained from the other co-owner or co-owners.

A. <u>The rules in the United States governing the rights and liabilities of copyright co-owners, including the right to license their work's exploitation to third parties, are default rules that they may completely or partially override by agreement among themselves.</u>

As defined by the 1976 Act, 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."[1] Courts deciding disputes between joint work co-owners generally look for analogies to the rules governing real property tenancies in common.[2] As a consequence, courts hold that each joint work co-owner owns an undivided fractional interest in the copyrighted work that gives it standing to sue for copyright infringement without joining the other co-owners[3]; that entitles the co-owner, in the event of suit, to recover a complete, rather than a divided, damage

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[1] Copyright Act § 101.

[2] *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976). *See also* Paul Goldstein, Goldstein on Copyright § 4.2.2 (2015) (hereinafter "Goldstein on Copyright").

[3] *See, e.g.*, *Broadcast Music, Inc. v. Evie's Tavern Ellenton, Inc.*, 772 F.3d 1254 (11th Cir. 2014).

award, subject only to a duty to account to the non-joining co-owners;[4] and that empowers the co-owner to (non-exclusively) license others to exploit the entire copyrighted work, again subject to a duty to account to co-owners for their share of the profits earned.[5]

The Copyright Act allows co-owners complete freedom to alter any or all of these default rules. So, for example, co-owners may agree that their undivided interests will be allocated other than according to the principle of equality; that one co-owner may transfer an exclusive (rather than nonexclusive) license to exploit the co-owned work to a licensee; and that no co-owner may grant even a nonexclusive license to exploit the co-owned work without the assent of all co-owners.[6]

B. Just as co-owners may consensually alter the default rules of copyright co-ownership, including the rules respecting the grant of licenses, so one co-owner may, through a condition or conditions imposed on a licensee, alter default rules, such as the rule that a license granted by one co-owner will privilege the licensee to exploit the entire work (*i.e.*, a 100% license).

In transferring copyright interests generally, whether through assignment or license, grantors commonly impose obligations on the grantee. These obligations may take the form of conditions, the breach of which will terminate the grant and make the grantee an infringer, or they may take the form of covenants, giving rise to an action for damages, but leaving the grant in force.

[4] *See, e.g.*, *Isabell v. DM Records, Inc.*, 774 F.3d 859, 871 (5th Cir. 2014).

[5] *See, e.g.*, *Richmond v. Wiener*, 353 F.2d 41, 46 (9th Cir. 1965), *cert. denied.*, 384 U.S. 928, *reh'g denied*, 384 U.S. 994 (1996). *See generally* Goldstein on Copyright § 4.2.2; Melville Nimmer & David Nimmer, Nimmer on Copyright §§ 6.10-6.12 (2015) (hereinafter Nimmer on Copyright); William Patry, Patry on Copyright §§ 5:7; 5:9 (2015) (hereinafter Patry on Copyright).

[6] Goldstein on Copyright, § 4.2.2; Nimmer on Copyright §6.10[a][2]; Patry on Copyright §5.7.

Where the contracting parties have failed expressly to specify whether an obligation is a condition or a covenant, courts will construe the obligation as a condition if compliance with it is a material term of the license.

Probably the most salient obligation that will be construed as a condition is the grantee's obligation to pay royalties.[7] Among other grantee breaches that will commonly give rise to an action for copyright infringement are exploitation of the copyrighted work outside the terms of the grant[8] or after the grant has expired.[9] A licensee's public performance of a musical work without the consent of all co-owners, under a license that is fractional rather 100%, would constitute infringement under these decisions and even under the narrower rule adopted by the Ninth Circuit that "the potential for infringement exists only where the licensee's action (1) exceeds the license's scope (2) in a manner that implicates one of the licensor's exclusive statutory rights."[10]

A copyright co-owner faces the choice between covenant and condition when imposing as a term of its grant that the licensee secure the assent of other co-owners before exploiting the co-owned work. If the co-owner makes the term a covenant rather than a condition, breach by the grantee will give the licensing co-owner a cause of action for damages. However, if the co-owner phrases the term as a condition rather than as a covenant, noncompliance will make the grantee liable for copyright infringement to both the licensing co-owner and the non-licensing co-owners.[11]

In addition to creating a fractional license by imposing a condition that the licensee obtain the consent of the other co-owners of the copyrighted work, a fractional co-owner may limit the

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[7] *See, e.g.*, *MDY Indus., LLC v. Blizzard, Entm't, Inc.*, 629 F. 3d 928, 941 n.4 (9th Cir. 2010).
[8] *See, e.g.*, *Kanakos v. MX Trading Corp.*, 216 U.S.P.Q. 1030 (S.D.N.Y. 1981).
[9] *See, e.g.*, *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 288 (2d Cir. 1982).
[10] *MDY Indus., LLC v. Blizzard, Entm't, Inc.*, 629 F. 3d 928, 940 n. 4 (9th Cir. 2010).
[11] Goldstein on Copyright § 4.2.2.

grant of its license so that it excludes from the license any protection from infringement of the rights of the other co-owners. Assuming that licensor and licensee have in fact bargained for such a fractional license, nothing in state contract law should override such a restriction in license scope, nor would the Copyright Act preempt such a contractual arrangement.[12]

C. <u>If as a matter of common industry practice copyright co-owners, PRO's, and music users effectively treat their licenses as fractional rather than 100%, a court adjudicating a license from a PRO could well construe the license as granting a fractional rather than a 100% interest in the co-owned work, notwithstanding the absence of any explicit condition to this effect.</u>

I am informed by the NMPA, and for purposes of Section C of my opinion I assume to be true, that the general behavior of copyright co-owners, users and PROs is consistent with co-owners granting the right to use and license only their fractional interest in joint works. Users take licenses from all PROs as well as from other, direct licensors to ensure that they have full consent to perform works. PROs — specifically, ASCAP and BMI — price their licenses for co-owned copyrighted works to users, and pay their members and affiliates, on the basis of the grant of a fractional license, rather than a 100% license, to the licensee. I am further informed that the ASCAP and BMI rate courts set rates on the basis of fractional, rather than 100% licenses. One fact evidencing this pattern of practice is that PRO member publishers and songwriters who co-own licensed joint works do not account to their co-owners for a fractional share of revenues—something that they would do if they were following the default rule of 100% licensing

[12] Goldstein on Copyright § 17.2.1.2 ("Contract law is a good example of a state law that will be immune from preemption under the extra element test.")

with a duty to account to the other co-owners for their fractional share of revenues In addition, I understand that a number of songwriters, publishers and counsel who represent songwriters in licensing transactions have written the Justice Department that they understand and have depended on the fact that their co-written songs have been licensed on a fractional basis.[13] I further understand that Sony/ATV signed a direct deal with Pandora expressly limited to Sony's fractional share.[14]

Do these departures from the default rule for joint works shape not only the pricing and distribution protocols of the PROs, and the arrangements *inter se* of the many musical work co-owners, but also the licenses granted to users by the PROs? A court could reasonably construe a PRO license in light of these practices as granting a fractional rather than a 100% interest in a co-owned work.

Specifically, although courts apply the parol evidence rule, which bars the use of extrinsic evidence "to contradict and perhaps even to supplement the writing,"[15] to copyright contracts much as they do to other types of contracts, courts have admitted extrinsic evidence to aid in interpreting a broad contractual term in a copyright license, and so, for example, have limited the scope of a copyright license in light of evidence that the consideration being paid by the licensee was markedly lower than the value of its use.[16] Following these decisions, evidence that a PRO

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[13] *See, e.g.*, Letter from Martin Sandberg to Chief, Litigation III Section, Antitrust Division, Department of Justice (Nov. 18, 2015).

[14] Billboard, Sony/ATV CEO Martin Bandier Says Pandora Deal Will Bring "Significant" Bump in Royalties (November 10, 2015), http://www.billboard.com/articles/business/6760578/sonyatv-martin-bandier-letter-pandora-deal.

[15] 2 E. Allen Farnsworth, Farnsworth on Contracts 7.2 (1990).

[16] *See, e.g.*, *Atkins v. Fischer*, 331 F.3d 988, 992 (D.C. Cir. 2003) (Fact issue existed as to whether agreement that contemplated defendant's preliminary use of plaintiff's product design extended to subsequent commercial use as well; court considered "the relatively small price" defendant paid for completion of first stage of agreement); *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d

license was priced and distributed at a fractional share rate, rather than a 100% share rate, would presumably be admissible to prove that the license granted only a fractional, and not a 100% share.

Although courts will not admit parol evidence to contradict the expressly limited terms of a license, the terms of the PRO form license that I reviewed,[17] are sufficiently broad to be construed as granting either a 100% license or only a fractional license: "ASCAP grants LICENSEE a non-exclusive Through-to-the-Audience License to perform publicly in the U.S. Territory, by Radio Broadcasting or New Media Transmissions, non-dramatic performances of all musical works in the ASCAP Repertory during the Term."[18] The fact that the license is nonexclusive rather than exclusive makes it particularly susceptible to interpretation in light of the circumstances that surround the license.[19]

Courts regularly admit evidence of industry custom and usage to explain the meaning of ambiguous terms in copyright contracts. In one case, where the contract provided that the defendant would not publish its paperback edition of the plaintiff's hardcover novel before a specified date, the court sought to determine what "publish" meant by examining extrinsic evidence, including evidence of trade usage.[20] In another case, where a recording agreement

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557, 565 (7th Cir. 2003) (Where software license called for licensee to pay the same consideration it had paid for earlier licenses limiting use to the Macintosh platform, it was reasonable for jury to conclude that the license in issue was also limited to that platform).

[17] ASCAP 2010 Radio Station License Agreement, January 1, 2010-December 31, 2016.

[18] *Id.* ¶3.A.

[19] *See, e.g.*, *Foad Consulting Group v. Musil Govan Azzolino*, 270 F.3d 821, 828 (9th Cir. 2001)("The Copyright Act places great emphasis on the necessity of writings to grant exclusive licenses, but not when it comes to granting nonexclusive licenses. As we have noted, nonexclusive licenses may be granted orally. Thus, if a copyright holder and another have a contract that clearly does not grant the other an exclusive copyright license, in a copyright infringement suit the other may nonetheless introduce nonwritten evidence such as testimony, course of conduct, and custom and practice to show that the copyright holder orally granted her a nonexclusive license.").

[20] *United States Naval Inst. v. Charter Commc'n, Inc.*, 875 F. 2d 1044 (2d Cir. 1989) (concluding

failed to "specify" the royalties to be paid to the plaintiff artists for the domestic licensing of their records, the court of appeals ruled that the trial court properly admitted evidence of trade custom to support its conclusion that the plaintiffs were entitled to a fifty percent royalty—the customary rate for licensing master recordings to unaffiliated third parties such as the defendant.[21] Custom and usage in PRO pricing and distribution practices may similarly give definition to the scope of the licenses that generate the subject payments.

There is a separate question whether a fractional owner can, consistent with its duties to its co-owners, license a PRO to include a 100% license to a jointly owned copyrighted musical composition in a broad PRO blanket license based on the co-owner's undivided fractional interest in the absence of the consent of the other co-owners. According to a leading real property treatise, tenants in common "may be found in a fiduciary relationship with one another, which may require a covenant to protect and secure their common interests."[22] Although the rules respecting the obligations of copyright co-owners *inter se* draw extensively on the rules of real property tenancies in common, the case law respecting the existence of fiduciary duties between copyright co-owners is sparse and indecisive, but would at least appear to support the imposition of such fiduciary duties in "special circumstances."[23]

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that an industry custom allowing publishers to ship books to stores in time to permit sale on the announced publication date meant that the publisher did not breach its agreement by shipping before the contractually specified publication date).

[21] *Thomas v. Gusto Records, Inc.*, 939 F.2d 395 (6th Cir.), *cert. denied*, 502 U.S. 984 (1991). *See also Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1945), *aff'd sub nom., Gumm v. Jerry Vogel Music Co.*, 158 F.2d 516 (2d Cir. 1946).

[22] Richard R. Powell, Powell on Real Property § 50.04 [3] (M. Wolf ed. 2007).

[23] *See e.g., Willsea v. Theis*, 1999 U.S. Dist. LEXIS 22471 (S.D.N.Y. 1999) (Plaintiff, the claimed co-author and co-owner of copyrighted work, "has sufficiently alleged existence of a fiduciary relationship to withstand an adverse judgment on the pleadings"; "the existence of a fiduciary relationship depends upon the particular facts of a particular relationship"); *Universal – MCA*

On the premise that a fiduciary duty may arise between copyright co-owners in "special circumstances," a PRO's 100% licensing of fractional interests may give rise to such special circumstances. Even apart from any question about the adequacy of the fees a PRO charges for its blanket licenses, the fractional owner arguably cannot discharge its fiduciary duty to account by delegating its authority to a licensing agent that (i) will comingle the license to the copyrighted work in a blanket license and not negotiate to license the work individually; (ii) is responsible to a board of directors that has the interests of multiple stakeholders in view and not simply the interest of the fractional owner and its co-owners; (iii) may allocate revenues resulting from its license fees among its members or affiliates and nonconsensual co-owners on a basis that does not adequately reflect the value of the nonconsensual co-owner's rights; and (iv) may charge excessive fees for administration (assuming that a PRO can charge any fees for the administration of rights by a nonconsensual co-owner).

D. <u>Most other countries with mature copyright laws and developed copyright industries require that, for a 100% license from a co-owner of a joint work to be effective, all co-owners must consent to the license, thus establishing as an international legal norm the same result that would be achieved in the United States by one co-owner's unilateral</u>

Music Publ'g v. Bad Boy Ent'mt, Inc., 2003 N.Y. Misc. LEXIS 831 (N.Y. Sup. Ct. 2003) (uncorrected and unpublished) ("Though co-authors of a copyright generally do not owe a fiduciary duty, the existence of 'special circumstances' and conduct may be sufficient to transform the parties' otherwise ordinary business relationship into a fiduciary one"). *See also*, *Swan v. EMI Music Publ'g, Inc.*, 58 U.S.P.Q. 2d 1089, 1091 (S.D.N.Y. 2000) ("In the case of a co-authorship, if one co-author renews the original copyright, solely in his own name, that renewal is held upon a constructive trust for the other authors, or the other author's heirs."); *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 646–47 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir. 1972) (" . . . compensation obtained from the unilateral exploitation of the joint work by one of the co-owners without the permission of the others is held in a 'constructive trust' for the mutual benefit of all co-owners and there is a duty to account therefor").

imposition of a condition that consent be obtained from the other co-owner or co-owners.

Legislation in most countries adopts a default rule for co-owner transfers that is precisely the opposite of the United States default rule. In these countries, unless the co-owners enter into an agreement to the contrary, all must join in the license in order for the licensee legally to exploit the work.[24] In many of these countries, the other co-owners cannot withhold their consent to a proposed license other than in good faith.[25] The adoption and longstanding subsistence of this default rule in most countries other than the United States indicates not only that joint consent is an international norm of copyright ownership, but one that has not injured the economic or moral rights of other co-owners or of third parties.

In sum, the copyright rules governing co-owners are default rules that can be altered by contract. Likewise, an individual co-owner can alter the default rules by imposing a condition on the license that he or she issues. If, as a matter of common practice, PROs and music users treat licenses as fractional, a court adjudicating such a license could well construe it as fractional notwithstanding the absence of an explicit condition. This would be consistent with the worldwide norm.

Respectfully yours,

Paul Goldstein

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[24] *See* Paul Goldstein & Bernt Hugenholtz, International Copyright: Principles, Law and Practice § 7.2 (3rd ed. 2013).

[25] *See, e.g.*, Japan, Copyright Act, Arts. 64-65; Germany, Copyright Act, Art. 8(2); France, Intellectual Property Code, Art. L. 113-3.

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EDUCATION

LL.B., 1967, Columbia University
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EMPLOYMENT

1985 - Lillick Professor of Law, Stanford University

1975 - 1985 Professor of Law, Stanford University

1972 - 1975 Professor of Law, State University of New York at Buffalo

1972 - 1973 Visiting Associate Professor of Law, Stanford University

1969 - 1971 Associate Professor of Law, State University of New York at Buffalo

1967 - 1969 Assistant Professor of Law, State University of New York at Buffalo

PUBLICATIONS

Books

Treatises *Goldstein on Copyright* (Third Edition, Aspen Law and Business 2015) (4 volumes with semi-annual supplementation)

*International Copyright: Principles, Law and Practice (*Third Edition, with Bernt Hugenholtz, Oxford University Press 2013)

Casebooks *International Intellectual Property Law: Cases and Materials* (Third Edition, with Marketa Trimble, Foundation Press, 2012)

Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials on Intellectual Property Law (Seventh Edition, with R. Anthony Reese, Foundation Press 2012)

Property Law: Ownership, Use and Conservation (Second Edition with Barton Thompson, Foundation Press 2013)

Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance (Sixth Edition with Gerald Korngold, Foundation Press 2014)

General Non-Fiction and other Professional Books

Intellectual Property in Asia: Law, Economics, History and Politics (with Joseph Straus, Berlin: Springer, 2009)

Intellectual Property: The Tough New Realities That Could Make or Break Your Business (Penguin/Portfolio 2007)

Copyright's Highway: From Gutenberg to the Celestial Jukebox (Revised Edition, Stanford University Press 2003)

Changing the American Schoolbook: Law, Politics and Technology (D.C. Heath & Co., Lexington Books Politics of Education Series 1978)

Fiction *Errors and Omissions* (Doubleday 2006)

A Patent Lie (Doubleday 2008)

Havana Requiem (Farrar, Straus & Giroux 2012)

Selected Articles and Essays

The Quiet Revolution in American Copyright Law, in Patents and Technological Progress in a Globalized World (Liber Amacorum Joseph Straus) (Springer 2009)

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Copyright in the New Information Age, 40 Catholic Law Review 829 (1991) (Brendan Brown Lecture)

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Infringement of Copyright in Computer Programs, 47 University of Pittsburgh Law Review 1119 (1986)

Derivative Rights and Derivative Works in Copyright, 30 Journal of the Copyright Society 209 (1983)

Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany, 14 International Review of Industrial Property and Copyright Law 43 (1983)

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The Competitive Mandate: From Sears to Lear, 59 California Law Review 873 (1971)

Copyright and the First Amendment, 70 Columbia Law Review 983 (1970)

Federal System Ordering of the Copyright Interest, 69 Columbia Law Review 49 (1969)

PROFESSIONAL ACTIVITIES

Of Counsel, Morrison & Foerster, since 1988

Chairman, U.S. Office of Technology Assessment, Advisory Panel, Intellectual Property Rights in an Age of Electronics and Information, 1985-86

Honorary Professor, East China University of Political Science and Law, since 2011

Member, Editorial Board, Cambridge University Press Intellectual Property Series

Member, Editorial Board, Archiv fur Urheber-Film-Funk-und Theaterrecht

Visiting Scholar, 1982, Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, Munich, Federal Republic of Germany