November 20, 2015

Chief, Litigation III Section

Antitrust Division

U.S. Department of Justice

450 5th Street NW, Suite 4000

Washington, DC 20001

To David C. Kully, Chief, Litigation III Section:

Future of Music Coalition (FMC) appreciates the opportunity to submit the following comments regarding the Antitrust Consent Decrees for the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). Our views on the issue of 100 percent licensing are informed by consultation with the vocational songwriters, performing songwriters and independent publishers who comprise our community.

FMC is a 15 year-old nonprofit that supports a musical ecosystem where artists flourish and are compensated fairly and transparently for their work. FMC works with musicians, composers and industry stakeholders to identify solutions to shared

challenges. We promote strategies, policies, technologies and educational initiatives that always put artists first while recognizing the role music fans play in shaping the future. FMC works to ensure that diversity, equality and creativity drives artist engagement with the global music community, and that these values are reflected in laws, licenses, and policies that govern any industry that uses music as raw material for its business.

We align with songwriters in their call for increased transparency and royalty rates that more appropriately reflect the value of their contributions to industry and musical culture.

Joint Licensing in Law and Marketplace Practice

Under the Copyright Act, a joint work is defined as "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] It is generally understood as a matter of law that joint copyright owners, i.e., separate contributors to a work, have the equal,

1 17.7 Copyright Interests—Joint Authors (17 U.S.C. §§ 101, 201(a))

nonexclusive right to commercially exploit a work, provided that the other owners receive an equal share of revenue from the exploitation, absent a written agreement stipulating other terms. However, this is not how music publishing has worked in practice. Any requirement by the Department of Justice that subjects Performance Rights Organizations (PROs) or owners of musical works to so-called 100 percent licensing is problematic.

Music creators have long enjoyed the ability to choose whether to license 100 percent of a work and manage accounting and royalty distribution to joint authors, or license their portion of the work separately under contractual agreement between parties. Through their membership with a PRO, songwriters and composers enjoy the ability to license the portion of the rights to which they control, without concerning themselves with whether co-authors of a work have negotiated adequate royalty and payment terms. This has allowed for tremendous collaboration across the globe, and produced musical works that have enriched society in countless ways.

The imposition of 100 percent licensing could chill such creativity, as songwriters seek to work with only those who are members of their PRO or are signed to the

same publisher. We share concerns with songwriters and independent publishers that 100 percent licensing could be a "race to the bottom" with regard to royalties, as any tenant to the work is free to negotiate below market rates that other parties are forced to accept. This problem is exacerbated under direct licensing frameworks, in which the licensor may receive non-performance related income to which other co-authors/owners are not beneficiaries. There is also the matter of a lack of transparency in deal terms. If the DOJ compels fractional licensing absent other protections, songwriters may be stuck with below-market rates and receive none of the monetary extras that (some) publishers receive. Worse, they will have no information about the specifics of the deals to which they are subject. Furthermore, 100 percent licensing may lead to a "two-class system" in which independent publishers are structurally disadvantaged.[2]

We understand that broadcasters and services are wary of publishers removing repertoire from PROs and not being forthcoming about what songs are off limits or require direct negotiation, potentially creating liability. We also recognize that smaller licensees may find themselves handicapped in direct deal scenarios due to

[2] Pincus, Matt. "SONGS Music CEO Matt Pincus: Why Music Publishing's Two-Class System Coul Spell the End for New Indie Firms." Billboard. N.p., 29 Oct. 2015. Web. 20 Nov. 2015.

the lack of authoritative, publicly searchable databases for ownership information on all musical works. However, we believe these concerns to be secondary to those of the songwriters and composers who must retain the ability to collaborate with any other creator with the comfort that their joint work will not be subject to potentially unfavorable deals without clear information regarding terms.

At this time, we would like to point out that all of these concerns are a direct result of the publishers' push for partial withdrawal of digital rights from ASCAP and BMI. As we warned in our August 2014 comments to the DOJ on the matter of consent decree modification,[3] such maneuvers would likely result in consequences both seen and unforeseen. We would characterize an Antitrust Division recommendation of 100 percent licensing to be the latter. As much as we recognize the inappropriateness of the consent decrees on the licensing of musical works performances, we feel strongly that this problem—one that now threatens the livelihoods and creative practices of countless songwriters—could have been avoided. Under the system that has been in place for decades, publishers and songwriters were individually and collectively members of the PROs, which issued

[3] Rae, Casey. "Future of Music Coalition Comments to the Department of Justice Antitrust Division on the Matter of the ASCAP and BMI Consent Decrees." Future of Music Coalition. N.p., 6 Aug. 2014. Web. 20 Nov. 2015.

blanket licenses to broadcasters and services. This provided end-to-end coverage and allowed writers to receive direct payment of their portion according to their membership agreements with their chosen PRO. Songwriter royalties were based on rates negotiated by their own PRO, and not subject to the terms of other joint authors/owners. It is only when this system is fractured that these and other problems arise. If publishers and PROs had listened more closely to songwriters, it may have spared our community the unease we now endure. We urge the DOJ to pay close attention to music creators when making any decisions regarding 100 percent licensing.

A Plan for a Post-Consent Decree World

Since our initial comments to the Division, we have come to the conclusion that the consent decrees inhibit fair market royalty rates for musical works performances, and that the DOJ itself is an inappropriate body to oversee ratesetting. This is not to say that the Department does not have a valid antitrust interest in this sector. In fact, we believe that the potential for anticompetitive behavior is ever-present in the music marketplace, and encourage the Antitrust Division to take seriously the tremendous leverage wielded by just three multinational corporations that operate

label and publishing divisions and share corporate parentage. However, preserving competition and protecting consumers from harm does not require rates adjudication governed by consent decrees. As the U.S. Copyright Office notes in its *Copyright and the Music Marketplace* report, ". . .it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system, which go far beyond the consent decrees."[4]

As participants in the Copyright Office Music Licensing Study, we advanced the idea of sunsetting the consent decrees and moving the licensing of musical works performances to the Copyright Royalty Board (CRB).[5] We are pleased that the Copyright Office has made this suggestion a cornerstone of their recommendations to Congress on updating federal laws governing music licensing.[6] There are many benefits that would result from migrating ratesetting to the CRB. Affected parties—including songwriters—would be able to submit evidence before the Copyright Royalty Judges and enjoy a transparent public proceeding with Congressional oversight and expert guidance from the Copyright Office as needed. We recommend

[4] "Music Licensing Study | U.S. Copyright Office." U.S. Copyright Office, Feb. 2015. Web. 20 Nov. 2015.

[5] Rae, Casey. "FMC Filing in Copyright Office's Second Request for Comments in Music Licensing Study." Future of Music Coalition. N.p., 12 Sept. 2014. Web. 20 Nov. 2015.

[6] Ibid.

placing musical works performance royalties under a "willing seller, willing buyer" standard, which we feel would produce rates more in line with the current marketplace. Additionally, we endorse the publishers' call for the CRB to be allowed to consider evidence from related proceedings in determinations for mechanical royalties, and extend this allowance to musical works. In order to achieve greater efficiency in licensing, we now support the "bundling" of performance and licenses and mechanical royalties by the PROs. It is our view that the CRB is in the best position to make rate determinations because it already presides over proceedings for mechanical royalties and the digital performance of sound recordings for webcasters, Internet radio and cable operators.

We recognize that the aforementioned would necessitate statutory revision. Given that Congress is currently examining existing copyright law with an eye towards an eventual update, we believe that now is the time to assist legislators in enacting reforms that preserve songwriters' long-held protections and allow for the continued performance of musical works on innovative services. As a part of any update, we recommend that the 50-50 songwriter/publisher splits and direct payment of the writers' share for musical works performance be codified in statute.

This, combined with the *sine qua non* matter of transparency, should ally the groups and organizations that support artists, and quickly reveal those who do not.

Conclusion

Improving market conditions for the licensing of musical works while preserving competition is no small task, and we commend the DOJ for undertaking this effort. In any recommendations, we ask only that the interests of music creators be taken into consideration—especially concerns regarding transparency. The DOJ has a crucial role to play in ensuring a vibrant music marketplace powered by incredible music and innovation. These goals are best served through antitrust scrutiny of market participants and not rates management via consent decrees placed on intermediaries meant to serve the interests of American songwriters. We thank you for the opportunity to share our perspectives.

Sincerely,

Casey Rae

CEO, Future of Music Coalition