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From: m[redacted] [mailto: m[redacted]]
Sent: Friday, November 20, 2015 4:26 PM
To: ATR-LT3-ASCAP-BMI-Decree-Review
Subject: Antitrust Consent Decree Review - ASCAP and BMI 2015

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

Re: Antitrust Consent Decree Review – ASCAP and BMI 2015

I am writing with respect to the issue of PRO licensing of jointly owned works, specifically the issue of so-called "100% licensing." I have worked in the music business for more than two decades. I am a copyright attorney and have held senior positions with two independent music publishing companies. I am also a songwriter and performer. I have worked in BMI's Legal Department, have served as a publisher member of ASCAP's Symphony and Concert Committee, and have been a Trustee of the Copyright Society of the USA. In addition, I have been a Board member of the New York Chapter of the Association of Independent Music Publishers (AIMP) and have taught music business courses at the college level for several years. I continue to counsel composers, publishers, labels and recording artists. I provide this background two demonstrate my knowledge of both the law and the practice as it relates to the music business, generally, and music publishing, specifically.

While it is true that absent a written agreement to the contrary, an author of a joint work may license 100% of the rights in that work subject only to a duty to account to that author's co-writers for their share of the proceeds, that is not how the music industry operates. For decades, songwriters and publishers have routinely entered into, and continue to enter into agreements where each party separately administers that party's interest – and only that party's interest -- in the particular song.

In the area of synch licensing, music supervisors and other music clearance professionals know that they need to obtain permission from all parties that separately administer a portion of the copyright in the song. Similarly, mechanical licenses are issued on a fractional basis where multiple publishers separately administer their interest in a particular work. ASCAP and BMI likewise administer only their shares in the song and price their licenses accordingly.

ASCAP and BMI operate on a fractional licensing basis because contractually they cannot license greater rights than they are granted by the underlying rights holders, the music publishers. To require ASCAP and BMI to license on a 100% basis not only flouts decades of industry

practice but vitiates the myriad agreements voluntarily entered into by songwriters and music publishers . It would also require songwriters and publishers to be involuntarily subjected to the licensing and payment terms of a PRO other than the one the parties chose to represent their interests in the particular works.

At a recent meeting of the AIMP, we were informed that it in the Justice Department's view, if the songwriters and publishers either do not – or cannot – agree to 100% licensing, ASCAP and BMI simply will not be able to represent the works where that is the case. If true, that would be a horrendous result, mandating that DSPs and other licensees would have to engage in the grossly inefficient process of directly licensing innumerable works from each individual rights holder. Given the way most popular songs are now written, this would require separate negotiations with multiple rights holders for the performance rights in each and every song rather than two or three PROs for all songs.

In sum, 100% licensing is contrary to longstanding industry practice and countless voluntarily negotiated contracts. It would turn a relatively straightforward and efficient licensing scheme for performance rights into one that is fractured, unwieldy and unworkable.

Thank you for your consideration.

Respectfully submitted,

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