

**MUSIC CHOICE'S COMMENTS IN CONNECTION WITH THE DEPARTMENT OF
JUSTICE'S REVIEW OF THE ASCAP AND BMI CONSENT DECREES
REGARDING PRO LICENSING OF JOINTLY OWNED WORKS**

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In connection with its ongoing review of the antitrust consent decrees in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) (collectively, the “Consent Decrees”), the United States Department of Justice, Antitrust Division (the “DOJ”) has requested public comments on a set of enumerated questions regarding the licensing of jointly-owned musical compositions by ASCAP and BMI (the “Request”). Music Choice, which provides a subscription-based digital cable music broadcasting service comprising over 50 channels of diverse audiovisual programming, respectfully submits these comments to address each of the DOJ’s questions.

INTRODUCTION

In its Request, the DOJ has identified a number of questions regarding ASCAP’s and BMI’s licensing practices related to jointly owned works. The PROs and certain of their affiliated music publishers have recently (and for the first time) claimed that, with respect to jointly owned songs for which fewer than all of a song’s publishers and songwriters are represented by ASCAP or BMI, the licenses issued by each PRO have historically not provided licensees with the right to perform such songs. Instead, these parties now claim, the PRO licenses have always provided only a contingent right, covering only the fractional share of the song owned by each PRO’s affiliates, which leaves licensees subject to infringement liability unless those licensees also obtain separate licenses from all other joint owners of the song. This attempt to re-write over one hundred years of music industry history and law must be rejected. The publishers’ claims are easily disproven; they are flatly inconsistent with (1) fundamental principles of copyright law; (2) the Consent Decrees and various judicial decisions interpreting those Decrees; (3) various licenses granted by the PROs; (4) the PROs’ agreements with their affiliated publishers and songwriters; (5) the PROs’ internal rules; (6) the PROs’ own public

statements; and (7) the positions historically taken by ASCAP and BMI in their negotiations with licensees.

Nor should the Consent Decrees be modified to change the fundamental nature and scope of the PROs' licenses. Such a change would further increase the market power of ASCAP and BMI by eliminating any possibility of competition between them, eliminate a key benefit of the blanket licensing regime, and vastly increase transaction costs associated with the licenses. In short, such changes would eviscerate the value and utility of the PROs' licenses and destabilize the entire music performance licensing market. There simply is no public interest that would be served by modifying the Consent Decrees to allow the PROs to withhold the right to perform songs in their repertoires merely because they do not represent all of the joint songwriters and publishers associated with those songs.

SPECIFIC RESPONSES TO THE DOJ'S QUESTIONS RELATED TO PRO LICENSING OF JOINTLY OWNED WORKS

1. Have the licenses ASCAP and BMI historically sold to users provided the right to play all the works in each organization's respective repertory (whether wholly or partially owned)?

There can be no serious question that the PRO licenses have always provided the right to play all songs in each PRO's respective repertory, irrespective of whether the PRO represents all of the joint owners of a given song in the repertory.

A. Joint Ownership Under Copyright Law

As a preliminary matter, the publishers' newfound claims that the PROs' licenses have never provided such rights are inconsistent with the long-standing treatment of licensing by joint owners under copyright law. Under United States copyright law, each joint owner of a copyrighted work owns a share of an undivided interest in the whole work and therefore has the

authority to grant a non-exclusive license for that work without the participation or permission of any other joint owners. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1145 (9th Cir. 2008) (joint owners each own share of undivided interest in the whole); *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007) (a co-owner may grant a non-exclusive license to a jointly-owned work unilaterally); *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998); *see also* 2 Patry on Copyright, § 5:7 (2015); H.R.Rep. No. 94-1476, at 121 (1976) (“Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits.”). Such a license from even one joint owner obviates the need for a license from any of the others because “a license from a co-holder of a copyright immunizes the licensee from liability to the other co-holder for copyright infringement.” *McKay v. Columbia Broad. Sys., Inc.*, 324 F.2d 762, 763 (2d Cir. 1963).

B. The Consent Decrees and Judicial Precedent

In the Request, the DOJ correctly notes that “[t]he Consent Decrees themselves describe ASCAP’s and BMI’s licenses as conveying the rights to play all works in each organization’s repertory.” This feature of the Consent Decrees is wholly inconsistent with publishers’ recent claims that the PRO licenses only provide contingent rights with respect to jointly-owned songs.

Moreover, courts interpreting the Consent Decrees have long recognized the bedrock principle that ASCAP’s and BMI’s blanket licenses grant users access to the *entire* repertory. In addition to the Second Circuit’s 2015 *Pandora* decision cited in the Request, which stated that ASCAP is “required to license its entire repertory to all eligible users,” the Supreme Court, as well as every other federal court that has examined the issue, have stated that the blanket license grants licensees access to a PRO’s entire repertory. *See Broad. Music, Inc. v. Columbia Broad.*

Sys., Inc., 441 U.S. 1, 5 (1979) (“Both [ASCAP and BMI] operate primarily through blanket licenses, which give the licensees the right to perform *any and all* of the compositions owned by the members or affiliates as often as the licensees desire for a stated term.”) (emphasis added); *id.* at 20 (describing the circumstances under which the blanket license arose as one where licensees wanted “unplanned, rapid, and indemnified access to *any and all* of the repertory of compositions,” and where individual transactions would be “expensive,” indeed, “prohibitive” for “licenses with individual radio stations, nightclubs, and restaurants”) (emphasis added); *see also U.S. v. Broad. Music, Inc.*, 275 F.3d 168, 173 (2d Cir. 2001) (“Traditionally, the BMI’s license of choice has been a ‘blanket license,’ a license that grants the licensee access to BMI’s entire repertory in exchange for an annual fee.”); *Am. Soc. of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 565 (2d Cir. 1990) (“As required by the ASCAP consent decree, ASCAP offers a blanket license for all of the three million songs in its repertory.”).

The courts have also noted that the value of a blanket license hinges on its ability to provide users access to the *entire* repertory. *See Broad. Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 767 (D. Del. 1981), *aff’d*, 691 F.2d 490 (3d Cir. 1982) (“BMI justifies the ‘full repertory’ blanket license on the ground that... a less than full repertory license system, if feasible at all, would be significantly more expensive to administer than a full repertory one.”). As will be discussed in response to Question 6, one of the key pro-competitive features of the PROs’ blanket licenses, relied upon by the courts and the PROs themselves to justify allowing the anti-competitive conduct of joint price fixing by the PROs, is that a blanket license provides licensees with immediate access to any and all of the works in a PRO’s repertory.

Indeed, it is long established that even if a music publisher that owns 100 percent of a song withdraws from a PRO, the PRO retains the right to license the song if the corresponding songwriter of the work remains with that PRO (and vice versa). *See Broad. Music v. Taylor*, 10 Misc. 2d 9, 20, 55 N.Y.S.2d 94, 103 (N.Y. Sup. Ct. 1945) (where publisher member withdrew from ASCAP and moved to BMI, songs remained in ASCAP repertory because songwriters remained as ASCAP members); *see also Schwartz v. Broad. Music, Inc.*, 180 F. Supp. 322, 333 (S.D.N.Y. 1959) (“ASCAP would continue to have the right to grant nonexclusive licenses in a resigned writer's composition as long as his publishers and collaborators remained members of ASCAP.”).

Critically, *the exact question at issue*, whether a single PRO’s license provides the right to perform jointly-owned songs when that PRO represents less than 100 percent of the song’s owners, *has already been answered by the courts*. In *Buffalo Broadcasting*, the district court was confronted with this question and held that if both PROs had the same song in their repertories due to split ownership, *a licensee had the option of licensing the song through either one of the PROs, without obtaining a license from the other*. *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, No. 13-95 (WCC), 1993 WL 60687, at *79 (S.D.N.Y. Mar. 1, 1993) (“*Buffalo Broadcasting*”). As discussed in more detail below, the *Buffalo Broadcasting* court lauded the pro-competitive benefits of allowing each PRO to license the entirety of jointly-owned songs. *See also, Schwartz v. Broad. Music, Inc.*, 180 F. Supp. at 333 (noting that ASCAP would retain the right to license a song after one songwriter withdrew as long as any of the song’s co-writers remained members of ASCAP).

C. Terms of ASCAP's and BMI's Licenses

The publishers' claims are also inconsistent with the facts and industry practices related to the PROs' licenses. As the DOJ correctly notes in the Request, ASCAP's and BMI's licensing practices have always suggested that each organization's license entitles users to play *all* works in their repertoires, without regard to whether such works are partially or fully owned by the licensing PRO's affiliates. The Request cites provisions in the BMI license for bars and restaurants and the ASCAP Business Blanket License, both of which clearly state that the licenses provide the right to perform all of the songs in each PRO's respective repertoire, not merely contingent, fractional interests in playing those songs.

As the first digital broadcaster in the world, Music Choice has been licensing through ASCAP and BMI for approximately twenty-five years. In addition to the examples the DOJ cites in the Request, every single one of Music Choice's licenses with BMI and ASCAP in all that time have similarly granted Music Choice the right to play all of the songs in each PRO's repertoire, not mere contingent, fractional interests in those songs. By way of example, Music Choice annexes to this submission excerpts of the operative language from its licenses with ASCAP and BMI as Exhibits A and B. Music Choice's agreement with ASCAP grants Music Choice a license to transmit "nondramatic public performances of musical compositions now or hereafter during the term hereof in the ASCAP repertoire, or as to which ASCAP has or shall have the right to license during the term hereof." Ex. A, section II. Music Choice's agreement with BMI defines the "BMI Repertoire" as "*all* musical compositions which BMI has the right to license for public performance now or hereafter during the Term of this License Agreement." Ex. B, section 2(a) (emphasis added). BMI's grant of rights provides Music Choice with the unlimited right to publicly perform "*all* musical works, the rights to grant public performances of

which BMI may during the Term hereof control.” Ex. B, section 3(a) (emphasis added). As demonstrated below, both ASCAP’s and BMI’s agreements with their publishers and songwriters clearly provide ASCAP and BMI with the right to license all of the songs in their respective repertoires, expressly including songs that were jointly written or owned with affiliates of the other PRO.

The indemnification provisions in Music Choice’s ASCAP and BMI licenses provide further clear evidence that each license provides the full and immediate right to perform all songs in each PRO’s repertoire, without the need to obtain licenses for split works from any unrepresented joint owners. In its agreement with Music Choice, ASCAP agrees to indemnify Music Choice from any claims, including copyright claims, “that may be made or brought against them . . . with respect to the nondramatic public performances licensed under this Agreement or any compositions in ASCAP’s repertoire which are written or copyrighted by members of ASCAP or as to which ASCAP has or shall have the rights to grant public performances during the term hereof.” Ex. A, section VI.A. Similarly, BMI agrees to indemnify Music Choice from any “claims, demands, and suits that may be made or brought against [Music Choice] with respect to the public performance licensed under this License Agreement of any composition in the BMI Repertory.” Ex. B, section 8. Each of these indemnification provisions would plainly cover a circumstance where an unrepresented joint owner of a song in the PRO’s repertoire attempted to sue Music Choice for performing a song in that PRO’s repertoire. Such indemnifications are wholly inconsistent with a limited, conditional, or fractional license.

D. ASCAP’s and BMI’s Agreements With Publishers and Songwriters

The very agreements through which ASCAP and BMI obtain their licensing authority from music publishers and songwriters expressly require that those publishers and songwriters

provide the PROs with the right to issue licenses for entire songs, even where the affiliated publisher or songwriter signing the agreement does not control 100 percent of the song. *See* ASCAP Writer Agreement, <http://www.ascap.com/~media/files/pdf/join/ascap-writer-agreement.pdf> (requiring the songwriter to grant ASCAP “the right to license non-dramatic public performances...of each musical work” that the songwriter, whether “alone, *or jointly, or in collaboration with others*, wrote, composed, published, acquired or owned”; or “has any right, title, interest or control whatsoever, *in whole or in part*; or that “may be written, composed, acquired, owned, published, or copyrighted by the owner, *alone, jointly or in collaboration with others*; or in which “the owner may hereafter ... have any right, title, interest or control, whatsoever, *in whole or in part*”) (emphasis added); ASCAP Publisher Agreement, <http://www.ascap.com/~media/files/pdf/join/ascap-publisher-agreement.pdf> (same); BMI Writer Agreement, http://www.bmi.com/forms/affiliation/bmi_writer_kit.pdf (requiring each songwriter to grant BMI the right to license “[a]ll musical compositions...composed by you alone or with one or more co-writers”). The PROs would have no reason to obtain these rights if their licenses did not include the rights; the fact that they get such rights is clear evidence that ASCAP’s and BMI’s licenses have always provided the right to perform entire songs, irrespective of fractional ownership.

E. ASCAP’s Internal Rules

The fact that the PROs have always issued licenses allowing performance of any song for which one of its members has any interest is also reflected in ASCAP’s internal rules. In its Compendium of ASCAP Rules and Regulations and Policies Supplemental to the Articles of Association (“ASCAP Compendium”), ASCAP expressly represents that it “licenses to Music Users, on a non-exclusive basis, the right to publicly perform, non-dramatically, all of the works

in the ASCAP Repertory.” ASCAP Compendium § 2.1,

<http://www.ascap.com/~media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf>. ASCAP’s rules acknowledge that works in the repertory include works that are jointly owned by members and non-members. ASCAP Compendium § 2.3 (discussing method of registering a song as part of the ASCAP repertory “[r]egardless of whether a work is the product of a collaboration with other ASCAP Members or with non-ASCAP members. . .”). The Compendium also states that ASCAP requires each member to grant it “the non-exclusive right to license the non-dramatic public performance of that Member’s musical compositions,” regardless of whether that composition was jointly or individually created. ASCAP Compendium § 2.7.1.

Indeed, ASCAP’s internal rules provide (consistent with established precedent) that ASCAP retains the right to issue licenses to perform a song even if the music publisher that owns 100 percent of the copyright in a song resigns from ASCAP, so long as any writer of the song remains in ASCAP, and vice versa. ASCAP Compendium § 1.11.5 (citing *Marks v. Taylor*, 55 N.Y.S.2d 94 (N.Y. S.Ct. 1945)). ASCAP’s own internal rules and regulations repeatedly recognize that ASCAP both obtains the right to license, and actually does license, the entirety of a jointly-owned song, even if not all of the owners are ASCAP members and even (in some circumstances) where none of the music publisher owners are members. These rules are wholly inconsistent with the publishers’ recent claims that the PRO licenses have not granted the right to perform jointly-owned songs in the PROs’ repertories.

F. The PROs’ Public Statements

Until certain publishers (very recently) began raising allegations to the contrary, both ASCAP and BMI have consistently taken positions in their public statements and regulatory

filings, acknowledging that their licenses provide the right to play all of the songs in their repertoires, irrespective of whether each PRO represents 100 percent of each song. The DOJ has cited examples of such public statements in the Request, but there are many others. For example, in connection with the Copyright Office's recent music licensing study ASCAP submitted public comments, in which it acknowledged that "ASCAP must grant a license to all the musical works in its repertory upon written request." Comments of ASCAP, p.3, Docket No. 2014-3, dated May 23, 2014,

http://copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/ASCAP_MLS_2014.pdf. Similarly, ASCAP and BMI submitted joint comments in connection with the Copyright Office's Report on the Satellite Television Extension and Localism Act of 2010, in which they acknowledged that each of their collective licenses provide licensees with "rights to perform every work in the repertory." Comments of BMI and ASCAP, p. 11, Docket No. RM 2010-10, dated April 25, 2011, <http://www.copyright.gov/docs/section302/comments/initial/042511-bmi-ascap.pdf>.

G. Positions Taken By the PROs in License Negotiations

Not surprisingly in light of the fact that the PROs' have always characterized their licenses as providing the full right to perform every work in their repertoires, each of ASCAP and BMI has always argued for the value of its license based upon 100 percent of its entire repertory. In Music Choice's 25-year history of negotiating with ASCAP and BMI (and SESAC, for that matter), neither the PROs nor Music Choice has factored the fractional ownership of jointly-owned songs into rate negotiations. To the contrary, each PRO always argues that its repertory (i.e., the total number of songs, not fractional shares of songs, in the repertory) has grown and has therefore increased the value of being able to play every song in the repertory.

2. If the blanket licenses have not provided users the right to play the works in the repertories, what have the licenses provided?

As discussed above, ASCAP's and BMI's blanket licenses have always provided users the right to play any and all works in their respective repertories. Any other conclusion would be wholly inconsistent with (1) long-standing industry practices; (2) the Consent Decrees; (3) the licenses actually issued by ASCAP and BMI; (4) the PROs' agreements with their publishers and songwriters; (5) the PROs' own internal rules and regulations; (6) representations by both ASCAP and BMI; and (7) well-established legal precedent. Moreover, such a conclusion would defeat the primary purpose of the ASCAP and BMI licenses: one-stop shopping for each PRO's entire repertory and the resulting decrease in transaction costs. If the licenses had only provided a mere contingent right to perform the large portion of each repertory comprising jointly-owned works, requiring the additional negotiation of several other licenses before the PRO license could actually be used, the utility of the PRO licenses would have been greatly diminished, if not destroyed.

3. Have there been instances in which a user who entered into a license with only one PRO, intending to publicly perform only that PRO's works, was subject to a copyright infringement action by another PRO or rightsholder?

Music Choice is not aware of a single case in which a user who entered into a license with only one PRO was subject to a copyright infringement action by another PRO or rightsholder based upon both PROs administration of separate shares of a joint work. As noted above, such an action would be precluded by long-settled copyright law principles. Indeed, the possibility of such a claim was expressly rejected in *Buffalo Broadcasting*, 1993 WL 60687, at *79. *See also, Schwartz v. Broad. Music, Inc.*, 180 F. Supp. at 333. As also noted above, such suits are expressly indemnified against by ASCAP and BMI.

4. Assuming the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, should the Consent Decrees be modified to permit or require ASCAP and BMI to offer licenses that require users to obtain licenses from all joint owners of a work?

The Consent Decrees should *not* be modified to permit, let alone require, ASCAP or BMI to offer licenses that require users to obtain separate licenses from all joint owners of a work. Not only would this modification fly in the face of long-standing, well-established principles of copyright law and settled industry practice (as discussed *supra*), but such modification would eliminate the only area of any competition among the PROs. Such a change would also destroy a key benefit of collective licensing: the reduction of transaction costs. If the PROs are allowed to withhold full licenses for jointly-owned works the effectiveness of the “blanket license” will be eviscerated, requiring licensees to identify every joint owner of every song they use to make sure they have licenses from every such joint owner in order to avoid a risk of infringement liability. Such a radical change from 100 years of industry practice would destabilize the broadcast industry. Music Choice simply does not have the resources required to track all of the splits for every song that it plays on its music channels.

Music Choice notes that it has always obtained licenses from all three PROs because ASCAP, BMI, and SESAC are “must haves.” Because of the way that it uses music, Music Choice needs blanket licenses, which allow it to constantly change the programming of its channels without separately licensing each song played. Each of the PROs has enough important music in its repertoires that is not included in the other PROs’ repertoires that Music Choice would not be able to operate its business without licenses from all three. The PROs, however, value their licenses without regard to split ownership, based upon the value of being able to play each PRO’s entire repertoire. This has essentially resulted in Music Choice’s double or triple payment for jointly-owned works.

Other types of users, however, may take advantage of other types of licenses, such as the per-program license, which have the real potential to allow competition among the PROs with respect to jointly-owned works. The pro-competitive benefits that would be lost if the Consent Decrees were modified to allow the PROs to withhold full licenses for jointly-owned works were recognized by the court in *Buffalo Broadcasting*. Specifically, *Buffalo Broadcasting* addressed the issue of whether a broadcaster that already had a performance license from BMI should also be required, if it operates under a per-program license, to pay a fee to ASCAP for songs in both PROs' repertories. *Buffalo Broadcasting*, 1993 WL 60687, at *79-80. ASCAP took the position that the broadcaster must obtain licenses for split works from both PROs, noting that BMI royalty fees at the time were only 70 percent of the ASCAP fees, and therefore if the BMI license alone provided the right to perform jointly-owned songs a broadcaster would be able to limit the amount of works licensed through the ASCAP per-program license and reduce its overall royalty burden. The district court rejected ASCAP's argument, opining that this result (that broadcasters may bargain to pay BMI's lower fees) is "entirely appropriate; in effect, ASCAP and BMI are competing in this narrow market for music licenses, and if BMI can undercut ASCAP's price, it should garner the customers." *Id.*

5. If ASCAP and BMI were to offer licenses that do not entitle users to play partially owned works, how (if at all) would the public interest be served by modifying the Consent Decrees to permit ASCAP and BMI to accept partial grants of rights from music publishers under which the PROs can license a publisher's rights to some users but not to others?

The public interest would not be served—but rather would be severely harmed—by permitting both partial withdrawal *and* requiring licensees to obtain licenses from all owners of a "split" work. Allowing the PROs to withhold full licenses to jointly-owned songs in their repertories, combined with allowing publishers to partially withdraw from the PROs would

multiply the harm from each of those separate changes to the Consent Decrees. As Music Choice demonstrated in its prior submissions, as soon as one major publisher partially withdraws from ASCAP and BMI, every other publisher with the resources to do so will be forced to follow suit due to the spiraling decrease in value of the PRO licenses. This will, in turn, vastly multiply the number of redundant licenses that a music user must obtain for jointly-owned works to the point where the transaction costs will be impossible to bear.¹ Moreover, as noted above, the negotiation of such licenses would be devoid of competition if users cannot rely upon a license from any one joint owner, as they have been able to do for the past century.

6. What, if any, rationale is there for ASCAP and BMI to engage in joint price setting if their licenses do not provide immediate access to all of the works in their repertoires?

In *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, the Supreme Court explained the justifications for allowing collective, blanket licensing of music despite the inherent anti-competitive effects of such collective licensing:

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package, and even small-performing rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses. Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material.

Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21 (1979).

¹ Music Choice has previously described in detail, in its April 21, 2015 submission, the sheer impossibility of attempting to negotiate direct licenses with withdrawn publishers (should it need to), citing the massive undertaking of continuously checking and verifying the ownership of all the songs in its programming library. This insurmountable administrative burden would be doubled if Music Choice were also forced to negotiate separately with each and every joint owner of a “split” work.

The reduced transaction costs (for both copyright owners and users) and the ability for licensees to gain *immediate, unfettered access* to the *entirety* of a PRO's repertory has similarly been advanced as a justification (for what may otherwise be illegal price fixing) in many other decisions. *See, e.g., Broad. Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 767 (D. Del. 1981), *aff'd*, 691 F.2d 490 (3d Cir. 1982) (“As earlier noted, the parties agree that performing rights societies and their blanket licenses reduce transaction costs which would otherwise be prohibitive. BMI’s blanket license thus has a pro-competitive effect in the sense that there would be no market if individual [licensees] were left to negotiate with individual copyright owners.”).

A new regime in which licenses from the PROs would no longer provide unfettered, immediate access to the entirety of that PRO's works would eliminate this primary justification for allowing the price fixing inherent in collective licensing. In other words, the countervailing benefit of a “single-fee blanket license, which [gives] unlimited access to the repertory and reliable protection against infringement,” cited by the Supreme Court would no longer exist. *Columbia Broad. Sys., Inc.*, 441 U.S. at 21. Instead, a licensee would have to engage in individual transactions, on a song-by-song basis, with withdrawn joint owners and/or joint owners who are not members of either ASCAP or BMI—transactions that are “quite expensive.” *Id.* at 20.

Allowing ASCAP and BMI to withhold full licenses to joint works contained in their repertories would change the very nature, and destroy the very purpose, of the PRO licenses. If this fundamental change were allowed, Music Choice cannot fathom any remaining rationale for permitting ASCAP and BMI to engage in collective price fixing, and the traditional reasoning that has shielded ASCAP and BMI from antitrust liability would in turn fail. Such radical changes to the nature and scope of the PROs' licenses would only lead to less competition and

increased market power for the PROs and their constituent publishers, which in turn would only lead to increased prices and decreased choice for consumers. None of this would ultimately benefit songwriters or copyright owners, either. Indeed, to the extent the nature and scope of the PRO licenses were so fundamentally changed, royalty rates would have to be slashed to account for the massively reduced value of the contingent, fractional licenses as compared to the current, full licenses.

Dated: November 20, 2015

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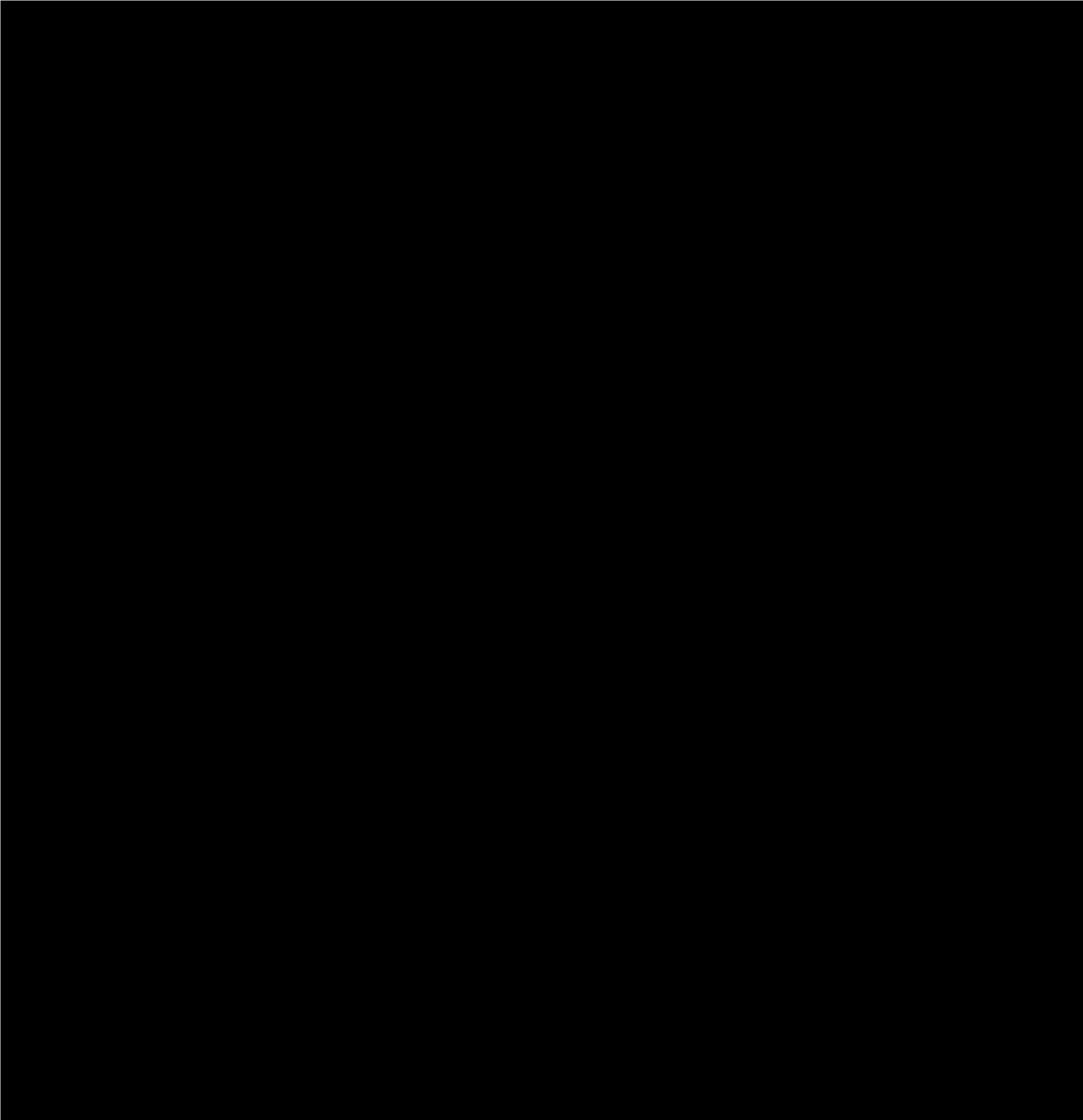
Chief Executive Officer

Paula T. Calhoun

Senior Vice President and General Counsel

MUSIC CHOICE

EXHIBIT A



II. LICENSE

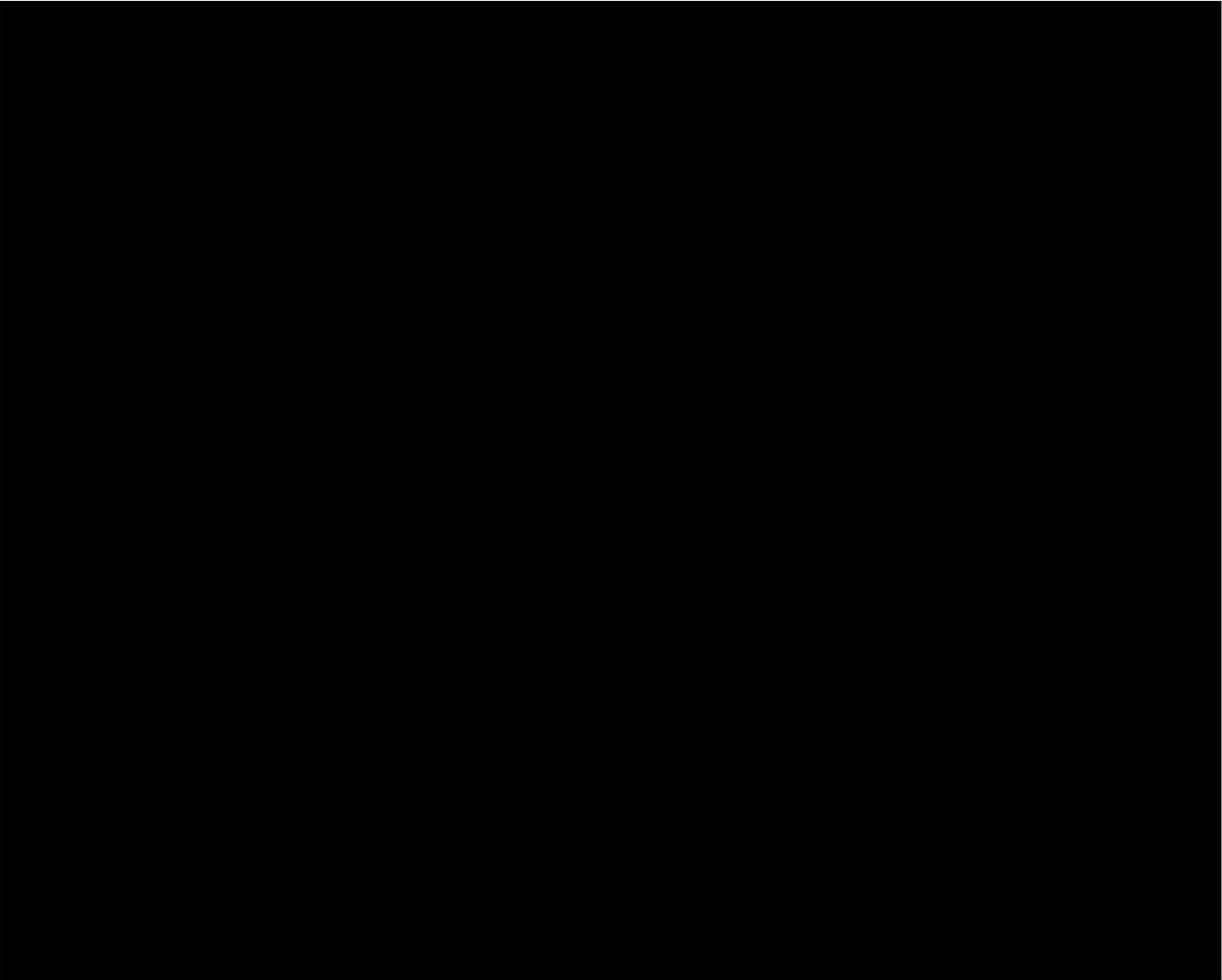
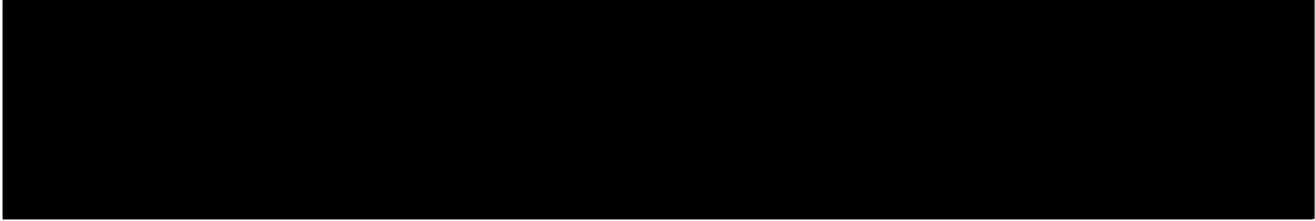
ASCAP grants to Music Choice and Music Choice accepts, [REDACTED]



, a non-

exclusive license to transmit as part of the Programming Service in the United States, over any

and all of Music Choice's Distribution Systems, nondramatic public performances of musical compositions now or hereafter during the term hereof in the ASCAP repertory, or as to which ASCAP has or shall have the right to grant such license during the term hereof. The license granted hereunder shall be a Through-To-The-Viewer License, as defined in Section I.E. herein.




VI. INDEMNIFICATION, REPRESENTATIONS AND WARRANTIES**A. Indemnification**

ASCAP agrees to indemnify, save and hold harmless and defend Music Choice, its parents, subsidiaries, successors, assigns, and agents, sponsors, advertisers, advertising agencies, distributors, and its and their officers, directors, employees, and artists, from and against any claims, demands or suits that may be made or brought against them or any of them with respect to the nondramatic public performances licensed under this Agreement of any compositions in ASCAP's repertory which are written or copyrighted by members of ASCAP or as to which ASCAP has or shall have rights to grant performance licenses during the term hereof.

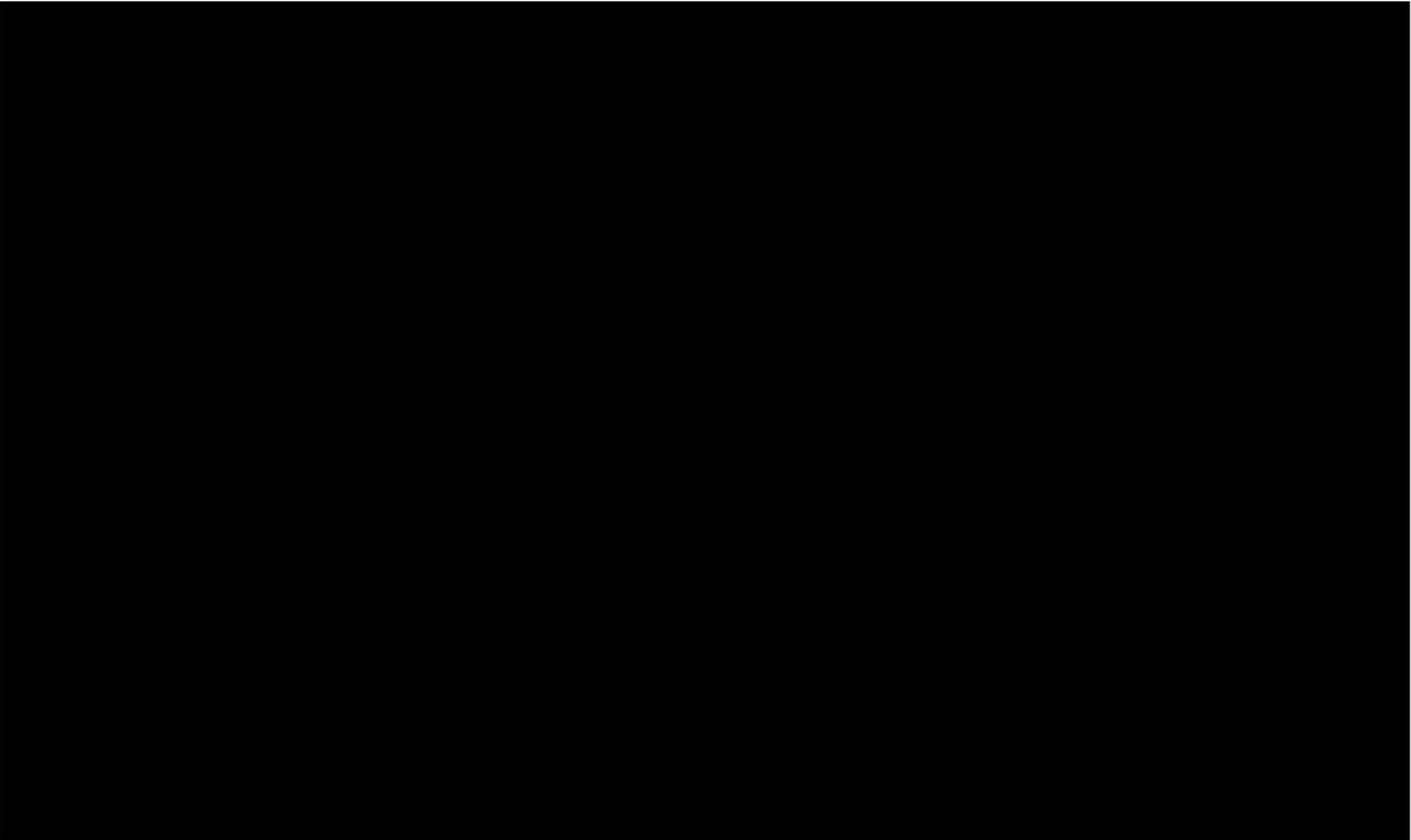
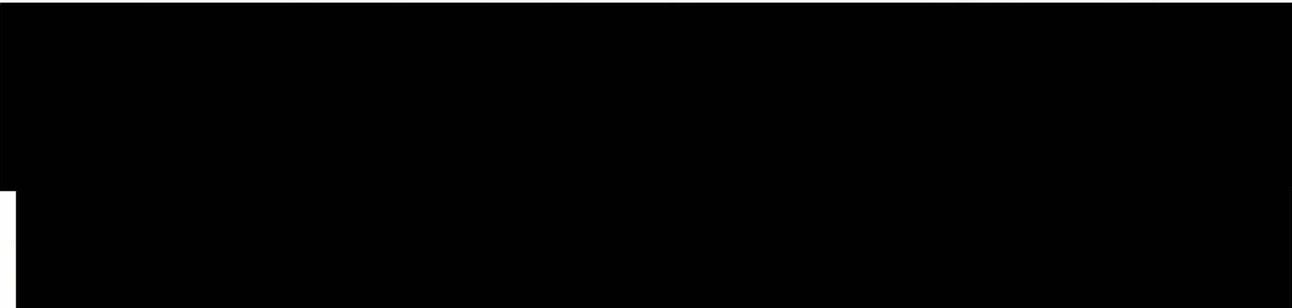


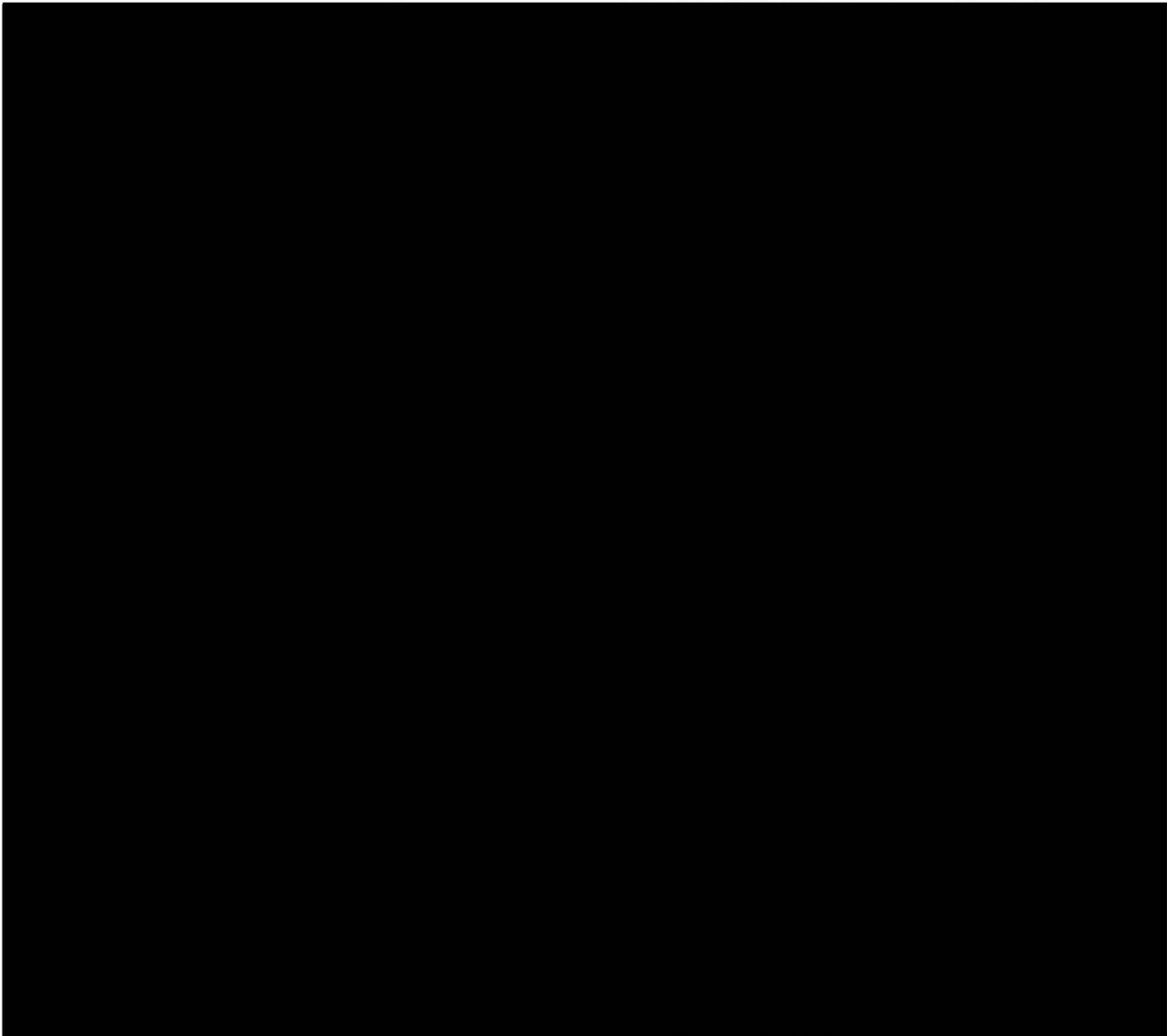
EXHIBIT B

**MUSIC CHOICE RESIDENTIAL MUSIC SERVICE
BLANKET LICENSE AGREEMENT**



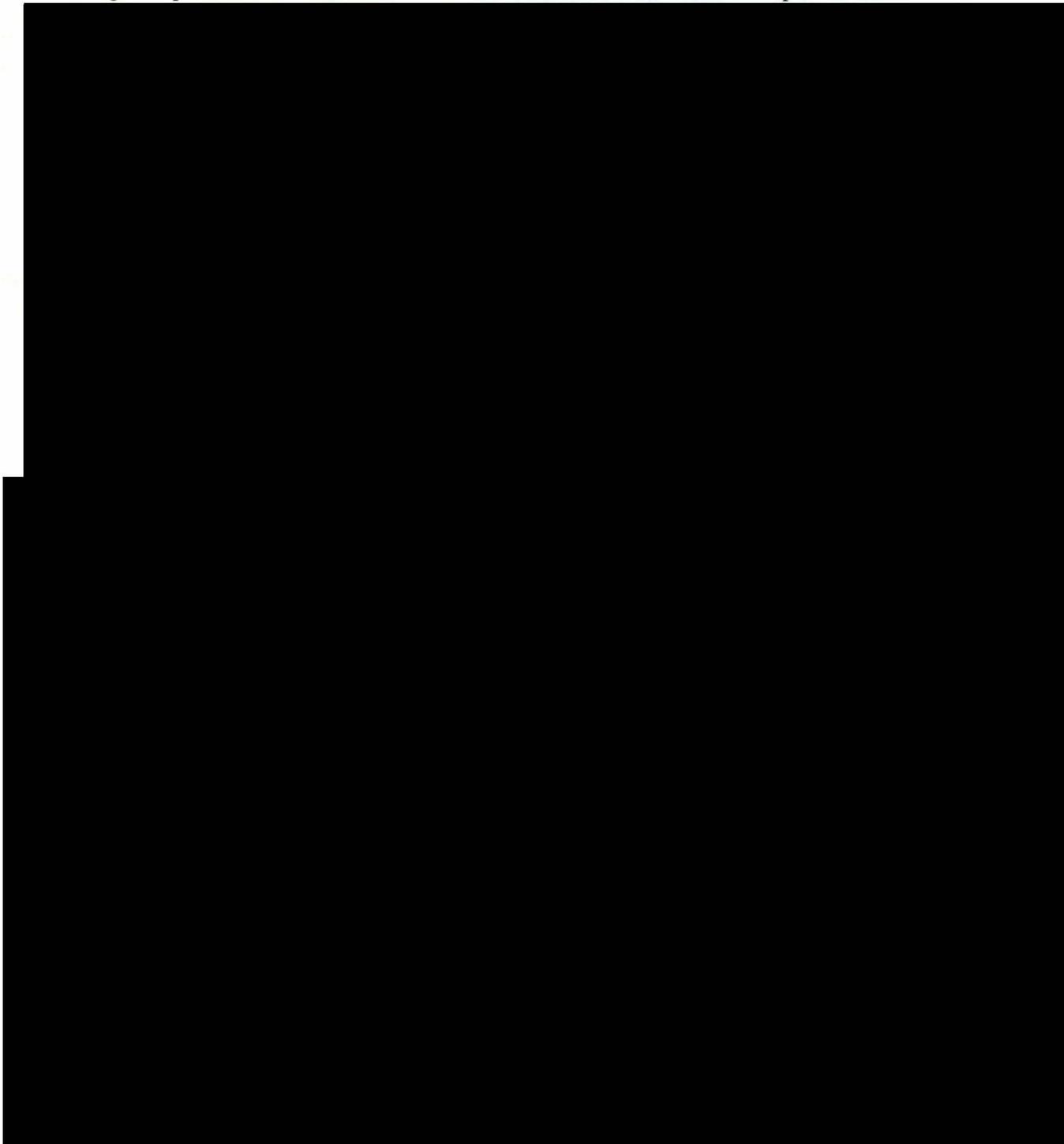
2. Definitions. As used in this Agreement, the following terms shall have the following respective meanings:

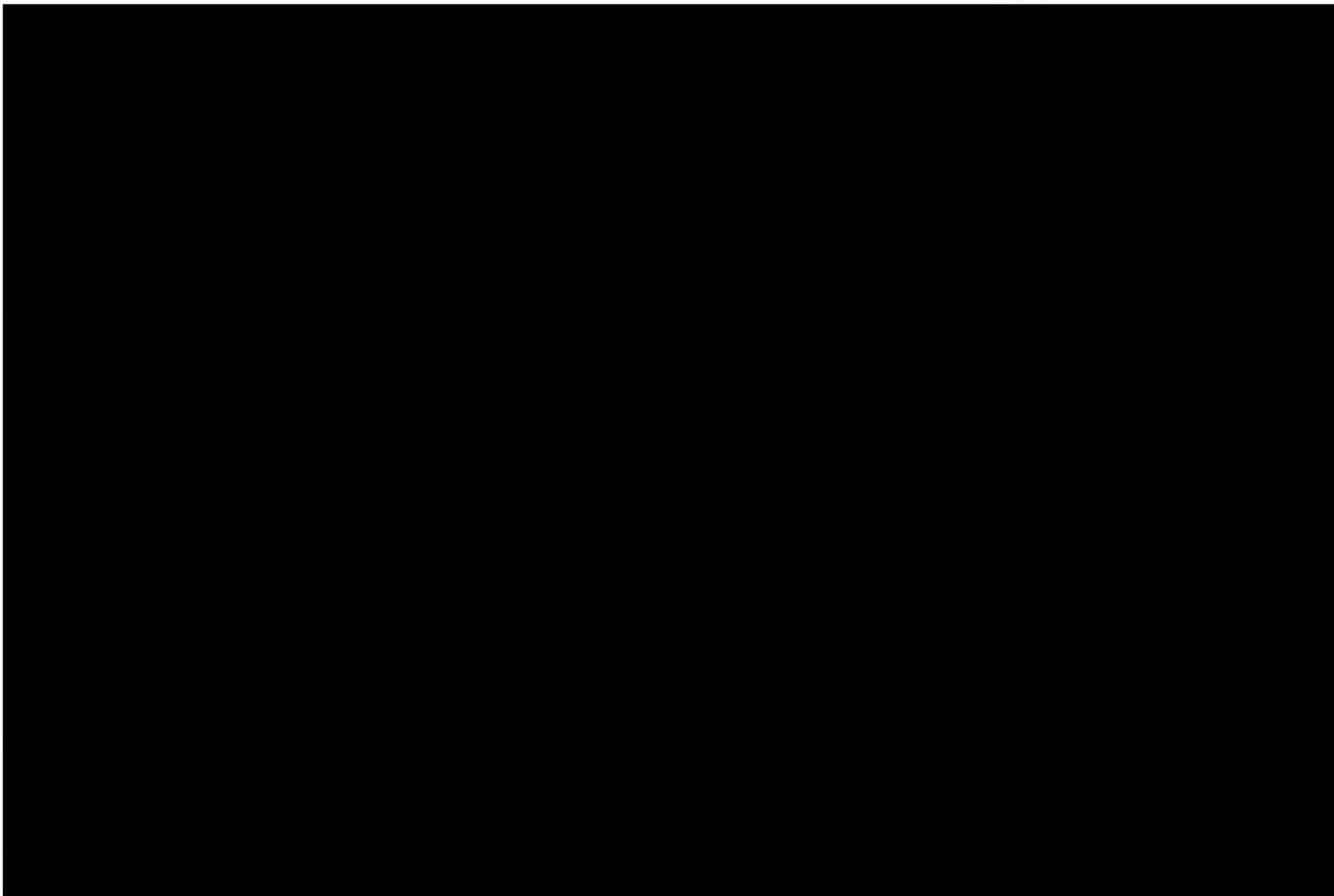
(a) "BMI Repertory" shall mean all musical compositions which BMI has the right to license for public performance now or hereafter during the Term of this License Agreement.



3. Grant of Rights

(a) BMI hereby grants to LICENSEE, for the Term of this Agreement, a non-exclusive, through to the listener license to use and publicly perform in and as part of the Programming Service to Subscribers within the Territory by and through Distributors, all musical works, the rights to grant public performance licenses of which BMI may during the Term hereof control. This license shall not include dramatic rights or the right to perform dramatico-musical works in whole or in substantial part. [REDACTED]





8. Indemnity

BMI will indemnify, save and hold harmless and defend LICENSEE, LICENSEE's parents, subsidiaries, successors, assigns, Distributors, advertisers and their advertising agencies, sponsors, and LICENSEE and their respective officers, directors, employees and artists, from and against all claims, demands and suits that may be made or brought against LICENSEE or them with respect to the public performance licensed under this License Agreement of any compositions in the BMI Repertory. LICENSEE must give BMI prompt notice of any such claim, demand or suit and will simultaneously deliver to BMI all papers it has received pertaining thereto and will promptly deliver any papers it receives thereafter. BMI at its expense will have full charge of the defense of any such claim, demand or suit and LICENSEE agrees to cooperate fully with BMI in such defense. LICENSEE may however engage LICENSEE's own counsel at LICENSEE's own expense who may participate in the defense of any such action. BMI will, upon reasonable request, advise LICENSEE whether particular musical works are available for performance as part of BMI's Repertory.

