November 20, 2015

VIA EMAIL
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 400
Washington, DC 20001
ASCAP-BMI-decree-review@usdoj.gov

RE: Comments by Peermusic
Submitted in Response to US Justice Department Antitrust Division
Request for Comments on PRO Licensing of Jointly Owned Works

To Whom It May Concern:

Peermusic welcomes the opportunity to respond to the September 22, 2015 request by the Antitrust Division for comments and information relevant to the questions posed therein.

Peermusic is the trade name for a group of music publishing designees under common family ownership since the company's establishment in 1928. Today Peermusic has 32 offices worldwide and represents thousands of composers and a catalogue of over 100,000 works. Peermusic is uniquely situated among those providing comments in response to the Antitrust Division's request as Peermusic has licensed compositions with ASCAP continually since 1933, and was the first publisher to provide rights in an existing catalogue of standards to BMI when it was founded in 1940. The following comments are based on our internal review of 75 years of contracts, correspondence and dealings between Peermusic, on the one hand, and ASCAP, BMI and songwriters on the other hand, during which period of time it has been unequivocally established that Performing Rights Organizations ("PROs") have been and must continue to license the right to publicly perform compositions on a fractional basis.

1. Historically ASCAP and BMI Licenses Have Permitted Users the Right to Play those Works in Each PRO's Respective Repertory Only to the Extent of Each

Affiliated Copyright Owner's (Publisher's) Fractional Rights in the Underlying Musical Compositions.

a. Before Fractional Interests Became an Issue

As of the establishment of BMI in 1939 and at the time the ASCAP Consent Decree was entered into in 1941, the question as to whether a PRO had the right to license all or only its fractional interest in a co-written composition was not an issue. While BMI's long-term goals certainly included growing the ranks of its affiliated songwriters, its immediate objective in 1939 was to acquire control over the right to license the public performance rights in musical compositions previously licensed to ASCAP. During BMI's formative years ASCAP's roster of affiliated writers outnumbered BMI's roster by a substantial margin, and instances of co-writers affiliated with different PROs were rare.

Peermusic founder Ralph S. Peer was soon faced with the commercial and creative implications of these rare instances of co-writers affiliated with different PROs. In 1943, Ralph Peer wrote to BMI expressing concern about the paucity of BMI writers who were creatively qualified to compose lyrics with Latin music songwriters signed to his new BMI-affiliated entity, Peer International Corporation, and expressed his need to rely on seasoned ASCAP lyric writers who were signed to his ASCAP affiliate, Southern Music Publishing Co., Inc. At the same time, Ralph Peer also communicated to BMI the need to ensure that each PRO would remunerate its respective affiliated writers for performances of compositions resulting from collaborations between BMI songwriters and ASCAP lyricists. Ralph Peer's clear position was that a user of a composition jointly authored by an ASCAP writer and a BMI writer should be obligated to secure licenses from both ASCAP and BMI.

At that time neither ASCAP nor BMI had any intention of licensing for public performance 100% of a composition that was co-written by authors affiliated with different PROs. To the contrary, both ASCAP and BMI encouraged their respective affiliated writers to write either alone or to collaborate solely with other writers affiliated with the same PRO. If either ASCAP or BMI had intended to implement a policy of

licensing 100% of a composition co-written by writers with different PRO affiliations, the encouragement of solo writing or co-writing only with the PRO's own affiliates would not have been necessary.

b. Failure to Pay in Respect of Non-Wholly Controlled Works

In 1955 ASCAP officially declared that it would refuse to allocate performance credits to compositions composed in part with non-members of ASCAP. BMI had the same policy in effect. The result of these parallel approaches was that neither of those PROs would recognize partially controlled compositions in either of their respective repertories. From the perspective of those two PROs, any reference in the Consent Decrees to "musical works", "compositions", or "repertory" would have been understood at that time to refer only to compositions solely written or co-written by its own affiliated songwriters, as compositions co-written by members of different PROs were not part of either PRO's repertory.

Upon reviewing this 1955 ASCAP regulation, Ralph Peer concluded with some dismay that neither fractional nor full-work licensing would be the rule. Even though collaborations between members of the two different PROs were becoming more frequent, it appeared no one would be paid for the public performance of the compositions resulting from such collaborations. Since ASCAP writers would not be paid on collaborations with BMI writers, Ralph Peer adopted a practice of encouraging only collaborations between those co-writers who were all affiliated with the same PRO. In Ralph Peer's opinion, however, this practice led to a decrease in the quality of the resulting compositions, to the detriment of the listening public.

c. Acknowledgment of Shared Rights

In the 1970s the PROs began to acknowledge compositions co-written by members of different PROs as part of their respective repertories and initially the PROs only did so on a temporary and strictly fractional basis. In ASCAP's June 9, 1971 "Collaboration Regulation" notice to its members (including Southern Music Publishing Co., Inc.), ASCAP for the first time agreed that its repertory would thereafter include "works written

in collaboration between an ASCAP and a BMI writer…." Although this is ASCAP's first reference to including such compositions in its repertory, the suggestion remained that ASCAP was not yet prepared to abandon the position that its repertory must ultimately be 100% controlled: the circular went on to stipulate that compositions co-written by BMI members would be admitted into the ASCAP repertory only "if (1) the BMI writer's affiliation agreement with BMI has a year or less to run, and (2) the BMI writer agrees that within one year he will become a member of [ASCAP] and place his interest in the work with an ASCAP publisher at his earliest opportunity."

Before fractional licensing became the industry norm, both ASCAP and BMI were focused on obtaining the right to license 100% of each composition in their respective repertories. This position ultimately gave way under pressure from publishers, songwriters, and market forces; fractional licensing and accounting then became the standard, replacing what by then had become the fiction of 100% repertory control. Since the time of its implementation, fractional licensing has been and should continue to be the industry norm, as Peermusic has maintained since the establishment of BMI. Only by continuing the industry practice of fractional licensing will writers be able to co-write the best compositions possible with whomever they desire while ensuring all writers are compensated for their creations.

2. Blanket Licenses Issued by ASCAP and BMI Grant the User the Right to Publicly Perform Such PRO's Fractional Interest in Each Composition in the Relevant PRO's Repertory.

It is the widespread present practice of the PROs to grant to users the performance rights in and to only the fractional interest of a composition the rights to which such PRO has obtained. Those who perform compositions under blanket licenses obtain such licenses from all of the PROs that have fractional interests in the compositions performed. In practice, these users obtain licenses from ASCAP, BMI, SESAC and maybe even the newly founded Global Music Rights. This process is a simple way to ensure nearly all songwriters and publishers are paid in respect of the performance of their compositions.

As discussed below, generally speaking, PROs obtain from their affiliates the right to license to third parties only the fractional interest in each composition which is attributable to the writer's fractional collaborative contribution to the composition concerned and which is owned or controlled by the publisher affiliate.

a. Copyright and Contract Law Principles

Fractional licensing has become the industry norm and is also supported by principles of contract law and copyright law as well as the language contained in the ASCAP and BMI Consent Decrees.

Co-written compositions typically qualify as "joint works" under U.S. copyright law. 17 U.S.C. §101 defines a "joint work" 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." Copyright in a joint work vests initially in the co-authors of such a work and unless there is an agreement to the contrary, each author owns the work in equal shares. Each of the co-authors has the right to grant non-exclusive licenses to use the work without the consent of the other co-authors as long as the co-author granting such rights pays to the other co-authors their proportionate share(s) of any monies received from such non-exclusive licensing. Each co-author also has the right to transfer the copyright in its fractional share of the composition to a third party (for example, to a publisher, like Peermusic).

When compositions are jointly written, it is industry custom and practice for the co-authors to complete a "splits sheet". A "splits sheet" is a short-form agreement that sets forth the percentage ownership of the composition between the co-writers (as compositions are not always owned in equal shares between the co-writers) and typically contains a provision that provides that each co-writer can only license his or her fractional share in the composition. When this type of provision is contained in a "splits sheet" relating to a particular composition, each co-writer is foreclosed from licensing the entire composition to a third party, even on a non-exclusive basis. Prominent co-writers will typically enter

into co-publishing/co-administration agreements providing that each collaborator will only license his or her contributory fractional share of a composition.

Although absent an agreement described in the immediately preceding paragraph, a copyright owner has the right to grant a non-exclusive license (including a performing rights license) to use the entirety of a composition, the PROs do not have this right. PROs are not copyright owners; they are merely non-exclusive licensees of the copyright owners and as such they do not have the ability to grant licenses for an entire composition, unless explicitly licensed by all of the co-authors (or co-owners) of a composition. Even if PROs were able to license the entirety of a composition as a co-owner has the right to do, PROs would violate copyright law in respect of any fractionally controlled composition were they to do so. Copyright law requires that the licensor remit fractional payment the licensing fees to co-writers but PROs can only make payments to their members. Thus a PRO's inability to make payment to a co-author of a composition would be a violation of the "whole-work" licensing scheme set forth in U.S. copyright law.

Additionally, when a writer transfers a copyright interest in and to a composition to a publisher, such a grant is *exclusive* and therefore does not qualify under the legal principles governing full-work licensing, which allow only for non-exclusive licenses covering the entirety of the work. In other words, a writer cannot transfer any rights to a greater percentage than the percentage of the composition which the co-writer in question owns. Therefore, a publisher cannot acquire from a single co-author the right to grant licenses for the whole composition, and a publisher cannot grant to a PRO the right to license a greater percentage of a composition than the percentage such publisher owns.

b. Consent Decrees Give Preference to Fractional over Full-Work Licensing.

As discussed above, since inception, neither ASCAP nor BMI has granted performance licenses in respect of compositions (or portions of compositions) they do not control, except in temporary situations where a writer moves from one PRO to another. Any permitted reliance on full-work licensing is only temporary, until fractional licensing

could be re-established in each case. The language contained in the ASCAP and BMI Consent Decrees lends further support to this understanding.

The ASCAP Consent Decree states (emphasis added):

> "…any writer or publisher member who resigns from ASCAP and whose works continue to be licensed by ASCAP *by reason of the continued membership of a co-writer, writer or publisher of any such works*, may elect to continue receiving distribution for such works on the same basis and with the same elections as a member would have, *so long as the resigning member does not license the works to any other performing rights licensing organization* for performance in the United States."

The text of this provision is clearly based on the understanding that co-owners of a composition are to receive fractional distributions in respect of revenues allocable to such a jointly owned composition. Further, full-work licensing is permitted in respect of a departing member's share in such composition, but solely to the extent the departing share is not fractionally assigned elsewhere. Once the free-floating fractional share is assigned to another PRO, any interim full-work licensing must give way to fractional licensing and accounting. Since ASCAP stops paying royalties to writers or publishers when such writer or publisher withdraws from ASCAP and takes its fractional interest in a composition to another PRO, it follows that ASCAP no longer has the right to license such fractional interest of the applicable composition. If ASCAP did have such rights, it would make payments in respect of such rights.

The BMI Consent Decree states (emphasis added):

> "Upon termination…of any contract with a writer or publisher relating to the licensing of the right publicly to perform any musical composition, defendant shall continue to pay for performances of

> the musical compositions of such writer or publisher licensed by defendant upon the basis of the current performance rates generally paid by defendant to writers and publishers for similar performances of similar compositions *for so long as such performing rights are not otherwise licensed*."

Just as is the case with ASCAP, full-work licensing by BMI is permitted in respect of a departing member's share in a composition, but solely to the extent the performing rights in the departing share are not licensed otherwise. Once they are so otherwise licensed, BMI's obligation to make payments in respect of such fractional share ceases, showing that BMI no longer has the rights to the fractional share in question.

Although the portions of the Consent Decrees cited above do not directly apply to compositions fractionally licensed directly by the withdrawing member, these provisions do not address direct licensing; they address the treatment of departing members. Where the Consent Decrees address direct licensing, deference to individual fractional licensing is clear.

Section IV(B) of the ASCAP Consent Decree gives its members the right to enter into direct, fractional licenses with music users by enjoining and restraining ASCAP from "[l]imiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a performing rights organization, non-exclusive licenses to music users for rights of public performance." If ASCAP were to issue preemptive full-work licenses to all interested users, ASCAP would render its members' direct licensing rights meaningless by "limiting, restricting, or interfering" with the members' rights to issue such direct licenses.

Section IV(A) of the BMI Consent Decree enjoins and restrains BMI from "[f]ailing to grant permission, on the written request of *all writers and publishers of a musical composition* including the copyright proprietor thereof, allowing such persons to issue to a music user [a license]…permitting the making of specified performances of such musical

composition by such music user directly to the public" (emphasis added). This provision requires the consent of all BMI-affiliated co-authors prior to the issuance of a direct license, an explicit endorsement of the principle that all co-owners must agree to the disposition of their rights of public performance.

c. Consent Decree Provisions Prohibiting Specific Conduct Do Not Force Unspecified Conduct.

Instead of applying a novel reading to the various references to "all works" in the PROs' "repertories" and the numerous variants and synonyms thereof, a reading that contradicts decades of commercial practice by all parties and contradicts otherwise clear provisions of the Consent Decrees, we believe it makes more sense to read these references as clear expressions of the principles of section IV.F of the ASCAP Consent Decree and section X.A of the BMI Consent Decree. Using nearly identical wording, these sections of the Decrees forbid the PROs from excluding select compositions from licenses granted, where such an exclusion is made in order to "exact additional consideration for the performance thereof." These sections describe various exceptions in which it would be deemed reasonable to withhold certain compositions from licenses, but the general rule is clear: the PROs cannot hold "hits" hostage for higher fees. Although there are references in these sections to "entire repertory," "some, any, or all," "all of the works" etc., these references can only be read in support of the clearly expressed principle of section IV.F and section X.A. We cannot see any reason to read these references instead in support of the principle of full-work licensing, a principle nowhere clearly expressed in either judgment.

The plain language of the Consent Decrees, when read in conjunction with an understanding of how contract law and copyright law work in this area, and the practice of the industry as a whole, indicate that the PROs do not have the right to license full compositions except in very limited circumstances. Neither the ASCAP Consent Decree nor the BMI Consent Decree explicitly expresses support of a general policy of full-work licensing. Under the Consent Decrees, full-work licensing is only addressed (and permitted) in the limited circumstance of a withdrawing member. Further, a general policy of full-work licensing would nullify the right of a PRO member to grant direct

performance licenses. Therefore, blanket licenses issued by ASCAP and BMI presently (and should continue to) allow users to perform the fractional interest in compositions to which the PRO in question has rights.

3. We Are Not Aware of Any Instances in Which a User who Entered a License with Only One PRO was Subject to a Copyright Infringement Action by Another PRO or Rightsholder.

4. If it is Assumed that the Consent Decrees Currently Require ASCAP and BMI to Offer Full-Work Licenses, the Consent Decrees Should be Modified to Require ASCAP and BMI to Offer Licenses that Require Users to Obtain Licenses from All Joint Owners of a Composition.

It is not our understanding that the Consent Decrees currently require ASCAP and BMI to offer full-work licenses; please see our discussion in section 2 above. However, if we do assume solely for the purpose of responding to this question, that the Consent Decrees presently do require ASCAP and BMI to offer full-work licenses, we would certainly advocate for their amendment to require users to obtain performance licenses from all joint owners of a composition.

We are certain that many of our fellow stakeholders – publishers, songwriters, and their various representatives – have called attention to the drastic and deleterious effects on the market that would ensue if the Consent Decrees were deemed to require full-work licensing, but Peermusic would respectfully call your attention to some results that we think would cause particular harm to a global independent publisher and the songwriters it represents.

a. Inequitable Results of Full-Work Licensing

Full-work licensing would lead to inequitable results between major publishers and independent publishers. As we have seen in the recent Pandora rate court proceedings, the licensing rates for ASCAP and BMI can vary. If ASCAP and BMI were expressly

permitted to grant full-work licenses, music users would simply obtain blanket licenses from the PRO with the lower rate. Such users would be entitled to perform those compositions wholly controlled by the relevant PRO in addition to those compositions that are only partially controlled by such PRO. The users would only have to obtain licenses at the higher rate for those compositions in which the PRO granting the blanket license has no interest. While the major publishers may have the market share to withdraw entirely from the PROs and/or enter into licenses directly with music users at higher rates, individual songwriters as well as independent music publishers, like Peermusic, would not have this ability. The value of individual songwriters' and independent music publishers' performing rights (and overall catalogues) would be decreased severely. Further, independent publishers would no longer be in a competitive position to sign new writers or grow their catalogues.

b. Implications for Co-Writing

The process of writing a hit song has changed drastically since the days of Ralph Peer's early roster. While co-written works then were rare, it is safe to say that virtually all of today's hits are the result of collaboration. In 2014, 93 of the top 100 compositions were written by two or more songwriters and 68 of such compositions were registered with more than one PRO. These numbers reflect the team-oriented practices of today's professional songwriters. Producers have stables of writers specifically hired to collaborate with today's top performers. It is not uncommon for four, five, six, or more writers to appear on the label credits sharing authorship of a popular composition.

Collaborative team songwriting between co-writers affiliated with different PROs in the wake of any mandatory full-work public performance licensing would be severely destabilized. Songwriters would face strong artificial incentives to work solely with members of their own PROs to avoid the risk of forfeiting control over the flow of critical revenues and this could potentially stifle creativity. Writers would face artificial pressure to consolidate their rights in a single music publisher (likely the major publisher associated with the producer and artist) in an attempt to try to centralize what would otherwise be chaotic lines of accountability and payments. PRO choice would disappear for all but the

most established writers. Songwriters' freedom to contract with publishers of their choice would be limited and competition among publishers would be restricted.

Mandatory full-work licensing would damage the songwriting market, interfere with contracts between songwriters and publishers, eliminate the efficiencies of co-administration agreements among writers, and artificially reduce competition among publishers. As an independent publisher seeking to place promising talent in writing rooms, Peermusic and its songwriters would suffer particular harm if fractional licensing were suddenly no longer the rule.

c. International Issues

Peermusic is a global publisher with numerous songwriters affiliated with performing rights societies outside the United States, as well as a subpublisher in the United States representing a wide range of ex-U.S. repertoire. If whole-work licensing were implemented via the ASCAP and BMI Consent Decrees, Peermusic could potentially be in violation of copyright laws, societal regulations, and industry norms outside the United States. Registering the compositions of foreign writers or subpublished catalogues with PROs operating under mandatory whole-work licensing would upend our contractual obligations to license only the rights explicitly conveyed to us. Peermusic's ability to arrange co-writing opportunities among our U.S. and ex-U.S. writers – often very successful collaborations, and common in the industry – would be severely complicated at best, and perhaps curtailed altogether.

These are only some of the many unintended and harmful consequences that would result from revising the Consent Decrees to require whole-work licensing of public performance rights. It is our position that the current market, operating on a fractional licensing basis, is efficient, uncomplicated, and supportive of collaboration among songwriters. Requiring or permitting the PROs to issue whole-work licenses would injure the public performance market, lead to chaos and uncertainty in the overall valuation of such rights, create opacity and confusion in respect of accounting practices, increase the PROs' and publishers' cost of doing business, and potentially give rise to litigation.

5. With Respect to Modifying the Consent Decrees to Permit ASCAP and BMI to Accept Partial Grants From Music Publishers Under Which the PROs Can License a Publisher's Rights to Some Users but Not to Others, Please See Peermusic's Comments Filed on August 6, 2014.

6. Conclusion

History, industry custom and practice, copyright law, contract law, the text of the Consent Decrees, the climate of the performing rights marketplace, the co-writing system, and the status of international laws and procedures all indicate that maintaining the practice of fractional licensing of public performance rights (and perhaps including in the Consent Decrees an even clearer statement requiring such fractional licensing) is in the best interest of the songwriting and publishing communities. Thank you very much for the opportunity to provide these comments.

Sincerely,

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