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David Kully
Chief, Litigation III Section
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U.S. Department of Justice
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ASCAP-BMI-decree-review@usdoj.gov

Dear Mr. Kully:

Gang, Tyre, Ramer, and Brown, Inc. has been engaged by the National Music Publishers' Association to provide you with our views of the whole works or "one hundred percent licensing" issue currently being contemplated by the Department of Justice in connection with a review of the ASCAP and BMI consent decrees.[1]

By way of background, our firm has long been involved in the music business. Between my partner, Mr. Salomon, and myself, we have over 60 years of experience representing record companies, music publishers, artists, songwriters, producers and others engaged in the creation, recording and exploitation of music. Currently, our practice focuses on artists (many, if not most, of whom are also songwriters), and includes such well-known names as Paul Simon, Stevie Wonder, P!nk, Neil Diamond, Green Day, R.E.M., Randy Newman, Tom Waits and many others.

I have taught and lectured extensively on the music business, including at Harvard, Yale, USC and UCLA. Also, I am the author of the book *All You Need to Know About the Music Business*, the 9th edition of which will be published in November of this year, and which the *Los Angeles Times* has called "the industry bible."

We understand that the Department of Justice is considering whether ASCAP and BMI should be required under the antitrust consent decrees governing aspects of their operations to issue licenses for one hundred percent of the musical compositions contained within their repertoires even if the applicable organization's members control less than one hundred percent of the compositions involved. We believe the implementation of such a requirement would (a) upset decades of custom and practice as to how co-authors establish their business arrangements, as well as radically changing the way the performance rights organizations ("PROs") currently account to members, (b) generally wreak havoc to long-established licensing practices relating to public performance of musical compositions, (c) immediately place numerous participants in the industry in breach of existing agreements, (d)

[1] *See* Final Judgments entered in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.) and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.), as amended.

provoke litigation between and among various parties regarding their respective rights, and (e) potentially exceed the scope of the Department's authority with respect to copyrights.

Further, if the DOJ is considering a requirement that ASCAP and BMI only accept songs for which the writer and publisher have the right to 100% license, such a practice would also seriously disrupt the current business. As we will note later, almost all of the most popular songs are co-written, and many of those are licensed by more than one PRO. Accordingly, unless all parties agree to one PRO licensing that song, which is not the norm in the industry (as also discussed below), the result would be that no one has the right to license the song.
Under court decisions construing the rights of joint owners under United States copyright law, one hundred percent licensing is *permissible*, but not *required*. As noted by both Nimmer and Goldstein, the two leading authoritative authors on United States copyright the rights and obligations of co-authors may be restricted by agreements between them. *See 1 Nimmer* at §6.10[C]; *Goldstein on Copyright* §4.2.2. And, in fact, in our experience, it is a widespread, routine practice in the music industry for co-authors to enter into such agreements. For example, agreements between joint authors often vary the percentages of ownership from the default copyright rule of equal ownership, and, as is most relevant here, such agreements often restrict a party to the licensing and collecting of income only from his or her agreed ownership share of the musical composition.

Many of our artist/songwriter clients collaborate with producer/songwriters in the creation of their works. When we prepare producer agreements between our artist clients and their producer/songwriter collaborators, we have, for many years, included a provision limiting the rights of each songwriter to administer only his or her share of the applicable composition and restricting him or her from licensing the other songwriter(s)' shares. In fact, in 2015 alone, we have prepared at least 30 such agreements, every single one of which contains a similar clause. The language we use in our form is attached as Exhibit A. Exhibit B is similar language I have been authorized to share with you used in the agreements prepared by the law firm of King, Paterno, Holmes and Saviano LLP, who represent major songwriters/producers such as Pharrell and Dr. Dre.

In fact, fractional control of musical composition copyrights is the norm in the music industry. One such example, among many, is the common practice regarding songs written for use in a motion picture to require fractional licensing and/or prohibit one hundred percent licensing. When a film production company engages a songwriter to write a song for a film, the songwriter and production company often co-own the copyright in the resulting song. The agreements between the production companies and the songwriters in these circumstances often allow each party to administer and collect income derived only from his/her/its share of the copyright. Each co-owner's license covers only that co-owners' fractional interest and does not cover the interest of the other co-owners. Further, such agreements virtually always prohibit the songwriter from licensing his or her share of the song in certain categories, such as commercials and competing motion picture or television shows.[2]

[2] These limitations are designed to protect the production company's substantial

Thus, should the Department adopt a rule that requires ASCAP or BMI to license one hundred percent of a musical composition in situations where the ASCAP or BMI member controls less than one hundred percent of that composition, the Department would immediately cause numerous authors/owners to be in breach of their existing agreements with their co-writers/co-owners. Disputes over these kinds of licenses could disrupt otherwise productive creative relationships between co-writers, chilling creative output. We further believe that one co-writer/co-owner could sue the other co-writer/co-owner for the acts of the other's performing rights organization, particularly where the defendant's performing rights organization licenses music at a lower rate than the plaintiff's. One could also envision lawsuits by an aggrieved co-writer against a PRO to which he or she does not belong ("non-affiliated PRO"), such as situations where the non-affiliated PRO is compelled to issue a license for a right reserved to that co-writer.

In addition, a one hundred percent licensing requirement may result in breaches by writers of their agreements with their publishers (the entities that own or administer copyrights for writers). Those agreements typically grant the publisher exclusive rights to the writer's interest in a work, subject only to public performance rights granted *by the writer* to the performing rights organization with which the writer is affiliated. For example, if one writer creates 50% of a song together with a writer who is signed to a non-affiliated PRO, and the non-affiliated PRO is required to license one hundred percent of that song, the first writer's publisher may have a claim against the writer for breach of that writer's agreement with the publisher. The writer may be responsible for the publisher's lost income if the non-affiliated PRO licenses at a lower rate than the one with which the writer is affiliated, or because of delay in receiving payment. This scenario would have a major impact on our clients, most of whom have agreements with major publishers and many of whom would find themselves facing potential claims which did not previously exist under the long-standing practice of fractional licensing.

Creating these breaches and the resulting potential litigation, and shifting liability to writers like our clients, would not seem to be the desired result of revisiting the ASCAP and BMI consent decrees.

We understand the Department is concerned about the potential difficulty of licensees obtaining proper licenses, but the reality is that licensees in every other endeavor (e.g., synchronization rights [licenses to use songs in audiovisual works such as motion pictures and television], mechanical licenses [licenses to use songs in

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investment in its motion picture. For example, it is common for major motion picture studios to enter into "co-promotion" agreements with advertisers, such as a toy character giveaway at a fast food chain, in exchange for millions of dollars of advertising that promotes both the restaurants and the motion picture. If the writer were able to license the song in a commercial for a competing fast food chain, it would put the film company in breach of its co-promotion agreement. And, because these co-promotion contracts are often entered into after licensing the song, the writer's contract restricts the writer from licensing the song to *any* commercial.

CDs and downloads], and print licenses) live in a world of fractional licensing and have no problem securing licenses. Further, as a practical matter, all PROs control songs that are *not* co-written, which means nearly every licensee, in any event, needs performance license from both BMI and ASCAP (as well as from SESAC and GMR) to cover all the music they use. Accordingly, there would be no simplification from such a new procedure.

Another area of contention, should one hundred percent licensing be required, is the question of which PRO's license governs, and how the payments would flow. Currently, the PROs' practice is to pay their members only for the fractional share of each song controlled by that member, in essence thereby licensing only those members' percentages of each composition. We are also advised that in setting license fees, ASCAP and BMI only claim market share based on their fractional interests in their repertoire.

If this practice were to change to 100% licensing, the first question would be which license governs. Would it be the first license in time? The last license? Would the licensee be free to choose, and if so, how will the system know what option is chosen, and therefore how to calculate the fees? Once the licensee issue is settled, what are the mechanics of payments? None of the PROs currently have payment information for non-affiliated members. What fees would be deducted in making these payments? If the payments go to the other society, could writers be charged fees by both the PROs? And how long would the non-affiliated writer's payments be delayed by passing through two hands?

We understand the Department has been briefed by others on the accounting and payment nightmares that could result if one hundred percent licensing were mandated. While we cannot speak to that issue from any direct experience, we are certain that our clients would suffer if those difficulties are in fact realized, whether or not they can be fixed in any reasonable time frame or at a reasonable cost. And that cost would be passed on to the songwriters, as ASCAP and BMI deduct their costs before paying the writers. Also, payments to songwriters would be delayed or perhaps lost entirely. Further, with fractional licensing, the co-owners of songs are always aware of every license, and can therefore track the income from that license. That is not the case if one party issues a 100% license. Indeed, in our experience, in the few instances where one co-writer has granted a 100% license for certain uses, we have seen situations where one owner did not even know money had been collected until years later, when they audited the co-owner (at no small expense, which makes this remedy impractical in all but the highest earning situations). Oftentimes, payments from performing rights organizations may be the only payments flowing to a songwriter. While payments from publishers are customarily semi-annual, PROs generally pay writers on a quarterly basis. Even more importantly, the PROs pay the songwriter's share of public performance royalties directly to the writers, even if the writer is not owed royalties by their publisher (for example, because of an earlier advance that has not yet been recovered). Delays or, even worse, lost payments, mean those songwriters will miss paychecks. For many of these people, it could affect their livelihoods and the welfare of their families.

Apart from practical concerns, we believe there is a question whether anyone other than Congress has the authority to mandate one hundred percent licensing. Article I, Section 8, cl.8 of the United States Constitution confers upon Congress the power to grant authors exclusive rights to their works. Congress has exercised that power from time to time throughout history, most recently in the Copyright Act of 1976, which has been amended several times since its adoption.

The Copyright Act does not contain any provision addressing the respective licensing rights of joint authors of copyrighted works. Courts, however, have applied the common law principles of tenancy-in-common to joint authors of copyrighted works. As noted above, under such common law, any co-owner *may* (but need not) non-exclusively license the whole of a joint work. See, e.g., *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988), *aff'd*, 490 U.S. 730, 104 L. Ed. 2d 811 (1989); *Erickson v. Trinity Theatre, Inc.*, 13 F. 3d 1061, 1068 (7th Cir. 1994).

A one hundred percent licensing requirement would create a mandate that does not exist in the law. Because Congress is granted the exclusive power under the Constitution to create copyright laws, it would seem that Congress has the exclusive authority to create a compulsory license for the use of a copyrighted music work. Congress has done so under very limited circumstances (such as with mechanical licenses [i.e., licenses to reproduce musical compositions in phonorecords], jukeboxes and cable television), but has not done so with respect to the public performance of musical works. The Department, in the process of regulating the licensing practices of copyright owners or their agents, seems to be considering, in effect, such a compulsory license that we believe Congress is exclusively entitled to create but has not chosen to do.

We further feel that adopting a one hundred percent licensing requirement would diminish competition in the provision of services offered by PROs. According to a *Billboard* magazine article dated October 23, 2015: "On the Oct. 24, 2015 Billboard Hot 100, just two songs were authored by one writer: 'Hit the Quan' by Richard Colbert (aka iLoveMemphis) and and [*sic*] Twenty One Pilots' 'Stressed Out' (by Tyler Joseph). The trend downward is staggering: 10 years ago, single writers (or singularly-credited entities) wrote 14 titles, which itself was down sharply from mid-October 1995 (32 such songs), 1985 (41) and 1975 (51)."

In other words, 98% of the top 100 songs were created by more than one writer, and to date, all of them have been paid their fractional shares by their respective PROs.

This *Billboard* article also noted that "[a]ccording to Hits Deconstructed founder David Penn**'s** recent report "Collaboration Nation," roughly 90 percent of Billboard Hot 100 top 10s in 2014 were written by two or more writers, and nearly half were written by at least four."

In many of those cases, different PROs represent the various co-writers of each song. The performing rights organizations, and in particular the smaller ones, would

have no incentive to compete with each other for those writers when these performing rights organizations know that ASCAP or BMI would be required to undermine their licensing ability by issuing one hundred percent licenses for co-written songs. Such a requirement may also dissuade potential new entrants into the market for performing rights licensing. If one hundred percent licensing is required, a songwriter can have his or her performing rights affiliation essentially overridden by another organization that could in theory hold as little as 1% of a song. This effectively limits the ability of writers like our clients to make their own choices about the appropriate organization to represent their rights. Thus, in the guise of increasing competition in one market, such a change may be restricting it in another market.

In sum, we believe the Department's imposition of a one hundred percent licensing mandate would disrupt long-established business practices in the industry, unnecessarily, and perhaps unlawfully, restricting the ability and right of a copyright owner to license public performance rights in and to his or her respective share of a musical composition, all without any discernible benefit to music users or consumers, and potentially to the detriment of those who rely on performance monies to feed their families. As noted, we believe there is a question of whether anyone other than Congress has the authority to require copyright owners to license compositions in what effectively amounts to a compulsory license for public performance rights. Accordingly, we respectfully request that the Department decline to take this position.

By_____
Donald S. Passman

EXHIBIT A
GANG, TYRE, RAMER & BROWN, INC.
FORM PRODUCER AGREEMENT LANGUAGE

Each party (or its music publishing designee) shall administer and exploit only its respective ownership share of the Controlled Composition[s] and shall not administer or exploit any other party's respective ownership share of [any/the] Controlled Composition. Notwithstanding the foregoing, you shall issue (or cause Your Publisher to issue) licenses for the use of Producer's and any Engaged Writer's share of [any/the] Controlled Composition in a recording featuring Artist's performances on proportionately the same terms as Artist (or Artist's music publishing designee) issues such licenses with respect to Artist's share of [such/the] Controlled Composition, including synchronization licenses, first-use mechanical licenses and mechanical licenses pursuant to controlled compositions clauses in Artist's recording agreement(s). If you fail to do so upon our request, you hereby irrevocably authorize and direct us to do so on behalf of you or Your Publisher.

EXHIBIT B
KING, HOLMES, PATERNO & SORIANO, LLP
FORM PRODUCER AGREEMENT LANGUAGE

1. Licenses for Musical Compositions: You hereby warrant, represent, acknowledge and agree that:

(a) The musical composition(s) embodied in the Masters set forth on Exhibit B attached hereto (each a "Composition", collectively the "Compositions") were written entirely and solely by the parties set forth in Exhibit B attached hereto, and the copyright therein shall be owned set forth in Exhibit B. Other than the Compositions, there are no musical compositions embodied in the Masters that were written or composed, in whole or in part, by you or any third party furnished or engaged by you hereunder, alone or in collaboration with any others, or which are owned or controlled, in whole or in part, directly or indirectly, by you or any third party furnished or engaged by you, or any other person, firm or corporation in which you or any third party furnished or engaged by you hereunder have or has a direct or an indirect interest.

(b) You shall have the sole and exclusive right throughout the universe to administer, exploit and to authorize the exploitation of only your respective ownership share of the Compositions.

(c) Your respective ownership shares of the Compositions are currently published by the publishing designee or third party publisher set forth below, and such publishing designee or third party publisher may be contacted as set forth below:

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(d) Notwithstanding the foregoing:

(i) You hereby grant to Artist and Record Company the irrevocable non-exclusive right and license to exploit your respective ownership share of the Compositions on the same terms and conditions applicable to Artist's respective ownership share thereof under the Recording Agreement, provided however that the mechanical royalty rate payable in connection with phonorecords in the United States and Canada shall in no event be less than one hundred percent (100%) of the statutory (or prevailing industry) rate (i.e., regardless of any so-called "caps").