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VIA E-MAIL
ASCAP-BMI-decree-review@usdoj.gov

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

Re: Comments on PRO Licensing of Jointly Owned Works

Dear Mr. Kully:

We represent Dr. Dre, Metallica, Pharrell, Van Halen, Carole King, Skrillex, Van Morrison, Tori Amos, Soundgarden, M.I.A., Yeah Yeah Yeahs, A Perfect Circle, 2pac, Marilyn Manson, Train, Alice in Chains, Sia, Lauryn Hill, Offspring, Brian Setzer, 30 Seconds to Mars, Iggy Azalea, Goo Goo Dolls, Aimee Mann, RZA, Journey and numerous other world-class recording artists and songwriters.

There have been recent reports in the press that the Department of Justice is considering whether ASCAP and BMI should be required pursuant to the consent decrees that govern them to issue licenses for 100% of each of the musical works in their repertoire which are very troubling to us. Such a requirement would fly in the face of long-standing music business custom and practice, whereby each joint owner administers his/her own fractional interest in jointly owned works and whereby ASCAP and BMI have always licensed such works on terms specifically determined with their affiliated writers' and publishers' fractional interests in mind.

We're aware, of course, of the legal precedents which hold that a joint author can issue certain licenses for 100% of a jointly owned work. But those precedents hold only that such 100% licensing is permissible—not that it is required. In fact, our joint owner clients routinely enter into "co-administration" agreements which specifically provide that each joint owner will license only his/her fractional interest. After all, is it really reasonable that a 1% joint owner's rights should override the wishes of the other 99%? Joint authors should have the same right to contract freely as any other creator or property owner.

And, for what it's worth, those legal precedents hold that the joint owner who issues a 100% license is required to account to the other owners. How would that would work? Would an ASCAP writer have to account to his/her BMI co-writer? Would he/she have to require ASCAP to account to the BMI writer? Or would ASCAP account to BMI? And what administrative fee would ASCAP deduct from the monies payable to the BMI writer, who has no agreement with ASCAP to govern that fee?

One also wonders how licensees would determine whether to obtain a license from ASCAP or BMI for a work jointly owned by an ASCAP affiliate and a BMI affiliate. If an innovative licensing approach were adopted by one society, could it be thwarted by its non-adoption by other societies? Could one society buy up fractional interests as loss leaders, knowing if could recover its investment by marking up the portion it doesn't control? The songwriters we represent (and the wider community of songwriters) would benefit by having more alternative approaches to licensing their performing rights, not fewer.

The reality is that fractional licensing of musical works is the custom in the music industry and is contractually required for most successful writers. The claim that this custom places too much of a burden on companies new to the music industry, many of which built their businesses based on paying little or nothing for music, is like asking sympathy for the fox who has to pay his way into the hen house. Licensees like radio stations, TV/film producers and record labels have gotten along just fine with the system as it is. In fact, ASCAP and BMI licenses have always been based on the fractional interests of ASCAP's and BMI's members; if a user were suddenly to have one of its licenses cover 100% of the rights in all of the songs licensed (instead of the fractional interest historically represented), the user would be getting significantly more than it is paying for.

If the DoJ were to require ASCAP and BMI to issue 100% licenses, it would disrupt long-standing music industry custom and unnecessarily restrict a joint owner's right to administer the exploitation of his/her property. It may even diminish competition in the market for performing rights administration—the opposite of the DoJ's mission. We urge you not to institute such a requirement.

Sincerely,

Peter T. Paterno

and Laurie L. Soriano
of King, Holmes, Paterno & Soriano, LLP

PTP:LLS:dj