RESPONSE OF THE SONGWRITERS GUILD OF AMERICA, INC. TO THE SOLICITATION OF PUBLIC COMMENTS BY THE UNITED STATES DEPARTMENT OF JUSTICE REGARDING THE QUESTION OF THE CONTINUED EFFICACY OF THE CONSENT DECREES TO WHICH THE PERFORMING RIGHTS SOCIETIES KNOWN AS AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("ASCAP") AND BROADCAST MUSIC, INC. ("BMI") REMAIN SUBJECT

SONGWRITERS GUILD OF AMERICA, INC.
5120 Virginia Way, Suite C 22
Brentwood, Tennessee 37027

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FOR SUBMISSION TO

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

ASCAP-BMI-decree-review@usdoj.gov

I. INTRODUCTION

A. SGA

SGA is the oldest and largest U.S. national organization run exclusively by and for the creators of musical compositions and their heirs, with approximately five thousand members nationwide and over eighty years of experience in advocating for music creator rights on the federal, state and local levels. SGA's membership is comprised of songwriters, lyricists, composers and the estates of deceased members. SGA provides a variety of administrative services to its members to ensure that songwriters receive fair and accurate compensation for the use of their works, including contract analysis, copyright registration/renewal filings, termination rights notices, and royalty collection and auditing.

Moreover, SGA takes great pride in its unique position as the sole, non-conflicted organizational representative of the interests of American and international music creators, uncompromised by the frequently competing and "vertically integrated" interests of other copyright users and assignees.

B. Summary of SGA's Positions on the PRO Consent Decrees

At the outset of these comments, SGA wishes to make clear that, with a single, crucial exception, it stands side by side with its PRO colleagues in supporting the principle that the Consent Decrees to which the PROs remain subject are severely in need of modification in order to mitigate the unfair economic results that these World War II era directives are causing to music creators in the 21st century.[1] In recent filings by both ASCAP and BMI with the U.S. Copyright Office concerning the issue of licensing reform in the performing rights area, the PROs joined SGA in arguing that all

[1] Eliminating the consent decrees in their entirety is beyond the scope of SGA's comments, but SGA would welcome the opportunity to address the issue if it becomes a serious consideration of the DOJ.

music creators deserve fair market value for the use of their works on all platforms, and that the Consent Decrees are crippling the ability of the PROs to establish market rates for the performance of musical compositions in digital environments on behalf of such songwriters and composers.

SGA further elaborated on this serious problem at a recent consultation with the Antitrust Division of the Department of Justice in Washington, DC on July 8, 2014. At that meeting, SGA asserted its strong belief that the Consent Decrees desperately need to be modified in order to make it possible for American and international music creators to realize fair compensation, free from the artificial devaluation of royalty rates that result from strict judicial interpretation of the decades-old Consent Decrees. By way of example, SGA highlighted the untenable results of recent rate-setting decisions concerning the digital music streaming company Pandora[2], the entire business model of which is built upon the use of musical compositions at rates far below market value. The Pandora situation stands as a stark example of the need to address the market inequities that flow from the Consent Decrees before further, irreparable harm is caused to the American music creator community and to American culture.

On the question of how to accomplish reform of the current Consent Decree model, SGA is in full accord with the PROs on four of the five basic principles each has articulated as being essential to accomplishing the task.[3] The four points on which SGA lends its full support to the PROs are: (1) the need to shift performance royalty rate-setting from rate court judges to private arbitrators; (2) the imperative for recognition of an evidentiary presumption that direct, arms-length licenses (the terms of which are fully disclosed) voluntarily negotiated by copyright holders who have withdrawn rights from a PRO provide the best evidence of reasonable market rates; (3) the related

[2] re Petition of Pandora Media Inc., 12-cv-08035, U.S. District Court, Southern District of New York.
[3] See, for example, Williams, Paul. "Music Licensing From a Songwriter's Perspective." *Recode*, 9 July 2014. Web. 04 Aug. 2014.

Congressional adoption of the "willing-buyer/willing seller" standard in rate setting for musical compositions, and; (4) the extension to PROs of the ability to license bundled rights beyond the singular right of public performance to new media services.

The very detailed arguments marshaled by the PROs in support of these four essential reforms in their recent public comments, which will undoubtedly be repeated in their submissions to the DOJ as part of the current process, make it unnecessary for SGA to set forth in greater detail the finer points of these principles beyond noting its full and enthusiastic support for them. Thus, rather than engaging in the redundant process of repeating those many points on which SGA is in agreement with the PROs, SGA's Comments will focus on the one critical area in which there is strong disagreement between the songwriter community on the one hand and the PROs and their music publisher members on the other: the wholly unnecessary extension to music publishers, in light of the other suggested reforms, of the authority to engage in the partial withdrawal of rights from the PROs. SGA is in vehement disagreement with the music publishers and the PROs that such a concession is either necessary or proper if the other reforms are instituted, and urges the DOJ to refrain from granting such a concession without consideration of the serious harm to the music creator community that such action could cause.[4]

Specifically, it is SGA's belief that granting such a "partial withdrawal" concession to music publishers, without guarantees of (i) full disclosure and transparency throughout the entire direct licensing process and (ii) direct payment from the source of gross royalties due to music creators through their PROs, will result in catastrophic losses to songwriters and composers due to obfuscation and oversight inability and failure. Moreover, SGA also believes that this concession

[4] United States of America v. American Society of Composers, Authors and Publishers. New York Southern District Court.

would all but guarantee the eventual economic collapse of the PRO collective licensing system that for over one hundred years has served the needs of the U.S. music creator community.

As noted, even though SGA remains in virtually unanimous accord with the PROs on its other positions regarding the Consent Decree and related legislative reforms, the remainder of SGA's Comments will be devoted nearly exclusively to detailing the reasons why the partial withdrawal concession would ultimately destroy the ability of the PROs to continue in business. Partial withdrawal would also irreparably harm the creators who make up the very class of citizens that the U.S. Constitution and the U.S. Copyright Act seek to protect over the interests of copyright assignees and users. SGA is particularly concerned that the support for partial withdrawal by the PROs is apparently being directed by their major music publisher members, who together control nearly 70% of the world's music copyrights[5], and whose threatened partial or full withdrawal would likely compromise the PROs' existence.

In sum, SGA has determined that allowing partial withdrawal would be devastating to creators and PROs because it would likely cause four distinct categories of harm:

(1) the elimination of any semblance of transparency by music publishers in any direct performing rights licensing deal of their choosing, enabling them to completely obfuscate licensing terms from music creators including such crucial information as the inclusion of advances, administrative fees, equity interests, and other remuneration in which music creators have a rightful expectation to share;

[5] Tanner, John C. "Digital Music: In Search of Biz Model." *Bloomberg Business Week*. Bloomberg, 11 June 2007. Web. 04 Aug. 2014.

(2) the shifting of all low-overhead, high-yield collection and licensing functions from the PROs to in-house music publishing staffs, leaving only the most costly, labor intensive administrative functions to the PROs (and thereby shifting hugely burdensome, per transaction costs to the remaining members within the PRO). Such a practice would result in the very opposite effect of the cost-spreading benefits intended to be realized through the collective licensing process, and would likely destroy the ability of the PROs to survive economically;

(3) the providing to music publishers of the means to recoup advances issued to music creators out of an income stream (the writer's share of performance royalties) for which the music publisher did not bargain in setting the amounts of the advances and the terms of the publishing deals, and over which it has had no expectation of control after more than a century of collective licensing precedent, and;

(4) the introduction of chaos into the performing rights marketplace, with

a) co-writers of musical compositions left without a viable, cost-effective means by which to collect their royalties under direct licenses issued by music publishers of their co-creators;
b) foreign writers being completely disenfranchised from the rights granted to them under the rules of their local performing rights societies, with the ability of music creators and PROs to exercise oversight concerning the licensing, royalty collection and distribution process rendered a virtual impossibility; and
c) the expectation of a right to affiliate with the PRO of one's choice completely removed from the American music creator experience.

II. DISCUSSION

A. The Elimination of Transparency

The rights of music creators to receive fair compensation for the use of their creative works flows directly from the mandate set forth in Article I, Section 8 of the U.S. Constitution, authorizing Congress to enact laws to encourage the progress of science and the arts. U.S. Const. art. I, § 8. Congress, pursuant to that mandate, has enacted laws setting forth protections for creators and inventors starting with the Copyright Act of 1790, passed in the very first U.S. Congressional session. Act of May 31, 1790, ch. 15, 1 Stat. 124.

One of the most valuable rights in the so-called "bundle of rights" granted to creators under the copyright laws, as they have developed since 1790, has been the right of public performance. At first, however, creators of musical compositions were not able to realize this critical value. The exercise of performance rights by individual music creators and copyright owners in the 19th and very early 20th centuries proved to be thoroughly unwieldy and almost wholly non-remunerative. Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers, 400 F. Supp. 737, 741 (S.D.N.Y. 1975).

By the early 1900s, in fact, songwriters and music publishers had recognized that the widespread performance of musical works would "render it impossible for individual composers and publishers to enforce effectively their performance rights individually." 2-8 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 8.19[A] (2010). The cost of "negotiating individual licenses for performances of musical compositions in every restaurant, nightclub, concert hall and ballroom

in the country" was found to be prohibitive. 2 Paul Goldstein, Goldstein on Copyright § 7.9 (3d ed. 2007).

Goldstein explains the genesis of the PROs in this context:

> By 1914, writers and publishers of musical compositions concluded that, if they were to enjoy the full economic measure of their performance rights, they would have to organize into a single collecting society that could, for a flat fee, offer users the right to perform any work in the society's repertory, and then distribute the collected fees among society members. *Id.*

Thus, in 1914 music creators and music publishers established the performing rights society ASCAP, specifically to help music creators avoid the staggering costs of direct licensing and marketplace monitoring, to enable the collection from users of fair market fees for their public performance of music, and to ensure distribution of such fair market fees to creators and copyright owners based upon actual or estimated use on a per musical composition basis.

Since the inception of ASCAP, and the subsequent establishment of BMI and a third U.S. PRO known as SESAC, America's songwriters have placed their trust in these PROs to collectively and fairly enforce their public performance rights. In turn, the PROs have consistently acted to protect the rights and financial security of creators.

The PROs have done so by enforcing the public performance right through the issuance of blanket licenses to users, the pursuit of legal actions against unlicensed infringers, the collection of royalties, and by ensuring the proper calculation of usage on which the distribution of such

royalties to creators and copyright owners is based. Perhaps of greatest significance in terms of developing such trust, however, is the fact that the PROs distribute such earned royalties *directly and separately to the songwriter and the music publisher, from pooled royalties, the collection of which has been based upon licensing arrangements the complete terms of which are transparent.*

The result of the establishment of this transparent, direct payment, blanket license system has been the development of public performance royalties into a crucial income stream for music creators, frequently comprising the principal means by which songwriters and composers are able to make a living as Congress and the Founders intended. The public has benefited enormously by this system, as well, though the widespread availability of licensed music and the steady creation of more and greater musical compositions by fairly compensated creators.

In connection with the activities of the PROs in their role as administrators of the public performance right, a very distinct pattern of music industry custom and practice has developed. Historically, most songwriters have assigned the rights in their musical works upon creation to music publishers, which act on the songwriter's behalf to license such works, collect royalties, and monitor the marketplace for licensing opportunities and unlicensed uses. Music publishers split the collected royalties with songwriters in agreed upon ratios, and frequently issue monetary advances to music creators at the threshold of publishing agreements, recouping such advances against royalties collected on behalf of the writer over the course of the agreement.

In this regard, one uniform practice over the past century has been the recognition that public performance rights in the works that are the subject of a music publishing agreement will be licensed and administered by a third party PRO on behalf of both the songwriter and the music publisher, and that such PRO will pay royalties earned thereon in the agreed upon ratios separately

and directly to the songwriter and to the music publisher. This is especially true in regard to the works of foreign music creators, whose musical works are often deemed assigned by law to the creator's local performing rights society, and sublicensed to ASCAP, BMI and SESAC through various contractual arrangements between societies, not through deals between the creator and a U.S. sub-publisher.

Though most music publishing agreements between U.S. songwriters and music publishers do not specifically prohibit music publishers from licensing performance rights directly to users, virtually every music publishing agreement concluded in the U.S. over the past one hundred years has made reference to the fact that it is anticipated that such rights will be licensed and royalties paid directly to each party by a PRO of which both the songwriter and music publisher are members.

In this regard, it should be noted that industry custom and practice have long dictated that the musical performance right consists of one half "writer's share" and one half "publisher's share." The writer's share is always paid directly by the PRO to the writer or his or her heirs. The publisher's share is sometimes paid in full to the music publisher (which then keeps or splits such share with the songwriter according to the terms of the music publishing agreement), and sometimes paid by the PRO—pursuant to the instructions of the parties—in partial shares directly to both the music publisher and to the songwriter's self-owned and administered business/ publishing entity. Through such industry custom and practice, music creators have been assured that they *will actually receive their earned royalties pursuant to the transparent terms of the licenses issued. The role of the PRO in ensuring that payment is in fact delivered correctly to the songwriter cannot be over-emphasized.*

A second and related issue of custom and practice, however, must also be noted as being far less beneficial to music creators. Music publishers sometimes sub-license their entire catalogs to third parties, such as administrators and sub-publishers in territories outside the U.S. To ensure that their songwriters have no ability to share in the advances and monetary guarantees received by the music publisher under such sub-licensing arrangements, music publishing agreements with songwriters almost invariably and explicitly exclude the songwriter from participating in such catalog-wide advances, providing that songwriters will be paid only when royalties are actually earned on a title by title basis under such sub-agreements.

This is one of the most problematic areas of the songwriter-music publisher relationship, due to the vast potential for abuse, especially in the area of direct blanket licensing of performing rights where performances are extremely difficult to track on a per title basis outside of the structure of the PROs. Under such a scenario, music publishers may receive and hold monies that may or may not eventually be paid to the songwriters who created the works that are the basis for the advances and guarantees negotiated by the music publishers in the first place. When the PROs are excluded from the royalty licensing and distribution process, songwriters are prejudiced both by their ignorance of the license terms negotiated with users by publishers, and by their inability to calculate for themselves what they are actually owed on a title basis under such licenses.

Until recently, due to the customs and practices of the music industry regarding the roles of the PROs, the rare issuance of direct performance licenses by music publishers was not a substantial issue of concern for songwriters in regard to the sharing of advances and guarantees due to the relatively *de minimis* amounts of royalties at stake. Now, however, glaring evidence has come to public attention which illustrates that some music publishers may be increasingly using their professed need to drastically expand their direct licensing of performing rights in order to gain

market value outside of the PRO Consent Decree structure for another, far more insidious reason: *to obfuscate licensing terms, and to re-direct money into their own coffers that might otherwise have been payable to music creators as royalties.*

Once again, SGA wishes to point out that it does not dispute the legitimacy of arguments that the Consent Decrees are depriving both music creators and music publishers from realizing anywhere near the full value of the performing rights in their copyrighted musical works, and emphatically supports the four reforms discussed above in Section 1B of these Comments. However, as the following testimony of Linus Barry Knittel (an executive of the copyright licensee DMX) revealed for the very first time in Broadcast Music, Inc. v. DMX, Inc., 08 Civ. 00216 (LLS) [at 996-1000], that the danger posed to music creators by the facilitation of direct licensing by music publishers outside of the PRO collective licensing system is not only real, but palpable:

> Question: [W]e talked about the arrangement with Sony. Are there other publishers with whom DMX has entered into agreements where there are advances?
>
> Knittel: Yes...There are a number of smaller publishers that we've given advances to…
>
> …Question: Now you discussed this morning...how you actually went about obtaining a direct license with at least Sony --one major-- correct? And you talked about, I believe, the fact that there was an advance made that totaled $2.7 million, correct?

Knittel: The advance was $2.4 million, I believe.

Question: And there was a $2.4 million advance and a second agreement that covered Sony's administrative expenses for $300,000, and that's how you get to the $2.7 million total, correct?

Knittel: That's correct.

Were it not for this testimony, it is likely that no songwriter or composer (whether or not he or she had or has works in the Sony music publishing catalog or in the EMI catalog recently acquired by Sony) would ever have known that Sony had received advances and administrative fees from DMX for the direct licensing of performing rights, let alone undisclosed remuneration worth $2.7 million. Moreover, years later it remains unclear whether DMX advances and administrative fees were ever shared with music creators by any music publisher, whether other remuneration in the form of equity stakes and technology fees were paid by DMX to any music publisher, and which other music publishers as noted by DMX received advances and fees other than Sony.

SGA believes it is highly likely that the DMX situation is the very tip of the iceberg concerning the economic harm already done to music creators through the direct, opaque licensing of performing rights by music publishers to numerous other licensees. Because of this, SGA urges DOJ not only to reject concessions to music publishers to allow partial withdrawal from PROs (an action that will inevitably increase the practice of direct licensing by permitting music publishers to exclude certain lucrative categories of licensing while still retaining the right to unfairly take advantage of collective licensing through the PROs), but to look closely at potential safeguards that might be put in place to prevent the opaque nature of *any* direct licensing deals from depriving music creators of the royalties due them from music publishers.

Furthermore, SGA wishes to point out that despite announcements by some major music publishers that they may continue to utilize the services of the PROs to distribute royalties to music creators directly, even following the partial or full withdrawal of their catalogs, not a single such publisher has announced that it intends to share with those PROs full and complete data concerning the upstream terms of its licensing arrangements, including fees, advances and related contractual benefits. That particular issue was one of the key subjects addressed in recent correspondence between SGA and its international partners in the Music Creators North America ("MCNA") alliance and the European Composers and Songwriters Alliance ("ECSA") on the one hand, and ASCAP and BMI on the other. It is SGA's firm belief that the views expressed in those written exchanges are extremely relevant to DOJ's examination of the Consent Decrees, and attaches them to these Comments as Exhibit 1. The content of this correspondence is self-explanatory as to the problems and issues that have arisen as a result of the accelerated movement by music publishers toward the direct licensing of performing rights.

B. Cherry Picking and Cost Shifting Within the PROs

One of the most troubling aspects of the suggested partial withdrawal concession is that it would give music publishers the ability to "cherry pick" those performing rights licenses it wishes to issue directly, inevitably leading to the withdrawal by major publishers of most or all low-overhead, high-yield licensing opportunities from the PROs, while leaving them with the most costly, labor intensive and low yield licensing activities still to perform. The resulting steep rise in cost per transaction rates to the PROs would severely impact their remaining, smaller music publishers and writer members that rely exclusively on the PROs for their performing rights licensing, collection, distribution and monitoring services. They would effectively now be subsidizing the costs of the major publishers without the benefit of the efficiencies and savings intended by the collective

licensing system. This, in turn, would inevitably lead to a steep decline in net revenues distributed by the PROs to their members, and eventually to the decline and disappearance of the PROs and the sell-off of smaller publishing companies (which would no longer able to compete in the marketplace) to the major music conglomerates.

This type of scenario has seemingly been played out before by the publishers in regard to the music industry's largest mechanical rights licensor, The Harry Fox Agency, Inc ("HFA"). Following the apparent relaxation of HFA rules governing partial withdrawal of catalogs and rights by its music publisher principals approximately ten years ago, SGA believes that the "cherry picking" by publishers of their most lucrative mechanical licensing opportunities commenced in earnest. This, in turn, is suspected to have led in part to a substantial decline in HFA revenue collections and commissions, the undesirable shifting of cost per transaction burdens from the major publishers to the smaller independents that continued to rely on HFA as their sole mechanical licensing, collecting, distribution and monitoring agent, and most damagingly, the diminishment of HFA's ability to serve as a watchdog and auditor for music publishers and their songwriter assignors over the activities of the major record labels (that, of course, own the major music publisher members of HFA). SGA calls upon DOJ not to facilitate a repeat of that process in any way.

C. The Recoupment of Music Creator Advances From Formerly Exempt Sources

Yet another highly damaging result for music creators that could stem from the extension of partial withdrawal concessions to music publishers centers on potential, unanticipated and unfair changes to the music community's longstanding songwriter and composer advance structure.

For the past century, music publishers have calculated advances to music creators at the threshold of music publishing deals under the assumption that the songwriter's share of performance royalties (writer's share and sometimes a retained portion of the publisher's share) will flow directly from the PRO to the writer and the writer's self-owned business/publishing entity. As the music publisher will therefore not be enabled to recoup the advance out of such shares paid directly by the PRO, the amount of the advance to the songwriter is determined (and thereby diminished) with this practice in mind.

It is highly likely that once music publishers regularly control the collection of the writer's share (including any related publisher's share retained by the writer as co-administrator) of performing rights income, the recoupment of advances out of that formerly sacrosanct royalty stream will be initiated by music publishers though such a right was clearly never bargained for. This unfair result would grant a *double* windfall to music publishers. The publisher would have succeeded both in recouping any outstanding advance on a work more quickly, and in having acquired the work for a reduced advance payment in the first place.

Once again, SGA calls upon DOJ not to facilitate this practice and result through partial withdrawal concessions, which would be devastating to songwriters and composers.

D. Chaos in the Performing Rights Marketplace

Finally, SGA would like to point out several of the other practical and enormously deleterious effects of direct licensing of performing rights by music publishers, some of which are bound to create the kind of marketplace chaos and instability that will inevitably lead to substantial economic losses among songwriters and composers:

1. Co-Writes

A survey of the most popular musical recordings in any given week in the United States reveals that the vast majority are recordings of musical compositions created through the collaboration of multiple songwriters or composers. This category of composition is known throughout the music industry as a "co-write." The Billboard Hot 100 Chart for the week of August 2, 2014, by way of example, shows that just 7 of the 100 musical compositions represented were written by a single writer, while 93% were co-writes. Some musical compositions that week had as many as 8-15 co-writers. The randomly chosen Billboard Hot 100 Chart for the week of April 14, 2012 contained just 6 songs written by a single composer. This phenomenon has profound implications as to the efficacy of a performing rights licensing system that relies upon direct licenses issued by just one of the sometimes many co-owners of co-written musical compositions.

U.S. copyright law has been interpreted by the courts to create a "tenancy in common" among the various co-owners of a work. (17 USC 201(a)). Thus, any co-owner may license an entire work on a non-exclusive basis to a third party user (provided the value of the work is not thereby destroyed), with the duty only to account to each co-owner for his, her, their or its (if it is a corporation) share of the remuneration realized. In the context of performing rights licensing, the complications of a system whereby a direct licensing publisher would have the responsibility to account to multiple co-creators/owners with little or no information concerning such persons or entities (or whether, for that matter, such persons or entities had licensed the user through their own PRO or directly at different rates) would result in chaos, and worse, in most music creators never getting paid. Even a system that allowed direct licensors to pay co-writer shares of royalties through the PROs would suffer from a total lack of transparency, again resulting in music creators never seeing their proper earnings or being able to monitor and audit the licensing music publisher for lack of privity. Under such conditions, PROs would also be left with little ability to monitor the

marketplace in any meaningful way, leading to enormous drops in collections affecting mainly creators and small, independent music publishers. To foster the widespread institution of such a system by making partial withdrawal concessions to music publishers would be a grave disservice to the entire music creator community.

2. Foreign Works and Composers

Following a meeting in London on June 6, 2014 among representatives of SGA, MCNA, and The Music Managers' Forum ("MMF"), a UK based organization representing the interests of mainly British recording artists (many of whom are songwriters and composers), MMF published a public statement on July 15, 2014 illustrating the further complications and chaos that would result from the broad adoption of direct licensing systems for performing rights in the U.S. Specifically, MMF points out that music publishers, in fact, *lack the authority* to withdraw rights from the PROs on behalf of foreign songwriters and composers:

> Sony/ATV cannot withdraw any non-US writers' works from the U.S. PROs and issue licences for their work as they do not own the right in any songs written by any writer who is a direct member of a PRO outside the USA. These non-U.S. writers assign their performing right directly and exclusively to their local PRO on a global basis. The right is owned by the PROs who have the sole authority to issue licences - to the exclusion of the writer and the publisher. These non-U.S. rights are passed exclusively to the U.S. PROs by the non-U.S. societies....
>
> The global network of non-profit PROs has served the consumer, the music users and the song writing and publishing community well for over a century. Despite the challenges of the digital environment, PROs provide economies of scale and streamlined licensing which keep transaction costs manageable. Writers sit on their Boards and can influence policy. While the PROs may not be perfect, they allow creators a voice and a direct income stream. Adjustments to this system should be nuanced and carefully thought through. More importantly to our members' clients, solely national focus poses a grave threat to the livelihoods of every writer, American or not.

Once again, SGA stresses that enabling the growth of a licensing system that would have profound, negative effects on market stability, the ability of U.S. and foreign creators to control and monitor the performed uses of their works, and that might engender harsh backlash from international societies and other nations against American songwriters and composers presents a serious threat to the survival of the American music creator community. It is SGA's belief that the views expressed by MMF in its public statement are extremely relevant to DOJ's examination of the Consent Decrees, and SGA attaches them to these Comments as Exhibit 2.

3. The Right of American Music Creators to Affiliate With the PRO of their Choice

As noted earlier in these Comments, "virtually every music publishing agreement concluded in America over the past one hundred years has made reference to the fact that it is anticipated that such rights will be licensed and royalties paid directly to each party by a PRO of which both the songwriter and music publisher are members."[6]

For over a century, in other words, every American songwriter and composer from George Gershwin, Yip Harburg and Duke Ellington to Dolly Parton, Bob Dylan and Beyoncé have had a more than reasonable expectation that they would forever be able to rely on the protections of their PRO of choice *as their right*, to protect them and their most vital stream of income. Suddenly, however, in 2014, U.S. music creators are being told that is not the case. Major music publishers have asserted that they may unilaterally disenfranchise songwriters and composers from their PROs as to musical works controlled by those publishers, and that there is nothing those music creators can do about it.

[6] "Amicus Brief of the Songwriters Guild of America." Broadcast Music, Inc. v. DMX Inc.10-3429-cv. U.S. District Court for the Southern District of New York. December, 2010.

SGA does not subscribe to that theory, nor does it believe that a vast majority of American songwriters and composers do either. In fact, SGA believes that the attempted withdrawal of rights by music publishers from PROs, including the writer's shares attached to those rights, will result in widespread litigation initiated by the creator community. Such a scenario would be nothing short of disastrous. In the face of potentially hundreds of breach of contract lawsuits against the music publishers, as well as international outrage led by foreign composer groups and their local societies, there would be a terrible chance for the collapse of performing rights royalties as a viable income stream, concomitant damage to the already diminished viability of music creation as a means to earn a living in the U.S., and the disappearance of the American PROs themselves.

Once again, SGA implores DOJ to address the enormous inequities of the Consent Decrees as quickly and efficiently as possible, without creating the means for music publishers to more easily, through partial withdrawal, disenfranchise American creators from their PROs.

III. Conclusion

SGA believes that the Consent Decrees to which the PROs remain subject are severely in need of modification in order to mitigate the unfair economic results that have devastated the songwriter community.

Moreover, SGA agrees with the PROs about: (1) the need to shift performance royalty rate-setting from rate court judges to private arbitrators; (2) the imperative for recognition of an evidentiary presumption that direct, arms-length, transparent licenses voluntarily negotiated by copyright holders who have withdrawn rights from a PRO provide the best evidence of reasonable market rates; (3) the related Congressional adoption of the "willing-buyer/willing seller" standard in rate

setting for musical compositions, and; (4) the extension to PROs of the ability to license bundled rights beyond the singular right of public performance to new media services.

There is one very important area where SGA diverges from the PROs; SGA has determined that the granting of partial withdrawal concessions to music publishers would spell the ruin of the music creator community because of four distinct categories of harm that such action would likely cause, by unnecessarily making direct licensing of performing rights a viable and attractive option for music publishers under any circumstances:

> (1) the elimination of any semblance of transparency by music publishers on any direct performing rights licensing deal of their choosing, enabling them to completely obfuscate licensing terms from music creators including such crucial information as the inclusion of advances, administrative fees, equity interests, and other remuneration that music creators have a rightful expectation to share in;
>
> (2) the shifting of all low-overhead, high-yield collection and licensing functions from the PROs to in-house music publishing staffs, leaving only the most costly, labor intensive administrative functions to the PROs (and thereby shifting hugely burdensome, per transaction costs to the remaining members within the PRO). Such a practice would result in the very opposite effect of the cost-spreading benefits intended to realized through the collective licensing process, and would likely destroy the ability of the PROs to survive economically;
>
> (3) the providing to music publishers of the means to recoup advances issued to music creators out of an income stream (the writer's share of performance royalties) for which

the music publisher did not bargain in setting the amounts of the advances and the terms of the publishing deals, and over which it has had no expectation of control after more than a century of collective licensing precedent, and;

(4) the introduction of chaos into the performing rights marketplace, with

a) co-writers of musical compositions left without a viable, cost-effective means by which to collect their royalties under direct licenses issued by music publishers of their co-creators;

b) foreign writers being completely disenfranchised from the rights granted to them under the rules of their local performing rights societies, with the ability of music creators and PROs to exercise oversight concerning the licensing, royalty collection and distribution process rendered a virtual impossibility; and

c) the expectation of a right to affiliate with the PRO of one's choice completely removed from the American music creator experience.

As the sole, non-conflicted organizational representative of the interests of American and international music creators, SGA thanks the DOJ for this opportunity to comment.

Respectfully submitted,

The Songwriters Guild of America

Rick F. Carnes, President
Songwriters Guild of America
5120 Virginia Way, Suite C 22
Brentwood, Tennessee 37027

Charles J. Sanders, Counsel
Attorney At Law, PC
29 Kings Grant Way
Briarcliff Manor, NY 10510

EXHIBIT 1

Music Creators North America
European Composer and Songwriter Alliance

October 18, 2012

Via Email and First Class Mail
Mr. John LoFrumento
Chief Executive Officer
ASCAP
One Lincoln Plaza, New York, NY 10023

Re: Request for Information Concerning Direct Licensing of Performing Rights

Dear John:

This request for information is submitted jointly by Music Creators North America (Music Creators NA) and the European Composers and Songwriters Alliance (ECSA), which have recently formed an alliance to protect and advance the rights of music creators throughout the United States, Canada and Europe. Together, Music Creators NA and ECSA represent national music creator organizations and their members from over thirty nations, all of which organizations operate independently and solely on behalf of music creators and their heirs.

As you are well aware, a situation has recently arisen that is causing enormous concern to music creators throughout the world. Multi-national and local US music publishers have begun expanding the practice of licensing US performing rights directly to copyright users, bypassing the US performing rights societies. We believe that it is at best unclear that such music publishers have the rights to do so, especially in regard to works already exclusively assigned to foreign societies by music creators, issues that we are fully investigating. Such direct licensing deals are completely opaque to the composer and songwriter community and in addition undermine the exclusive assignment of the performing right that Canadian, European and UK music writers vest in their PROs. Much of what we do know about these arrangements is based upon what has been gleaned from the transcripts produced in the DMX litigations, which revealed through sworn testimony that certain music publishers may have received substantial, up-front financial benefits (among other advantages) that were neither reported to nor shared with their affiliated songwriters and composers in that instance, and potentially in many others.

It is our further belief that the DMX deal in particular --and direct performing rights licensing deals in general-- threaten to seriously diminish (and have already diminished) the value of performing rights in the US, causing the loss of tens of millions of dollars in US performing rights revenues to music creators. Our concern over this trend is heightened by our understanding that the Sony/EMI Music

5120 Virginia Way, Suite C22 Brentwood, TN 37027 Phone: (615) 742-9945

Publishing Group, whose combined catalogs we believe represents well over thirty percent of the US music publishing market, has apparently informed the US PROs (including ASCAP) of its intention to remove all new media rights from the societies starting on January 1, 2013. We are extremely concerned that this action alone will financially eviscerate the ability of the PROs to continue functioning as the guardians of songwriter and music publisher performing rights interests as they have for the past full century. If the vertically integrated broadcasting/music copyright entity Universal Music Publishing Group were to follow suit, we fear that the US performing rights collective licensing system -- established in large part to provide security to music creators -- could completely collapse.

We are aware of the complexity of competition laws in the US, and that certain sensitivities must be observed in ensuring that the antitrust laws are properly observed. We are, in fact, carefully examining those laws and their potential application to the formulation of solutions to the issues we face. Under any circumstances, however, it is clear that no law exists to prevent the disclosure of basic factual information concerning important aspects of the direct licensing issue, including the potential effect of direct licensing on (i) the rights and incomes of music creators in the US and elsewhere; (ii) the ability of the US PROs to function effectively as the guardians of US performing rights for creators; and, (iii) the ability of music creators to achieve the transparency necessary to properly oversee the licensing of their rights and the collection and distribution of their royalties.

The following questions request information from ASCAP regarding how the removal of certain rights from the organization, for the purpose of direct licensing by music publishers, may affect the organization and the music creators affiliated with it.

1) Can you provide a list of the direct licensing agreements already completed, or anticipated, that have resulted in the removal of rights from ASCAP in the last five years? Can you provide an estimate of what percentage of ASCAP's repertoire has been affected by these deals? How will this affect the ability of ASCAP to effectively operate as the representative of US performing rights on behalf of music creators, especially if the trend continues?

2) What is ASCAP's view of how the practice of direct licensing will affect the rights and incomes of music creators in the US and abroad? More specifically, how might direct licensing of performance rights by music publishers rather than ASCAP affect transparency—that is, the ability of music creators to monitor the licensing of their rights and the proper and accurate payment of royalties? Does ASCAP have any ability to assist or represent its music creator members in securing the information they need from their respective music publishers regarding the details of any direct performing rights licensing agreements secured by the publishers, so that proper royalty payments may be monitored by creators and inappropriate cross collateralizations against advances can be avoided or corrected? And how, if at all, does ASCAP intend to communicate to its music creator members information

concerning future deals involving the direct licensing by music publishers of performing rights now administered by the organization?

3) Do ASCAP's affiliation agreements with its music creator members and foreign societies impact the ability of music publishers to directly license performing rights in a work on behalf of individual music creators, or the ability of such music creators (or heirs) to demand that ASCAP license rights and collect royalties tied to the "writer's share" of such work on their behalf, whether or not a music publisher licenses their share of such work directly?

4) What policies or procedures are in place to prevent an ASCAP music publisher board member from remaining on the board when the company he or she represents removes, or proposes to remove, a substantial portion of works or of specific rights in such works from the society, giving at least the appearance of a conflict of interest with respect to both ASCAP and its music creator affiliates? Is there any prohibition in place that would prevent ASCAP from providing independent legal counsel for the music creator members of its board, the specific role of which would be to ensure that they are fully apprised of the legal rights of music creators on issues of conflict with publishers?

ASCAP is a signatory to the CISAC Professional Rules for Music Societies approved earlier this year, which stipulates as an important, overarching principle that every CISAC organization must "conduct its operations with integrity, transparency and efficiency." It is our concern that ASCAP's ability to fulfill these obligations may be deeply compromised by the recent actions of music publishers regarding the direct licensing issue, and that the answers to the above questions will assist the music creator community in understanding the facts behind the current challenges presented by the direct licensing of performing rights in the US. We are hopeful that the framing of solutions will flow from a greater understanding of the full circumstances surrounding these serious problems.

We look forward to receiving the requested information and any additional thoughts you may have on the matters raised above, and to discussing them with you. We would greatly appreciate your substantive reply to this letter prior to October 31, 2012, and we thank you for your kind assistance.

With regards,

Alfons Karabuda
Executive Chairman: ECSA
c.c. Paul Williams, ASCAP

Rick Carnes
Co-Chair: Music Creators NA

ECSA Members

http://www.composeralliance.org/article,en,6,members_&_links.html

Music Creators North America Members
Songwriters Guild of America
Songwriters Guild Foundation
Songwriters Association of Canada
La Société professionnelle des auteurs et des compositeurs du Québec
Screen Composers Guild of Canada

ASCAP

John A. LoFrumento
Chief Executive Officer

January 10, 2013

Via Email
<rickcarn[redacted]
Rick Carnes
Co-Chair,
Music Creators North America

Via Email
<alfons.karabu[redacted]
Alfons Karabuda
Executive Chairman,
European Composer and Songwriter Alliance

Re: Request for Information Concerning Direct Licensing of Performing Rights

Dear Rick and Alfons:

Please accept my apologies for the delay in responding to your letter of October 2012. Although your letter, as entitled, seeks information on direct licensing, your letter also seeks information regarding the withdrawal of rights with respect to certain "New Media Transmissions." As the latter topic was scheduled for discussion at ASCAP's recent October and December 2012 Board meetings, I was somewhat constrained in replying until that topic had been fully vetted. Accordingly, in order to give you a complete reply, we waited until after the conclusion of those meetings.

At the outset, let me say that ASCAP embraces your organizations' missions to represent music creators and their heirs; and second, that I do regret the confusing nature of recent press coverage concerning both the issues of direct licensing and the withdrawal of certain "New Media" rights. I hope that this letter may serve to dispel some of this confusion as well as clarify ASCAP's position.

Constraints on ASCAP vis-à-vis Direct Licensing by U.S. Publishers

ASCAP devotes itself to achieving the most efficient, cost effective means of licensing and distributing the maximum royalties we can to our members. Indeed, ASCAP has achieved an administrative operating ratio of 11%, one of the lowest of any performing right organization ("PRO") in the world; and this achievement is despite certain constraints imposed on ASCAP by its consent decree or the Amended Second Final Judgment ("AFJ2"). Pursuant to Article IV of AFJ2, "ASCAP is hereby enjoined and restrained from: . . . (B) Limiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a performing rights organization, non-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS
ASCAP Building, One Lincoln Plaza New York, NY 10023
212.621.6223 Fax: 212.721.0955 E-Mail: jlofrumento@ascap.com
Web Site: http://www.ascap.com

exclusive licenses to music users for rights of public performance." In short, ASCAP may not interfere with any members' choice to license directly. Moreover, as you know, the power to issue a direct license, here in the United States, is typically held by a publisher, either by reason of that publisher's ownership of the copyright in the musical work, or by reason of an administrative or other contractual relationship giving that publisher legal control over the licensing of the underlying musical work.

ASCAP is not privy to many or most of the terms of the contracts between publishers and their administered or controlled publishers and/or writers, nor does ASCAP, as a third party to such contracts, have any standing to enforce rights in these contracts. ASCAP is only informed as to what entity is the controlling or administering publisher and the works which fall under the contract.

DMX Direct Licenses

With respect to the direct licenses which certain ASCAP and BMI publishers entered with the entity now known as DMX, ASCAP shares in the frustration that certain publishers openly decided to license with DMX at rates, which had the net effect of lowering the rate which ASCAP (and BMI) now receive for a blanket license to their respective repertories, not otherwise directly licensed. Nonetheless, the decision by certain publishers to license directly was their own to make, and one with which ASCAP could not interfere. Both BMI, and then later ASCAP, sought in rate court to obtain a higher rate than DMX was willing to pay either of them, in light of the direct licenses. Neither BMI nor ASCAP was able to prevail. Instead, DMX's "rate," to which certain publishers agreed, was ruled by both rate courts as the appropriate benchmark; and, the Second Circuit for the U.S. Court of Appeals confirmed those rulings.

Further, because of the requirement in our respective consent decrees that US PROs, like ASCAP and BMI, license similarly situated users "similarly," the outcome of the DMX case has required that ASCAP and BMI offer lower rates to all suppliers of background/foreground music. Whether those publishers which engaged in direct licensing proceeded to distribute those royalties to their contractual partners, administered publishers and writers, is a contractual matter between those parties to which ASCAP is not privy and does not have standing to inquire. Notwithstanding this lack of insight, we believe, that overall, royalty receipts in aggregate both to ASCAP and BMI, and the direct licensees, from all these types of services will be lower going forward.

Constraints vis-à-vis DMX and foreign writers

On the specific issue of whether DMX could obtain from BMI's publishers the right to license directly foreign affiliated writers' rights, the BMI DMX rate court ruled that BMI and DMX could rely on a publisher's representation that it held those rights. ASCAP's trial followed the decision in BMI's trial, and thus, ASCAP was legally constrained in its ability to challenge those findings.

Withdrawal of New Media Transmission Rights

The act of direct licensing repertory to a particular music user should be considered separate and apart from the act of withdrawing certain rights in repertory for certain categories of music users. Here, I can confirm that ASCAP's Board, comprised of half writers and half publishers, has allowed for the possibility of the withdrawal of certain digital public performance rights to permit certain types of non-public performance rights to be licensed or "bundled" in tandem. I must emphasize to you these reflect a narrow category of rights for a defined set of music users. These categories of New Media public performance rights, – if withdrawn from ASCAP, include those New Media services – which require, in addition to a public performance right: (1) a reproduction or mechanical license (e.g., Rhapsody, Spotify); (2) a license for the public performance of a sound recording (e.g., Slacker); (3) a synchronization license or other license associated with the underlying musical composition for short-form music videos and audiovisual content uploaded by users (e.g., YouTube); or, (4) a license to transmit music via a cloud locker type service (e.g., iTunes Match, Amazon Music).

ASCAP will continue to license and distribute royalties for the many prominent online and mobile services not included in these categories, including but not limited to long form, audiovisual streaming services, such as Netflix, Hulu, and Amazon VOD (i.e., video on demand). In addition, any "New Media Transmission" services that are operating under existing licenses with ASCAP will not be affected by the withdrawal until the expiration of their ongoing ASCAP licenses.

You have expressed concern that the "withdrawal of rights" will "*financially eviscerate the ability of PROs to continue functioning as the guardians of songwriter and music publisher performing rights interests*" (quoting your letter at page 2). At this point in time, it is important to emphasize here that overwhelmingly, the vast majority of ASCAP's nearly $1 billion in revenues – 98.5% or more - are not touched by these narrow categories for which New Media Transmission licensing rights were withdrawn or may be withdrawn. Moreover, any music user that is eligible for a "through to the audience" under ASCAP's consent decree is expressly precluded from the scope of rights that may be withdrawn. This means, by way of illustration, that ASCAP will continue to license and collect for all other public performance rights, including performances on radio, satellite radio, television, cable, and those mediums' activities online (i.e., the website and mobile platform activities of these broadcast radio and television stations, cable programs and cable operators) as well live performances and any New Media services not affected by the withdrawal of rights.

The policies and procedures applicable to the modification of an ASCAP member's grant of rights for certain New Media Transmissions are set forth in Section 1.12 of ASCAP's Compendium, available at http://www.ascap.com/members/~/media/Files/Pdf/members/governing-documents/Compendium-of-ASCAP-Rules-Regulations.ashx.

ASCAP also will continue to license and distribute royalties for all New Media services on behalf of members who have not withdrawn their works from the ASCAP repertory.

Constraints on Withdrawal of Foreign Affiliates in the U.S.

Lastly, as a result of the meeting of ASCAP's Board in December, an important point of clarification was added to Section 1.12 of the Compendium: with respect to foreign PRO members affiliated with ASCAP for the U.S., they will be presumed excluded from an exercise of withdrawal of rights for New Media Transmissions unless authority to the contrary is provided. The newly added text to the Compendium shall read that any ASCAP Member seeking to withdraw rights in a work in which a writer or publisher affiliated with a foreign PRO has an interest in that work "*may not withdraw that Member's or the member of the foreign PRO's rights in that work for New Media Transmissions, unless and until the foreign PRO member has complied with the rules of the foreign PRO applicable to its members to give effect to such a withdrawal.*" (Emphasis added).

Questions Posed

Your letter posed a series of four sets of questions. While it is my hope that much of what has been set forth above responds contextually, in large part, to your questions, we will endeavor to provide some more specific answers where we can.

Question Set #1

ASCAP cannot provide you with a list of direct licensing agreements "already completed" for the simple reason that unless they have been made public through court procedures or otherwise, such as was the case with certain ASCAP publishers which entered direct licenses with DMX, these agreements are confidential, proprietary arrangements between an authorized publisher and a music user. Thus, while ASCAP may be notified of a direct license, it is not at liberty to disclose its existence to the public.

You have asked what percentage of ASCAP's repertory has been affected and how it might affect the ability of ASCAP to operate effectively. As noted above, the vast majority of ASCAP's licensing activities and resulting in nearly $1 billion in revenues last year, or at present 98.5% of which, remain unaffected.

Question Set #2

You have asked what ASCAP's view is on the practice of direct licensing's affect on the rights and incomes of music creators in the U.S. and abroad, and its impact on transparency with regard to the payment of royalties. As noted above, and again here, the vast majority of ASCAP's licensing activities, and associated revenues will remain unaffected. To the degree that ASCAP can provide transparency for its members,who may have withdrawn rights for New Media Transmissions, ASCAP's Board has authorized ASCAP to offer "back office" services for processing any New Media Transmission royalties, which may have been directly licensed, using ASCAP's databases and interfaces that are intended to be as transparent as possible, and accessible directly by all members via their online ASCAP Member access accounts.

You have also asked whether ASCAP has the "ability to assist or represent its music creator members in securing the information they need from their respective music publishers regarding the details of any direct performing rights licensing agreements secured by publishers, so that proper royalty payments may be monitored by creators and inappropriate cross collateralizations against advances can be avoided or corrected?" (quoting your letter at page 2). As discussed above, ASCAP is not privy to the contractual relations between publishers and administered publishers and writers, including whether advances may or may not be cross collateralized and if so to what extent. Therefore, it follows that ASCAP would not be in a position to provide such information. However, ASCAP's Board has authorized ASCAP to offer "back office" processing services for the distribution of New Media Transmission royalties which may have been directly licensed by publishers. To the extent that ASCAP is asked to and does render such services, ASCAP intends to render them at the highest level of transparency as possible.

Question Set #3

You have asked generally about the affiliation agreements of foreign PRO creator members with ASCAP and to what extent it impacts the ability of presumably ASCAP music publishers to license performing rights directly on behalf of these creator members or allow these foreign PRO members to demand that ASCAP license their "writer's share," regardless of whether the ASCAP publisher seeks to license directly.

With respect to the issue of withdrawal of rights of foreign PRO members affiliated with ASCAP for the U.S. via their ASCAP publishers, based on exploratory discussions with several foreign PROs, ASCAP's Board decided that the most cautious approach was to adopt a presumption that such a withdrawal for a foreign PRO member by a U.S. publisher may not be effectuated unless supporting documentation is provided. As for the right of U.S. ASCAP publishers to license directly, this again remains a matter of contractual relations to which ASCAP is not privy. Moreover, as also discussed above, ASCAP is constrained by its consent decree from interfering in attempts by its members to license directly. This has been the case for decades now. In some cases, our publishers believe that a direct license may be the only opportunity a writer member has to have his or her creation exploited, and that is a choice reserved to these contractual parties. In any event, we cannot interfere with the exercise of the exercise of these rights by our members.

In this third group of questions, you have also asked whether ASCAP could insist on licensing a foreign PRO member's writer share – via ASCAP, and notwithstanding an effort by an ASCAP publisher member to license the publisher share directly. There are two answers to this. The first, as with many other questions that you have raised, rests on the precise contractual relation between the foreign PRO writer member and the U.S. publisher, and again, that is a relationship to which we are not privy. Presumably, if such a contractual relationship prohibited direct licensing, the parties to that contract could so inform ASCAP and we would notate our records accordingly. The second is how U.S. Copyright Law operates in this context. Unlike other jurisdictions, to the extent that a

Music Creators North America
European Composer and Songwriter Alliance

October 18, 2012

Via Email and First Class Mail
Del Bryant
President and CEO
BMI, Inc.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0030

Re: Request for Information Concerning Direct Licensing of Performing Rights

Dear Del:

This request for information is submitted jointly by Music Creators North America (Music Creators NA) and the European Composers and Songwriters Alliance (ECSA), which have recently formed an alliance to protect and advance the rights of music creators throughout the United States, Canada and Europe. Together, Music Creators NA and ECSA represent national music creator organizations and their members from over thirty nations, all of which organizations operate independently and solely on behalf of music creators and their heirs.

As you are well aware, a situation has recently arisen that is causing enormous concern to music creators throughout the world. Multi-national and local US music publishers have begun expanding the practice of licensing US performing rights directly to copyright users, bypassing the US performing rights societies. We believe that it is at best unclear that such music publishers have the rights to do so, especially in regard to works already exclusively assigned to foreign societies by music creators, issues that we are fully investigating. Such direct licensing deals are completely opaque to the composer and songwriter community and in addition undermine the exclusive assignment of the performing right that Canadian, European and UK music writers vest in their PROs. Much of what we do know about these arrangements is based upon what has been gleaned from the transcripts produced in the DMX litigations, which revealed through sworn testimony that certain music publishers may have received substantial, up-front financial benefits (among other advantages) that were neither reported to nor shared with their affiliated songwriters and composers in that instance, and potentially in many others.

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We are aware of the complexity of competition laws in the US, and that certain sensitivities must be observed in ensuring that the antitrust laws are properly observed. We are, in fact, carefully examining those laws and their potential application to the formulation of solutions to the issues we face. Under any circumstances, however, it is clear that no law exists to prevent the disclosure of basic factual information concerning important aspects of the direct licensing issue, including the potential effect of direct licensing on (i) the rights and incomes of music creators in the US and elsewhere ; (ii) the ability of the US PROs to function effectively as the guardians of US performing rights for creators; and, (iii) the ability of music creators to achieve the transparency necessary to properly oversee the licensing of their rights and the collection and distribution of their royalties.

The following questions request information from BMI regarding how the removal of certain rights from the organization, for the purpose of direct licensing by music publishers, may affect the organization and the music creators affiliated with it.

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concerning future deals involving the direct licensing by music publishers of performing rights now administered by the organization?

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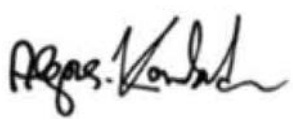
BMI is a signatory to the CISAC Professional Rules for Music Societies approved earlier this year, which stipulates as an important, overarching principle that every CISAC organization must "conduct its operations with integrity, transparency and efficiency." It is our concern that BMI's ability to fulfill these obligations may be deeply compromised by the recent actions of music publishers regarding the direct licensing issue, and that the answers to the above questions will assist the music creator community in understanding the facts behind the current challenges presented by the direct licensing of performing rights in the US. We are hopeful that the framing of solutions will flow from a greater understanding of the full circumstances surrounding these serious problems.

We look forward to receiving the requested information and any additional thoughts you may have on the matters raised above, and to discussing them with you. We would greatly appreciate your substantive reply to this letter prior to October 31, 2012, and we thank you for your kind assistance.

With regards,



Alfons Karabuda
Executive Chairman: ECSA

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La Société professionnelle des auteurs et des compositeurs du Québec
Screen Composers Guild of Canada

BMI

Del R. Bryant
President
Chief Executive Officer

December 2012

Dear Alfons and Rick:

Please excuse the delay in our response to your request for information dated October 18, 2012. The weather on the East Coast of the U.S. was particularly unfavorable during the week when our response was due, and I am afraid we were caught a little off guard by the severity of the impact in lower Manhattan where BMI's offices are located. I am pleased to be able to tell you that our New York offices are once again open for business, and that all of our New York-based employees are safe. We are doing everything we can to continue to serve our writers and publishers during the recovery.

Please also accept our sincere appreciation for your efforts in reaching out to us, and for your organization's careful and thoughtful consideration and diligence in trying to understand the situation in the U.S. relating to direct licensing and rights withdrawal that seems to be a popular topic for the trade press in recent weeks. Please understand that BMI takes very seriously its responsibility under the CISAC Professional Rules that you reference at the end of your letter, and welcomes the opportunity to try to explain its perspective on these matters.

Direct Licensing in the U.S.

As you have pointed out in your letter, competition law and the operations of the U.S. PROs differ from other territories. BMI operates under a Consent Decree (a complete and accurate but unofficial copy of which is attached hereto). Pursuant to Article IV(A) of the BMI Consent Decree, BMI cannot refuse to allow its members to enter into a non-exclusive direct license with a music user making direct performances to the public in the United States, and BMI's affiliation agreements (current forms of which are also attached) expressly set forth the right to enter into direct licenses and the responsibility of affiliates to notify BMI with respect thereto.

As you know, it is customary in the U.S. for songwriters to assign their copyrights to music publishers and/or to enter into co-publishing or administration agreements with music publishers. Pursuant to those agreements, the music publisher is usually authorized to license and administer the writer's interest in the musical work. In line with this custom, and consistent with BMI's obligations under its Consent Decree and the provisions of its affiliation agreements, it follows that BMI would recognize a direct license from a music publisher to a music user as valid for both the music publisher's own

7 World Trade Center, 250 Greenwich Street, New York, NY 10007-0030 (212) 220-3100 Fax: (212) 220-4448
E-Mail: cbry[redacted]

performing right share and the share of the writer(s) it represents. Since the music publisher, not BMI, is the licensor in the case of a direct license, the writer's share in the royalties from the exploitation of the work under the direct license would flow from the publisher and not from BMI, and royalty distributions would be governed by the provisions of the agreement between the writer(s) and the music publisher, not the writer's affiliation agreement with BMI.

As you also know, direct licensing in the U.S. is not a new phenomenon. Indeed, while BMI strongly believes in the value and efficiency of collective licensing for many of our customers, there are certainly instances where a publisher might decide, at its own discretion, that a direct license is in the best interests of the publisher and its writer(s). If, for example, you are a rights owner whose music is not often performed, a direct license that includes a promise of increased usage by a customer that does not need access to the rest of the BMI repertoire could be one such instance.

The BMI/DMX Rate Case

With respect to the DMX rate cases referenced in your letter, and the BMI rate case with DMX in particular, there are two aspects worth noting. First, BMI believed, and strenuously argued in that proceeding, that individual direct licenses entered into by DMX were not proper benchmarks for determining the reasonable value of a BMI blanket license for its entire repertoire. As noted in the previous paragraph, there may be any number of reasons why an individual rights owner may make an informed decision to enter into a direct license, and may value that license in a manner differently than a PRO would value a blanket license to the works of its collective membership. BMI believes that the direct license and the collective license are two entirely different products and one should not be used to assess the reasonableness of the other. Unfortunately, BMI's rate court determined that the uniform rate for the direct licenses that DMX entered into with some music publishers in the U.S. constituted the basis for a rate benchmark for the value of all of the rights owners represented by BMI. This was the conclusion even though many other BMI rights owners expressly rejected the offer of entering into a direct license with DMX.

Second, being well-aware of the different ways in which performing rights are held and licensed in territories outside of the U.S., BMI raised the issue of whether DMX's direct licenses (including its direct license with Sony) covered the writer's share of royalties for performances of foreign works by DMX. The BMI Rate Court held that DMX was entitled to rely on a publisher's representation that it controls the writers' share to foreign works. Here is the actual text from the Court's decision:

> *"The parties dispute whether direct license credits claimed by DMX for performances of foreign works licensed by BMI through an agreement with a foreign performing rights society should be presumed to include the writer's share in addition to the publisher's share. BMI proposes that only the publisher's share be included unless DMX provided it with evidence that the writer's share was intended to be directly licensed, because there is a general uncertainty whether publishers have the right to directly license a foreign writer's share. DMX proposes that the writer's share be credited unless BMI is notified by the foreign society that the direct license does not cover the writer's share. In its pre-*

trial brief, DMX states that the publishers have represented to it that they have the right to grant DMX permission to perform the foreign writers' works. (DMX Br. at 63). The trial testimony reveals that Sony, after entering its direct license with DMX, represented to BMI that it had the right to enter into a direct license on behalf of both their domestic and foreign writers, and BMI accepted those representations. (Tr. at 608-09). DMX should likewise be entitled to rely on the representations it has received from publishers. In circumstances where such permission is not assumed as a matter of course, BMI should accept DMX's representation that it has in fact been obtained."

Our reading of this decision is that DMX was entitled to rely on the representation from U.S. publishers with respect to foreign works, and BMI was compelled to accept those representations as well. The court did not rule on the veracity of any such representations, however, and it would seem to leave open the possibility that the rights owner of a foreign work could challenge the representation. [To the extent that it is determined that performances of any foreign works were not properly covered by the direct license (or that the writer's share is not so covered), BMI should be paid for any such foreign works on behalf of the foreign writers under the DMX AFBL license crediting formula. BMI is prepared to work with DMX and/or the U.S. publishers on your behalf to ensure that your members receive the performance royalties that they are entitled to receive from BMI.]

Rights Withdrawal

With respect to the issue of the rights withdrawals that you reference in your letter, BMI respects the interests of our affiliates to seek fair remuneration for the exploitation of their musical works. BMI maintains that, through collective licensing, BMI can deliver fair remuneration through the establishment of reasonable rates for performing right licenses with our customers, the administration of those licenses with the benefit of the economies of scale inherent in representing a large amount of repertoire, and, finally, the timely distribution of reasonable royalties for the performances we license.

BMI also recognizes, however, that there has been constant downward pressure on the blanket license rates established by the U.S. PROs for the use of their respective repertoires (see, for example, the recent petition by Internet music service Pandora seeking to lower the rates that it would pay to another U.S. PRO). BMI also appreciates the significant time, expense, and uncertainty of rate court litigation. Although we firmly believe that the solution for publishers is not to move away from collectively licensing, but rather, to collectively support improvements to the current process, we cannot force our vision on rights holders or fault them for pursuing alternatives.

At the same time, we recognize that alternatives to our blanket license could substantially alter both the legal and business relationships and expectations among the U.S. PROs and their respective writers and music publishers, as well as the foreign PROs with whom we have entered into reciprocal representation agreements. While it is our hope that will not be the case, we do appreciate the concerns that you are expressing on behalf of your members. As such, we welcome the opportunity to commence a meaningful dialogue with you and your members and our affiliated music publishers in order to ensure that BMI can continue to serve your mutual interests efficiently and effectively.

With these thoughts in mind, we turn to the specific questions in your letter.

Answers to Questions

1. You have requested a list of the direct licensing agreements already completed or anticipated that have resulted in the removal of rights from our repertoire[1] in the last five years. Please understand that, assuming you are referring to direct licensing agreements where a BMI affiliate decides to license a music user directly, as opposed to direct licensing that takes place pursuant to a rights withdrawal, there are hundreds, if not thousands, of such direct licenses, many of which were granted by individual composers and/or smaller music publishers for individual works or smaller catalogs and for specific uses. Accordingly, we do not believe that it is practical, appropriate or potentially even relevant, to produce such a list.

   Additionally, due to the nature of many of these direct licenses, it is impossible to assess the impact that they have on BMI's ability to effectively operate as a representative of U.S. performing rights. Some music users essentially limit their use of music to that which they can secure via a direct license. This obviously has a significant impact on BMI's ability to license these customers, but may be entirely appropriate and in the best interests of the music creators on whose behalf the direct license was issued.

   Also, some rights owners have intentionally sought direct licensing opportunities where music users have refrained from using their music if its use would give rise to the obligations accompanying a PRO's blanket license. In many cases, both in the U.S. and abroad, this has opened up an opportunity for music creators to receive royalties from performances that wouldn't otherwise have occurred.

   These examples clearly affect BMI's ability to license these exploitations, but it would not be fair to say that they have necessarily had a negative impact on our ability to effectively operate as a representative of U.S. performing rights on behalf of music creators. We believe we can and will continue to do so with the vast majority of our customers for the benefit of both the domestic and foreign writers, and the music publishers, that we represent.

   On the other hand, we recognize that the direct licenses in the DMX matter may be more relevant to your inquiry, not because they were direct licenses, but because of the impact that they have had on lowering PRO rates for commercial background music services. We also recognize that the issue of rights withdrawals could have an impact on the utility of the blanket license upon which the marketplace has relied for efficient and effective licensing. As such, we welcome the opportunity to discuss the DMX case and the broader question of rights withdrawal with you in greater detail at your convenience.

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[1] While the questions in your letter are directed to ASCAP, we assume you meant these to be directed to BMI, and we have answered them accordingly.

2. You have inquired as to BMI's view of how the practice of direct licensing (presumably in the context of both traditional direct licensing, as well as in the context of rights withdrawals) will affect the rights and incomes of music creators in the U.S. and abroad, and in particular, how it relates to transparency and the ability to monitor licensing and the proper and accurate payment of royalties. Generally, we believe that the interests of music publishers and music creators (and indeed, BMI's) are well-aligned when it comes to obtaining fair remuneration for exploitations of their musical works around the world, and we expect that we will continue to work together to ensure that will continue to be the case. We may be able to assist our writer members by obtaining the information they need from their respective music publishers regarding the details of any direct performing rights licensing arrangements and the royalties payable to the writers with respect thereto. Indeed, music publishers may welcome such a role for BMI to the extent that it may ease their burden to report and pay royalties for directly licensed performances to songwriters. Further, if BMI is retained to administer direct licenses on behalf of a music publisher affiliate as some recent reports have suggested, we will be in an even better position to ensure that our writer affiliates remain well-informed as to the relevant details of any of these direct licenses.

3. You have asked whether affiliation agreements with music creators and [reciprocal representation agreements] with foreign societies impact the ability of music publishers to enter into direct licenses. With respect to U.S. works, BMI's affiliation agreements with its writers give BMI the right to license the writer's interest in their musical works, subject to their right to enter into non-exclusive direct licenses. This is also true for BMI's affiliation agreements with its publishers. It is our experience that it is usually the music publisher that enters into a direct licensing agreement with a user on behalf of itself and the songwriter(s) it represents. In this regard, the specific terms of the publishing agreement between the writer and the music publisher will control the relationship and the ability of a publisher to directly license a writer's work.

   With respect to foreign works for which BMI obtains the right to license such works under reciprocal representation agreements with foreign societies, the ability of a publisher to directly license the music creators' interest in musical works depends on that foreign writer's and that music publisher's agreements with each other and the foreign society. While it might be difficult for BMI (due to its Consent Decree, U.S. competition law and the recent DMX decision) to independently assert its right to license the writer's interest in a foreign work irrespective of what the music publisher has purported to grant under a direct license, it does not necessarily follow that BMI would be precluded from doing so if, in fact, BMI, through its reciprocal representation agreements with foreign societies, and not the music publisher, has the right to license the writer's interest in the work(s). We would welcome your support in helping to clarify this situation so that we can ensure that BMI is fulfilling your members' expectations.

Thank you again for reaching out to BMI for its perspective on these issues. We look forward to continuing the discussion with you and our music publisher members to ensure that BMI is adequately serving its affiliates, and the foreign societies' members and affiliates that have entrusted their performing rights in the U.S. to BMI.

Regards,

EXHIBIT 2

British Music Managers Forum Responds to Sony/ATV's Letter to US Songwriters 15 July 2014

The Music Managers Forum shares the concerns expressed by Sony/ATV as to the complexity of licensing systems in the USA and worldwide. Part of the problem is indeed the constraints in the USA on licensing negotiations imposed by the outdated Consent Decrees that govern ASCAP and BMI and prevent them securing a fair market rate for their members. That the US Department of Justice is currently reviewing the Consent Decrees is a positive development.

However, on behalf of our songwriter clients, the MMF is alarmed at the suggestion by any music publisher, especially one with such considerable market power as Sony/ATV, that they would withdraw from the performing right organisations (PROs) and attempt to issue licences directly to US users thus complicating licensing.

Sony/ATV cannot withdraw any non-US writers' works from the US PROs and issue licences for their work as they do not own the right in any songs written by any writer who is a direct member of a PRO outside the USA. These non-US writers assign their performing right directly and exclusively to their local PRO on a global basis. The right is owned by the PROs who have the sole authority to issue licences - to the exclusion of the writer and the publisher. These non-US rights are passed exclusively to the US PROs by the non-US societies.

Publishing contracts outside the USA only give the publisher a right to share in the revenue from the performing right, but not ownership of the right itself. For example, as long as The Beatles, the Rolling Stones, Coldplay, Jean Michel Jarre and Adele etc. continue as members of their local PRO, no US publisher can issue licences for their work. As far as we're aware, the letter from Sony/ATV was not sent to non US writers, once again highlighting the complications posed for licensees of territorial posturing in a global digital marketplace.

While the MMF is wholly sympathetic to Sony/ATV's frustrations, the threat of withdrawal is an issue for the entire global community of composers and societies. There are at least four other reasons why US withdrawal and direct licensing are a risk to writers' livelihoods.

1. Potential licensees will still have to go via the PROs as well as the publishers which could lead to differential pricing and more complicated and more costly transactions.
2. Writers' contracts routinely state that they are not entitled to be paid a share of revenue that is paid as advances, lump sums or is not able to be "directly and identifiably" attributed to their work. How confident can writers be that they will be paid their shares of direct licence monies?
3. Co-writing songs is a common practice. How does a co-writer signed to a different publisher get paid when his writing partner is signed to a publisher who is issuing direct licences? He has no contractual relationship with his partner's publisher to rely upon.
4. The PROs allocate unique identifiers to each song or composition (the International Standard Works Number or ISWC). These have now been allocated to over 95% of the world's musical works and their use across the globe ensures that usage and works are correctly matched and writers paid what they are entitled to be paid. Many music publishers operate their own, different identifiers. The lack of common work identifiers between publishers and the PROs complicates revenue allocation.

The global network of non-profit PROs has served the consumer, the music users and the song writing and publishing community well for over a century. Despite the challenges of the digital environment, PROs provide economies of scale and streamlined licensing which keep transaction costs manageable. Writers sit on their Boards and can influence policy. While the PROs may not be perfect, they allow creators a voice and a direct income stream. Adjustments to this system should be nuanced and carefully thought through. More importantly to our members' clients, solely national focus poses a grave threat to the livelihoods of every writer, American or not.[7]

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[7] Once before Sony/ATV led the charge with a direct licence to a US music service. The result has been a disaster for the whole music community. Every song writer and music publisher in the world is still paying back US $150 million to background music services in the US as a result of an ill-advised direct licensing deal concluded by Sony/ATV and other independent publishers in the US. These direct licences were agreed at a fee 70% less than the licensee was paying via the PROs!

It is a matter of public record that Sony/ATV accepted an advance of US$2.3 million and an administration fee of US$400,000 from DMX, a major US background music service. Buried in the agreement was a per location licence fee that was 30% of what DMX was paying the PROs. Bad for business? Not for DMX. The US Rate Court proceedings that followed had the effect of reducing the licence fee for <u>every</u> background music service in the USA. The global music community is still refunding the licence fees to background music services in the USA as a result and licences going forward sit at 30% of the former PRO value. Writers and publishers will never recover from the damage to the value of their royalty income in this sector of the market. .