



Music Creators North America
5120 Virginia Way, Suite C22
Brentwood, TN 37027

May 1, 2015

Ethan Glass
Assistant Chief
Litigation III Section
US Department of Justice
Attn: Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Ethan:

On behalf of the Alliance of songwriter and composer organizations who participated in our recent April 14th meeting in Washington, DC (the names of which members are listed below), we would like to extend our sincerest thanks to the US Department of Justice (DOJ) for devoting so much time and effort toward examining the music creator perspective regarding the proposed modernization of US performing rights society (PRO) consent decrees. We are especially gratified that DOJ recognizes that along with protecting societal interests through competition, the preservation of the rights of creators is also of paramount importance in this effort, consistent with the mandate for protection of authors and inventors set forth in Article I, Section 8 of the US Constitution and supported by Congress, the Executive Branch and the Judiciary through a multitude of initiatives and decisions over a period of more than two centuries.

We further take this opportunity to repeat that, with one crucial set of reservations concerning the general issues of transparency at the source and the right of collective oversight against abuses (both of which issues we believe must be addressed in any effective solutions), our Alliance applauds the proposed changes to the decrees that DOJ has outlined as having the potential to increase the value of music in the marketplace. DOJ, in turn, has graciously invited the Alliance to reiterate our concerns regarding transparency and collective oversight in writing to ensure clarity, as a prelude to further discussions with our music and technology industry colleagues with an eye toward formulating proposed, joint solutions to be presented in the coming weeks. The US Copyright Office, in fact, has also said it will consider our request to assist us in setting up and potentially hosting such meetings. We are energetically following through on these matters, and as requested, will keep DOJ closely apprised of our progress.

First and foremost, our Alliance recognizes that the consent decree issues with which DOJ is dealing are complex, and appreciates its recognition that forging effective solutions requires an in-depth understanding of the discreet problems music creators face in their role as the vulnerable bedrock on which the rest of our industry rests. We are also grateful DOJ understands that the positions developed by our Alliance are of necessity nuanced, and thank the Agency for its willingness to incorporate these subtleties into its analysis.

By way of familiar background, the music publishing industry has recently announced that in order to achieve full and fair market value in the licensing of digital performing rights, direct licensing of such rights outside of the PRO consent decrees is a necessity. Publishers have also expressed their strong desire to continue realizing the savings and efficiencies that collective administration through the PROs provides concerning the blanket licensing of other categories of performing rights, including general licensing. In order to accomplish both of these goals, publishers ask that they be permitted to “partially withdraw” from the PROs, removing digital rights licensing from the PRO’s purview, while still remaining PRO affiliates for the licensing of other categories of performing rights. Our Alliance recognizes that beneficial results may flow to the music creator community if the ability to partially withdraw is extended to publishers *under the correct conditions*, and believes that our community is willing to give consideration to lending its full support toward such principles. As noted, however, garnering such creator support for this publisher position (and thereby avoiding our community’s active opposition) will require addressing the creative community’s drastic needs for both effective transparency and meaningful oversight in the direct licensing process.

Allow us to provide greater specifics. In a digital world in which it grows increasingly more difficult to achieve a living wage as a working songwriter or composer, the performing right is frequently the most important stream of income a music creator has to sustain his or her career. With that in mind, creators have deep concerns that without transparency at the source concerning the precise details of direct performing rights licensing deals, and a cost-effective means of collective oversight to ensure full and proper payment of royalties, their livelihoods are at the mercy of publishers who under certain circumstances may significantly and opaquely underpay royalties.

This fear is not based upon idle speculation. As pointed out in prior comments by our Alliance organizations to the DOJ, some publishers have already been shown likely to have obfuscated the details --and at times even the very existence of-- administrative payments, equity participation, guarantees, advances, and other forms of remuneration related to their recent direct licensing activities, facts gleaned by music creators only as a result of protracted litigations. (See, *for example*, Comments Submitted By The Songwriters Guild of America, Inc. to the United States Department of Justice, August 6, 2014, at 11-13).

It is also a grave concern of songwriters and composers that publishers may seek to offset the writer's share of direct licensing royalties against un-recouped advances, a right clearly not bargained for, paid for, or owned by publishers. Connected to this issue is the likelihood that calculation and reporting of such off-sets to individual creator advances would be vague at best, and completely opaque and un-auditable at worst.

Further and of enormous significance, since the "tenancy in common" doctrine provides that under US law one copyright owner may license a copyrighted work on behalf of all co-owners, direct licensing establishes the danger that a music creator's work may be licensed by, and his or her royalties collected by, a publisher to whom the creator has utterly no connection. In such instances, the likelihood that the creator will not be paid at all is exceedingly high, as is the chance that a publisher will withhold royalties it collects on behalf of its competitors/co-owners to establish further competitive advantages.

Against this backdrop of potential, and even likely, opaque administrative abuses by some publishers leading to non-payment of music creators in direct licensing contexts, it is equally important to remember that many American music creators, and nearly all foreign songwriters and composers, also retain the hard-fought contractual right to demand that their performing rights be managed (including the monitoring and payment of royalties) by the administrator of the creator's choice—whether a PRO or any other designated administrative entity.¹ Moreover, the overwhelming majority of songwriters and composers continue to trust in the collective licensing and administration systems that have served the music creator community well for a century or more (although there is admittedly much room for improvement in the area of transparency between the PROs and their constituents, an issue that will also continue to be discussed among the parties). Thus, the reality is that if publishers begin to engage in wide-spread direct licensing on an opaque basis completely outside of the PRO collective licensing system, the result will likely be a flood of litigation over the enforcement of such contractual rights brought by music creators, and the defection in droves of American songwriters and composers to foreign societies, where the control over their performing rights administration is defined with unimpeachable clarity.

Our goal is to help avoid such devastating results, which would cause enormous and long-lasting harm to US music creators and American musical culture on both a national and a global basis. (And that would mean harm to the entire US economy in myriad ways, as pointed out in our recent meeting in which we discussed the broad, far-ranging economic benefits to the US trade balance supported by the export of American cultural products embraced by the world). It is our

¹ Maintaining this competitive, free market system is of crucial importance to ensuring superior services at the lowest cost in regard to the administration of performing rights.

carefully considered position that the best and perhaps only way to achieve that goal is by devising a unified system that both incentivizes the continued use by publishers of the collective administration model even as they direct license, and which also serves the vital needs of creators by mandating transparency at the source and collective oversight as the prerequisites for partial withdrawal.

The DOJ has expressed to our Alliance that it is indeed considering such a system, including the extension to publishers of a new privilege of partial withdrawal and the granting to PROs of a new privilege to establish independent, direct licensing “administrative arms” to confidentially handle back room operations for those publishers who opt to direct license through partial withdraw. To repeat, our organizations are willing to consider support for, rather than opposition to, these two proposed, partial solutions to the existential challenges that the music industry faces. Such Alliance support for these new music publisher and PRO privileges, however, would be absolutely contingent on the initiation of the effective protections for music creators outlined in this letter. Without those essential music creator safeguards, the changes proposed would represent only two of the three equally crucial needs of our communities. As the old axiom goes, two-legged stools are dangerous to all, while supporting none.

It is therefore the emphatic recommendation of our Alliance to both the DOJ and to our music industry colleagues that the PRO consent decrees be amended to permit partial withdrawal of certain categories of rights by publishers, but if and only if agreement can be reached that (1) those publishers that exercise the opportunity of partial withdrawal from a PRO will: (a) utilize the services of a creator-designated collective administrator (such as the PRO of the individual music creator’s choice) to distribute gross music creator royalties and other remunerations directly to such music creators (with administrative costs of such distributions to be borne fairly by both the publishers and creators), *and* (b) abide by mandatory transparency at the source requirements that require confidential but complete disclosure to such collective administrator of the full terms of any direct licensing deals negotiated by or on behalf of such publisher (including but not limited to all details concerning administration fees, advances, guarantees and equity provisions²), *and*; (2) that any contractual or other rights of an individual music creator to refuse the direct licensing of the performing rights in his or her musical works by publishers be preserved.

As noted above, it is the intention of our Alliance to engage in a series of discussions with all interested parties to explain the views of music creators on these complex issues, and to build consensus, if possible, concerning joint recommendations for DOJ action based on the above proposal. That process has already begun, and will continue over the next several weeks. It is

² The pro-rata distribution of the value of such equity to music creators within a reasonable time under generally accepted accounting principles must be the subject of further discussion.

our hope that all parties will grasp the seriousness with which the music creators view the problems associated with opaque direct licensing, the intention of our community to enforce its rights in this regard, but also our additional and long-standing willingness to help negotiate proposed compromise solutions that both serve the interests and protect the needs of all.

We very much look forward to sharing our further ideas and recommendations with DOJ, and together with our industry colleagues, to jointly forging effective, compromise recommendations for consideration. We close, however, by adding that music creators simply cannot abide under any circumstances with the creation of a system whereby increased performing rights revenues from US consumer activity flow primarily to a small handful of multinational corporations, without benefit to those directly engaged in music creation (the very "Authors" whom the US Constitution seeks to protect). To permit such an unfair result would be contrary not only to Constitutional intent and consumer sentiment and interests, but also to sound national economic policy.

The American public wants to support and sustain those who create the music that so enhances their lives, and has repeatedly said so. Without provisions ensuring transparency at the source and the opportunity for effective, collective oversight as described in this letter, however, the stage is set for an outcome that will threaten the very survival of musical composition as a livelihood and an art form. It will also, over time, damage consumer interests as much as it will destroy the American songwriter and composer community. That would be the worst possible set of outcomes of all, and we intend to put all of our collective energies behind an effort to ensure that the rights of both creators and consumers are simultaneously protected for the benefit of everyone, with the help and guidance of DOJ.

Sincerely,



Rick Carnes
Co-Chair, Music Creators North America



Eddie Schwartz
-Chair, Music Creators North America

cc: Charles J. Sanders, Esq.

List of Signing Organizations

- The Songwriters Guild of America (SGA)
- The Songwriters Guild of America Foundation (SGAF)
- The Council of Music Creators (CMC)
- The Society of Composers & Lyricists (SCL)
- Music Creators North America
- The Songwriters Association of Canada (SAC)

La Société professionnelle des auteurs et des compositeurs du Québec
(SPACQ)
The Screen Composers Guild of Canada (SCGC)
International Council of Music Authors (CIAM)