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David Kully, Esq.
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U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Supplemental Comments of the Radio Music License Committee, Television Music License Committee and National Association of Broadcasters Concerning Proposed Closing Statement Relating to Potential Modifications to the ASCAP and BMI Consent Decrees

Dear Dave and Kelsey:

We are pleased to submit these brief comments on behalf of the Radio Music License Committee, the Television Music License Committee and the National Association of Broadcasters (collectively, the "Broadcasters"), in response to the briefing provided by you to the user community on July 5 and 6, 2016 as to the conclusions anticipated to be reached by the Antitrust Division concerning potential modifications to the ASCAP and BMI consent decrees. As you are aware, the Broadcasters, who represent major stakeholders in the existing music performance licensing market, have been actively involved in the Government's consideration of this matter, including via written submissions dated August 6, 2014, August 20, 2015 and November 20, 2015, as well as in-person meetings on three separate occasions. We appreciate the careful attention the Antitrust Division has given this important topic and its solicitude for the interests and concerns of all parties with a stake in its outcome.

We are gratified that the Government has determined that no modifications to the consent decrees are warranted at this time. For the many reasons articulated in our prior submissions and discussions, the day-to-day operations of local radio and television broadcasters would be significantly disrupted were ASCAP's, BMI's, and the music publishers' interests in radical reformation of the consent decrees to be accommodated. As the Department has come to recognize in relation to its consideration of permitting these performing rights organizations to license solely the fractional interests owned by certain of their affiliated composers (and no less, in the Broadcasters' estimation, in contemplating permitting so-called partial withdrawals by major music publishers), agreeing to such a dramatic change in practice would undermine the very rationale for ASCAP's and BMI's continued existence in conformance with antitrust law: their ability, in the words of the Supreme Court, to afford users "unplanned, rapid, and indemnified access to any and all of the[ir] repertor[ies] of compositions." Implementation of the proposed

modification relating to fractional licensing would, instead, deprive users of those existing procompetitive attributes, substituting in their place a need to secure rights from every partial rights claimant in countless works as a condition of their performance – a change in practice that would entail enormous transactions costs, a practical inability to obtain comprehensive license coverage, and resulting exposure on the part of users to potentially consequential -- even ruinous -- copyright infringement damages. Such alteration of the status quo would, in addition, upend countless industry agreements, including with program suppliers, that have been negotiated and agreed upon in reliance on the existing music performance rights system.

Notably, notwithstanding that the proposed fractional licensing modification would deprive the Broadcasters and other users of the full indemnifications for performing any and all works in the ASCAP and BMI repertories on which they have always relied, licenses from those PROs would still be necessary to obtain *partial* rights to perform the many "split" works in their repertories. But in addition, the Broadcasters, among countless other users, would be saddled with needing to secure additional licenses from each of the remaining partial rights owners -- wherever situated and however identifiable (if at all), at enormous cost and uncertainty. The benefits to users of such a change in industry practice would be nonexistent, while the very rationale for legitimizing ASCAP and BMI as collective licensing entities would have evaporated. The sole beneficiaries would be rights owners such as major music publishers who would be incentivized to exploit the market power created by such change in practice and empowered to "hold up" users wishing to publicly perform works in which those publishers possess fractional ownership interests. As the Government has concluded, no sound public policy interests support such change in licensing practice.

We note finally that the "spin" being placed by ASCAP, BMI and the major music publishers on the conclusions reached by the Government and the extent to which their implementation will alter the status quo is blatantly inaccurate. The Government is right in concluding that the requirement that ASCAP and BMI afford licensees the right to publicly perform the entirety of the works in their repertories reflects a continuation of current practice – not, as falsely portrayed by the music interests, a radical alteration of prior practice. Throughout their many decades of license experience, the radio and television industries have negotiated licenses that explicitly authorize their performances of *all* works in the ASCAP and BMI repertories. Those broad grants of rights have reflected the similarly broad grants of rights that ASCAP and BMI have secured from their affiliated composers and music publishers. That existing practice aligns with copyright law's authorization for each co-owner of a joint work to license public performances of that work in its entirety. In short, the suggestion that the grants of rights in such licenses have heretofore been limited to the fractional ownership interests held by ASCAP's or BMI's affiliated composers is simply fictional. In fact, the current PRO license system has not been shown to be "broken" at all. It instead has functioned well overall – not least of all, in generating more than $2 billion annually in license fees to ASCAP and BMI.

In the aftermath of the conclusion of the current investigation, there is no reason to anticipate the kind of license turmoil of which ASCAP, BMI, and the major music publishers forewarn – assuming good faith, antitrust compliant, and economically rational behavior on the part of those entities. Local radio and television broadcasters stand prepared to carry on business as usual: negotiating periodically with ASCAP, BMI and other legitimate rights owners and performing rights organizations as appropriate to secure music performance licenses at fair and reasonable prices and to pay each such rights representative in line with its estimated market share of anticipated performances. Nothing need change on that score.

As far as ASCAP's and BMI's relationships with their affiliated rights owners are concerned, there is no reason to expect a massive exodus of rights owners from a system that has been so beneficial to them. To the extent there are perceived to be gaps in the chain of rights conveyances between certain composers and/or music publishers and ASCAP and BMI that arguably limit these PROs' ability to afford users rights to perform entire works (a contention that, in our estimation, also has been vastly blown out of real-world proportion), there is no reason to assume that simple modifications to existing contracts between and among parties acting non-collusively and with a common interest in a continued orderly music performing rights system could not be fashioned during the one-year transition period to be afforded ASCAP and BMI.

Once again, we thank the Antitrust Division for its thorough and thoughtful analysis of the important issues presented and appreciate its consideration of these additional comments.

Sincerely,

R. Bruce Rich

cc: Rick Kaplan
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