BEFORE THE
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, D.C.

U.S. Copyright Office Study on Music Licensing	**Docket No. 2014-3**

COMMENTS OF THE SONGWRITERS GUILD OF AMERICA, INC.

The Songwriters Guild of America, Inc. ("SGA") respectfully submits these comments in response to the U.S. Copyright Office's (the "Office") Notice of Inquiry dated March 17, 2014 for written comments on issues regarding its Study on Music Licensing (the "NOI").

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, including contract analysis, copyright registration and renewal filings, termination rights notices, and royalty collection and auditing, to ensure that songwriters receive fair and accurate

compensation for the use of their works. SGA takes great pride in its unique position as the sole untainted representative of the interests of American and international music creators, uncompromised by the frequently conflicting views and "vertically integrated" interests of other copyright users and assignees.

B. General Views Concerning This Inquiry and Call for Comments

SGA is extremely gratified by, and supportive of, the efforts of the Office in undertaking this Study on Music Licensing at this crucial time of change and upheaval throughout the American and global music communities. The accelerating shift to digital distribution as the overwhelmingly preferred consumer method of accessing music has created enormous new challenges for songwriters and composers. Moreover, the ability of songwriters and composers to support themselves through income gleaned from the public consumption of their musical works has been deeply compromised, particularly by the continued, rampant theft of musical works by self-proclaimed Internet "pirates" and the failure of licensed digital sources of music to pay fair compensation to music creators at equitable, market value rates. These problems must be addressed if the American professional music creator community is to survive and continue in its vital role as one of the great sources of this nation's cultural advancement and global influence.

In that regard, SGA believes that the questions posed by the Office in its broad inquiry on music licensing are comprehensive, providing a crucial opportunity for all interested parties to participate in the process of suggesting solutions that each

considers necessary and proper to address the dire problems our community faces. The expression of those inevitably divergent and potentially controversial views, however, will undoubtedly spark further analysis, debate and comment. While it is unclear that any consensus will arise from this process, SGA welcomes the opportunity to review and analyze the comments and proposals of all the stakeholders in the hope that, at a minimum, our differences can be narrowed. In many ways, in fact, SGA views the opportunity for the music creator community to analyze and react to the comments and suggestions of other interested parties submitted in this first round of submissions as the most important aspect of this process.

II. Musical Works

The following general comments are submitted in answer to questions 1-7 of the NOI.

SGA has identified four principal areas of greatest concern in regard to adequate protections for composers and lyricists in the licensing context. These are the indispensible needs for (A) fair market value compensation for the use of musical works; (B) complete transparency throughout the licensing, use and payment process; (C) full and equal representation of music creator interests in the management of any organization(s) legislatively or administratively created as so-called "centralized licensing" agents, and (D) the establishment of a stable and secure digital marketplace in which the theft of musical works is diminished to a level at which commercial interests no longer have to compete against a black market economy, the rates for which are set permanently at "free."

A. Fair, Market Value Compensation for the Use of Musical Works

SGA is in accord with the views of the Performing Rights Organizations ("PROs") and others expressing the idea that the governmentally imposed consent decrees to which the PROs remain subject are severely outdated, crippling the ability of the PROs to establish fair, market value rates for the performance of musical compositions in digital environments on behalf of music creators. SGA has and will in the future be communicating with the U.S. Department of Justice and other offices of the U.S. Government concerning the necessity to review and overhaul these consent decrees in ways that make it possible for American and international music creators to realize fair market compensation for the use of their works, free from the artificial devaluation of royalty rates that result from strict judicial interpretation of decades-old decrees formulated for the pre-Internet and digital distribution era.

By way of example, the untenable results of recent rate-setting decisions concerning the digital music streaming company Pandora, the entire business model of which is built upon the exploitation and distribution of musical compositions at rates far below market value, stand 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.

Moreover, SGA also stands side by side with its music community colleagues in support of the Songwriter Equity Act currently pending in both houses of Congress

(S. 2321, H.R. 4079). That Act would direct the Copyright Royalty Board to utilize the “willing buyer – willing seller” ("WBWS") standard in setting future royalty rates pursuant to its oversight mandate under the Copyright Act. SGA believes that the WBWS formula would likely lead to far more equitable results in rate setting for the use of musical compositions, including a long overdue increase in the current statutory mechanical royalty rate. That rate has for a decade stagnated at the level of 9.1 cents per physical or digital copy made and distributed even as inflation and other devaluing factors have advanced at alarming rates.

SGA is a founding member of the Musical Creator North America coalition ("MCNA"). Additional comments concerning the submission of MCNA's important forthcoming “Study Concerning Fair Compensation for Music Creators in the Digital Age” are included in Section VII of this submission.

B. Complete transparency throughout the licensing, use and payment process.

For close to two decades, American music creators have been assured again and again by leaders of the technology community, members of the marketplace of copyright licensees, and by its own music publisher partners, that the great benefit of the digital age for songwriters and composers is the promise of “transparency.” The brave new world of immutable ones and zeros, it has been pledged to creators, will at last put an end to decades of obfuscation and uncertainty concerning the accurate payment and distribution of royalties. Unfortunately, these promises of full disclosure and access

for creators in the tracking of copyright uses and the concomitant payment of royalties have so far gone largely, if not completely, unfulfilled. The issue of mandatory transparency concerning intellectual property licensing and transactions, in fact, is one that the Office should consider within this NOI. Any new or modified licensing system without a requirement of complete transparency will still leave songwriters at an impossible disadvantage.

For the purposes of this round of comments, SGA wishes to point out two areas of music licensing activity in the digital marketplace that currently require especially intense scrutiny if promised levels of transparency are ever to be realized.

The first category of activity concerns the so-called "pass through" mechanical license established under section 115 of the Copyright Act (through provisions of the Digital Millennium Copyright Act), whereby mechanical licensees of music (such as record companies) holding licenses permitting the manufacture and distribution of physical copies of sound recordings embodying musical compositions may "pass through" such licenses to digital distributors of the sound recordings. This creates a situation in which the creators and owners of musical compositions have no privity of contract with online music distribution giants such as Apple iTunes, and must therefore rely on sometimes adversarial record company "intermediaries" for the monitoring and payment of royalties earned via online download usage. To the knowledge of SGA, not a single royalty audit of online distributors of music such as iTunes by the creators and owners of musical compositions has ever taken place due

to this licensing anomaly. Under such circumstances, music creators simply do not have a mechanism under which they can verify that proper monitoring and payment of royalties by online music download distributors is taking place. This manifestly unfair and opaque system should be quickly and decisively rectified.

The second category regarding the lack of transparency is even more troubling to the music creator community, as it concerns a movement away from the important tradition of collective performing rights licensing through the PROs that has benefited and given protection to the community of American music creators for over one hundred years. The trend toward direct licensing to copyright users by music publishers of performing rights in musical compositions is one that is causing grave concern to the music creator community because of the utter lack of transparency in the direct licensing process.

Since the establishment of ASCAP in 1914, music creators in the United States have been able to rely upon the PROs for licensing, collection and distribution services in the performing rights context pursuant to a one on one relationship between each creator and his or her chosen PRO. This system has not only provided music creators with the crucial assurance that an important source of revenue will be paid directly to them by the PRO, but has also fostered the development of a robust partnership of advocacy for music creator rights between SGA and the PROs over the past eight decades.

Music publishers, however, citing the unfairly stifling effects of the consent decrees on the ability of PROs to negotiate fair market royalty rates for the performance of musical works in the digital era, have recently begun in earnest to consider following through on their announced intentions to withdraw their catalogs from the PROs and to license performing rights directly. While, as noted above, SGA fully supports efforts to revamp the consent decrees in ways that will solve the fair market royalty rate-setting problem, it cannot and does not support a solution that will allow music publishers to partially or fully withdraw their catalogs, including the rights of both American and foreign music creators from the PROs, without formal commitment to complete transparency as well as to music creators being granted the full value of their rights.

This complex issue was recently the subject of important correspondence between SGA and its international partners in the MCNA and the European Composers and Songwriters Alliance ("ECSA") on the one hand, and the two largest PROs - ASCAP and BMI - on the other. It is SGA's firm belief that the views expressed in those written exchanges are extremely relevant and important to the completeness of this licensing study, and SGA hereby attaches copies of the correspondence as Exhibit I. 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.

Moreover, it should also be noted 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 withdrawal of their catalogs from the PROs, not a single such publisher has announced that it intends to share with those PROs full and complete data concerning the terms of its licensing arrangements, including fees, advances and related contractual benefits. This lack of transparency will inevitably, in the view of SGA, result in music creators being denied the full value for their rights, as was evident in the DMX licensing situation noted in the correspondence in Exhibit I.

C. Equal representation of music creator interests in the management of "centralized licensing" organizations

SGA looks forward to the opportunity to consider and comment upon any proposals that may be forthcoming from the music and recording communities for the establishment of a more streamlined, centralized and potentially combined music and sound recording licensing system. SGA has consistently over the past years (and increasingly over the past several months) made inquiry to both the music publishing and recording industries concerning their potential plans for introduction of any such proposals, but has not yet been informed of their specific intentions.

Nevertheless, SGA can state with certainty that in considering the merits of any such proposals, it shall be guided by many of the same essential principles that it expressed in 2006 regarding the consideration of the "SIRA" legislation. These

include the sine qua non for music creator community support, namely the need for equal creator representation on the governing boards and any dispute resolution bodies of any designated licensing agent or agents. In addition, SGA will insist that prohibitions against the surrender of rights of creators through "letters of direction" will be included in any proposals; this will ensure that the rights granted to creators are not easily vitiated by the imposition of marketplace pressures by copyright administrators in inevitably superior bargaining positions. SGA reserves its right to identify other essential components of any such proposed licensing systems, including a bar against unchecked spending authority by any designated agent or agents; transparency in providing data (at no or minimal cost) to songwriters about collections and disbursements; timely distribution of royalties; fair distribution to creators of unclaimed funds; and to express those thoughts and conditions in future comments.

D. Establishment of a stable and secure digital marketplace where the theft of musical works is diminished to a level at which commercial interests no longer have to compete against "free"

The looting of musical works on the Internet has continued nearly unabated over almost two decades, during which time the income of the music and recording industries (and especially of individual music creators and recording artists) have been diminished, according to reliable estimates, by as much as two-thirds. Consideration of the viability of new licensing systems and rate setting mechanisms

without addressing the drastic need to curtail online digital theft of musical works is, in SGA's view, an exercise in futility.

Moreover, accepting the notion that licensed music distributors and services must be permitted to artificially depress royalty payments because they must compete against black market free goods stands the principles of fairness and the sanctity of property ownership on their heads. In considering the viability of any licensing solutions proposed under this NOI, there must be recognition that unless additional systems and laws are put in place to control or eliminate theft, no licensing scheme can possibly address the royalty needs of the music creator community.

SGA would once again like to thank the Office for its work regarding the potential development of a small claims court system to address the needs of individual music creators for an affordable means of rights enforcement. SGA looks forward to assisting the Office in any way it can in furthering discussion of the small claims issue as an important component of curbing rampant online infringement of musical works.

III. Questions Concerning Sound Recordings and Platform Parity

SGA looks forward to reviewing the comments of its recording and music industry colleagues regarding questions 8-13, and to presenting our views, if appropriate, during the next round of comments.

IV. Changes in Music Licensing Practices

Concerning questions 14-17, SGA hereby repeats its comments about the issue of direct licensing as set forth above, and respectfully reserves its right to comment further, if appropriate, in the next round of comments.

V. Revenues and Investment

In answer to question 18, SGA hereby respectfully submits as Exhibit II a copy of an important and widely disseminated interview conducted by MTP's Christian Castle with SGA President Rick Carnes, originally published in January, 2009, on the issue of damage to the American music creator community by online theft. Speaking as a songwriter, the SGA President gives a detailed assessment of the difficult financial landscape in which music creators are now forced to operate, outlining problems that have only expanded and deepened in the ensuing five-year period.

Question 19 can be read in two different ways: asking about the equities in the division of revenues between creators and distributors and asking about the equities in the division between sound recording owners and musical composition owners. As for the first interpretation, we address this issue above under "II. A. Fair, Market Value Compensation for the Use of Musical Works," where we point out that the current consent decrees cripple the ability of music creators to obtain fair, market value rates for the performance of musical compositions from digital distributors. As for the second interpretation, we believe that both sound recording owners and the creators and owners of musical compositions deserve fair market value for their

works, and the pitting of sound recording owners versus creators and owners of musical compositions is based on a false presumption that allows the distributors of music to avoid paying fair market rates for both, with songwriters and composers suffering deeply unfair financial discrimination as a result. SGA respectfully reserves it right to comment further on this issue, if appropriate, in the next round of comments.

VI. Data Standards

SGA supports the comments of the PROs, ASCAP and BMI, concerning the establishment of data standards raised by question 22, and respectfully reserves its right to comment further upon review of other submissions.

VII. Other Issues: Study Concerning Fair Compensation for Music Creators in the Digital Age (May 2014)

As noted above, SGA, as a founding member of the international music creator advocacy organization Music Creators North America ("MCNA"), is pleased to announce that MCNA's "Study Concerning Fair Compensation for Music Creators in the Digital Age" will be published on or about May 31, 2014. This Study, in its final stages of review by author Pierre-E Lalonde, will shortly be available widely on the Internet and in printed form.

With the permission of the Office, SGA hereby respectfully requests permission to submit a copy of this Study upon its publication as an Exhibit III to these comments.

VIII. CONCLUSION

SGA applauds the Office's efforts and initiative in launching its study of music licensing issues at this most challenging time, and looks forward to working with the Office in helping to shape a future in which the rights and incomes of music creators are fairly and equitably protected.

Respectfully submitted,

Rick Carnes, President
Charles J. Sanders, Counsel

Songwriters Guild of America, Inc.
5120 Virginia Way, Suite C 22
Brentwood, Tennessee 37027

Dated: May 23, 2014

Exhibit I

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

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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?

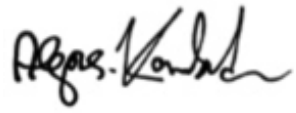
3) Do ASCAP's affiliation agreements with its music creator members and foreign societies impact the ability of music publishers to directly license performing rights in a work on behalf of individual music creators, or the ability of such music creators (or heirs) to demand that ASCAP license rights 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
<rickcarnes@songwritersguild.com>
Rick Carnes
Co-Chair,
Music Creators North America

Via Email
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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-

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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.

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

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 BMI) 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 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.

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

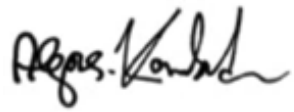
concerning future deals involving the direct licensing by music publishers of performing rights now administered by the organization?

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?

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

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

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

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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.

---

[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 II

http://musictechpolicy.wordpress.com/2012/03/10/an-inconvenient-truth-songwriters-guild-president-rick-carnes-talks-about-the-effect-of-piracy-on-american-songwriters/

The MTP Interview: An Inconvenient Truth: Songwriters Guild President Rick Carnes talks about the effect of piracy on American songwriters

March 10, 2012

American songwriters are one of our greatest sources of culture as well as important contributors to America's "soft power"--our ability to win hearts and minds around the world by attraction and not by force.

As Professor Joseph Nye would say "Lennon trumped Lenin." (See Center for Strategic & International Studies *Smart Power* favored by the Obama Administration in the "change" direction for U.S. foreign policy.) But Internet analysts, self-appointed futurists as well as self-anointed consumer advocates almost always misunderstand the role of songwriters and the negative effects that rampant piracy has had on them.

People who just write songs don't sell T-shirts, don't play shows, don't have all the other income streams available to them that the EFFluviati point to as substitute revenues for the cruel theft of labor value by companies like Kazaa, Morpheus, Limewire and the Pirate Bay. You hear a lot of

talk about "follow on" artists or "remix culture"? Songwriters are the ones who are most often "followed upon" and "remixed out of culture". And as noted in this interview, there are fewer and fewer original professional songwriters around every year. Rick Carnes is the President of the Songwriters Guild of America, and is a tireless advocate for American songwriters on Capitol Hill. He lives in Nashville, the songwriting capitol of the world.

MTP: There is a popular image of a songwriter sitting in front of a piano in a little cubicle at the Brill Building or Music Row and grinding out the hits. What kind of business relationships do songwriters have today?

Carnes: Most songwriters today are independent operators. Music piracy was the death knell for the day of music publishers having staffs of songwriters. The Brill Building is still there but the last time I visited it was to talk to the folks at Saturday Night Live. There wasn't a songwriter in sight. Business relationships now are with lawyers and managers. They put together the deals and venture capitalists put up the money. The deals are done to get the next big recording artist signed to a label and then everyone gets a piece of the action in some 360 deal. Used to be you found a great singer then you looked for a great song. Now you find a great deal maker then look for someone with deep pockets.

MTP: Are there more or fewer songwriters working today than there were 10 years ago? If there's a change, what forces in the business are causing that change?

Carnes: The days of music publishers who have large staffs of professional songwriters seem to be over. Music publishers used to have both established writers and their 'farm team' of new talent. Now they have neither. The people they sign today (if any at all) are either working

recording artists or 'future' recording artists. The days of the 'stand alone' songwriter appear to be over. There are multiple causes for this situation but most of the damage was wrought by two specific problems. The first being that the Internet has turned into a Cyber-Somalia.

Professional songwriters used to live on advances from their music publisher. These advances were to be recouped from record sales only ("mechanicals" is the industry term for these revenues). Music piracy killed record sales so that made it impossible for music publishers to recoup the advances they paid songwriters so they stopped signing writers and let go of the ones they had when their contracts ran out. For example, the music publisher I was writing for in 1998 had twelve great songwriters on staff. By 2008, they had no songwriters on staff. For the math impaired that is a reduction of 100%.

The second major problem was/is a practice by the record labels of putting "controlled composition" clauses in their artists recording contracts. For the non-lawyers reading this, these clauses are a very complicated system established by the record labels to insure that they don't have to pay the full statutory rate imposed by the U.S. Copyright Office for the songs recorded by the artist that the artist either writes or "controls". ***[Editor's note: this includes songs co-written with a producer or other writer who is not the artist or a member of a group artist. It started right about the time that another SGA member, Hoyt Axton, helped to spearhead indexing the mechanical royalty rate to the Consumer Price Index in 1976.]***

Once an artist signs a recording contract containing one of these clauses (and since all the major labels have them they have little choice) the [beginning] artist will receive, at most, 75% of the

statutory rate for recording any song they write or co-write. It is the co-writing that causes problems for the professional songwriters. The record labels, because they can pay a lesser rate for any song written or co-written by the recording artist, insist that the artists now write or co-write all their songs. This has lead to a tremendous drop in the number of professional songwriters and, in most cases, the quality of the songs. The public is constantly complaining about having to pay US $12 to US $18 dollars for an album with only one or two good songs on it. You can trace the cause of this problem back to the early eighties when all the record labels began implementing control compositions clauses in their contracts. Since then the norm on an album is one or two professionally written (or co-written) songs and a lot of filler songs that the artist wrote in order to satisfy the record label's demand for cheap music.

MTP: Tell me about what you do at the Songwriters Guild and the untold riches you are being paid for the job?

Carnes: I am President of the Songwriters Guild of America and if I am supposed to be getting "untold riches" someone forgot to tell me! The mission statement of the SGA is two words "Protect Songwriters". That lack of specificity has forced me to show up in all kinds of places I never thought I would be! I was the lead witness in the latest Copyright Rate Board hearing. I have testified on behalf of songwriters in both the Senate and the House of Representatives on many issues concerning songwriters rights, and I have spent the last ten years flying all over the country talking to people about the harm that is being done to American music by the widespread theft of songs on the Internet by a mob of anonymous looters.

MTP: What is the most common question you get from your membership?

Carnes: How do I get a song cut by Beyonce?

MTP: What are your top three legislative issues for this Congress?

Carnes: The performance right in an Audio Visual download; Controlled Compositions; Fighting Music Piracy (as always) (If I could add a fourth it would be a 'bail-out' for all the songwriters who lost their jobs because their intellectual property was not protected by the U.S. Government on the Internet).

MTP: Who are you listening to at the moment, and what new music interests you the most?

Carnes: Luca Mundaca. A fabulous new Brazilian jazz artist who plays great guitar, sings like an angel, and writes amazing melodies. I have no idea what she is singing about since I don't speak Portuguese. But the songs knock me out anyway. That's what I call great songwriting.

MTP: Where do you think that songwriters are going to end up in the next 5-10 years? Meaning what role do you think they have in the music business?

Carnes: Songwriters were the number one loser of income in the U.S. economy in 2004 (Music piracy taking its toll). So we are used to tough times. I hope to see a bottom form somewhere in the steep drop in record sales and a rebound sometime in the next ten years. If that doesn't happen I guess we will all end up sleeping in the subway!

The real role of songwriters in the music business is to add meaning to people's lives. That is not a job you want to leave to amateurs. It is a job for professionals.

MTP: Do you find that members of Congress do not have a clear idea about the role of songwriters as a general rule?

Carnes: I think they understand the role of songwriters better than the typical major record label executive. At least the Members I have talked to understand that the Constitution includes provisions for royalties for creators because without them the quality of life suffers. While it is true that the Copyright laws are very difficult to understand in great detail, the general principle that creators have a right to control the copying of their work is understood by all except the most radical of the 'Free Culture' advocates. There are a couple of people on the Hill who think that 'Fair Use' extends to sharing a copyrighted song with the entire world for free.

MTP: Who do you view as the greatest commercial opponents of songwriters?

Carnes: The Major record labels are our biggest 'commercial' opponents. They have wreaked havoc on the songwriting community by forcing controlled composition clauses into their artist recording contracts. After them it would be all those companies out there that want to use our songs to sell something else (like advertising) and not pay us a dime. Anytime you go on a website that is offering free music they have no license to use and selling your visits to that site to advertisers you are looking at one of the 'greatest commercial opponent of songwriters'. I wish I could offer you a list but it would be too long to type in one sitting. Besides, didn't Richard Nixon get in trouble for having an Enemies List?

I hear a lot of talk from Google and the big online companies about their "partnerships" with the "music industry". I find more often than not when you drill down on what that means is deals with major labels.

MTP: Do you ever have any of these companies come to you to ask you what you think or try to make a deal with your members?

Carnes: Yes, we have had companies come to us about deals. But that is because our catalog administration program has some hit songs that you have to have in order to compete in the market. So in terms of whether these services are 'reaching out' to smaller labels and music publishers the SGA is not a good gauge.

MTP: If you had to rank the top five online companies as the "best" meaning most friendly to songwriters, who would they be and why?

Carnes: Songwritersguild.com would be number one *grin* (a shout out here to our webmaster). After that I am not a fan of any particular online company since I have had to spend the last three years of my life fighting them in rate court to try to get a decent interactive streaming rate. (Which we finally won!) But I am a subscriber to Rhapsody and I check out MySpace a lot since I have so many friends that are artists and in bands. MySpace, at least, has exposed a lot of indie music.

MTP: And the five "worst"?

Carnes: Whoever the top 5 p2p sites are today. And just for the record, I am not a fan of Google because I believe their search algorithm reduces all art to the lowest common denominator. That's a real culture-killer if I ever saw one.

MTP: Anti-copyright organizations often try to tell musicians and the music industry that they have their eye on the wrong ball, that they can offset the decline in CD sales by selling another T-shirt to fans who it would be easy to find because they were all on email.

Carnes: Songwriters don't sell T-shirts. We're too ugly and we dress funny. Songwriter fan clubs meet in phone booths so the email lists are too small to monetize effectively. But seriously folks, songwriters don't sell concert tickets, or ancillary merchandise. We make our money on record sales and radio airplay. Or, we USED to make our money on record sales. Illegal downloading ended that. Now we are looking for new jobs.

The most infuriating thing about being lectured to by anti-copyright groups about how songwriters need to get a new 'business plan' is who gave them the right to tell us how to make a living? Who are they to say we shouldn't fight to defend our rights? In truth, I find their suggestions are unbelievably arrogant and self-serving.

MTP: Do you find that there are a lot of self-appointed music industry experts who have never sold a record? I'm thinking of a specific event at which I was sneered at by Eben Moglun at Future of Music Policy Summit II in 2001 for questioning the effect of piracy on independent artists and I was told more or less that I was a primitive thinker because I didn't see that declines in CD sales would be made up by merch. I'm also thinking of a panel I was on with Corynne McSherry of the EFF at which she wedged the audience by asking the crowd if "Silicon Valley" was going to let "Hollywood" push it around. Thankfully the "Silicon Valley" fans and the "Hollywood" fans hadn't been tail gaiting or painting themselves funny colors. [Editor's note: And if "Silicon Valley" wouldn't listen to

"Hollywood," would "they" listen to musicians in Bollywood, Miami, Seattle, Austin, New Orleans, London, Harlem, in no particular order.] Do you have similar experiences?

Carnes: There do seem to be a lot of people trying to make the rules who never played the game. I have had some interesting back and forth on some panels but I must say that the most interesting panel I have ever witnessed was at the Leadership Music Digital Summit a couple of years back. The subject was how the music biz could 'compete with free'.

For some reason there was an actual economist on the panel who was totally silent for the entire panel until the very last when he spoke up and said that anyone who thinks there is a business model that competes with free is out of his mind. In any Capitalist society consumers are taught from cradle to grave to always get the best 'deal' they can, and NO DEAL beats free. I mention his comment only because it was the first time that I ever saw these 'self-appointed music industry experts' ever called on any of their malarkey by a real expert and the discussion was concluded in one sentence.

Castle: If you had to pick the most important issue of 2009 for songwriters, could you and if you could, what would it be?

Carnes: Same as every year for the last 10….Illegal downloading. If I may quote a real economist, "Nothing competes with free".

Castle: Is Rock and Roll dead?

Carnes: Yes, Rock and Roll is dead. The genre' was played out by the mid-seventies but it has survived in a zombie-like fashion for thirty years past its expiration date.

Part of the charm of Rock music is that practically anyone can play it. It can be written by amateurs and performed by teenagers without those difficult and expensive years of training that other forms of music require. Unfortunately that also makes it the perfect ‘corporate’ music. You can get kids who don’t need money to support families or pay house notes to sign contracts that no thinking adult would sign. This allows a record label to exploit ‘this year’s model’ for all they are worth until they reach the end of their contract and want to renegotiate for decent terms. Then they simply replace them with another teen idol. The simplicity of the music has allowed the major labels to treat recording artists like ‘temp workers’.

Hopefully with the decline and fall of the major label system we might finally get to see where the music really wants to go once it is released from this corporate death-grip.