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**COMMENTS OF THE SONGWRITERS GUILD OF AMERICA, INC. CONCERNING
THE ASCAP AND BMI CONSENT DECREES**

August 9, 2019

The following Comments are respectfully submitted to the US Department of Justice (DOJ) by the Songwriters Guild of America, Inc. (SGA) in answer to DOJ's call for comments regarding the Consent Decrees currently applicable to the American Society of Composers, Authors and Publishers (ASCAP) and to Broadcast Music, Inc. (BMI).

I. The Songwriters Guild of America, Inc. (SGA)

SGA is the longest established and largest music creator advocacy and administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Established in 1931, SGA has for 88 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the nation and the world. SGA's organizational membership numbers approximately 4500 professional music creators and their heirs, to whom the organization provides a variety of services including legislative advocacy, educational outreach, and optional copyright administration services.

Through SGA's affiliations with both Music Creators North America, Inc. (MCNA) (of which it is a founding member) and the International Council of Music Creators (CIAM) (of which MCNA is a key Continental Alliance Member), it is also part of a global coalition of music creators and heirs numbering in the many hundreds of thousands.

2. Introduction

To begin, SGA would like to thank DOJ for undertaking this very important review of the ASCAP and BMI Consent Decrees at a crucial moment in the history of the American music industry. As we have continually maintained over a period of decades, the Consent Decrees have for *eighty years* presented an impenetrable barrier preventing American music creators from realizing the full, fair market value of their performing rights. Today, in a maturing, digital music market in which electronic streaming has rapidly become the public's overwhelmingly preferred medium for consuming music, the inability to earn fair value for public performances (our most important source of royalty income) is continuing to cripple the ability of songwriters and composers to earn a living through our chosen profession.

The resulting damage to American culture, the American economy, and to music creators personally has been devastating, as huge numbers of talented and popular songwriters and composers have been forced to abandon their careers due to their inability to support their families on below-market royalty income. This trend is sadly expected to continue for some time even if the outdated and unfair provisions of the Consent Decrees are properly modified or eliminated in order to change course toward economic justice.

As DOJ is well aware, SGA has many times in the past made clear our positions in regard to the Consent Decrees, and we are appreciative that our voice has been heard. The comments we jointly submitted with our colleagues dated May 1, 2015 regarding the dangerous concept of "partial withdrawal" of rights from ASCAP, BMI and potentially other performing rights organizations (together, "PROs") by music publishers, for example, presented to DOJ what we continue to believe is crucial information concerning the problems facing the PROs and the music creator community when it comes to collective licensing and the urgent need for transparency. We hope that DOJ will once again consider the transparency imperatives described in those comments (which we have appended to this submission as Attachment 1) in this round of Consent Decrees review.

Moreover, while it is certainly true that the recently enacted Music Modernization Act has attempted to address some of the inequities rooted in the Consent Decrees concerning royalty rate issues, the legislation unfortunately does not address all of them. Likewise, it certainly does not fully resolve those problems related to transparency and withdrawal, including protection of what we consider to be the sacrosanct right of songwriters and composers to choose their own PROs and not have that decision-making capacity challenged or taken away. That “right of choice” will be one of the central concerns addressed by these Comments.

3. Endorsement of the ASCAP and BMI Joint Statement

With all of that in mind and subject to our further comments below, SGA would first and foremost like to express our firm support for the positions expressed by ASCAP and BMI in their statement dated February 28, 2019 (appended to this submission as Attachment 2). The very important points made in that joint statement, which we ask be considered incorporated in their entirety into these Comments, provide an excellent guide for DOJ to understand the scope and seriousness of the hardships faced by the US music creator community as a result of the continued imposition of the World War II-era Consent Decrees.

However, in addition to our support for the ASCAP and BMI joint position, we feel it is equally vital to express our concerns over the urgent need to ensure that any amendments and reforms made to the Consent Decrees include specific safeguards for music creators concerning their “right of choice.” The extraordinary importance of that issue is explained below.

4. Attempted, Unilateral Withdrawals of Performing Rights By Music Publishers, and the Music Creator’s “Right of Choice”

In the spring of 2016, SGA first became aware that certain music publishers had taken the highly unusual step of attempting to remove catalogs of compositions from ASCAP not only for themselves, but purportedly also on behalf of the songwriter and composer members of ASCAP

who had written the musical compositions contained in those catalogs. It was our position then, as now, that for over a century individual songwriters and composers have had and continue to have the right of choice --unless explicitly agreed otherwise-- to independently determine which PRO is to represent their share of performing rights in their own compositions.

That right of choice, which emanates principally from Section 106 of the US Copyright Act of 1976 (and its predecessor legislative provisions) granting to authors rights in their works from the moment of creation, is embedded as deeply in music publishing community custom and practice as any principle of law governing the US and global music industry. It has, in fact, been perhaps the single most important safeguard of the interests and incomes of US music creators for 100 years or more, and is arguably responsible in significant part for the extraordinary success across the world's music markets of America's songwriters and composers for that entire period--to the additional, derivative benefit of American music consumers as well as independent and vertically integrated music publishing and recording companies.

The right of music creators to rely on their performing rights societies to protect their most important stream of income from interruption and invasion by either copyright users *or* assignees has likewise, in many cases, been the principle element that ensures those creators' financial security, and as a result, their career longevity and creative output. Songwriters and composers ranging from Irving Berlin, Duke Ellington, Cole Porter and Peggy Lee to Chuck Berry, Bruce Springsteen, Cardi B, and Beyonce have all shared one thing in common as they have pursued their careers as music creators: the right and ability to control their share of performing rights in their own creations.

So firmly and completely has this tenet of a creators' right of choice been accepted among music publishers that since at least the 1940s, virtually every American music publishing firm of note has operated two or more separate entities --one solely affiliated with ASCAP and another with BMI-- for the express purpose of accommodating the decisions of songwriters and composers to select their own PRO. That decision to affiliate with one's PRO of choice typically pre-dates entering into publishing agreements of any kind by the music creator, and from the very start of the songwriter/composer's career, he or she regards that PRO as his or her "home" in the music community. As a result of SGA's long history of cataloging music publishing agreements on

behalf of its members, we can also say with authority that the creators' right of choice is also nearly always incorporated, directly or by implication, into the contractual language of every music publishing agreement signed by an American songwriter and/or composer.

Under this longstanding custom and practice, the creators' right of choice has also been a key factor in fostering competition between ASCAP and BMI (and between and among their subsequent competitors). This has yielded not only a far more efficient system of collective licensing in the United States, but has additionally provided badly needed economic benefits, incentives and intellectual property value for creators by fostering a demand for their "writer's share" of public performing rights often met with offers from PROs of advances in exchange for their initial affiliations and renewals.

With this historical background in mind, on June 1, 2016, SGA, the Society of Composers and Lyricists (SCL), the Council of Music Creators (CMC), Music Creators North America (MCNA), the European Songwriter and Composer Alliance (ECSA), the International Council of Music Authors (CIAM), and several other music creator organizations sent a letter to the US PROs ASCAP, BMI and SESAC requesting that the right of choice of every music creator to select his or her own PRO be respected. The relevant portions of that letter are as follows:

As you are aware from past correspondence between us, the global songwriter and composer community is greatly concerned by recent actions of individual music publishing companies that purport to have the authority to unilaterally withdraw certain rights, compositions, and catalogs from representation by the American performing rights organizations. Some of these companies have openly asserted that they control and may exercise such rights of withdrawal without the need to seek permission from, engage in consultation with, or even give notice to the music creators whose works are the subject of such withdrawals.

We dispute the exercise of these alleged "rights of withdrawal" by music publishers until their contractual authority to do so is actually proven, and we have explicitly reserved the rights of our constituents to independently object, whether they are US writers who believe their contractual rights prohibit such withdrawals without their prior, express

permission, or non-US creators whose works are exclusively assigned at the time of creation to their local PROs.

On April 1, 2016, Billboard Magazine reported that one of the so-called "majors" (and perhaps other publishers), had withdrawn and switched its production catalogs from one US PRO to another on a strictly unilateral basis. Not only was permission from the affected music creators not sought, not a single one of the songwriters or composers whose works were contained in such catalogs was notified of the withdrawal by the publisher, or by either of the affected PROs, until after the date upon which such withdrawal was purportedly effectuated....

It is our firm belief that publishers do not possess the unfettered authority to choose the PRO that administers a creator's work, regardless of whether any or all of that work is commissionable (i.e. Work For Hire), without clear, demonstrable and individualized proof of such authority. Moreover, we can conceive of no situation that would eliminate the need or duty of any PRO to timely disclose to affected writers and creators prior to the date of effectuation of such alleged withdrawal, receipt from a publisher of a unilateral notice of withdrawal of a work.

Our views are underscored by our knowledge that ASCAP, BMI, and SESAC are signatories to the CISAC Professional Rules for Music Societies, which stipulates that every CISAC organization must "conduct its operations with integrity, transparency and efficiency." We don't believe that non-transparency to affected writers, in regard to receipt of notices of unilateral withdrawal of works, is in accord with this stipulation. Furthermore, the exclusive assignment of the rights of non-US songwriters and composers to their local PRO would seem to eliminate automatically the ability of a music publisher to effectuate a withdrawal of such foreign music creators' rights and/or works from your organizations.

In light of the foregoing, we respectfully request that ASCAP, BMI, and SESAC immediately cease any action to effectuate any music publisher's claim of a right to unilaterally withdraw material from your control until such time as the publisher or

publishers in question have completely established their legal authority to do so on a case by case basis as to individual creators and individual works.

The bottom line for composers and songwriters in regard to their “right of choice” concerning PRO affiliation cannot be more obvious. All the changes in the world to improve the ASCAP and BMI Consent Decrees fashioned by DOJ will be rendered a nullity to members of the music creator community if immediately following such changes taking effect, their memberships can be unilaterally terminated by music publishers claiming --but not compelled to demonstrate-- an unambiguous right to do so. Stated another way, should any modification of the Consent Decrees permit publishers to force creators to withdraw from the PRO with which the creator has affiliated without regard to the creator’s right of choice, SGA respectfully asserts that the government will be taking away valuable rights of creators without due process or just compensation.

It would be hard to overestimate the frustration, anger and loss of a songwriter or composer upon learning that his or her publisher (or worse, the subsequent purchaser or assignee of such publisher about whom the creator may know nothing) is presumptively in a position to terminate that creator’s membership in his or her PRO. Many creators have already expressed fear that such action on the part of music publishers would represent yet another step toward diminishing the value of performing rights to songwriters and composers, leading eventually to the unprecedented collection of the writers’ share of performing rights directly by publishers and the use of such royalties to offset advances and expenses—something that has rarely if ever been done in either the United States or in any other jurisdiction throughout the world.

This situation would be particularly onerous because those original royalty advances were calculated taking into account that the writer’s share of performing rights would *not* be available for recoupment. Permitting such forced, unilateral termination at the discretion of a publisher would doubly penalize creators—they did not receive an advance that included the writer’s share of performances, but will have advances recoupable from other streams of income recouped from the very writer’s share of monies that was excluded from the calculation. The inevitable result of such a disastrous turnabout in business practice would be a death blow to a substantial percentage of songwriter and composer careers, present and future.

Another potential consequence of such a radical change in US music publishing industry practice could well be that the remaining American songwriters and composers would seek to affiliate exclusively with foreign PROs, since in many foreign jurisdictions the creators' right of choice regarding exclusive assignments of rights to PROs is given far stronger legal protection. The economic damage to the American music industry caused by such a trend would be as serious as it is predictable. And ironically, with the controversial ability of music publishers to directly license performing rights outside of the PRO structure firmly established in the US, the attempted scuttling of the creators' right of choice in the US appears to be totally unnecessary, absent an intention on the part of music publishers to create a completely opaque and un-monitorable environment when it comes to performing rights.

Finally, but in no way less worrisome, is the possibility that by doing away with the right of choice, the major US music publishers will each subsequently attempt to withdraw their entire catalogs from ASCAP and BMI, including the rights of their affiliated composers and songwriters. This scenario would create an extreme imbalance in the marketplace, leaving not only music creators at the mercy of their publishers in regard to the unilateral termination of their protective PRO affiliations, but also condemning ASCAP and BMI to compete against companies with market shares equal to or exceeding their own, but unhindered by governmental oversight or regulation. The negative effects that would be brought about in such an uncompetitive environment are, once again, as obvious as they are toxic to market health.

SGA respectfully suggests that avoidance of such an unfortunate and unnecessary set of scenarios should be an important focus of DOJ's inquiry as it conducts its review of the ASCAP and BMI consent decrees, and urges DOJ to consider these caveats in devising its future plans and actions.

5. Conclusions

SGA once again thanks DOJ for this opportunity to submit these Comments. We hereby reiterate our support for the ASCAP and BMI positions set forth in Attachment 2, as augmented

by our suggestions concerning additional transparency safeguards and protections for the “right of choice” of all music creators concerning their PROs.

Respectfully submitted,

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cc: Charles J. Sanders, Esq.

The Board of Directors of the Songwriters Guild of America, Inc.

The Board of Directors of Music Creators North America, Inc.