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Via Online Submission
September 11, 2014

Jacqueline C. Charlesworth,
General Counsel and Associate, Register of Copyrights.
Library of Congress
Copyright Office
101 Independence Ave., SE
Washington, DC 20559-6000

Re: Music Licensing Study: Second Request for Comments
Federal Register Vol 79 No 141 42833

Dear Ms. Charlesworth,

I was honored to participate in the Nashville roundtable discussions on June 4th and 5th of this year, which form part of this Music Licensing Study.

On behalf of Modern Works Music Publishing and the composers it represents, I am pleased to submit these further comments in response to the request cited above.

As an administrative agency for composers, we endeavor to recommend optimal policies that do not favor licensors at the expense of licensees, or vice versa. We hope that the following comments contribute to a reconciliation of positions that will eventually form the basis of new copyright legislation.

We begin with two overarching policy recommendations that inform our answers to the published questions.

First, Congress should expand the authority of ASCAP and BMI.

We believe that the diverse views and recommendations expressed in the Music Licensing Study can be ultimately reconciled to all parties' satisfaction, and for the public good, if Congress expands the mandate of collective copyright agencies, particularly ASCAP and BMI (the "PROs").

ASCAP and BMI are in a superior position to administer rights under modernized copyright statutes because:

- They have operated successfully on behalf of their composers and publishers for a century, and they have done so in an essentially not-for-profit manner by fixing their administrative costs as a percentage of revenue;
- They control 95% of the marketplace for musical works;
- They maintain the most frequently updated, detailed, and publically accessible databases of interested-party claims to musical works in the industry;
- They safeguard a longstanding policy of paying 50% of disbursements directly to composers and 50% to their publishers (about which more below);
- They have consistently invested in their infrastructure to make licensing more efficient;
- They provide resources and advice to musicians and music businesspeople, and facilitate networking between different corners of the industry;
- They have well-established, reciprocal relationships with foreign collective rights organizations;
- They have complied with consent decrees for decades, thus accelerating licensing for the public good.

An expanded mandate will require a rewriting of the current consent decrees, and should include the following:

- The right for ASCAP and BMI to negotiate and issue nonexclusive licenses for all exclusive rights under the current §106, including but not limited to mechanical rights and certain synchronization licenses.
- The right for ASCAP and BMI to license performance rights in sound recordings, including digital rights, and any terrestrial broadcast rights that may be granted by future law to featured artists and sound recording copyright holders.
- The right for ASCAP and BMI to negotiate so-called "bundled" licenses of various rights under a blanket system.

As the collective rights organizations' mandates are expanded, we also envision a simplification of the formula for payments disbursed, as follows:

25% to composers (and lyricists)
25% to publishers
25% to performing artists
25% to labels

Composers and performing artists are equally important to a work's success in the marketplace. Similarly, publishers and labels take independent but equally

important risks in promoting new works. The above allocation of royalties assumes that the PROs will eventually be bundling rights held by each of these licensors and that, even when rights are licensed separately, the aim of the PROs will be to assign royalties in these proportions relative to the total amount of distributable funds in a period.

Composers and performing artists would receive their payments directly, and those revenue streams would not be collectable by their agents (publishers and labels) without a written assignment that would be revocable and time limited.

Congress should also appoint regulators at the Copyright Office to ensure that:

- ASCAP and BMI are subject to independent and publically available financial audits, as well as audits of specific license procedures.
- An ombudsman is made available at the Copyright Office to mediate, and perhaps arbitrate, complaints and concerns of composers, publishers, and licensees who interact with the PROs, with such a framework for alternative dispute resolution being a requirement prior to initiating any lawsuits.

The recommended regulatory offices should be funded out of PRO revenue in order to be self-sustaining, but the staff should be independently appointed to prevent conflicts.

Other specialized collective agents—such as the Harry Fox Agency, SESAC, and SoundExchange—may become eligible to compete with ASCAP and BMI if they agree to operate in accordance with consent decrees and fixed administrative margins, effectively "signing on" to be regulated by Congress and the Copyright Office.

Second, compulsory licensing should be preserved but redesigned

Compulsory licensing, consent decrees, and rate-setting boards serve as reasonable restraints on copyright monopoly, and should be preserved.

The current §115 should not be construed as an obstruction to "free market" negotiations, or as an archaic "piano-roll statute," but as an *antitrust provision* that accelerates the entry of musical works into the public sphere, while ensuring that copyright holders are paid.

It is beneficial that the §115 statutory rate creates a *floor* for mechanical royalties. The criticism that the statute also creates a *ceiling* for royalty payments—which limits the earnings of composers and publishers—is *not* the most important reason for the dysfunction of our current mechanical licensing system. Rather, the pass-through custom of mechanical licensing has been primarily responsible for the erosion of earnings by composers and publishers. A direct, point-of-sale collection of

mechanicals will ensure better compliance. Also, the proportion of income collected by composers and publishers compared with other interested parties (labels and performers) should be dramatically increased per unit of sale or performance. We believe that none of the foregoing recommendations is incompatible with antitrust measures that serve as the logical counterweight to the control of copyright properties.

In light of the preceding policy recommendations, we answer the specific questions in the notice of inquiry.

1. ***Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.***

It is crucially important that musical-work data not become a commodity of private firms (including but not limited to Google) but remain in quasi-public collective rights societies that have long histories of Congressional and judicial mandates.

The Congressionally mandated performing rights organizations—ASCAP, BMI, and SESAC—have been at the forefront of publically available databases of musical works on the Internet since the late 1990s. The PRO databases have traditionally constituted the first stop for prospective licensees to research a work's copyright holders.

If the PROs are given additional authority to license all rights under §106, then their already comprehensive databases can expand to include additional items, such as ISRC codes, which link underlying compositions with master recordings. The PRO databases have the advantage of building upon strong historical data provided by copyright holders, and the PROs have established their authority to serve as a data repository.

Alternatively, Congress could stipulate via statute that each works-registration entry at *any* agency database must be hyperlinked to the other agents responsible for licensing other exclusive rights. For example, an ASCAP work entry could display a link to the relevant page at the SoundExchange website that lists master recordings of that work. This would be a short-term solution that in the long run could prove problematic, as different databases would constantly have to be reconciled.

The Copyright Office should *not* take over the role of database management, because doing so is not self-sustaining (it would require tax dollars or administrative fees paid to a government agency) and could be construed as conflicting with the Berne Convention, which ensures copyright protection in the absence of formal registration.

2. *What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?*

ISWC codes for underlying copyrights and ISRC codes for master recordings are potentially the best identifiers for musical works and sound recordings. IPI numbers are assigned to stakeholders controlling rights in the underlying copyright (including but not limited to composers, lyricists, and publishers). Currently I am not aware of a standardized code for performing artists.

The assignment of ISWC, ISRC, and IPI codes is decentralized. It could be useful for the United States government (perhaps the Copyright Office) to assume such responsibility for works and recordings that originate—and interested parties who reside—in the USA.[1]

The universal adoption of such codes should be mandated by statute; *not* as a requirement for copyright protection (which might conflict with the Berne Convention), but as a condition of Congress granting authority to the collective rights societies under the Act.

3. *Please address possible methods for enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of non- usage-based forms of compensation (e.g., advances against future royalty payments and equity shares).*

Large firms, including music publishers and the PROs, are able to license their entire catalogs via "non-usage-based forms of compensation," such as advances or blanket license fees covering an entire repertory during a period of time in a certain territory.

Whether such fees are disclosed to individual composers, or the public in general, is less important than the fact that they generate significant cash flow for the firms, which helps *mitigate the risk* that some copyrights may not perform as well in the marketplace than others.

Since individual creators cannot manage risk as described above, large firms serve an important function in the health of the music business *provided that* they use their cash flow to foster and exploit the works they control. This principle can be compared to the way banks encourage economic growth through loans, rather than simply investing deposits for their own benefit.

Governmental regulation of risk management in the music business could find an analogy and precedent in the tax code, which requires private foundations to distribute a minimum investment return that is statutorily defined.[2] In the context of copyright, assignees could be required to "plow back" a percentage of gross

income as a dividend to creators. The analogy to the tax code is tenable if we view copyright law as an indirect government subsidy to creators.

4. ***Please provide your views on the logistics and consequences of potential publisher withdrawals from ASCAP and/or BMI, including how such withdrawals would be governed by the PROs; whether such withdrawals are compatible with existing publisher agreements with songwriters and composers; whether the PROs might still play a role in administering licenses issued directly by the publishers, and if so, how; the effect of any such withdrawals on PRO cost structures and commissions; licensees' access to definitive data concerning individual works subject to withdrawal; and related issues.***

The important role of the PROs in the music business cannot be understated, and the withdrawal of rights by large publishers will have a deleterious effect.[3]

If PROs are forced to compete with individual music publishers who intend to license performing rights directly, the PROs' health will be endangered. At the same time, it may be difficult to enforce compliance of compulsory licensing statutes if individual firms are able to negotiate private agreements.

The efficiency of blanket licensing as employed by the PROs has been described as follows:

> Suppose that before the [PRO] was formed, competition among copyright holders drove the price of individual licenses down to $1000 but there were [also] transaction costs borne by the licensee of $500. Suppose further that licensees would have been willing to pay up to $2000 for a license. Hence they received $500 of consumer surplus. A [PRO] that acquired exclusive licensing rights from its members might be able to charge users the full $2000 for the blanket license because it would have a monopoly…. If, however, the [PRO] acquires only nonexclusive rights, then the most it can charge is $1500… because users have the option of going around the blanket license and acquiring licenses directly from the copyright holder. Thus licensees are no worse off and the composers are better off, so there is a welfare gain that could not be achieved if the blanket license were prohibited as a form of price fixing (which it is).[4]

The withdrawal of rights from the PROs *en masse* would have the effect of deteriorating the revenue base and eliminating the welfare gain described above; but this can be offset by permitting PROs to license all rights under §106.

5. ***Are there ways in which the current PRO distribution methodologies could or should be improved?***

To the extent that distributions can be based on census data, rather than statistical samples, such census methodology should predominate. The problem is that a large

amount of tracked performances will not be payable, because the credit afforded to a single performance of a work may be a tiny fraction of a cent. In the current system, the sum of these undistributable amounts constitute a revolving fund that can be used for special awards and grants, as well as PRO administrative overhead. Both forms are important ways in which PROs support artists.[5]

6. ***In recent years, PROs have announced record-high revenues and distributions. At the same time, many songwriters report significant declines in income. What marketplace developments have led to this result, and what implications does it have for the music licensing system?***

PRO revenue growth is still driven by the largest, traditional licensees (such as network and cable television, and large radio conglomerates), whereas royalty distribution is affected by the number of traceable performances.[6] An increase in the latter fractures the available cash into very small pieces.

Both performing rights and mechanical rights are affected by (i) the changing marketplace in favor of digital streams and (ii) the current statutory formulas for calculating payment of on-demand streams. The proliferation of digital services that allow on-demand streams has led to a quantifiable "long tail" of small numbers of streams of individual works. This, in conjunction with the current statutory mechanical formula for streaming, has led to an enormous increase in very small royalty allocations per use.

Members have pressured PROs to account for performances on a census basis for many years. Prior to the advent of the digital music marketplace, PROs could realistically counter that each performance could not be reasonably tracked. Given advances in technology, the pressure to pay on each performance will not subside. By expanding the mandate of the PROs to derive revenue from more sources, their ability to continue to license efficiently can continue.

7. ***If the Section 115 license were to be eliminated, how would the transition work? In the absence of a statutory regime, how would digital service providers obtain licenses for the millions of songs they seem to believe are required to meet consumer expectations? What percentage of these works could be directly licensed without undue transaction costs and would some type of collective licensing remain necessary to facilitate licensing of the remainder? If so, would such collective(s) require government oversight? How might uses now outside of Section 115, such as music videos and lyric displays, be accommodated?***

We emphatically do <u>not</u> recommend the elimination of compulsory licensing for the reproduction of musical works.

The above inquiry begs the question of §115's proposed elimination. A compulsory mechanical license is one reasonable restraint against copyright monopoly and redounds to all creators in its guarantee of income.

Far more reasonable than eliminating compulsory mechanical licensing is a renovation of the statute that removes those intermediaries and associated costs that are no longer technologically necessary to effect transactions.

First, the so-called "pass-through" model, which has historically allowed record labels and master recording licensees to collect and distribute mechanical royalties, should be eliminated by new language in the statute. Mechanical royalties should be collected and recorded at the point of sale—e.g. when a song is downloaded or streamed—and that royalty should be remitted to the collective rights societies authorized by Congress. This will greatly increase the speed of mechanical royalty cash flow and prevent the (occasionally specious) deductions that have historically diminished payments by record labels to composers and publishers in the USA. The foregoing recommendation finds widespread precedent in custom and practice outside the USA.

Second, compulsory mechanical rates should be significantly increased as a proportion of total revenue derived from a sale. Fifty percent (50%) of sales revenue should be allocated to composers and publishers with that percentage inclusive of other exclusive rights that may be implicated. Thus, content that includes video imagery would be covered under this compulsory licensing proposal (in addition to necessary synchronization license fees). Further proposals for synchronization licensing in various contexts appear below.

8. ***Are there ways in which Section 112 and 114 (or other) CRB rate-setting proceedings could be streamlined or otherwise improved from a procedural standpoint?***

New media and new technology have posed the greatest challenges to setting rates, as the CRB and private actors look for reasonable precedents. Rate-setting boards are among the antitrust remedies attached to copyright law. But it is important to note that "another form of antitrust remedy involves merely *potential* judicial rate setting."[7] It may be desirable for rate-setting to be subject to a two-step process, the first of which is a test to determine whether an existing rate structure (such as the mechanical rate) can simply be applied to the new medium by analogy. A temporary rate can be set for a period of three years, during which time the major licensors and licensees must privately negotiate a reasonable rate that begins in year four. Only if private parties are unable to agree upon the rate at the conclusion of the experimental period would the CRB dictate it. This proposal would be predicated on a complementary elimination of the so-called "safe harbor" rule of the DMCA.

9. ***International licensing models for the reproduction, distribution, and public performance of musical works differ from the current regimes for licensing musical works in the United States. Are there international music licensing models the Office should look to as it continues to review the U.S. system?***

Several aspects of ex-US custom and practice should be closely reviewed for potential benefits, as follows:

(i) Collective rights organizations as quasi-public cartels. International copyright collectives work especially well as affiliates of government. Implicit in the policy recommendations made here is the notion that a stronger mandate should be granted to collective rights agencies with Congressional oversight.[8] Most of the burden of regulatory oversight can be allayed by an overhaul of consent decrees and compulsory licensing schemes, so that a cartel does not unreasonably impede the licensing of works.

(ii) Collection of Mechanicals by Collective Rights Societies. Only after obtaining a license from a society and the creation of a mechanical royalty deposit account would a record label or digital service be permitted to begin sales. Mechanicals would then be deposited at the societies upon pressing, or at the point of a digital sale. The foregoing is in contrast to the current US practice whereby record labels can effectively negotiate a complete waiver of mechanical royalties.

(iii) Blanket Synchronization Licensing in Certain Contexts. In much of the world outside the USA, synchronization rights are licensed in conjunction with performing rights, *provided that* the use is ephemeral (i.e. broadcast only), distributed only within the territory, and that no commercial product endorsement is associated with the use. This increases the availability of music for so-called background uses in dramatic film and TV programs, which currently face the highest transaction costs despite limited production budgets. [9]

Respectfully,

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Managing Partner, Co-Founder
Modern Works Music Publishing

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[1] For descriptions of ISWC, ISRC, and IPI numbers please see:

- *Frequently Asked Questions*. ISWC International Agency, n.d. Web. 11 Sept. 2014. http://www.iswc.org/en/faq.html;
- "General." *ISRC*. N.p., n.d. Web. 11 Sept. 2014. https://www.usisrc.org/faqs/general.html;

- *Homepage*. N.p., n.d. Web. 11 Sept. 2014. <http://www.ipisystem.org/SUISASITES/IPI/ipipublic.nsf?Open>.

[2] "26 U.S. Code Â§ 4942 - Taxes on Failure to Distribute Income." *LII / Legal Information Institute*. N.p., n.d. Web. 11 Sept. 2014. <http://www.law.cornell.edu/uscode/text/26/4942>.

[3] In 2013, 52% of music publishing revenue in the USA was derived from performing rights royalties as distributed by the PROs. See "What's New." *NMPA*. N.p., n.d. Web. 11 Sept. 2014. <https://www.nmpa.org/media/showwhatsnew.asp?id=112>.

[4] Landes, William M., and Richard A. Posner. *The Economic Structure of Intellectual Property Law*. Cambridge, MA: Harvard UP, 2003. 386. Print.

[5] See for example: "ASCAP Plus." *Www.ascap.com*. N.p., n.d. Web. 11 Sept. 2014. <http://www.ascap.com/members/ascaplus.aspx>.

[6] In 2012, roughly 50% of ASCAP's total revenue was derived from traditional, domestic radio and television sources. See "Annual Report." *Www.ascap.com*. N.p., n.d. Web. 11 Sept. 2014. <http://www.ascap.com/about/annualreport.aspx>.

[7] Daniel A. Crane. 76 Antitrust L.J. 307 Bargaining in the Shadow of Rate-Setting Courts. P1.

[8] See for example the legal basis of GEMA: "GEMA." *Wikipedia*. Wikimedia Foundation, n.d. Web. 11 Sept. 2014. <https://en.wikipedia.org/wiki/Gesellschaft_f%C3%BCr_musikalische_Auff%C3%BChrungs-_und_mechanische_Vervielf%C3%A4ltigungsrechte#Legal_Basis>.

[9] For more detail on foreign synchronization licensing please see: Coleman, Dan, and Keith Hauprich. "That Sync-ing Feeling." *NYSBA Entertainment, Arts, and Sports Law Journal* 19.3 (2008): 17-18. Print.