Comments from

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on

"Music Licensing Study"

before the

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Library of Congress

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The Nashville Songwriters Association is responding only to some questions where we can offer the best input to the U.S. Copyright Office based on NSAI's mission and expertise.

QUESTION #3

PLEASE ADDRESS POSSIBLE METHODS FOR ENHANCING TRANSPARENCY IN THE REPORTING OF USAGE, PAYMENT AND DISTRBUTION DATA BY LICENSEES, RECORD LABELS, MUSIC PUBLISHERS AND COLLECTIVE LICENSING ENTITITES, INCLUDING DISCLOSURE OF NON-USAGE-BASED FORMS OF COMPENSATION (e.g. ADVANCES AGAINST FUTURE ROYALTY PAYMENTS AND EQUITY SHARES).

Exclusive publishing agreements signed by songwriters/composers differ among publishing companies. Varying degrees of transparency exist. Some publisher statements furnish detailed information indicating where payments originated. Others have less detail. Some publishing companies report and distribute settlement dollars, advances, bonuses, fees, unclaimed funds and other such monies. Some do not. It should be mandatory that such payments be disclosed by record labels and music publishers. Performing rights societies offer a more consistent degree of transparency on their payment statements.

There are too many examples of advances, bonuses, etc. that are received by publishing companies and are never paid to the songwriter or composer. While such payments may be labeled an advance, bonus, etc., the money is being generated to the publisher for a group of songs over a specific time period. Songwriters who don't share in such funds because the payments are not attributed by titles should receive a pro rata disbursement though earnings generated by the percentage of earnings a writer generated for their respective companies during the time period of their exclusive songwriter/publisher agreements -- calculated within the time period covering payment of advances, bonuses or other such payments. These disbursements should be allocated based on the splits defined by time period in each exclusive songwriter/composer publishing agreement.

Under the present system songwriters who may want to audit a publishing company can find the process prohibitively expensive. Additionally, a songwriter or composer who initiates an audit can jeopardize the writer/composer's business relationship and future agreements with a specific publishing company.

NSAI has long stood for better dispute resolution mechanisms in the current licensing/collection marketplace and with potential future incarnations of music licensing and collection entities. Dispute resolution bodies should include representatives who are songwriters. Such bodies should be able to audit and/or have necessary access to pertinent records/information in order to make appropriate distribution determinations. In the event of direct licensing, the "writers share" (a portion of music publishing royalties defined in individual songwriter-music publisher agreements) designated for the songwriter or composer, should be

paid directly to the creator. Congress, the U.S. Department of Justice, the U.S. Copyright Office or any relevant agency should consider rules for royalty collection bodies, whether it is a publisher who directly licenses, or a future collective licensing agency, being structured similarly to not-for-profit entities.

The present system of mechanical royalties "passing through" record labels should change to a system of direct payments to songwriters and music publishers. Royalties due to songwriters and music publishers collected by record labels from third party providers are paid with little or no information. How can payments be tracked accurately when statements do not identify the third-party provider? If Section 115 is not eliminated, transparency should be required for these and all pass-through payments.

On another front, when it comes to transparency of proprietary data by music licensing collection agencies, such as ASCAP, BMI or any future collective licensing incarnation, great caution must be exercised. If all metadata were publicly accessible, to an Internet service provider for example, such a company could easily begin licensing music with no protections built in for songwriters. Songwriters and creators could suffer terrible consequences under such a scenario given such market power. This is a separate issue from transparency/rights for the creators who are owed royalty income.

QUESTION #4

PLEASE PROVIDE YOUR VIEWS ON THE LOGISTICS AND CONSEQUENCES OF POTENTIAL PUBLISHER WITHDRAWALS FROM ASCAP AND/OR BMI, INCLUDING HOW SUCH WITHDRAWALS ARE COMPATIBLE WITH EXISTING PUBLISHER AGREEMENTS WITH SONGWRITERS AND COMPOSERS; WHETHER THE PROS MIGHT STILL PLAY A ROLE IN ADMINSTERING LICENSES ISSUED DIRECTLY BY THE PUBLISHERS, AND IF SO, HOW: THE EFFECT OF ANY SUCH WITHDRAWAL ON PRO COST STRUCTURES AND COMMISSIONS; LICENSEES' ACCESS TO DEFINITIVE DATA CONCERNING INDIVIDUAL WORKS SUBJECT TO WITHDRAWAL, AND RELATED ISSUES.

The U.S. Department of Justice should sunset or dramatically alter the ASCAP and BMI Consent Decrees to essentially allow them to operate in a free market environment when it comes to negotiating licensing and collecting royalties. ASCAP and BMI should be able to license and collect all royalties, including mechanical royalties, which their members wish them to represent. If such changes are made, arbitration, rather than the present rate court structure, should be utilized to resolve disputes. If DOJ does not institute such changes in the Consent Decrees, Congress should.

The current system of broadcast radio rate negotiations and the rate court process has resulted in what have been termed "overpayments" to PRO's from broadcasters, resulting in either a cutback on current distributions, or holding back a percentage of royalties to cover the

difference. Sunsetting Consent Decrees in favor of a free market system, coupled with an arbitration system versus a rate court, would eliminate such payment uncertainties for songwriters.

In the event such changes are not made, and music publishers begin a partial or whole withdrawal of rights from ASCAP and BMI, there is a near certainty that those collective licensing models would suffer greatly or collapse entirely. If major music publishers directly license and collect the digital performance royalties easiest to accomplish, it is unlikely that ASCAP and BMI could continue to exist on what is left, at least with the same efficiency and cost. Most music publishers lack the infrastructure to license and collect performance royalties from bars, restaurants or live performance venues. Publishers who could not utilize direct licensing would be left with either no collective licensing alternative or ones that would be very costly and reduce income for them and many songwriters and composers.

There are two issues to address. First is the ability for either ASCAP and BMI, or alternatively music publishers, to negotiate fair rates for songwriters and composers under a willing buyer-willing seller model.

Some existing publisher agreements with songwriters and composers allow publishers to directly license, others do not or are absent on this issue. How can songwriters/composers who are self-published, or have regained the rights to their songs and administer them outside a publishing agreement, competitively utilize direct licensing unless a collective agency such as ASCAP and BMI acts on their behalf? Can smaller publishing companies effectively negotiate the same rates as publishers with greater market shares through direct licensing? How efficient can direct licensing be if music publishers cannot represent any title written or co-written by a member of a foreign performing rights society? How efficient can direct licensing be if each music service must deal individually with each music publisher instead of a collective society? How efficient can direct licensing be when you consider many songs have co-writers, often multiple co-writers, each represented by different publishers? In such circumstances ASCAP and/or BMI can still play a vital role in administering direct licenses. The performing rights societies still have the most efficient systems in order to carry out such administration in a cost effective and timely manner.

Second is the issue of rules that would govern the distribution of funds negotiated under wholly or partially withdrawn rights. ASCAP and BMI essentially act as not-for-profit collection arms for songwriters and composers. The issues of the ability to negotiate in a free market, and the rules governing how funds are distributed, must be considered separately.

If other licensing/collection agencies evolve for either whole or partial administration of songwriters' rights, the not-for-profit concept should be considered essential. At minimum future licensing entities should be subject to strict rules of transparency and direct distribution of performance royalties to songwriters, including a dispute resolution body, independent audits or some kind of arbitration that would give songwriters an equitable voice in ensuring all

advances or similar payments resulting from direct licensing agreements are being fairly distributed to songwriters/composers.

Consent Decrees, if continued, should allow for denial of certain rights. Such latitude is already possible for record labels and artists in the music industry, to screenwriters, book authors and other creative copyright holders. Free market choice is necessary to allow creators to make strategic career decisions. This includes denying licenses to certain users or the ability to make exclusive deals for a period of time. Garth Brooks recently announced that his new album would finally be available in digital format, a format he did not choose to utilize for earlier records. He chose specific businesses such as Wal-Mart for previous releases as part of a strategy that proved to be financially beneficial to him. This example is illustrative of inequities between the underlying work and sound recording copyrights. If a music licensing-collection agency could benefit its songwriter-composer members by licensing rights only to specific providers, or making exclusive deals for a given period of time, they should be allowed that freedom.

QUESTION #5

ARE THERE WAYS IN WHICH THE CURRENT PRO DISTRIBUTION METHODOLOGIES COULD OR SHOULD BE IMPROVED?

Songwriters/composers often wait three quarters, or nine months to be paid. This is due to certain payments trickling in over a period of months. Other payments are collected more quickly, particularly from digital sources. Any cost effective distribution of monies which are collected by performing rights societies or any future licensing collection entities which can be paid out more quickly would be welcomed.

The delay in distribution of foreign performance royalties takes even longer, often 21 months or longer. Some of this may be due to the foreign societies, but anything the U.S. Copyright Office can do to encourage reciprocity and more timely royalty payments would be valuable.

QUESTION #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?

While there is more performance royalty money being collected by ASCAP and BMI, and both have more songwriter members, those facts are statistically misleading. There are many more payees to ASCAP and BMI, from traditional businesses to Internet sources and digital companies. Many, many more writers receive small royalties, primarily from a variety of digital services, but they do NOT count those royalties as their primary source of income. YouTube is an example of where non-professional songwriters and performers may receive very small payments. Such individuals can join a performing rights society but are not considered professional songwriters or composers in the traditional sense.

More mechanical and performance royalties are going to artist songwriters at the expense of non-performing songwriters and composers. Record labels now employ a 360 contract model which requires an artist to share sources of income that were not traditionally part of the agreement between a label and artist. This can include music publishing, resulting in artists being economically forced to include more of their own songs on albums.

Record labels are releasing fewer singles so songs stay on charts longer. Therefore, a hit single can produce significantly more broadcast airplay performance income for both the artist-writer and non-performing songwriter for a single release. However significantly fewer songs are being released than compared to a decade ago. Playlists are also much smaller. Songwriters who earn more performance income for a song are earning income on considerably fewer releases. Additionally, songwriters who could earn meaningful income for a song lower on the singles charts now earn much less for songs achieving the same chart position.

Mechanical royalties have decreased and continue to decrease by an alarming rate. Many songwriters report a reduction of 60 to 70% or more. As streaming becomes more popular, sales and performance royalty income per songwriter continues to decline. Twenty years ago there were between 3 and 4 thousand music publishing deals available for songwriters in Nashville. Today there are somewhere between 3 and 4 hundred. One major reason is dramatically less income from album cuts not released as singles. A few years ago a non-single cut on an album with high sales volume produced greater income for many songwriters. Today album cuts, with a few rare exceptions, produce very little income.

Income from a single synchronization agreement is also significantly lower. With hundreds of television networks and online content providers compared to just a few years ago, more synch licenses are issued, but for a much lower amount per use.

The “oldies” format is more popular than ever, but royalties to those songwriters are not for new creations by currently working songwriters or composers.

QUESTION #7

IF THE SECTION 115 LICENSE WERE TO BE ELIMINATED, HOW WOULD THE TRANSITION WORK? IN THE ABSENCE OF 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 ACCOMODATED?

Non-performing songwriters are threatened with extinction under the current Section 115 compulsory licensing rules and the outdated ASCAP and BMI Consent Decree models. Those writers and composers have scraped by while losing income through the advent of file sharing, Internet piracy and music streaming becoming the new delivery model. At tens of thousandths of a penny per stream for Internet radio, the non-performing songwriter cannot survive. Some of America's greatest performers, such as Frank Sinatra, Elvis Presley and Madonna depended on non-performing songwriters and composers for the music that shaped their careers.

In Nashville and across the United States there are alarmingly fewer songwriters than there were just a few years ago. Many songwriters who once had exclusive publishing deals no longer have them. NSAI's best guestimate is up to 80% of songwriters in Nashville who earned a fulltime living from royalty payments are no longer signed to a publishing deal and no longer receive royalties from new titles. This is true across the United States.

NSAI strongly supports elimination of Section 115. We favor a willing buyer-willing seller free marketplace approach to determining mechanical royalty rates. We believe the underlying work is more valuable that the present 9.1 rate established by the Copyright Royalty Board. In the synchronization marketplace, for example, the underlying work and the sound recording copyrights typically share an equal value. The idea of a compulsory license is antiquated in the modern era of digital music delivery. The compulsory license was supposed to create a "basement" rate for mechanical royalties for songwriters. Instead the compulsory license effectively became a tool to establish a mechanical royalty "ceiling" for songwriters. The fact that only the United States and Australia continue to employ a compulsory license illustrates its ineffectiveness in a digital delivery world.

Former U.S. Register of Copyrights Marybeth Peters drew the same conclusion: "The more time I have spent reviewing the positions taken by the music publishers, the record companies, the online music services, the performing rights societies and all the other interested parties, the more I have become convinced that as a matter of principle, I believe that the Section 115 license should be repealed and that licensing of rights should be left to the marketplace, most likely by means of collective administration."

The Nashville Songwriters Association strongly supports THE SONGWRITER EQUITY ACT introduced by Reps. Doug Collins and Hakeem Jeffries, legislation that would allow the real market value of the underlying work to be established based on marketplace evidence. THE SONGWRITER EQUITY ACT, however, is only a partial solution and a starting point for a broader conversation in Congress. The best solution is elimination of Section 115 in favor of a free market.

The Recording Industry Association of America has proposed: "that RIAA hopes to work through with its industry partners (a proposal that) would encourage blanket licenses that include all the necessary rights instead of multiple licenses from multiple entities with overlapping rights," and it includes a suggestion that publishers and songwriters be compensated with rates negotiated and agreed to by industry partners rather than those set by courts".

While the concept of a more efficient licensing system is something everyone agrees on, the RIAA proposal would basically eliminate the ability of music publishers or self-published songwriters and composers to initiate or directly negotiate their own agreements.

The most efficient path to digital service providers obtaining necessary licenses would be to allow the PRO's to license and collect mechanical royalties. Other uses outside of Section 115 could also be licensed through PRO's.

If PRO's are allowed to license royalties beyond performance royalties, arbitration, rather than a government controlled entity such as the Copyright Royalty Board, is a much more efficient and fair mechanism to oversee disagreements and problems.

QUESTION #10

PLEASE IDENTIFY ANY OTHER PERTINENT ISSUES THAT THE COPYRIGHT OFFICE MAY WISH TO CONSIDER IN EVALUATING THE MUSIC LICENSING LANDSCAPE.

The music industry in the United States and around the world has changed dramatically in the digital era. NSAI reiterates the devastating impact those changes have had on professional non-performing songwriters and composers.

I became Executive Director of the Nashville Songwriters Association International (NSAI) in 1997. When I accepted this position, the songwriting profession in Nashville and around the United States was at its apex. There were several thousand professional songwriters in Nashville who earned a living writing songs that defined American culture. Those songs were one of our country's largest balance-of-trade export items and touched people's emotions at life's most important moments.

Things quickly changed. First came Internet music piracy and file sharing. Songs were essentially free to anyone who wanted them online. Getting an album cut was no longer a significant income source for songwriters since there were vastly fewer albums and sales on the remaining releases declined dramatically. Mechanical royalties fell by 70% or more for most songwriters.

The Nashville music industry has historically been located on three streets called "Music Row". After piracy and file sharing became prevalent, FOR SALE signs were so common that the Nashville Songwriters Association decided to create a poster to highlight the plight of the American songwriter. Those signs were so common that NSAI had to create two posters which still showed only a few of the buildings that once housed working songwriters… buildings where iconic songs had been written. The FOR SALE signs are no longer there. The buildings are now non-music industry related offices, condos or have been torn down.

Following the decline in mechanical royalties, songwriters prayed for a broadcast radio single in order to generate enough royalty income to feed their family. That revenue disappeared as streaming music became the new consumer model. Songwriters who had earned a few pennies from record sales or a broadcast radio performance, pennies that were split between co-writers and their music publishers, now earned micro-pennies through digital streaming. Once again, many more of America's great songwriters were forced out of the profession.

Continuing economic pressure dictated that even if the developing artist had limited writing ability, the remaining staff writers had to write with them to have any real chance of getting songs on their projects and making money. Approximately four thousand staff songwriting positions at Nashville music publishing companies dwindled to a few hundred.

Every day great songwriters come to my office, asking if I know of any possible opportunity. I do not because the opportunities no longer exist.

Digital delivery models continue to evolve while more great American songwriters fall by the wayside. Nashville has lost 80% or more of those who claimed songwriting as a fulltime occupation since the year 2000. This startling statistic alone demands changes in an antiquated royalty system. Consent decrees crafted in World War II could not have possibly anticipated the current and rapidly developing delivery mechanisms for music.

The fundamental question is whether the songwriter/composer's creation is a property right. Article I, Section 8 of the U.S. Constitution states the view of our Founding Fathers: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

If the song/composition is a property right, then that right should be subject to rates established in a free marketplace based on the willing buyer-willing seller principle.

Through the history of recorded and broadcast music in the United States a system evolved that eroded the property right of song and music creators through Congressional action, court cases

and through contracts and business practices within the music industry and by various distributors of music.

Many songwriters, composers and artists are subject to grossly unfair rules and deals, particularly in the digital era of music delivery. They really have no choice but to agree to an unfair framework if they want to have any chance of partnering with a company that can bring them compensation for their creations and performances.

There has never been a greater demand for music. NSAI believes that songwriters, composers and artists can be fairly compensated while the music "industry" and distributors are also able to make reasonable profits. All of this can happen while the music consumer is provided more music choices than ever at a fair price. A fair framework must be established now in order for everyone to benefit.

Our Founding Fathers believed authors deserved real economic opportunities and reasonable protection in a free market because they understood the promise of our new Nation was its ideas and intellectual creations.

THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL

ABOUT NSAI

The Nashville Songwriters Association International (NSAI) is the world's largest not-for-profit trade association for songwriters. NSAI was founded in 1967 by 42 songwriters including Eddie Miller, Marijohn Wilkin, Kris Kristofferson, Felice and Boudleaux Bryant and Liz and Casey Anderson as an advocacy organization for songwriters and composers. NSAI has around 5,000 members and 165 chapters in the United States and ten other countries.

The Nashville Songwriters Association International is dedicated to protecting the rights of songwriters in all genres of music and addressing needs unique to the songwriting profession. The organization recently created the first "group" copyright infringement insurance policy for songwriters and formed a partnership for affordable health care for its members.

The association, governed by a Board of Directors composed entirely of professional songwriters, features a number of programs and services designed to provide education and career opportunities for songwriters at every level.

NSAI owns The Bluebird Café, a legendary songwriter performance venue in Nashville, Tennessee. The Music Mill, at 1710 Roy Acuff Place in Nashville, where the careers of Alabama, Reba McEntire, Toby Keith, Shania Twain and Billy Ray Cyrus were launched, serves as headquarters for the Nashville Songwriters Association International.