GOVERNOR GREG ABBOTT

August 29, 2016

The Honorable Loretta E. Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Attorney General Lynch:

I write to express my disagreement with the U.S. Department of Justice's (DOJ) recent decision regarding the consent decrees in *United States v. Broadcast Music, Inc.*[1] and *United States v. American Society of Composers, Authors and Publishers.*[2] The Texas Music Office is housed within my office and is charged by law with promoting the Texas music industry. As the head of that office, I must object to the DOJ's position in these cases, which is both legally flawed and threatens to harm the music industry in Texas. I respectfully request that the DOJ reconsider its position.

The DOJ ultimately concluded that the consent decrees require Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) to offer only full-work licenses to their respective music repertoires, including those songs in which BMI or ASCAP only represent a fraction of the ownership rights. However, despite claims to the contrary, BMI and ASCAP have never offered full-work licenses to fractionally owned songs, and the consent decrees have never been interpreted by the DOJ to require that until now. This drastic change in course will have severe consequences for music artists and the music industry as a whole. Specifically, the DOJ's conclusion will inhibit collaboration between music artists, upend longstanding practices within the music industry and further reduce royalty payments to music artists.[3]

The DOJ claims that the plain language of the consent decrees does not permit it to reach any other conclusion. That is incorrect. The decree language on which the DOJ bases its conclusion states that BMI and ASCAP must grant to users licenses to "perform" the songs in their

[1] 64 Civ. 3787, 1994 WL 901652 (S.D.N.Y. 1994).

[2] 41 Civ. 1395, 2001 WL 1589999 (S.D.N.Y. 2001).

[3] These effects, along with many others, are explained in detail in the dozens of public comments the DOJ received during its review of the consent decrees. *See* https://www.justice.gov/atr/ASCAP-BMI-comments-2015.

respective repertoires. From the word "perform," the DOJ extrapolates an obligation that was never in the contemplation of the parties to the consent decrees and that runs counter to longstanding industry expectations. Consent decrees are not statutes to be construed based solely on their text. Instead, consent decrees are to be construed under the ordinary rules of contract interpretation. They should be interpreted in the context of the lawsuits from which they arise and in light of the expectations of the parties to those lawsuits. *See U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 237 (1975) (when interpreting a consent decree, it is proper to consider "the circumstances surrounding the formation of the consent" decree); *U.S. ex rel. Anti–Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, 712 F.3d 761, 767 (2d Cir. 2013) (reasoning that a consent decree should be read "in the light of the . . . intention of the parties as manifested" by the decree). There is no indication that these consent decrees were intended to address the issue of full-work licenses or that full-work licenses were even at issue in the underlying litigation. The DOJ's conclusion is based on a technical construction of the decrees' terms rather than a contextual understanding of the decrees' role in resolving discrete legal claims that had nothing to do with the full-work license issue. It is well-settled law that consent decrees of this nature should be given a narrow construction. *See Perez v. Danbury Hosp.*, 347 F.3d 419, 424 (2d Cir. 2003). The decrees in these cases are susceptible to alternative interpretations, and they should be construed narrowly to impose only the obligations anticipated by the parties to the decrees.

Even if the plain language of the consent decrees did clearly impose an obligation to grant full-work licenses, which it does not, the decrees should be amended to recognize and legitimize BMI's and ASCAP's current practice of fractional licensing. The DOJ has refused to agree to any such amendment, claiming that it would not be in the public interest. The DOJ claims that permitting BMI and ASCAP to offer fractional licenses would impair the function of the market for public performance licensing and could result in certain music not being played by users. But as previously noted, fractional licensing represents the status quo, and most music users recognize this fact. It is the DOJ's new interpretation of the consent decrees that would disrupt the market, not fractional licensing. An amendment modifying the consent decrees to expressly permit fractional licensing is in the public interest, and the DOJ should reconsider its opposition to such an amendment.

Thank you for your thoughtful consideration of these concerns. If you have any questions about this matter, please contact Brendon Anthony, Director of the Texas Music Office, at (512) 463-6666.

Sincerely,

Greg Abbott
Governor

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