June 30, 1995

Anne K. Bingaman, Esq.
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Department of Justice
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Dear Ms. Bingaman:

This will serve as a follow-up to your letter of June 13, 1995 to Cong. Carlos J. Moorhead, Chairman of the Courts & Intellectual Property Subcommittee of the Judiciary Committee of the House of Representatives, regarding discussions between interested parties as to the music licensing practices of performing rights societies. We are requesting a business review letter on an expedited basis under the business review procedure of the Dept. of Justice, 28 CFR 50.6, to seek the Department's enforcement intentions with respect to these discussions.

Cong. James Sensenbrenner (R.-Wis) has introduced H.R. 789, the so-called "Fairness In Music Licensing Act of 1995", a copy of which is attached. This bill was introduced at the behest of a coalition comprised of members of the National Restaurant Association, the National Licensed Beverage Association, the National Retail Federation, various food service industry trade associations, plus trade associations comprising organizers and sponsors of conventions and trade shows, owners of convention facilities, as well as religious broadcasters, seeking to regulate certain business practices of the three performing rights societies in the United States --the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc., (BMI) and SESAC, Inc.

Because the Coalition sought to have legislation introduced rather than voluntarily seek to discuss their alleged grievances separately with each society, Cong. Moorhead and Cong. Patricia Schroeder invited the Coalition and the three societies to meet together face-to-face under the auspices of the House Subcommittee. The societies welcomed that opportunity and accepted the congressional invitations to meet with the Coalition.

The initial meeting was held in the Subcommittee's hearing room on May 24, 1995, attended by Cong. Moorhead, Cong. Schroeder, Cong. Sensenbrenner, Cong. Sonny Bono, as well as various Subcommittee counsel and staff members. It was the expectation of the Subcommittee that these meetings would continue until all of the matters raised by HR 789 were resolved. A second meeting took place on June 23, 1995. Cong. Moorhead has suggested that a third meeting be scheduled for late July.

In order to continue the discussions requested by Congressman Moorhead and to address the many issues raised by the Coalition and HR 789, it

may be necessary for the performing rights societies to engage in various activities including but not necessarily limited to the following:

- to jointly discuss, propose, support, oppose, alter or amend legislation and/or amendments to legislation;

- to jointly discuss, agree to and carry out activities to inform Congress of our views with respect to legislation or amendments to legislation;

- to jointly lobby Congress with the intent of influencing Congressional activities; and

- to jointly submit our views on each matter relevant to the proposed legislation in response to inquiries from Congress and/or the Coalition.

HR 789 would expand the existing narrow exemption in the Copyright Act found in 17 USC §110(5), to exempt from copyright liability virtually all business establishments for provision of music by means of radio and television sets; provide for local arbitration of rate disputes with performing rights societies rather than the non-discriminatory nationwide rate regulation established by the consent decrees in United States vs. ASCAP, Civil Action No. 13-95 (S.D.N.Y. on March 14, 1950), and United States vs. BMI, No. 64-Civ-3787 (S.D.N.Y. on December 29, 1966, as modified on November 19, 1994); radically limit the amount of damages recoverable for infringing performances of music; establish a requirement that unprecedented "per programming" period licenses be offered to radio broadcasters; require performing rights societies to provide certain information about their repertories; mandate increased federal supervision of performing rights societies' consent decrees; exempt sponsors of trade shows and others from vicarious liability; and exempt broadcasters from liability for the performance of copyrighted music during broadcast church services.

With respect to access to repertory, the performing rights societies are each in the final stages of developing computer on-line access to their respective repertories. The mechanics of each society's system are being independently designed and programmed. In addition, all three societies currently make available repertory information by means of toll-free telephone and in response to written requests. The societies want to ensure that the Coalition is fully informed on the issues surrounding repertory access and specifically to respond to requests of the Coalition for additional information.

H.R. 789 proposes a system of local arbitration both with respect to the setting of fees and with respect to disputes over the application

of fees to individual establishments. The performing rights societies have made clear to the Coalition from the beginning that actual fees (either actual dollar amounts or fee determinants) would not and could not be the subject of joint discussion. However, it may be necessary to discuss the impact of local arbitrations on the consent decrees of ASCAP and BMI and the effect of such a system on the financial stability of SESAC and possible alternative dispute resolution mechanisms.

H.R. 789 would establish an exemption from vicarious liability for trade show and meeting planners, sponsors and associations and the facilities where such meetings are held. It is our intent to discuss with the Coalition existing law with respect to vicarious liability and the implications of such an exemption on the writers and publishers represented by the societies.

H.R. 789 requires the Justice Department to submit an annual report to Congress on the conduct of the societies. As an alternative, the societies might find it useful to discuss formal and informal measures for addressing misconduct, both on the part of individual representatives of each society and on the part of music users. In addition, the societies have proposed separate ad hoc "customer relations" committees for each society which would be empowered to respond to complaints and inquiries and hopefully prevent minor incidents from becoming major disputes.

Finally, H.R. 789 proposes to exempt virtually all commercial establishments from infringement liability for the performance of music by means of radio and television sets in the establishment. 17 USC §110(5) currently provides a limited exemption for such performances in small business establishments. The section has been the subject of numerous court decisions and it is now interpreted in one manner by two Federal Circuit Courts of Appeal and in another by the remaining Circuits. The Supreme Court has refused certiorari. The performing rights societies may seek to discuss standards or guidelines that would clarify the application of the exemption.

It is unclear exactly what other joint discussions or agreements may be appropriate, but such discussions could result in proposals by one or more societies outside of legislation. For example, the steps each society has taken to respond to the marketplace demand for repertory information were developed and reached independently and not in response to legislative requirements.

The performing rights societies are cognizant of the need to avoid at all costs any joint discussion of common pricing. Nothing in these meetings contemplates or suggests that in any way. At no time will we raise or respond to any suggestion that we discuss specific rates or fees for the licensing of public performances of music. We advised

the Coalition at the beginning of our first meeting that any such discussions will have to be had between the Coalition and each performing rights society separately.

Although the societies will not jointly engage in and will specifically avoid joint price discussions, the societies and the Coalition are likely to engage in extensive discussions of other issues. At all times during these discussions, each society will vigilantly preserve its independent judgment and, to the extent possible, no joint agreements will be entered. However, in order to resolve all matters surrounding the pending legislation, joint agreements may be called for. We intend not to enter into any joint agreement that would have any anticompetitive effect unless that anticompetitive effect was minimal and was outweighed by economic efficiencies.

Accordingly, we respectfully request the Department's expedited treatment of our business review request seeking the Department's current enforcement intentions.

It is our view, and we believe, also that of Cong. Moorhead and Cong. Schroeder, and their Subcommittee's counsel, that these meetings would be in the interests of all parties and the general public.

With thanks for your assistance and prompt attention to this matter.

Sincerely,

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