

**BEFORE THE
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, D.C.**

**Music Licensing Study: Second Request
for Comments**

Docket No. 2014-03

**COMMENTS OF THE AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS**

The American Society of Composers, Authors and Publishers (“ASCAP”) respectfully submits comments in response to the U.S. Copyright Office’s (the “Office”) July 18, 2014 Notice of Inquiry (the “NOI”) for additional written comments on issues relating to its study to evaluate the effectiveness of existing methods of licensing music.

At the outset, ASCAP commends the Office for conducting this study. Considering the abundance of initial comments and the active participation in all three roundtable discussions, it is obvious that the issues the Office has raised affect a wide variety of interests. It is also apparent that these issues are complicated, interdependent and without any easy solutions. To that end, ASCAP is prepared to work with the Office as necessary to work through these issues with the hope that positive results for all interested constituencies may be achieved.

What ASCAP has surmised from its participation is that despite the debate and conflicting opinions on the myriad of issues raised during the course of the study, there appears to be three points to which practically every party agrees. The first is that the

music licensing system demands the utmost in efficiency, for the benefit of music creators, music services and, ultimately, the general public. The second is that music creators – songwriters and artists alike – deserve to be fairly compensated for the use of their work. The third, essentially a corollary of the first two, is that collective licensing as practiced by ASCAP for 100 years is a necessary piece of the licensing solution. Not one participant posited that ASCAP and the other U.S. performing rights organizations (“PROs”) are relics whose time has passed. To the contrary; it was widely affirmed by songwriters, composers and music publishers, large and small, as well as by the licensees who require rights to their music, that without the PROs, the music licensing system would collapse.

However, despite the unanimous support of the PRO collective licensing system, questions were raised by the Office and various participants regarding the future of the PROs and their operations. Considerable time was spent discussing the potential effect of major publisher withdrawals from the PROs. Participants raised questions regarding PRO operations; specifically regarding transparency of data – i.e., the ascertaining of ownership information data for musical works – as well as issues regarding PRO distribution methodologies. In these comments, ASCAP offers further information that we hope will help clarify information regarding ASCAP’s operations and further the Office’s study of these issues. Additionally, we will offer our views of the proposal offered by the RIAA for providing a unitary license for the right to use music as part of a digital service.

I. Publisher Withdrawals

ASCAP's view on publisher withdrawal has been quite clear. In our recent comments to the Department of Justice regarding the Department's current review of the ASCAP consent decree, ASCAP argued for the ability of publishers to exercise the rights granted to them under the Copyright Act – that of controlling their exclusive rights in the manner that they see fit.¹ As we described, despite publishers' continued expressed preference for collective licensing through ASCAP, the ability to enter into direct licenses with music users has taken on new importance in recent years for a number of reasons. Direct licensing in certain situations is most likely to permit publishers to realize the full value of their copyrights, particularly with respect to the use of their works by streaming music services. Moreover, publishers crave increased flexibility to manage their own rights and negotiate contractual terms directly with particular music users in a manner that ASCAP may not negotiate. Finally, some publishers desire the ability to license their public performance rights together with other rights when appropriate.

To meet these needs, ASCAP has requested that its consent decree be amended in order to clarify that our members may grant to ASCAP limited rights as those members elect. A number of large publishers have publicly stated that without the ability to flexibly license their catalog by granting to the PROs only specific rights, they may inevitably choose to leave the PRO system entirely. In our initial comments, and during the roundtables, ASCAP voiced a major point of concern: as the efficiency benefits of collective licensing exists by virtue of our ability to realize aggregated revenues for, and

¹ The ASCAP rate court has interpreted the ASCAP consent decree to prohibit any partial grant of rights. The BMI rate court reached a different conclusion but with the same practical effect. As of the date of these comments, the rate court's ruling on this issue is on appeal to the Second Circuit.

spread associated costs among, our entire membership, the loss of a substantial market share represented by the withdrawing publishers will result in a loss of revenue but without an attendant drop in expenses, which will have to be unfairly borne by the remaining ASCAP members. This burden could potentially eliminate the benefits of ASCAP's collective licensing.

ASCAP's current overall operating ratio is under 12%. For every dollar we collect, we are able to distribute 88 cents as royalties to our members. That number, of course, is an aggregate ratio. The actual operating costs and ratio of licensing and administration varies with each separate medium. The costs associated with licensing bars, nightclubs, concerts and other "general" music uses is greater than that of other, less labor intensive usage. The costs associated with data processing for broadcast television and radio performance distribution is more than those associated with some other media. While we do not have figures that we can share with the Office, it would seem that the types of licensing for which publishers would ideally wish to remain within the collective licensing system are those that have higher relative associated costs such as the licensing of "general" (e.g. bars, nightclubs) music users and broadcast usage. With the retention of major catalogs in the ASCAP repertory for such labor or expense laden licensing and distribution areas, those higher costs can be spread among all members including the large publishers with higher market share. If those publishers felt compelled to withdraw entirely from ASCAP and handle those licensing and administrative aspects on their own, we may have to reconsider our strategy regarding the licensing and distribution efforts of some of those labor and expense-heavy areas.

While we cannot comment on the internal licensing and administrative capabilities of individual publishers (though it is safe to say such capabilities of smaller and independent publishers are limited), we can comment on our capabilities. We are able to annually contact, license and administer to many tens of thousands of individual music users throughout the U.S. (currently ASCAP licenses hundreds of thousands of users). We are able to receive music use information from many of those music users listing the works performed by those users – from both audio and audiovisual users – representing hundreds of billions of performances annually. And, we are able to take that music use information and match it to the appropriate music publisher and songwriter interests in a repertory of many millions of songs, taking into account assignments, bequests, levies and other dispositions of rights and royalty streams. We are able to maintain, better than any other entity, a database of musical works and rights holders (which we discuss below). We are able to associate and coordinate with the repertories of PROs from around the world to ensure appropriate royalty distribution on a global basis, making American music an important and favorable source of trade for American creators. We have invested in and developed a licensing administration system that is well prepared for the 21st century.

And as songwriters and composers have made abundantly clear, we are able to ensure that songwriters and composers receive their interests *directly and transparently*. They know that as members of ASCAP, they will receive their due share, in a manner that is open, fair and democratic.

The music publishing community understands our capabilities. Indeed, upon withdrawing their rights on a limited basis, the publishers were able to secure

administration arrangements with ASCAP that enabled the publishers to negotiate directly their digital rights in the free market, but leave the administration of such deals – receiving fees, processing music use information data, matching works to interested parties and paying all interested parties – to ASCAP. In this way, the partial withdrawals were effectuated in a somewhat seamless manner in that fees were paid to ASCAP and distributions were made to the publishers and writers as before, but utilizing license agreements negotiated directly (and confidentially) by the copyright owners in the free market.

In the event that music publishers fully withdraw their catalogs from ASCAP, we hope that music publishers would continue to exploit ASCAP’s advanced administrative capabilities. In this manner, the expenses of ASCAP’s overall administration operations would be borne by both ASCAP’s remaining members (through the deduction of operating costs) as well as by the withdrawing publishers (through the payment of administration fees), allowing ASCAP to continue serving the interests of our membership. And, in this manner, songwriters and composers would be assured of continued payment directly and transparently through ASCAP.

Of course, licensing would be the purview of the withdrawing publishers. ASCAP cannot comment as to their capabilities in this regard. Obviously, such publishers would be able to negotiate their rights as they best see fit in the free market. However, considering the labor intensity inherent in licensing certain “general” and other music users, it may be that fully-withdrawing publishers will give up completely some revenue streams, or, alternatively, utilize the services of PROs that are not at this time constrained by consent decrees and can receive limited grants of right for such purposes.

II. Data Transparency

Much of the roundtable discussions centered upon issues surrounding data transparency. Specifically, how is, or can, authoritative data regarding the identity and ownership of copyright musical works and sound recordings be collected and publicly made available. Some information was offered during the course of the study regarding musical works information data availability. We hope to clarify the availability of such data and explain how ASCAP, along with its sister societies, maintain and make available that data.

ASCAP is a member of a trade association of collecting right organizations, including PROs, named the International Confederation of Societies of Authors and Composers, which is known as “CISAC.” One of CISAC’s essential purposes is to coordinate the technical activities of societies. To that end, CISAC’s societies have worked to develop a common information system (“CIS”), the purpose of which is to introduce, develop and maintain: (i) standards for the efficient distribution of royalties and (ii) databases which enable members to share information based on the CIS standards. Through the CIS, CISAC-member PROs have developed a system to identify writers and their works through various identification and catalog standards, which we discuss in more detail below.

A. IPIs: How Writers and Publishers are Identified

Upon joining a PRO, a writer (all songwriters, composers and lyricists are hereinafter referred to as “writers”) or music publisher member discloses to that PRO its full contact and other personal information that the PRO might find relevant and necessary to pay the writer or publisher royalties. Considering the sensitive nature of

personal information, the PRO keeps this information confidentially in its own proprietary and confidential membership system or database. However, because PROs must know which musical works are licensed through which PROs in order to properly distribute royalties, CISAC has adopted a system of uniform number coding used to link musical works with their writers and publishers and their PRO affiliation. This is the function served by the “IPI” (interested party identifier) and the “ISWC” (the international standard work code for musical societies), as well as the CISAC CIS-Net (the network of databases used for referencing data on musical works, which allows for cross- referencing for ISWCs to IPIs).

Once a writer’s or publisher’s membership in a PRO is accepted, the PRO will apply for a unique IPI for that unique member. The Swiss PRO, SUISA, manages the issuance of IPIs in accordance with the CIS Standards adopted by CISAC.² The function of an IPI number is the de facto international identifier of that person or entity. It is the IPI that is thereafter associated globally with the writer of the work, even if his or her PRO affiliation changes. If, for example, a writer resigns from ASCAP and joins BMI, he or she retains the same IPI. Those writers that work under various pseudonyms will obtain a “Base IPI number” and separate sub-IPI numbers for each pseudonym. The pseudonym sub-IPIs will automatically link to the Base IPI, such that usage of any of the writer’s sub-IPIs will refer back to the Base IPI. Through the IPI system, PROs around the world can identify writers and publishers and their affiliated PRO.

² Prior to 1994, this identifier was known as a “CAE” number (the French acronym for compositeur, auteur et editeur); however, it is still common that the term “CAE” is used interchangeably with the term “IPI”. Today, movement is underway to transition the IPI to “ISNI” numbers (International Standard Name Identifier).

While the PRO itself retains detailed information regarding its members in its own confidential databases, the global IPI database contains only partial identifying information regarding the writers and publishers, limited to the name of the writer or publisher, its affiliated PRO, date of birth and nationality. The IPI database does not contain the writer's or publisher's address, residence or contact information, the identity of any assignees, or in the case of a deceased writer, his or her heirs. That information is held by each PRO.

The IPI database is, of course, accessible by all PROs as part of the CIS-Net network of databases overseen by CISAC, referred to above. Standing alone, the IPI database has little significance as it serves merely to list centrally all writers and publishers that are members of PROs to permit such writers and publishers to be identified internationally by a specific code number; it is only when the IPI is used in connection with other data that it has utility, for example to connect writers and publishers with the musical works they have created, as explained below.

B. ISWCs: How Musical Works are Identified

The writer and publisher data regarding a musical work (i.e. who wrote and published a work) is unknown to PROs until the creators of the work -- the writer(s) and/or publisher(s) -- publicize that information. This publication is accomplished through registration processes operated by each PRO separately. Members of a PRO are required to register their works with their PRO for inclusion in that PRO's own works database.

Generally speaking, this registration process follows CISAC registration standards (referred to as "Common Works Registration" standards), and which in turn

allow for obtaining a unique ISWC. Much as each PRO member is given a unique IPI code to identify the member in a standardized manner, at least for newer works, each musical work that meets certain standards of completion is similarly given a unique international work code approved by ISO (International Organization for Standardisation), known as the ISWC, to identify that work internationally in a standardized manner.

Upon receipt of a title registration by a member or members, the PRO, once all writers have been identified (which generally occurs through the PRO work registration process), applies for an ISWC for that work from the International ISWC Agency (which is appointed by ISO), which is responsible for overall ISWC system maintenance and administration.³ An ISWC cannot be created without the inclusion of specific metadata in the application including (1) title of the work and (2) *all* composers, authors and arrangers of the work identified by their IPI numbers. The ISWC Agency administers databases for allocated ISWC numbers and their corresponding descriptive metadata and shares that information with the PROs for inclusion in the PROs' own databases. In the case of a work with multiple writers from different PROs, the ISWC will be generated upon the first filed PRO application. In that instance a PRO that subsequently requests an ISWC for the same work will be informed that an ISWC has already been generated for that work based on the other PRO's application. In this manner consistency in ISWC generation is assured. More information about ISWC creation is available at www.iswc.org.

³ The International ISWC Agency appoints and oversees the work of regional and/or local ISWC numbering agencies that are authorized to receive and process applications from PROs in their region or locality. The regional agency responsible for the U.S. and Canada is known as Songcode.

C. How IPI and ISWC Data Are Connected and Made Available

As discussed, when a member joins a PRO, an IPI is created for that member. And, when all the writers of a work are identified by their IPI numbers an ISWC is created for that work.⁴ Of course, each PRO administers to its own separate repertory, with unique administration and distribution requirements. To that end, each PRO maintains its own respective musical works database. A PRO works database contains for each work, the title and its ISWC code (if assigned), as well as a unique work code (“Work ID”) assigned for each work by the PRO for internal usage, as well as all associated writers and publishers for each work with their unique IPI numbers (if provided), and their fractional share information. It should be underscored that each work will have two identifiers – the ISWC as well as the PRO’s own internal Work ID number. If the work were ever removed from a PRO’s repertory, the ISWC would remain with the work, but a new internal Work ID would be created for the new PRO for its own licensing and distribution purposes.

As full copyright (i.e., writer, publisher and fractional share) information regarding a work is not always known definitively when the work is first registered and there are often multiple writers and publishers on the work requiring subsequent and multiple, sometimes conflicting, registration information, or the copyright information changes over time due to assignments, sales, grant terminations or other disposition or change of interests, a PRO must expend resources securing and maintaining the complete and current copyright information. This process involves manual labor and is part of the operational costs of operating a PRO. The PRO must be in contact with publishers on a regular basis to ensure that copyright information is accurate and current. It is important

⁴ Again for split works, the ISWC is created based on the first application.

work, and it is the reason the PRO databases are, and should continue to be, the authoritative repository of musical work data.

Because many works are written by multiple writers from more than one PRO (“split works”), and separate registrations for the same work may be made with different PROs, the PROs must also cooperate to ensure that the information for a given work is correct and that the data in each PRO works database conforms. This, too, entails manual labor and effort and cooperation among the PROs. In order to reduce costs and increase efficiencies and data accuracy, ASCAP, BMI and SOCAN are currently working together through the groundbreaking MusicMark™ project to obviate duplicate efforts and to ensure accurate works information throughout each of the societies’ databases. Today, a single Common Works Registration or electronic batch registration containing the work information will be sent to each of the societies simultaneously, eliminating the potential for inconsistent database information and creating efficiencies in the registration process. Additionally, through MusicMark™ the PROs are working together to fix any inconsistencies in data (e.g., same IPI number for all writers). It is anticipated that MusicMark™ will lead the industry to greater data accuracy and increased database and operational efficiencies.⁵

To ensure that all PROs around the world have access to the same musical work information, the PROs, through CISAC, make their musical works database information accessible through the CIS-Net network of databases. Of course, internal work databases, while helpful to the PROs, must also be useful to the public, music users and consumers. Accordingly, ASCAP and other PROs maintain free, publicly searchable databases of the works which they represent in their territories; ASCAP’s is known as

⁵ Potentially, this project could lead to a single hub source of North American musical works information.

ASCAP Clearance Express or ACE®, and is available through ASCAP’s website, at <http://www.ascap.com/ace/>. This searchable database contains that same works database information, providing, again, information on title, writer and publisher, affiliated society, with attendant IPI, ISWC and ASCAP Work ID data. ASCAP’s ACE® database can be searched by title, writer, publisher, Work ID, ISWC as well as “performer” (i.e. recording artist). Information is updated on ACE® weekly to ensure that all work, writer and publisher information is current.

Currently, ASCAP’s ACE® database does not offer the names and contact information for publisher interests held by other U.S. PROs, but discloses the existence of other interests. Accordingly, currently one must search both the ASCAP ACE® database and the public database offered by the other PROs to obtain full publisher information for “split works.” Again, the PROs internally possess the full information based on work registration information and constant subsequent data maintenance efforts, and full information is available to all PROs via the CIS-Net. The public may obtain from ASCAP full publisher information regarding specific works upon request. Additionally, some publishers make their own work information available online.⁶

Many voiced the desire to be able to obtain through public databases such as ASCAP’s ACE® database full ownership information for each work. ASCAP, again, necessarily possesses this information as part of our operations and we are exploring how we may utilize our ACE® database to provide even more detailed work information to

⁶ For example Universal Publishing provides a searchable Song List on its website at <http://www.umpg.com/#contentRequest=repository&contentLocation=sub&contentOptions=>. The database discloses work ISWC and identity of all writers. However, only Universal publishing information is disclosed.

the public. We are confident that we will continue the lead in providing open and transparent information.

And, of course, we provide full catalog information to our members through ASCAP's Member Access online portal. Through Member Access, ASCAP members are able download their catalog with ASCAP Work ID, title, writer, publisher, society affiliation, ISWC and (with or without) share information. The member may provide that catalog information to anyone of their choosing.

Much discussion during the roundtables concerned access by digital services to comprehensive uniform data including, the ability to match musical works information to sound recording information. ASCAP does not maintain sound recording information, but as mentioned to the Office during the roundtables, ASCAP is equipped to handle the intake of attendant sound recording information for each work and make attendant sound recording identifiers available in its database. With that availability, the PROs would be able to offer the most comprehensive music data source. ASCAP is willing to discuss the potential for such matching with SoundExchange and other sound recording organizations.

Discussion also centered on the ability for services to include all song and recording metadata (e.g., ISWC and ISRC) to rights holders for automatic, or more efficient, processing. ASCAP receives music usage information from many sources, including from audiovisual producers, broadcast stations and digital services. As ASCAP mentioned, we have had success with trial projects to include work identifiers in metadata files that are sent to music recognition technology companies along with the audio files so that detection data includes these work identifiers and eliminates the need for

automated or manual matching to the musical composition in our works database. We envision more cooperation within the industry on this front.

III. The ASCAP Distribution System

One of greatest advantages ASCAP offers to songwriters and music publishers over other licensing organizations is that we are a membership organization run and overseen by our members. ASCAP's Board of Directors, which approves major changes to ASCAP's operations, is comprised of twelve writer members and twelve publisher members elected by the membership. In this manner, every substantive decision regarding ASCAP's operations is approved by, and for the collective interest of, ASCAP's overall membership.

Perhaps paramount of the substantive decisions made for the membership are those affecting the distribution of royalties. It is argued that in an ideal world every single use of music would result in a royalty payment or credit. This type of royalty distribution paradigm theoretically works with regard to other rights such as reproduction and distribution, for which the sale of actual copies can easily and inexpensively be determined. In the world of public performances, comprised of hundreds of billions of uses annually across an incredibly large universe of media, a pure accounting of every use is essentially impossible. Consider the sheer number of bars and nightclubs that play recorded music or host live musicians. Consider the many tens of thousands of radio stations – many small with limited frequency power. Even were an entity able to devote the resources towards tracking those performances, utilizing the most current technologies to do so, the associated expenses would clearly dwarf the revenue benefits.

Accordingly, ASCAP has developed and refined a distribution system that best takes advantage of current technologies to monitor performances, and makes distributions in a manner that maximizes overall distributions as efficiently as possible and in a manner that is purely transparent to our membership.⁷ The basis for our distributions is the ASCAP Follow-the-Dollar™ system. This system essentially ensures that royalties paid by a particular licensee media type are being fairly distributed to those members whose works were performed on that media type. For example, license fees paid for performances on broadcast television are paid to the members whose works are performed on broadcast television. Fees paid by radio broadcasters are paid to members whose works are broadcast on radio. And, so on.

The Follow-the-Dollar™ system is coupled with a crediting system that allocates credits for performances; such credits are then converted to dollars based on the amount of license fees paid. Credits are determined through various statistical weighting formulas that take into account factors such as size of licensee, time of performance (e.g., primetime or middle of the night) and type of performance (e.g., background or feature usage), all of which factor into the value of a credit. These distribution rules, as with all of our governing documents and policies, are set by the Board and are available to all members and the public at <http://www.ascap.com/members/governingdocuments.aspx>.

One important point bears mention – ASCAP’s royalty distribution crediting process is member agnostic. A work earns distribution value regardless if the work is written by a Grammy award winner or by an unknown newcomer. What matters are the

⁷ The monitoring technologies include radio and Internet fingerprinting and other recognition applications. Additionally, ASCAP receives from producers and other submitters electronic cue sheet information regarding works performed on audiovisual works enabling efficient matching to audiovisual programming databases.

performances of the works. This feature, unique to ASCAP membership, is consistent with ASCAP's defining policy of transparency and fairness to our membership.

The basis for any distribution is, of course, the ability to monitor or survey performances. This is largely where uninformed complaints about PRO distribution operations lie. As mentioned, it is believed that ideally all performances would be surveyed on a census – or complete count – basis. We are extraordinarily able to accomplish this feat with many media such as network television, syndicated local television programming, all general entertainment and premium cable networks, hundreds of the top-grossing live concerts, symphonic concerts, major background music and digital jukebox services and digital Internet services that provide us with music use data, among others.⁸

When a full census is impractical due to associated costs, we conduct sample surveys designed to be a statistically accurate representation of performances in certain media. Most notably, the sample survey is applied to broadcast radio performances, an industry consisting of many tens of thousands of stations where a complete census is not cost-efficient even with the utilization of the most up-to-date technologies. The sample takes into consideration numerous relevant factors such as station size, region, format (genre) and license fee (i.e., the greater the fee, the more often the station will be sampled). As new technologies make surveying a given medium such as broadcast radio economically efficient, we implement those technologies to move closer to a full census.

As explained, however, the expenses associated with monitoring certain music usage can be too high to make any survey impractical. The prime example is the

⁸ The music usage data ASCAP receives from music producers and users is staggering. We receive billions of bits of data – from cue sheet logs of audiovisual uses to digital Internet service transmission logs – to enable our distributions to our members.

monitoring of performances occurring at many “general” licensed establishments such as bars and nightclubs. Considering the manner by which music is generally performed in these venues, the number of performances and the relatively low fees paid by such licensees, any survey would be economically inefficient. Nevertheless, members whose works have been performed in such non-surveyed venues are able to receive compensation on account of such performances. First, we may distribute royalties on account of such performances upon notice from a member of specific performances at such a venue. Second, fees from such non-surveyed licensees are allocated and distributed to our members on the basis of surveyed broadcast performances, which experience demonstrates closely matches the performances in a non-surveyed venue. Additionally, ASCAP also compensates members for such non-surveyed performances through various awards.

Finally, it bears mention that we employ numerous membership representatives to respond to all member distribution questions and concerns, and act expeditiously to resolve any distribution issues. ASCAP also provides to our membership members a procedural dispute resolution process in those instances where a distribution question is not adequately resolved. That review process has rarely been utilized, which is a clear testament to ASCAP’s success in serving our members considering the hundreds of billions of performances occurring annually.

We may one day reach the point where all usage monitoring and distribution can be accomplished in an automated fashion through the touch of a single button. We are obviously not there yet, but have made leaps in that direction unimaginable years ago to best serve the interests of our members.

IV. International Models

The Office solicited information for consideration regarding international models for musical works licensing. ASCAP has in the past described, and the Office is aware, of the paradigm for international performance licensing. We believe it bears repetition here.

PROs exist in most modernized countries, and almost all PROs are members of CISAC. In addition to coordinating collecting right organizational and technical activities, CISAC provides bases for licensing relationships between PROs, offering model contractual terms for reciprocal licensing agreements. The concept of reciprocal licensing arrangements has worked well for many decades. Each PRO has traditionally received mandates from its members that would permit the PRO to license performances (or the equivalent right) occurring in its own local territory and to authorize foreign PROs to license their works in those foreign territories.⁹ Each PRO traditionally enters into reciprocal agreements with PROs of other countries to provide the right for each PRO party to that agreement to license the repertoires of the other PRO party in their own territory. In this way, for example, ASCAP would be able to license performances occurring in the U.S. of works in the repertory of the German society, GEMA; in turn, GEMA would be able to license performances of ASCAP works occurring in Germany. The system of reciprocal agreements assures songwriters and publishers that the public performances of their works will be licensed practically everywhere in the world.

PROs track and allocate royalty distribution for foreign works in the manner it calculates and allocates royalties for performances of its own domestic repertory.

⁹ Some PROs receive exclusive rights from their members, while others receive only the non-exclusive right to license the performances of its members' works; and still other PROs receive assignments of performance rights.

Payments, with detailed reports, are then made to sister PROs for further distribution by those PROs to their members.¹⁰

In the physical analog-bordered world, this model has worked seamlessly. No PRO would consider licensing live or mechanical performances or local broadcasts occurring in another country; hence the reliance on reciprocal agreements. And, no publisher would consider taking on this role directly in their own country; hence their reliance of collective licensing. However, the borderless digital world, where single transmissions can invoke multiple rights and be made on a global basis, has changed the possibilities of PRO dynamics. First, PROs could consider the opportunities of licensing their repertory to digital services beyond their borders on a multi-territorial basis.¹¹ Second, publishers could consider the advantages of licensing directly all rights as an alternative to reliance on PRO licensing.

A prime example of how publishers and PROs are adjusting to the new dynamics is the evolving digital licensing marketplace in the European Union. First, it should be noted that following European Commission decisions and recommendations, rights holders were given the ability to authorize a PRO of their own choice to manage and administer rights and to limit the grants given to such PRO.¹² Second, most PROs in the EU can (and generally do) license multiple rights (i.e. mechanical and performance) necessary for digital transmissions. Finally, this year the EU passed a new Directive that contains specific provisions intended to assist PROs operating in the EU to respond to the

¹⁰ While ASCAP distributes royalties to its publisher and writer members directly, it is the general practice that foreign PROs will pay to ASCAP on account of foreign performances only the writer share of royalties and pay publishers their share directly (generally through that publisher's local sub-publisher).

¹¹ The competition issues inherent in cross-border licensing are beyond the scope of these comments. It should be noted that the European Union and its Court of Justice have considered these issues, leading to the recent EU directive on cross-border licensing in the EU. See FN 13 *infra*.

¹² See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:276:0054:0057:EN:PDF>

licensing needs of the digital market. This new Directive also lays out new rules for such EU PROs regarding multi-territorial licensing, as well as transparency, governance and the handling of revenues collected on behalf of rights holders.¹³ Together, these form the basis for a new model for digital licensing in the EU.

Prior to these rules, digital services would be forced to enter a license with each PRO separately, which would limit the operability of the services to only those repertoires of those PROs with which they could enter a license and solely in the territories of such societies. Digital service providers, however, often want to cover a multitude of territories and a large catalog of music. They also often want to test new business models. Moreover, some PROs do not have the capability to handle the administration of such licensing (e.g., they do not have the capacity to process data from service providers on music downloads and streaming, or to match this data with their repertoire of songs leading to invoice limitations). Accordingly, a solution that permits PROs to offer the repertoires to digital services on a multi-territorial basis and administer to the repertoires of other PROs was necessary. The Directive sets forth the requirements placed upon PROs to engage in multi-territorial digital licensing and administration and we encourage the Office to review the Directive.

Under the new Directive, numerous possibilities are available. First, a PRO can license a service to utilize its repertoire across the EU (assuming that PRO has met the Directive's administration and operational requirements). Second, if the PRO could not meet the Directive's requirements, it could outsource the administration or it could authorize through agreement another PRO able to comply with Directive requirements to

¹³ See The Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN>

license its repertory on a multi-territorial basis along with the repertory of such other PRO. Third, the PRO could create a joint venture with other PROs to collectively administer their repertories. Finally, publishers have the right to withdraw from their PRO the rights necessary for multi-territorial digital licensing and can entrust the withdrawn rights to another PRO or license on a multi-territorial basis on their own. These measures would ensure that no national repertoire of music remains locked in to one territory, permitting digital services to expand throughout the EU.

Copyright Owners and PROs are taking advantage of these possibilities. First, as we noted in our initial comments, EU PROs bundle mechanical and performing rights to enable digital services to obtain licenses efficiently. Moreover, music publishers and EU PROs are utilizing the available flexibility to grant multi-territory licenses for online music through a series of collaborative ventures and non-profit entities set up specifically for the purpose of granting digital licenses throughout the EU.¹⁴

The Office should understand that these ventures are furthering the development of the digital marketplace in the EU. However, the relevance to the U.S. marketplace is somewhat limited, in part due to the constraints placed upon ASCAP by its consent decree and the constraints of the Section 115 license. As described and discussed at length in initial comments and at the roundtables, ASCAP cannot accept limited grant of rights as can EU PROs. Moreover, ASCAP cannot now offer licenses granting multiple

¹⁴ For example the ARMONIA venture of the Spanish, French and Italian PROs (see <http://www.rockol.com/uk/news-444715/google-lands-deal-with-armonia-for-musiclicensing>), the CELAS venture created to license the Anglo EMI music catalog on a pan-European basis (see <http://www.celas.eu/CelasTabs/About.aspx>), the PEDL venture for the Warner Chappell catalogue (see <http://www.warnerchappell.com/pedl/pedl.jsp>), the DEAL venture for Universal's catalog (see <http://www.sacem.fr/cms/site/en/home/about-sacem/documentation/2009-press-releases/universal-music-publishing-group-and-sacem-announce-name-of-pan-european-licensing-model-as-well-as-a-variety-of-pan-european-deals-with-major-internet-companies>), and the IMPEL venture to license the Anglo catalogs of a group of independent publishers.

rights required by most digital services, and the Section 115 license does not offer blanket licensing options. Accordingly, until such modifications are made, the licensing flexibility underway outside of the U.S. remains somewhat elusive to the U.S. marketplace.

V. Songwriter Income

The Office queried why is it that PROs have recently announced record-high revenues and distributions yet many songwriters have reported significant declines in income. As many comments noted, this anomaly is due to a confluence of several factors. First, overall songwriter income has declined because mechanical right income has dropped by a large margin. The NMPA recently announced that due to changes in the way music is distributed, with sales of copies being replaced by streaming models, performance rights now comprise over 50% of publishing revenue, while mechanicals dropped to only 23%.¹⁵ In the past these percentages were in inverse. This drastic loss in mechanical royalties affects overall songwriter income.

Second, royalties from digital services comprise a growing percentage of performance royalties. And, due to the nature of digital services which provide enormous transmission capacity, the total number and variety of performances on such digital services greatly exceeds the number and variety of performances made through traditional media means. As such revenues must be allocated to a greater number of performances and spread among a greater number of songwriters and publishers, individual receipts from that growing segment are smaller.

¹⁵ <http://www.nmpa.org/media/showrelease.asp?id=233>

The problem, as many have voiced during the course of this study, is that the fees paid for such performances do not reflect fair market value. Even if one were to take into account the greater number of performances and transmitted works, if revenues were to increase – as they presumably would if set in the free market – individual income would consequently increase. We would hope that these increases would offset the negative factors discussed above.

VI. Unified Licensing

In the course of this study, a proposal issued by the RIAA was raised by the Office. That proposal, in its simplest iteration, would permit owners of sound recordings (or their agents) to grant a single license to cover all rights – for both sound recording and musical works – and distribute to music publishers their share of remuneration based upon splits negotiated between the recording owners and music publishers.

Presumably the proposal would afford music services the utmost in licensing efficiencies. However, as many echoed during the course of the study roundtables, permitting the record labels the right and ability to negotiate all musical works rights on behalf of music publishers and songwriters has the following negative effects:

1. **It removes the ability for musical work rights holders to control the use of their property.** Currently, the PRO consent decrees and Section 115 compulsory license deny publishers and songwriters the ability to negotiate in the free marketplace. Nevertheless, despite these constraints, musical works rights holders have control over their negotiations with music users, and in the case of PROs can decide, as they see fit, whether to reach a final negotiated rate, the terms of those license deals or to

ultimately leave the license to a rate setting process to which they have some control as rights holders. The RIAA proposal would remove even that bit of control. It would, for example, permit labels to barter licensing for consideration or other benefits singularly unique to the labels (such as certain promotional value), but without any resulting value to music publishers and songwriters. This is clearly a possible outcome were record labels to continue to obtain equity stakes in music services. It would leave any dispute resolution or rate setting process in the hands of the labels, leaving the evidentiary and precedential outcome of any such litigation in favor of the labels. In totality it is purely counter to the basic principles of copyright control afforded to creators and owners of musical works.

2. **It adds additional layers thereby reducing transparency.**

Much has been stated regarding the lack of transparency between copyright owners and creators. Recording artists have long found licensing and distribution by the labels to lack necessary transparency. Similarly, songwriters have voiced similar transparency concerns regarding licensing and payment by their music publishers. Shifting the licensing process for musical works completely out of the hands of music publishers and PROs would add yet another layer, additionally obfuscating the licensing and payment structure.

3. **It adds additional layers thereby reducing efficiency.** The proposal does not account for distribution among music publishers and songwriters. Ultimately, the proposal would have the PROs and publishers (and songwriters) fight over the scraps thrown to them, resulting in a cost shift from the music services to the

musical works rights holders. In that scenario, the labels and music services gain at the expense of publishers and songwriters.

4. **It removes competition in the marketplace.** There currently exists competition in the marketplace by virtue of multiple PROs and other market entrants. Shifting the negotiation of performing rights licensing from the PROs and their members to the labels removes the market checks inherent in separate rights organization negotiations.

* * *

We recognize the difficult task ahead for the Office. Our industry is unique. We possess the united goals of providing the best music possible to the public at affordable prices and ensuring that creators are respected and fairly remunerated for their efforts. But in doing so, we recognize that inherent conflicts place obstacles in the path of easy solutions to licensing problems. ASCAP believes that we can collectively reach solutions that permit our industry to adapt to these quickly evolving times for the benefit of music creators and users alike, ensuring that that the music licensing marketplace is one that fosters the availability of new music and the next generation of music creators. We hope to be an integral part of those solutions.

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