

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

**In the Matter of Strategic Plan for
Recordation of Documents**

Docket No. 2014-1

**COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND
PUBLISHERS AND BROADCAST MUSIC, INC.**

The American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) respectfully submit comments in response to the U.S. Copyright Office’s (the “Office”) Notice of Inquiry dated January 10, 2014 for written comments on issues regarding recordation of documents with the Office (the “NOI”).¹ ASCAP and BMI support the efforts of the Office to modernize its document recordation operations and to provide further a clear, open and usable system by which copyright owners and users may identify ownership information relating to copyrighted works. While ASCAP and BMI recognize the importance of this goal, we at the outset urge the Office to proceed deliberately and with caution to ensure that decisions do not risk unfairly compromising the rights and economic interests of this country’s music creators.

I. INTERESTS OF ASCAP AND BMI

ASCAP and BMI are the nation’s two leading music performing rights licensing organizations (“PROs”), representing collectively over hundreds of thousands of songwriter, composer and publisher members and a repertoire of millions of copyrighted musical works. The PROs license the non-dramatic public performance rights in musical works to their

¹ 79 Fed. Reg. 2696 (Jan. 15, 2014).

repertories on a non-exclusive basis to a wide range of users, including digital broadcasting entities such as radio, broadcast television, cable, satellite and the Internet, as well as restaurants, stores, concerts, background music services, aerobics and dance studios, and many more. The vast majority of ASCAP and BMI member songwriters and publishers are the consummate “small businessmen and women” who depend on their royalties for a major portion of their income.

ASCAP and BMI represent not only U.S. writers and publishers, but also hundreds of thousands of foreign writers and publishers through reciprocal license agreements with PROs in nearly every country in the world. Through these reciprocal agreements, ASCAP and BMI are each permitted to license in the U.S., the public performing right in many thousands of musical works by foreign songwriters and composers. ASCAP and BMI also receive royalties from those foreign PROs for performances of ASCAP and BMI musical works occurring overseas.

As part of their directive to license their members’ works, and in furtherance of the goal of ensuring compliance with U.S. copyright law, the PROs are also authorized to bring lawsuits on behalf of their respective members for the infringement of the public performing right. ASCAP and BMI have each brought thousands of such infringement actions in the name of their respective members over the past decades.

Such licensing and enforcement efforts result in the distribution of royalties and other collected funds to their members and affiliates for the performance of their works. ASCAP and BMI endeavor to efficiently and comprehensively distribute royalties using the most

modern means available; it is a testament to the PROs' resources that they are able to distribute nearly all of license fees collected.²

It is therefore of crucial importance for ASCAP and BMI to collect, maintain and utilize the most current and comprehensive data and documentation regarding their members, their works and the proper ownership and beneficiary interests to and in those works. First, the PROs require such data to define the scope of the license grant to licensees; the ASCAP and BMI repertories must have definition. Indeed, both ASCAP and BMI are required to answer questions from the public relating to works in their respective repertories, as well as to maintain and make accessible to the public an online electronic listing of the repertories that they license in the U.S and to update those listings weekly. These listings provide thorough information to users of the works in the PROs' repertories. Second, ASCAP and BMI require current data regarding the ownership and proper entitled parties of each work in the ASCAP and BMI repertories in order to properly distribute collected royalties to their members and affiliates.³ Indeed, the PROs often rely on documentation presented by their members, including evidences of recorded transfers and the like, to resolve disputes as to the appropriate interested parties to a work. Third, when ASCAP and BMI bring infringement actions on behalf of their respective members and affiliates against entities that are publicly performing these members' and affiliates' works and refusing to pay a license fee, they must present to the court accurate documentation regarding the interested parties to the work or works at issue, or the action fails.

² Both ASCAP and BMI operate as non-profit-making businesses and do not retain earnings. Instead ASCAP and BMI return all license fees collected, less operating expenses, as royalties to their respective affiliated songwriters, composers, and music publishers whose works are publicly performed.

³ Of course, ASCAP and BMI must also maintain accurate data regarding the performances of their members' and affiliates' works, to enable them to properly allocate fees collected for performances of works to the proper entitled parties.

To that end, the PROs collect proper title, authorship, and ownership information upon initial inclusion of the works into their respective repertoires, and receive updated ownership and entitled party payment information upon any subsequent changes to that information, often, when necessary through copies of actual transfer documents. The incentive for ASCAP members and BMI affiliates to provide this information is obvious; without ensuring that ASCAP and BMI's records are current, accurate and complete, proper licensing and payment would not be possible.

The existence of a source of complete, current and accurate information regarding musical works and ownership is accordingly crucial to the PROs and their membership; indeed, a sizable portion of ASCAP and BMI's operating costs are dedicated to this specific issue. The NOI recognized the "privately maintained" databases operated by ASCAP and BMI (and others such as SESAC, Inc. and The Harry Fox Agency) and their importance. It is due to those databases that, in our experience and opinion, problems claimed by users in obtaining ownership or clearance information for other kinds of copyrighted works are relatively rare in the context of licensing musical works. In the PROs' experience, creators and music users face no substantial difficulties in procuring clearance information for those uses of musical works that the PROs do not license – for example, dramatic performances, and synchronizing music with motion pictures or television shows (so-called "synch licenses") – in large part, because the PROs and other music organizations such as the Harry Fox Agency maintain such extensive databases of copyright information, as well as contact information for their respective affiliates and members, which creators and music users can freely access at any time and without charge to determine where to obtain rights and clearances.⁴ These musical works databases are invaluable

⁴ BMI pioneered an online database greatly facilitating the public's ability to identify the creators and copyright owners of BMI musical works. See <http://www.repertoire.bmi.com>. Similarly, ASCAP offers copyright

resources for those who want to use musical works. Often the first stop for rights and clearance information, the PROs maintain information on virtually all copyrighted musical works, and up-to-date contact information for the overwhelming majority of works, allowing potential creators and music users to contact and seek appropriate license for any uses of musical works.⁵

ASCAP's and BMI's interest in this NOI are therefore not about providing to the public an extensive database of works and ownership information (which is already in existence for musical works as described above), but rather one about ensuring that the Office maintains and efficient, affordable and accessible records repository and retrieval system, which none of the PROs in the U.S. maintain. Indeed, ASCAP and BMI rely upon these registration facilities for documentation to further ASCAP and BMI's ability to bring infringement actions on behalf of their members as well as provide supporting documentation to ASCAP and BMI's foreign affiliated PROs. Often ASCAP and BMI are delayed, or cannot bring, infringement actions, or assist in resolving title disputes between their members, due to the delay in having their members procure necessary registration and/or chain-of-title evidence. In addition, certain countries in which foreign PROs operate require extensive documentation of title, including copies of copyright registrations. These requirements and the difficulty, not to mention the expense, of

information publicly through its ACE database ("ACE"), located at <http://www.ascap.com/ace>. ACE is a database of song titles licensed by ASCAP in the U.S., and includes copyrighted arrangements of public domain works and foreign compositions licensed by ASCAP songwriters, including co-writers who are either affiliated with other PROs or not affiliated with any organization; the names, contact persons, addresses, and phone numbers of publishers or administrators of the works; and even the names of some of the performers who have made commercial recordings of the works.

⁵ Moreover, for decades now, the PROs around the world through their participation in the International Confederation of Societies of Authors and Composers (known as "CISAC" – based on the acronym for its French name, Confédération Internationale des Sociétés d'Auteurs et Compositeurs), a global trade association of collecting right organizations, have worked to develop "Common Information Standards" for the maintenance and exchange of information regarding their musical works repertoires, including agreed upon protocols and unique numbering systems. Most recently, certain of the larger PROs are funding the design of a Global Repertory Database ("GRD") that will further assist music services in identifying (and properly compensating) the copyright owners of musical works. Attached for the Office's reference is an appendix previously submitted to the Office in other contexts, describing in more detail the practices and efforts of PROs to maintain and link their databases (the "Appendix").

procuring copies hinder both ASCAP and BMI and their affiliated foreign PRO from protecting their members' repertoires. Therefore, ASCAP and BMI each possess a clear interest in ensuring open, easy and affordable access to this information.

II. SUBJECTS OF INQUIRY

ASCAP and BMI do not propose any specific solution to the Office's concerns, but rather offer the following generalized comments to the subjects of inquiry. It should be noted at the outset that ASCAP and BMI's comments are particular to the musical works industry, which due to its unique evolution has long addressed the issue of comprehensive data as described above.

A. Electronic Recordation.

ASCAP and BMI strongly favor the Office's efforts to transition to an electronic platform for collecting and processing all data functions, including remittance of recordation information. ASCAP and BMI have long adopted electronic submission of data, and can attest to its benefits. We believe validation and quality control can be lessened through the use of input checks, such that certain information must be completed in an accepted standardized manner in order for the recordation to be effected. This would at the least alleviate failure to insert certain necessary information such as both grantor and grantee information, prevent duplication of information (e.g., the same entity for grantor and grantee), provide address and zip code validation and the like. Further implementation could enable validation checks against current database information. For example, it is common for music publishers to continuously record transfer information as a part of doing business -- a system can provide validation against previously input data by that publisher to ensure consistency in data fields with regard to such publisher (e.g., to prevent misspellings, inaccurate contact information, etc.).

Of course, it is often the case that transfers are made at the catalog level and not the single work level (for example, a full publisher catalog), in which case, the Office would need to

consider and implement batch submission processing that would match the operational processing given to single work recordings.

B. Linking of Information and Metadata.

As described in the Appendix, the musical works data systems utilize standardized coding, certain of which (such as ISWCs) we would advocate be included as fields in remittances. ASCAP and BMI also advocate for the inclusion of already obtained registration number information so as to enable both searching by such identifier and linkage to those documents. Private music industry databases (as set out in the Appendix) include much of the standardized coding information, though rarely Office registration numbers. ASCAP and BMI are open to exploring how to achieve certain linkage benefits while avoiding redundant efforts.

C. Incentives.

The NOI suggests the potential for providing incentives for recordation in the form of a precondition for lawsuit filing, eligibility for remedies such as statutory damages and attorney's fees, and even invalidating transfers that have not been recorded. ASCAP and BMI oppose any such incentives or conditions.

As the Office is well aware, any enactment requiring formalities could conceivably violate U.S. obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). Berne mandates that the "enjoyment and exercise" of copyright rights "shall not be subject to any formality."⁶ TRIPS incorporates Berne's articles governing formalities and a limitation on rights or imposition of burdens on copyright owners would violate TRIPS as well.⁷

⁶ Berne Convention for the Protection of Literary and Artistic Works, art. 5(2) (Paris Text, 1971).

⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 9(1), 13.

Congress understood that any formality imposed as a condition for bringing infringement suits would indeed be a limitation on the “enjoyment and exercise” of copyright. It is for this reason that Congress, in passing the Berne Convention Implementation Act of 1988 (“BCIA”),⁸ ensured that no preregistration or registration condition for bringing an infringement suit upon copyright be imposed upon any non-U.S. Berne work (*see* 17 U.S.C. § 411), and that no recordation requirement for bringing an infringement suit upon copyright be imposed on *any* work.⁹ Any lawsuit conditioned upon recordation (of non-U.S. Berne works) would clearly be in violation of U.S. treaty obligations.

While Congress believed that the imposition of registration conditions for an award of statutory damages and attorney’s fees for both U.S. and non-U.S. works would be consistent with our treaty obligations (*see* 17 U.S.C. § 412), such action has been criticized¹⁰ and imposes a burden on foreign authors. Due to the much greater burden placed upon grantees in recording documents of transfer, a stronger argument can be made that such a requirement serves as a limitation on the “enjoyment and exercise” of copyright in violation of treaty obligations, particularly when all documents evidencing the full chain of title must be recorded.¹¹

Finally, the Office should not consider any proposal to condition a transfer of ownership upon recordation. Such an imposition would invariably be challenged on numerous legal grounds.

⁸ The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 further limited the registration requirement from works from the U.S. and all non-Berne countries to only a “United States work.”

⁹ The BCIA eliminated the existing Section 205(d).

¹⁰ *See Nimmer on Copyright*, § 7.16[C][2] n.135.1

¹¹ The difficulty in proving damages, and the routine reliance on statutory damages, underscores the position that a formality placed upon recordation to obtain statutory damages would interfere with the enjoyment and exercise of copyright in violation of Berne.

While ASCAP and BMI fully support the idea of creating incentives for document recordation and the building of a fuller public repository, it should not be done in a retributive manner that punishes those that fail to do so. The idea behind placing incentives upon recordation is to create a more robust and complete public record. A, if not *the*, major purpose for such public record of copyright information is to provide the public – users and owners alike – with current ownership information in those works (whether for licensing purposes or otherwise). However, as described above, the musical works licensing industry has already developed robust data repositories and systems that enable the public to obtain ownership information with regard to the vast majority of musical works in a simple, efficient and inexpensive manner. Accordingly, we see no policy justification to penalize those who fail to record musical works transaction documentation. However, ASCAP and BMI wish to suggest that implementation of an electronic recordation procedure has the potential to be easier to accomplish and less expensive than the current paper recordation system; these factors could encourage more filings and function as incentives themselves.

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ASCAP and BMI are more than happy to assist the Office in any way possible to further its goals of providing an accessible, robust and dynamic modern records system.

Respectfully submitted,

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APPENDIX: OVERVIEW OF PROs DEVELOPMENT OF GLOBAL DATABASES

As mentioned in the Comments of ASCAP and BMI, performing right organizations (“PROs”) have for decades now worked on developing protocols for exchanging information about the ownership of musical works under the aegis of the International Confederation of Societies of Authors and Composers (known as “CISAC” – based on the acronym for its French name, Confédération Internationale des Sociétés d’Auteurs et Compositeurs), a global trade association of collecting right organizations. The PROs have been driven to do so given the extensive means by which individual musical works are used and performed through all types of media and platforms worldwide. It is absolutely crucial for the PROs to carry complete and accurate databases, maintained under agreed standards, listing the musical works, writers and owners which they represent in their territories to enable the licensing of such works by music users as well as accurate distribution of royalties paid under such licenses.

While we do not expect that these database systems, which the PROs have created, would or could be replicated fully or easily for other types of copyrighted materials, we respectfully submit that the Copyright Office should understand how an industry can work jointly to minimize almost completely the issue of orphan works. Thus, set forth below is a high level summary of some of the procedures that have been adopted by PROs, as well as present work on designing a Global Repertory Database (the “GRD;” also sometimes referred to as the “GRDB”).

A. IPIs: How Writers and Publishers are Identified

Upon joining a PRO, the 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. The PRO keeps this information confidentially in its own proprietary and confidential membership database. No other PRO has access to the non-public, personally identifying, and confidential data or membership database of any other PRO. However, because PROs must know which musical works are licensed through which PROs in order to properly distribute both domestic and foreign royalties, all the PROs worldwide have adopted a system of uniform number coding used to link musical works with their writers and publishers and their PRO affiliation. As noted, this system is overseen by CISAC.

CISAC has 231 societies, as either full, associate and provisional members, in 121 countries, which collect for creators or “authors” of musical, literary, audiovisual, graphic and dramatic works, with the majority being collecting societies for musical works. See www.cisac.org. One of CISAC’s “essential purposes” is to co-ordinate the technical activities of collecting right organizations. To that end, CISAC’s societies have worked to develop a “common information system” or “CIS,” the purpose of which is to introduce, develop and maintain: (i) standards for the efficient distribution of royalties (“CIS Standards”); and, more importantly for our purposes, (ii) databases which enable members to share information based on the CIS Standards. Referenced therein are several standards, which are discussed in greater detail below, including the “IPI” (interested party identifier), the “ISWC” (the international standard work code for musical societies) and CIS-Net (the network of databases used for

referencing data on musical works, which allows for cross- referencing of ISWCs to IPIs, including unique PRO codes).

Once a writer's or a publisher's membership in a PRO is accepted, the PRO will apply for a unique IPI for that unique member. The function of an IPI number is the de facto international identifier of that person or entity and link to its PRO of affiliation by territory. It is the IPI that is thereafter associated globally with the writer of the work and the work's publisher (on a territorial basis), even if his, her or its society of affiliation may change. If, for example, a writer resigns from ASCAP and joins BMI, he or she retains the same IPI.¹²

While the PRO itself retains detailed information regarding its members and affiliates in its own confidential databases, the IPI database contains only limited 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. However, the IPI database is accessible by all PROs, as well as certain music users, as part of a network of databases with musical work information known as CIS-Net, as overseen by CISAC.

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 the utility, for example (and most importantly) to connect writers and publishers with the musical works they have created, as explained below.

B. ISWCs: How Musical Works are Identified

Every musical work, whether a song, classical composition or television soundtrack cue, has been written by one or more writers, who divide their interests in their work by an agreed-upon percentage. These writers typically, but not always, assign their copyright interests in the work to one or more music publishers, generally in the same fractional ratio; sometimes a writer will retain some share of ownership as a "publisher." The writers of a specific work will, of course, never change once the work is written, whereas publishers of works sometimes change when they sell their works to other publishers, writers terminate their contracts with publishers and take back their publishing interests, give their copyright interests to another publisher and/or authorize another publisher to administer their works.¹³

The writer and publisher share 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

¹² 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. This ensures that works authored by one writer under various pseudonyms will all link back to the same writer and the writer's PRO of affiliation.

¹³ In the case of foreign PROs, however, the writer remains with the foreign PRO – typically having given it an exclusive right to license – and whatever changes may take place vis-à-vis the writer's publishing relationship, the new publishing relationship would still run through the foreign PRO.

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 title database. The title registration will contain the identities of the writers and the publishers (updated as necessary), the appropriate fractional shares and affiliated PROs of each. Once registered by a PRO member, the work becomes a part of that PRO’s repertory. Many PROs maintain free, publicly searchable databases of the works which they represent in their territories; ASCAP’s is known as ASCAP Clearance Express or ACE, and is available through ASCAP’s website, at www.ascap.com/ace/; BMI’s database is available at www.bmi.com; and SESAC’s is available at <http://www.sesac.com/Repertory/Terms.aspx>. By virtue of these searchable title databases, any member of the public can peruse the vast repertories of the U.S. PROs, which together contain practically the entire U.S.-based copyrighted song repertory,¹⁴ as well as the works of foreign PRO members as represented by ASCAP, BMI and SESAC here in the U.S.

To ensure, however, that the entire world musical works repertories are aligned, works registration follow CISAC-agreed 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, each musical work is similarly given a unique international work code, known as the ISWC, to identify that work internationally in a standardized manner.

To ensure that all PROs have access to the same musical work interest information, the PROs, through CISAC, make their musical works title database information accessible through the CIS-Net. In this way, PROs all access the CIS-NET, and thereby have access to a connected listing of all works by ISWC and all writers/publishers by IPI. Of course, again, the information a PRO makes available regarding a work – as available on CIS-Net – does not contain any contact information. The contact information for the copyright owners is available at the PRO level, on their publicly available databases. If a member of the public wishes to determine who is the copyright owner of a particular work, it need only contact (or search the databases of) the PRO with which that owner is affiliated. The PRO can advise a user whether the work is indeed in its repertory, and how to contact its copyright owner, or by utilizing the CIS-NET direct the user to the proper PRO who can advise the user of the copyright ownership information. The key point is that because of the CISAC CIS-NET systems, all PROs worldwide access uniform information regarding tens of millions of copyrighted works worldwide. Moreover, because of the worldwide access to the same databases, which are used to ensure full and accurate distribution of royalties, the PROs have the ability and incentive to ensure that the data in the CIS-NET is complete and accurate. Each PRO routinely reviews the data therein, particularly to complete information for any “unidentified” works.

C. GRD: The Global Repertoire Database

As explained, CIS-NET, which contains undoubtedly the world’s most comprehensive, interlinked databases of writers/publishers and their works is not searchable by the public

¹⁴ It should be noted that some PROs have a legal requirement to make its list of members and repertories publicly available. See, e.g., Section X of the ASCAP Consent Decree at <http://www.ascap.com/~media/Files/Pdf/members/governing-documents/ascapafj2.pdf>.

directly, nor does it contain contact information of the copyright owners; one must still contact the PROs directly for that information or use their publicly accessible databases. However, a working group was created in December 2009 following certain “Online Roundtable” discussions sponsored and facilitated by the DG Competition of the European Commission. The working group’s role was to consider how a GRD for musical works might be created and deployed to provide access to a single, consolidated source of data which music creators, music publishers, music rights societies and other users can rely on for authoritative, multi-territorial information about the ownership and/or control of musical works.

After a period of study, a number of PROs formed an entity to employ contractors to design the GRD and lay out its requirements. These societies have already invested substantial sums for this purpose. In addition, the GRD is working under a collaboration agreement with representatives of various other international and European based music publisher and songwriter associations, as well as a wide range of the major online and mobile music service providers. It is hoped that through the creation of the GRD, music users and copyright owners will have an even more efficient means of identifying the owners of specific copyrighted musical works.