

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

**In the Matter of Notice of Inquiry
Regarding Music Licensing
Study**

Docket No. 2014-03

**COMMENTS OF SESAC, INC. IN RESPONSE TO NOTICE OF INQUIRY
REGARDING MUSIC LICENSING STUDY**

SESAC, Inc. (“SESAC”) respectfully submits these comments in response to the Copyright Office’s Notice of Inquiry (the “NOI”) dated March 17, 2014, Fed. Reg. 14739, soliciting written submissions regarding its music licensing study.

SESAC is a performing rights organization (a “PRO”) that services both the creators and users of non-dramatic musical works (that is, musical compositions—songs—as distinct from sound recordings of songs) by issuing public performance licenses, collecting fees for those licenses, and distributing resulting royalties to its affiliated songwriters, composers, and music publishers. It is the second oldest of the three domestic PROs recognized under the Copyright Act, the smallest of the PROs, and the only for-profit PRO. SESAC also is the fastest growing PRO, growing exponentially while serving as a constant source of innovation in such areas as state-of-the-art performance monitoring for its affiliates. It licenses public performance rights in hundreds of thousands of songs on behalf of its many thousands of affiliated songwriters, composers, and music publishers.

SESAC appreciates the opportunity to comment on topics presented in the NOI. SESAC’s comments to specific numbered questions are as follows:

5. Please assess the effectiveness of the current process for licensing the public performances of musical works.

Virtually all performance right licenses granted in this country are issued by one of the three United States PROs – SESAC, the American Society of Composers, Authors and Publishers (“ASCAP”), and Broadcast Music, Inc. (“BMI”). Together, the PROs represent the performing rights of literally millions of musical works created and owned by thousands of songwriters and publishers. The PROs also service thousands of music users by providing licenses which authorize those users to perform the music to enhance their programming, establishments, or websites.

Given this vast number of transactions, the efficiency of the PROs is apparent. Without the PROs, each music user would need to seek licenses with the individual copyright holders of each piece of music they wish to perform. Conversely, the individual creators and owners of musical works would be unable to effectively license many, if not most, users due to the sheer volume of transactions involved. By aggregating large catalogs of musical works that are most often licensed collectively, the PROs bring economies of scale and efficiency to the marketplace. These benefits are most often realized through a licensing method called the “blanket license.”

A blanket license permits a music user to perform any of the works in a PRO’s repertory as often as they wish during a given period of time for a fixed fee. Thus, the music users, creators and owners are liberated from the overwhelming effort that would otherwise be necessary to separately negotiate each and every license for each and every performance. This license type also eliminates the arduous task of accounting for every specific use of every musical work performed, saving the music user administrative time and resources. Moreover, the blanket license creates certainty for the music user with the knowledge that they will not be exposed to copyright infringement liability. In addition, the blanket license has been repeatedly

upheld in the courts as an efficient and cost effective method of licensing the public performance right in musical works.¹

As a service to the music users, the PROs also provide other types of licenses when the blanket license might not be a good fit. For example, SESAC, ASCAP, and BMI offer what is called a “per program license,” which allows the music user, typically a television broadcaster, to perform any work in a PRO’s repertory while paying fees only for those programs that actually contain that PRO’s music. Other licensing models exist that offer additional flexibility to both the music user and the copyright holders, including direct licensing and source licensing. Furthermore, as the needs of music users evolve, SESAC will continue to innovate and craft new and appropriate licensing solutions.

6. Please assess the effectiveness of the royalty ratesetting process and standards applicable under the consent decrees governing ASCAP and BMI, as well as the impact, if any, of 17 U.S.C. 114(i), which provides that “license fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.”

ASCAP and BMI are both are subject to federal consent decrees. Under those decrees, a licensee has an automatic right to use music upon requesting a license. If a given music user cannot reach agreement on a license rate through negotiations with either ASCAP or BMI, either the music user or the PRO can initiate proceedings for the license rate to be set by a judge in the United States District Court for the Southern District of New York designated for that particular PRO (these are the frequently referenced “rate courts”).²

¹ See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 21 (1979); *Buffalo Broadcasting Co. v. American Soc’y of Composers, Authors & Publishers*, 744 F.2d 917, 934 (2d Cir. 1984).

² See *United States v. American Soc’y of Composers, Authors & Publishers*, 2001-2 Trade Cas. (CCH) 73,474 (S.D.N.Y. June 11, 2001); *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. (CCH) 71,378 (S.D.N.Y. Nov, 18, 1994).

In addition to paying license fees for the right to stream the underlying **musical composition**, digital music services are also required, pursuant to Section 114, to pay separate license fees for the right to stream the **sound recording** in which the composition is embodied.³ Unlike rates for the public performance of musical compositions established by the rate courts, royalty rates for the non-interactive performances of sound recordings are set by the Copyright Royalty Board (the “CRB”) within the Library of Congress.⁴ These statutory license fees for the right to stream sound recording are paid to SoundExchange, a collective administrative agent representing record companies that own the sound recordings, as well as recording artists and background musicians.⁵

These separate rate-setting processes – the CRB for sound recordings and the rate courts for musical compositions – are grossly out of step with each other. This has created a dramatic rate disparity between the compensation set for the public performance of a musical work versus the public performance of a sound recording.

Royalties paid for the use of music by the streaming service Pandora are a case in point. In its Fiscal Year 2013 Annual Report, Pandora acknowledged that it paid fully 55.9% of its revenue in royalties to SoundExchange for the right to publicly perform sound recordings (based on a “willing buyer/willing seller” standard set by the CRB). In stark contrast, Pandora acknowledged that it paid only 4.3% of its revenue in royalties for the right to publicly perform the underlying musical works. In other words, Pandora pays 93% of the total royalties it allocates for music use to record labels and artists through SoundExchange, while paying only 7% of those total royalties to songwriters, composers and publishers.

³ 17 U.S.C. 114(i).

⁴ 37 CFR 301.1, et seq.

⁵ 37 CFR 380.4.

This imbalance is due in part to the current language of Section 114(i), under which the ASCAP and BMI rate courts are expressly prohibited from considering the royalty rates for the public performance of sound recordings when setting royalty rates for the public performance of those underlying compositions. That language was originally intended as a means to ensure that the songwriter's and publisher's royalties would not be cannibalized by payments made for the newly-established public performance right in sound recordings in 1995. In fact, the application of that language by the courts has had the opposite effect – the rate court judges' inability to consider rates set by the CRB with respect to sound recordings has led to this wide inconsistency in public performance rates, despite the critical contribution of each creative source to the value of the performed work. The rates paid to songwriters are a small fraction of the rates paid to those associated with the sound recordings that embody the songwriters' works.

SESAC strongly believes that this disparity should be addressed expeditiously, and supports the approach taken in the Songwriter Equity Act of 2014, namely that Section 114(i) be amended to end the prohibition against the rate courts consideration of SoundExchange rates set by the CRB. This change would allow the rate courts to consider all relevant evidence and draw their own conclusions, encouraged only to set a “willing buyer/willing seller” rate that bears a fair relationship to the sound recording performance rate. The specifics would be left to the rate courts in their discretion. The proposed language merely establishes a process that permits consideration of the CRB rates, which should lead to a more reasonable valuation for musical compositions.

By modifying Section 114(i) to permit the rate courts to include in their consideration these “willing buyer/willing seller” royalty rates paid for sound recording performances,

Congress would afford the rate courts the ability to address the rates for the public performance of musical works based on a more complete examination of marketplace factors.

7. Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternative that might be adopted?

SESAC is of the opinion that the consent decrees governing ASCAP and BMI artificially distort the true value of copyrights in musical works. Pursuant to the consent decrees, both ASCAP and BMI must provide immediate authorization upon the request of any music user, before a license rate has been agreed upon, a requirement that disincentivizes music users from conducting rate negotiations in a timely fashion.⁶ Moreover, if ASCAP or BMI and the music user cannot agree upon the fee for such license, either party may initiate a rate court proceeding before the United States District Court for the Southern District of New York.⁷ The rates determined by these rate courts rarely approach the rates that would result from an arms-length transaction between parties in a free market.

The rates established by these rate courts often do not reflect the real world value of the public performance right for a variety of reasons. The rate courts are not bound by a standard that would yield rates approximating those that would otherwise be agreed upon between a willing buyer and a willing seller in an unregulated environment (for example, as required under 17 U.S.C.114(f)(2)(B)). Instead, the burden is on ASCAP or BMI to prove that the proposed fees are reasonable.⁸ The consent decrees, however, offer no definition or guidelines as to what constitutes “reasonable.” As a result, the rate courts have often refused to consider the fees

⁶ See *United States v. American Soc'y of Composers, Authors & Publishers*, 2001-2 Trade Cas. (CCH) 73,474 (S.D.N.Y. June 11, 2001); *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. (CCH) 71,378 (S.D.N.Y. Nov, 18, 1994).

⁷ Id.

⁸ Id.

agreed upon by ASCAP or BMI and other music users outside of the rate court process as benchmarks for determining the reasonableness of a proposed fee.⁹ Thus, the rates set by the rate courts may bear no relationship to fees that are actually derived in a free market transaction.

As a result, the consent decrees have the effect of unduly suppressing the value of public performance rights and holding songwriters and music publisher royalties' hostage to systematically protracted rate negotiations and expensive, time-consuming rate court proceedings. SESAC believes that the creators and owners of musical works would be better served by the free market determination of fees for the licensing of the public performance right in musical compositions instead of the rate court process as it currently exists.

10. Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

SESAC agrees with the Copyright Office that federal copyright protection should be extended to pre-1972 sound recordings. Such an extension would establish a uniform body of law for all sound recordings, as well as increasing equity between songwriters (many of whom do not record commercially released recordings) and recording artists (many of whom do not write musical compositions). The vast majority of musical compositions are fixed in the form of sound recordings, so it strikes SESAC as unfair that the Copyright Law would protect post-1972 musical compositions while leaving pre-1972 sound recordings of those very same songs unprotected by federal law.

Any Section 112 and 114 statutory licenses should include both pre-and post-1972 sound recordings. SoundExchange distributed \$170.4 million in royalties in 2013¹⁰, proving that it has

⁹ See *In re Pandora Media, Inc.*, 2014 U.S. Dist. LEXIS 36914 (S.D.N.Y. Mar. 14, 2014).

the wherewithal to effectively license, collect and distribute significant royalties to recording artists and sound recording owners. SoundExchange would equally benefit the artists and owners of pre-1972 sound recordings.

Finally, uniform legal treatment of pre- and post-1972 sound recordings will benefit music users as well. As evidenced by the popularity of blanket licensing for musical compositions and sound recordings alike, commercial music users value the predictability of licensing their entire libraries through one or a small number of licenses. Pre-1972 sound recording federalization will provide music users with uniform law for the licensing of sound recordings, whether those users are obtaining sound recording rights by means of statutory licensing or marketplace negotiations.

12. What is the impact of the varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms? Do these differences make sense?

The Section 112, 114, and 115 statutory licenses are utilized, to varying degrees, by a wide variety of music services, ranging from satellite radio to internet radio, and from digital download services to on-demand streaming services. SESAC regularly licenses an even broader array of music services and experience has shown that each music service, regardless of delivery platform, has one primary goal: to grow their businesses despite lingering piracy and increasing competition from other forms of media and entertainment. Similarly, the end users of these varying music services are simply looking for music to enhance their lives, whether it be streamed through the internet or transmitted to them via satellite.

To the extent that the Copyright Act continues to offer statutory licenses, the ratesetting standards underpinning those licenses should reflect the fundamental truth that the various

¹⁰ <http://www.soundexchange.com/pr/music-industry-leader-soundexchange-celebrates-year-of-milestones-with-2013-total-distributions-reaching-590-million/>

services are competing for the same users. Furthermore, the principal goal of any statutory license ratesetting should be to reflect rates that would otherwise be agreed to in a free market. Accordingly, SESAC views the “willing buyer/willing seller” standard as the right standard for any statutory license, regardless of delivery platform.

13. How do differences in the applicability of the sound recording public performance right impact music licensing?

Differences in the applicability of the sound recording public performance right also create an uneven playing field for competing music services. This will become even more striking as online music services and terrestrial radio continue to converge in the marketplace. For example, every year increasing numbers of car manufacturers offer dashboard integration of both online radio and on-demand streaming services. The music licensing industry is careening towards a world where drivers press a single button to access internet transmissions and another for terrestrial radio transmissions. Without copyright reform, recording artists will continue to be compensated only for digitally transmitted public performances but not for terrestrial transmissions.

14. How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?

Historically, direct licensing by individual creators and owners of musical works has been rare because neither the creators, nor the copyright owners, nor music users see it as efficient. Moreover, most songwriters prefer to focus on songwriting rather than licensing musical works.

Nevertheless, although seldom utilized, direct licensing remains a valuable tool for both copyright owners and licensees alike.

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

SESAC believes that alternative licensing models are best developed by private actors in the free market. As new distribution and performance delivery systems for music arise, the market reacts to develop the models that will effectively and efficiently license those uses. For example, in response to the large amount of user generated content being uploaded to YouTube each day, much of which contains music not owned by the uploader, the micro-synchronization or “micro-sync” model was created by the private sector. Companies such as Rumblefish, Inc. via tools like FriendlyMusic.com now offer affordable licenses for the synchronization of music with video for small, non-commercial (i.e. micro) uses such as on YouTube. In fact, Rumblefish has amassed a song library of 2.5 million tracks and licenses music for 65 million videos online and is adding 80,000 a day.¹¹

SESAC is confident that the market will continue to fashion appropriate licensing solutions to meet the evolving needs of music users.

16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?

Private industry is constantly engaged in developing new licensing models and the technology needed to support those models. For example, as mentioned in SESAC’s response to question 15 above, Rumblefish has developed a technology platform to facilitate the micro-sync licensing model that arose in response to the high volume of low value, non-commercial uses of

¹¹ http://www.oregonlive.com/silicon-forest/index.ssf/2014/04/rumblefish_passes_14_billion_m.html.

music in online videos. In addition to Rumblefish, other companies such as AdRev, Audiosocket and SourceAudio operate technology in the micro-sync marketplace. Also, beyond just the synchronization market, companies like Crunch Digital have developed technology to manage the data flow for content licensees including digital service providers, multi-channel networks, game companies, application developers, and mobile carriers. Such services include royalty reporting for direct licenses. Crunch Digital also provides services to copyright holders including record labels and music publishers.

7digital, Ltd. and MediaNet are other examples of private industry developing solutions to license music on a large scale to a wide variety of users and consumers. That company powers digital music services for consumers, developers, and partners in market sectors such as consumer electronics, automotive, carriers, fashion, and fast-moving consumer goods brands. 7digital, for instance, provides a digital music platform which offers access to over 23 million tracks all of which have been fully licensed by major record labels, independent labels, and royalty collection societies. The platform allows its developers and partners to create new music websites and applications, or to integrate music into existing services.

SESAC feels that, as the landscape continues to shift, the free marketplace will be the key to technological and other innovations necessary to maintain efficiency and cost effectiveness in music licensing. SESAC has been and remains committed to the use of technology to drive innovation in the music distribution and licensing markets.

17. Would the music marketplace benefit from modifying the scope of the existing statutory licenses?

Notwithstanding the recent introduction of H.R. 4572, the STELA Reauthorization Act on May 6, 2012, SESAC believes that marketplace alternatives in music licensing are preferable

to compulsory licensing, which tends to devalue copyrights in music. SESAC concurs generally with the Copyright Office's recommendations contained in its Satellite Television Extension and Localism Act, § 302 Report (2011) (the "2011 Report") for eliminating the compulsory statutory licenses for cable retransmission under Section 111 and satellite retransmission under Sections 119 and 122 of the Copyright Act.

Section 111, which was enacted in 1976, authorizes cable operators to retransmit local and distant television (and radio) signals to their customers. Section 119, which was enacted in 1988, authorizes satellite carriers to retransmit distant network and non-network television station signals for private home viewing by their customers. Section 122, which was enacted in 1999, authorizes satellite carriers to also retransmit local television station signals into those stations' local markets.

In line with the Copyright Office's conclusions in its 2011 Report, SESAC agrees that: (a) statutory licensing of such retransmissions by cable and satellite providers is outdated, having been initially intended to encourage the growth of these then-nascent, now-mature industries; (b) alternative and innovative market-based licensing models, including collective licensing, are feasible and preferable; and (c) such new licensing models are likely to evolve and become even more efficient based upon technological advancements.

In its Satellite and Home Viewer Extension and Reauthorization Act Section 109 Report (2008) (the "2008 Report"), the Copyright Office concluded that the Section 111 and 119 compulsory licenses are "arcane, antiquated, complicated, and dysfunctional," and serve to keep license fees below market value. In sum, as the Copyright Office recommended in its Reports regarding Sections 111, 119, and 122, SESAC strongly believes that compulsory licensing should be abolished.

18. How have developments in the music marketplace affected the income of songwriters, composers, and recording artists?

As the saying goes, “It all begins with a song.” Without songs, and the songwriters who create them, there would be no music industry.

Substantial anecdotal evidence indicates that songwriter royalties in the United States have decreased in recent years for a number of reasons, including illegal downloading, radio consolidation leading to fewer playlist spots, music publishing industry mergers leading to fewer staff songwriter positions, and the migration of music consumption from physical to digital formats that have not yet made up for the resulting decline in revenues.

Useful empirical evidence is also available. For example, according to a 2013 report by the Confédération Internationale des Sociétés d'Auteurs et Compositeurs (“CISAC”), the United States is well behind a number of other industrialized markets—including the United Kingdom, Germany, Japan, Canada, and even Slovenia—in terms of annual musical rights collections per capita. According to CISAC, in 2012 collections for musical rights in the United States did not keep pace with the growth in the Gross Domestic Product.

19. Are revenues attributable to the performance and sale of music fairly divided between creators and distributors of musical works and sound recordings?

Revenues attributable to the performance and sale of music are not always divided fairly between creators and distributors of musical works on the one hand, and creators and distributors of sound recordings on the other hand. Although SESAC negotiates the terms of its public performance licenses absent the constraints of the consent decrees under which ASCAP and BMI operate, it notes that the differences in governmental rate-setting procedures at the Copyright Royalty Board (the “CRB”) regarding public performance rates for sound recordings and the rate

courts with respect to the public performance rates for musical works have negatively impacted the value of the entire public performing rights sector including SESAC.

Royalties paid for the use of music by the streaming service Pandora are a case in point. In its Fiscal Year 2013 Annual Report, Pandora acknowledged that it paid fully 55.9% of its revenue in royalties to SoundExchange for the right to publicly perform sound recordings (based on a “willing buyer/willing seller” standard set by the CRB). In stark contrast, Pandora acknowledged that it paid only 4.3% of its revenue in royalties for the right to publicly perform the underlying musical works. In other words, Pandora pays 93% of the total royalties it allocates for music use to record labels and artists through SoundExchange, while paying only 7% of those total royalties to songwriters, composers and publishers.

This gross disparity contrasts sharply with the royalties paid to U.S. songwriters, composers and publishers in foreign territories, where streaming music services pay fees for the public performance of the underlying musical works that are significantly higher than the fees paid for the public performance of sound recording in which they are embodied.

SESAC believes, and fairness demands, that this glaring imbalance in the United States should be corrected.

21. How do licensing concerns impact the ability to invest in new distribution models?

Although it is of the strong opinion that the music licensing issues discussed in these Comments should be addressed promptly to better protect its affiliated songwriters, composers, and music publishers, SESAC meanwhile continues to invest in innovation, including new technologies to constantly improve its licensing, fee collection, and royalty distributions to its affiliates.

For example, SESAC recently began working with a technology company in a new program aimed at utilizing the latest advances in audio-recognition technology to improve the performance rights licensing and distribution supply chain. SESAC will use a unique digital pattern-recognition algorithm to capture performances of its repertory in programming on broadcast and cable television and also digital transmissions. Initially, thousands of audio files will be monitored across multiple platforms. This technology will be accompanied by a suite of other enabling technologies, including watermarking, to develop a technology-agnostic, but holistic solution for performance rights licensing, tracking, and royalty distribution.

Moreover, SESAC now offers a groundbreaking development in royalty distribution. It has accelerated domestic terrestrial radio performance royalty payments to its affiliates from the traditional quarterly distributions to monthly distributions. SESAC utilizes advanced tracking technology to monitor broadcast radio to ensure the most complete and accurate radio royalty payments to its affiliates. It is the first performing rights organization to fully integrate fingerprinting technology into its survey and distribution systems, building on the efficiencies of cutting-edge technology to further expedite payments to rights holders.

Thus, while advocating on behalf of its affiliates to improve the music licensing system generally, SESAC at the same time continues to utilize new technologies specifically to improve its internal music licensing and royalty distribution processes.

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

It is SESAC's position that the adoption of universal standards for the identification of musical works and sound recordings is best addressed in the private sector, and that the various ongoing market initiatives be allowed to progress unfettered by government involvement.

Further, SESAC continues to believe that standards established via free market solutions by private industry have the best chance to bring about greater efficiencies with respect to music licensing.

24. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

It is abundantly clear to SESAC that there is a wide-ranging problem concerning unauthorized performances of musical works in the United States, particularly in the area of so-called “general licensing.” Specifically, a substantial number of small businesses—including restaurants, hotels, taverns, nightclubs, dance facilities, as well as concert halls and other live music venues—perform music without the necessary authorization.

SESAC has an obligation to its affiliated songwriters, composers, and music publishers to oversee the effective licensing of the musical works created and owned by its affiliates. While in theory this obligation may seem rather straight-forward it is, in fact, a laborious, time-consuming, and expensive process because many owners and operators of businesses that entertain their patrons and their communities with copyrighted music (whether through live or recorded music) are often unaware of or ignore the obligation to obtain the necessary authorization.

SESAC believes that assistance from the Copyright Office—for example, in the form of a letter or other public document that could be duplicated and included with the educational materials sent by SESAC and the other PROs to prospective licensees—would go a long way towards educating the public about the value of copyright, music licensing, and the effect that respect for the rights of creators of intellectual property has upon the United States economy as a

whole. SESAC is available at the Copyright Office's convenience to discuss in more detail how such an effort might be accomplished.

In conclusion, SESAC appreciates the opportunity to comment on these topics and is prepared to assist the Copyright Office with further input in the course of its music licensing study.

Respectfully submitted,

Dated: Nashville, Tennessee
May 23, 2014

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