

Before the
United States Copyright Office
LIBRARY OF CONGRESS
Washington, DC

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Music Licensing Study:))
Request for Additional Comments) Docket No. 2014-03
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**ADDITIONAL COMMENTS OF BROADCAST MUSIC, INC. ON
COPYRIGHT OFFICE MUSIC LICENSING STUDY**

On July 18, 2014, the Copyright Office (the “Office”) issued a Second Request for Comments (the “Notice”) in connection with its Music Licensing Study. 79 Fed. Reg. 42833 (July 23, 2014). The Office issued the Notice following the submission of written responses to its initial Notice and Request for Public Comments of March 11, 2014 (79 Fed. Reg. 14739, Mar. 17, 2014) (the “Initial Notice”) and a series of two-day public roundtables addressing music licensing that were held in Nashville, Los Angeles, and New York City in June 2014. In the Notice, the Office lists ten additional questions that were raised in the initial comments and roundtables relating to the licensing of musical works and sound recordings in the United States.

Broadcast Music, Inc. (“BMI”) is one of three music performing rights organizations (“PROs”) operating in the United States whose principal roles are to license the public performing rights in musical works on behalf of their members. BMI applauds the Office for its interest in helping creators and music users improve the licensing landscape through necessary changes and modifications in the current legal and regulatory framework.

As discussed in BMI’s Comments on Copyright Office Music Licensing Study that were submitted on May 23, 2014 in response to the Initial Notice (hereinafter the “Initial Comments”),

and as the Office well knows, BMI's blanket licensing has been endorsed over the decades by a broad panoply of parties across the copyright licensing spectrum. It has been applauded by the Registers of Copyrights in several reports presented to Congress. That being said, there are numerous obstacles and challenges to the efficient licensing of musical works in the digital online environment. The Notice poses a number of questions that address these areas of concern, and we respond to the questions affecting the licensing of musical works below.

RESPONSE TO THE NOTICE

BMI's responses to Questions 1-3 concern access to data and transparency, particularly with regard to BMI's extensive catalogue. We address publisher withdrawals from the PRO catalogs, the current PRO distribution methods, and related marketplace developments in response to Questions 4-6. We offer a brief assessment of international licensing models in response to Question 9. Finally, we assess the impact on music licensing of restrictions placed on BMI by the consent decree in response to Question 10.

Data and Transparency

- 1. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.**

As an initial matter, BMI supports the Office's current efforts to improve its public database, including for online records related to copyrighted works, and to update its procedures for recordation of the assignments and transfers of ownership. BMI commends the Office's initiatives to implement platforms and data standards that facilitate business-to-business applications in the copyright industries and technology sectors. Finally, BMI has always

supported and will continue to support full government funding for the Office so that it can achieve such goals and continue to serve the interests of copyright owners and users alike.

Without diminishing the value and utility of the Office's goals with respect to its public database, BMI believes that it is the role of the private sector, and not the federal government, to determine what data relating to copyrighted musical works is necessary for the efficient function of the licensing marketplace and how such data should be made available to the public and licensees. The collection and maintenance of accurate data related to the identity and ownership of musical works are essential to efficient and accurate licensing and royalty administration and distribution-related services that BMI provides for licensees and affiliates. As such, BMI dedicates considerable resources to this effort, and these resources are funded by the license fees that BMI collects. Contrary to the unfounded assertions of music licensing committees representing certain large media entities, BMI does not engage in practices designed to make it difficult to identify musical works, in furtherance of BMI's purported market power. The reality is quite the opposite. BMI has made portions of its data available to many users on many occasions in support of license negotiations and administration, and we currently exchange significant portions of our performance data with licensees when necessary to the computation of license fees.

Since 1995 BMI has maintained a searchable song title database, available at www.bmi.com, with public access to core metadata on the works of BMI affiliates. BMI was the first PRO to make its database available online; today that database includes more than 8.5 million musical works. Licensees can search BMI's database to determine whether a particular work is licensed by BMI and can also find contact information for the music publisher from which the licensee can obtain a direct license or source other rights. More recently, BMI, along

with U.S. PRO American Society of Composers, Authors and Publishers (“ASCAP”) and Canadian PRO Society of Composers, Authors and Music Publishers of Canada (“SOCAN”), launched a joint initiative called MusicMark with the goal of creating a common, authoritative picture of the musical works those PROs represent. Starting on March 31, 2014, music publishers were able to submit registration files to all three PROs simultaneously, which creates efficiencies in improved workflows and facilitates consistency of data across the PROs’ internal databases.¹

BMI and its MusicMark partners are not the only entities within the private sector to make a commitment to understand and respond to the current and prospective informational needs of customers. On June 27, 2014, Universal Music Publishing Group (“UMPG”) announced that it would be putting its U.S. catalog online, with password-protected access. UMPG intends ultimately to make its worldwide repertoire available online.² On July 16, 2014, Sony/ATV Music Publishing also made its entire song catalogue available on its website, through a password-protected search.³ At the express direction of these and other BMI-affiliated music publishers on whose behalf BMI currently provides administration services for certain of their direct licenses, BMI sends licensees detailed reports containing tens of thousands of work-by-work claims every quarter to enable royalty fee calculations under those licenses.

Importantly, the private sector has already made a significant investment to understand the current and prospective informational needs of the marketplace and the existing business

¹ Press release, ASCAP, BMI and SOCAN collaborate on MusicMark (April 2, 2014), available at http://www.bmi.com/news/entry/ascap_bmi_and-socan_collaborate_on_musicmark. For additional information, see <http://www.musicmark.com>.

² Press release, Universal Music Publishing Group To Offer Expanded Access To Song Catalog Data Through Company’s Website (June 27, 2014), available at <http://www.umusicpub.com/#contentRequest=newsdetail&contentLocation=sub&contentOptions=%26articleID%3D6437%26from%3Dpressreleases>.

³ Press release, Sony/ATV Makes Entire Catalogue Available Online (July 16, 2014), available at <https://www.sonyatv.com/index.php/articles/2566>.

processes and workflows that cause data discrepancies among licensors and, as a result, uncertainty for licensees. For BMI to maintain its technology and provide necessary upgrades to database hardware and software requires millions of dollars, a substantial investment for a non-profit-making organization.⁴ As the Office knows well, technology is an expensive yet necessary component of operating successfully in the twenty-first century.⁵

Data is a valuable asset that requires constant, sound management and continuing investments in data-science advances. BMI is committed to funding a level of transparency and access to repertoire information consistent with the reasonable needs of the marketplace, but it should be stressed that it is not BMI's intention simply to throw open its database – the product of 75 years of hard work and investment – for the public (including the legions of new entities competing with BMI in the music rights licensing/administration sector) to use in any way it sees fit. Additionally, BMI's responsibility to protect the confidential personal information of its affiliates is of paramount importance, and privacy protection and commercial-grade security measures are necessary components in a digital-based world. Contractual terms and royalty payment information are confidential and should remain proprietary and secure. BMI is well equipped to gather, assimilate and share certain reliable data and to work cooperatively with the Office to make it a twenty-first century institution.

⁴ BMI returns all license fees collected, less operating expenses and reasonable reserves, as royalties to its affiliated songwriters, composers, and music publishers whose works are publicly performed each year.

⁵ See, e.g., *Fiscal 2014 Budget Request: Before the Subcomm. on the Legislative Branch of the H. Comm. on Appropriations*, 113th Cong. 1st Sess. (Feb. 27, 2013) (statement of Maria A. Pallante, Register of Copyrights): “The Office is navigating an increasingly challenging budget environment at the very time it must improve aging technology systems and upgrade business processes to meet the demands of the digital age. Since fiscal 2010, it has absorbed a 7.3% reduction in its appropriation. The overall effect was a 4.6% reduction in total budget authority The Office substantially reduced its information technology budget, indefinitely postponing critical upgrades to the Office's electronic registration service that directly supports copyright commerce and affects both authors and users of copyrighted materials.”

2. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

BMI is among the 130 PROs around the world that participate in the International Confederation of Societies of Authors and Composers (“CISAC”), a global trade association and the umbrella organization of collective rights managers.⁶ CISAC’s societies have worked to develop certain global standards for identifying songwriters, composers, and music publishers, and their musical works.⁷

When a songwriter, composer, lyricist, or music publisher joins a PRO, the PRO applies for a unique identifier, or Interested Party (“IP”) Name Number, for the joining member. Associated with each IP Name Number is information necessary to identify uniquely the entity to which it applies, specifically the name of the writer or publisher, the PRO affiliation, date of birth (if applicable), and nationality. This information is collected and maintained in the IP Name Number database, the IPI System, which is an international system owned and managed by the Swiss copyright management organization SUISA⁸ and used by CISAC societies. All other identifying information about the joining member remains confidential with its affiliated PRO, including address, residence or other contact information, the identity of any assignees, and the heir(s) of any deceased writer. An IP Name Number is unique to each joining member, and is the primary international identifier for that member, even if its PRO affiliation changes.

⁶ CISAC is the acronym for its French name, Confédération Internationale des Sociétés d’Auteurs et Compositeurs. See www.cisac.org. See also Comments of ASCAP and BMI, In the Matter of Strategic Plan for Recordation of Documents, Docket No. 2014-1 (March 15, 2014) (hereinafter the “Recordation Comments”) at Appendix 1, available at http://copyright.gov/docs/recordation/comments/79fr2696/ASCAP_BMI.pdf.

⁷ For additional information on CISAC’s common information standards, see the Appendix to the Recordation Comments.

⁸ SUISA is the Cooperative Society of Music Authors and Publishers in Switzerland. See <http://www.suisa.ch/en>.

For musical works, the most widely embraced identifier is the International Standard Work Code (“ISWC”), which is approved by the International Organization for Standardization and is managed by CISAC in its capacity as the International Standard ISWC Agency.⁹ Each member of a PRO registers its musical works with the PRO for inclusion in the PRO’s title database.¹⁰ The PRO in turn requests from CISAC a unique ISWC for that musical work, and CISAC maintains a database that identifies all musical works by ISWC. A searchable database with core metadata is publicly available online at <http://www.iswc.org>. Through CISAC, the PRO community has been exploring ways to disseminate more widely ISWCs to improve efficiencies in the licensing and administration of the musical works the PRO community represents.

To incentivize more universal availability and adoption, BMI encourages the Office to amend its current forms for applying to register the copyrights in musical works to allow applicants to provide ISWC information. Consequently, once a certificate of registration of copyrights issues, ISWC information for the registered musical work would become publicly available through the Office’s online catalog. Additionally, as discussed in joint comments with ASCAP regarding the Office’s strategic plan for recordation of documents, BMI also advocates that the Office include ISWCs as fields in remittances for the recordation of transfers of copyrights.¹¹ Providing this information would enable searching by ISWC as well as by registration number, thereby ensuring that BMI would be able to verify recordation records prior

⁹ See Recordation Comments at Appendix 3.

¹⁰ BMI’s repertoire of musical works is available at <http://repertoire.bmi.com/startpage.asp>.

¹¹ Recordation Comments at 7.

to bringing infringement actions on behalf of its members as well as to provide supporting documentation to foreign affiliated PROs.¹²

A separate identifier for sound recordings exists, called the International Standard Recording Code (“ISRC”). The ISRCs are managed by various national agencies associated with the International Federation of the Phonographic Industry (“IFPI”).¹³

BMI strongly supports broad adoption and use of standard identifiers for musical works and sound recordings. Government incentives for adopting these global identifiers, however, should not be done in a manner that punishes those that fail to use the identifiers.¹⁴ The musical works licensing industry has already developed robust systems that enable the public to obtain data with regard to the vast majority of musical works in a simple, efficient, and inexpensive manner. By implementing small changes related to updating forms for the registration of musical works and the recordation of transfer of ownership to include global identifiers, the Office would encourage more registration and recordation filings.¹⁵

3. Please address possible methods for enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of non-usage-based forms of compensation (e.g., advances against future royalty payments and equity shares).

As described above, BMI is continuously striving to serve better the needs of both copyright owners and businesses that use music, in ways they can understand and use easily.

¹² *Id.* at 5, 7.

¹³ For additional information on the ISRC identifiers managed by IFPI, see <http://isrc.ifpi.org/>.

¹⁴ BMI categorically rejects the suggestion of the Digital Media Association (“DiMA”) included in its response to the Initial NOI that statutory damages should be conditioned on a copyright owner’s participation in a centralized database of musical works and sound recordings. See Comments of DiMA (May 23, 2014) at 29.

¹⁵ As stated in the Recordation Comments, BMI also opposes providing incentives for recordation in the form of a precondition for filing a lawsuit, eligibility for remedies such as statutory damages and attorney’s fees, and invalidating transfers that have not been recorded. See Recordation Comments at 7-9.

As discussed in response to Question 1, BMI and partners ASCAP and SOCAN have launched their MusicMark initiative, with a goal of creating a common, authoritative picture of the musical works that we represent. This will facilitate a more efficient way to register and maintain accurate, up-to-date information relating to musical works. It is also anticipated that MusicMark will ensure that businesses have access through the partner PROs to more precise information about music whose rights they wish to license. As general practice, BMI does not give any equity shares, and information regarding advances is not publicly disclosed.

In addition, BMI is currently working toward enhancing transparency for three key constituencies: (1) to the general public; (2) to BMI's affiliates; and (3) to BMI's licensees.

Information Available to the Public

BMI currently provides a significant amount of information on its website that can be accessed by anyone at anytime from anywhere in the world. This information includes:

- *Searchable Repertoire.* BMI has developed and maintains an extensive searchable repertoire database on www.bmi.com and has for nearly two decades. The database includes more than 8.5 million musical works, along with the associated writers and BMI-affiliated publishers – all of which can be searched by title, artist, songwriter, or composer, by anyone at any time.
- *Payment Schedules.* A full year in advance, BMI publishes the dates on which it will make its royalty distributions, and for what period of time. This schedule is provided online in BMI's Royalty Policy Manual.¹⁶
- *Royalty Information.* The BMI website provides comprehensive information about how royalties are calculated and distributed in the Royalty Policy Manual.¹⁷

To enhance BMI's searchable repertoire database, and as discussed in response to Question 2, several initiatives already underway are being enhanced to improve public transparency and search capability and provide detailed data about each work posted, including:

¹⁶ See the schedule of payment dates available at http://www.bmi.com/creators/royalty/general_information/detail.

¹⁷ The Royalty Policy Manual is available at http://www.bmi.com/creators/royalty/general_information/detail.

- All writers in BMI’s database with affiliation and standard IP Name Number;
- All BMI publishers with current affiliation and IP Name Number;
- Annotated linkage between the BMI writer and their corresponding BMI publisher;
- Other non-BMI represented publishers noted as “*Additional non-BMI publishers*”;
- and
- If needed, a disclaimer to indicate the work (or a share of the work) is not licensed by BMI for all uses.

To the extent BMI has the data available, additional information may include record release date, ISWC, and the name of the recording artist(s) associated with the work.

Information Available to BMI’s Affiliates

For its affiliated songwriters and music publishers, BMI provides information about royalty payments, copyrights, registration, and licenses on www.bmi.com. Additionally, BMI has invested significant resources into enhancing transparency for its affiliates in a number of areas that are available through their online, password-protected accounts with BMI:

- *Online and Mobile Accounts.* Affiliates can set up online accounts that are secure and up-to-date 24 hours a day, 7 days a week, and 365 days a year. Additionally, affiliates can receive mobile access to their account information, including tax documents, works registrations, and previous statements.
- *Detailed Statements.* Individual royalty statements show the detail of songwriters’ and publishers’ performances: how, when, how frequently, and where their music was played, and what royalties they are receiving for those performances.
- *Changes to Distribution Rules.* BMI provides more than six months’ notice to our affiliates of upcoming changes to distribution rules, allowing ample opportunity to address questions and concerns with BMI’s knowledgeable affiliate services team.

BMI is continuously looking to improve the amount and quality of information available to its affiliates and to provide affiliates with the resources they need to continue to pursue their livelihoods as songwriters and music publishers. The improvements to the BMI repertoire

discussed above will benefit BMI's affiliates in helping to identify the public performances of their musical works and to ensure timely payments for those performances.

Information Available to BMI's Licensees

BMI's website provides extensive information about the BMI repertoire and the public performing right licenses that BMI offers. These licenses clearly define the fees for the different uses of music that a business may have. Form licenses are available on www.bmi.com for potential licensees to view prior to signing up with BMI.

Additionally, BMI provides certain online services for its licensees. With a password-protected account, businesses that license music from BMI have the ability to review and manage their accounts online or through a mobile site, including renewing their licenses, reporting their music usage and making their license fee payments.

Musical Works

- 4. Please provide your views on the logistics and consequences of potential publisher withdrawals from ASCAP and/or BMI, including how such withdrawals would be governed by the PROs; whether such withdrawals are compatible with existing publisher agreements with songwriters and composers; whether the PROs might still play a role in administering licenses issued directly by the publishers, and if so, how; the effect of any such withdrawals on PRO cost structures and commissions; licensees' access to definitive data concerning individual works subject to withdrawal; and related issues.**

BMI believes that permitting publisher withdrawal of certain digital performing rights from BMI would be beneficial for the music industry and the market. There are various logistics and consequences of such a partial withdrawal that would significantly impact the market. We address each of those issues in turn below. Of course, total withdrawal from PROs by significant catalogs presents a great range of challenges.

How Withdrawals Would Be Governed by the PROs

In a December 2013 decision, the BMI rate court held that under BMI's consent decree, BMI must license *all* of a publisher's public performing rights in a work or *none* of them.¹⁸ That is to say, the rate court determined that under the BMI consent decree, BMI may not license to any user the rights to a work that has been partially withdrawn. This decision led four large music publishers who are seeking partial withdrawal to reach temporary "suspension" agreements with BMI, allowing their works to be licensed by BMI for all purposes through 2014. At the same time, certain publishers have stated that they may feel the need to withdraw their works from the BMI repertoire altogether if the BMI consent decree is not modified to allow for partial withdrawal.¹⁹ Putting publishers to this "all in" or "all out" choice is not only bad policy under copyright and competition principles, it is potentially catastrophic for smaller publishers and songwriters who depend on BMI for their livelihood, and for BMI's hundreds of thousands of customers who depend on BMI to fulfill their copyright obligations. BMI has recently encouraged the Antitrust Division of the U.S. Department of Justice (the "Department") to prioritize amending the BMI consent decree to allow publishers to withdraw defined digital rights from BMI while allowing BMI to license all other music uses.²⁰

¹⁸ *Broad. Music, Inc. v. Pandora Media, Inc.*, 2013 WL 6697788, at *3-4 (S.D.N.Y. 2013) ("The BMI Consent Decree requires that all compositions in the BMI repertoire be offered to all applicants If BMI cannot offer those compositions to New Media applicants, their availability does not meet the standards of the BMI Consent Decree, and they cannot be held in BMI's repertoire. Since they are not in BMI's repertoire, BMI cannot deal in or license those compositions to anyone."). The ASCAP rate court had previously made a determination that put publishers in the similar position of having to leave ASCAP entirely if they wished to retain any licensing right exclusively for themselves. *See* Opinion & Order, *In re Petition of Pandora Media, Inc.*, No. 1:12-cv-8035-DLC (S.D.N.Y. Sept. 17, 2013), *appeal docketed*, No. 14-1158 (2d Cir. Apr. 16, 2014).

¹⁹ *See, e.g.*, Ben Sisario, *Sony Threatens to Bypass Licensers in Royalties Battle*, N.Y. Times, July 11, 2014, at B2, available at http://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html?_r=0.

²⁰ *See* Public Comments of BMI, U.S. Department of Justice, Antitrust Division, Review of Consent Decree in *United States v. Broadcast Music, Inc.* (August 6, 2014) at 12, available at http://www.bmi.com/pdfs/advocacy/bmi_public_comments_to_doj.pdf.

Prior to these rate court decisions, large music publishers had approached BMI and ASCAP to request the withdrawal of the right to license certain defined categories of digital music services, while remaining affiliated with PROs for licensing all other music users. BMI agreed to these “partial rights withdrawal” requests, subject to detailed guidelines that BMI developed to ensure that the process would be both orderly for BMI and fair to BMI licensees. These guidelines, which were available on www.bmi.com,²¹ detailed certain areas of publisher’s partial withdrawals of digital rights from BMI, namely:

- Scope of Digital Rights Withdrawal.
- Scope of Repertoire Subject to Withdrawal.
- Timetable for Digital Rights Withdrawal.
- Catalog Acquisitions and Transfer and Publisher Administration Agreements.
- Licenses in Effect.
- BMI Administration Agreement.
- Direct Licensing.

In fact, partial rights withdrawal would serve only procompetitive purposes. First, it retains the efficiencies that BMI and its blanket license provide for traditional music users, and for publishers and songwriters who choose not to withdraw even partially. Second, it would empower publishers to engage in direct licensing for digital music uses outside the shadow of the rate court without disrupting their ability to use BMI to license for non-digital uses. In this sense, partial withdrawal allows rates for digital users to be set more by market forces and less by a finder of fact, without sacrificing the efficiencies associated with BMI. Third, the direct

²¹ These guidelines were removed from BMI’s website on December 31, 2013, following the *Pandora* rate court decision.

licenses resulting from partial withdrawal will provide improved benchmarks for any finder of fact, since they will not be negotiated in the shadow of the rate court or arbitration.

Whether Withdrawals Are Compatible with Existing Publisher Agreements

BMI's current affiliation agreements with its publishers and songwriters cover the public performing right for all purposes, with the exception of grand performing rights which are withheld. These agreements can be modified to allow for digital rights withdrawal. In connection with those modification agreements, BMI also prepared the guidelines for digital rights withdrawal discussed above which endeavored to ensure a fair process for all participants in the marketplace.

In the event that some form of partial rights withdrawal is permitted, modifications to BMI's existing publisher affiliation agreements could be made to allow for such withdrawal, just as it was prior to the 2013 BMI rate court decision.

Whether the PROs Might Play a Role in Administering Publishers' Direct Licenses

In the context of partial rights withdrawal, BMI can still assist publishers in providing certain royalty administration services for their direct licenses covering the withdrawn rights, with administration terms and fees as agreed to by the parties. BMI would continue to provide its customary licensing and distribution services to the publishers and songwriters with regard to all other aspects of the public performing right.

Licensees' Access to Data Concerning Individual Works Subject to Withdrawal

BMI is willing to work with any withdrawing publisher to provide access to data concerning those works specifically subject to the withdrawal. As more fully described in other responses, BMI has been providing reports containing tens of thousands of work-by-work claims every quarter to enable license fee calculations for publishers that have entered into direct

licenses with certain digital music users, and we are prepared to discuss other actions that might be taken with regard to data access to help facilitate the effective functioning of this new market.

5. Are there ways in which the current PRO distribution methodologies could or should be improved?

BMI's methodology for distributing royalties to affiliates is set forth in the Royalty Policy Manual, which is available online at www.bmi.com for all current and potential songwriter, composer, and publisher members to review at any time.²² BMI's customary distribution processes provide written details regarding the calculation of royalty payments for the public performance of songs in various media, including radio, television, digitally, and in live venues in the U.S.²³ The U.S. PROs compete for repertoire. If a given PRO's methodology was not competitive, copyright owners and creators would still have options. To the extent that distribution methodologies could be improved, the marketplace ensures that incentives exist in this key area. Our response above details current efforts and initiatives that are underway to improve data accuracy and transparency. International societies follow their own practices with regard to royalty distributions and send royalties to BMI. BMI sends its affiliates quarterly royalties for international performances, indicating the society and type of performance.

²² See http://www.bmi.com/creators/royalty_print/detail.

²³ BMI, ASCAP, and SESAC each have a different distribution methodology to calculate royalties for their respective members. The Radio Music License Committee ("RMLC") complained in its comments to the Initial NOI that these methodologies are "designed to maximize [the PRO's] own market share" that leads to "absurd result[s]." See Comments of the RMLC (May 23, 2014) at 8. BMI rejects such baseless assertions and affirms that nothing requires the PROs to utilize identical distribution methodologies. BMI's distribution methodology is fair, transparent, and designed to maximize the amount of royalties paid to affiliated songwriter and publisher members. In general, the criticisms levied by major media industries neglect to credit the key role played by PROs over the years in fostering through their royalty distributions the creation of new music that itself has fueled the tremendous growth of media in the United States. Music is not a commodity like electricity – it is made by real people, often in collaboration, and often building on and changing existing genres in new and exciting ways. BMI's talented executives identify, nurture, and recognize new music as well as support legacy works of long enduring value.

6. In recent years, PROs have announced record-high revenues and distributions. At the same time, many songwriters report significant declines in income. What marketplace developments have led to this result, and what implications does it have for the music licensing system?

The emergence of digital technology and the Internet has revolutionized the consumption of music around the world. Not only has the proliferation of digital outlets greatly increased the number of firms making public performances at any given time, it has also increased the number of public performances exponentially.²⁴ The sheer number of copyrighted songs performed publicly on any given day has increased dramatically due to the much deeper playlists possible in the digital space as compared to terrestrial radio. In addition, the instant availability to the public of the widest possible choice of recorded music by means of streaming technology has come at the expense of an accelerating drop-off in the sale of recordings (hard copies and downloads).²⁵ This decimation of the market for recorded music has made public performances of the kind licensed by BMI the most important source of compensation for songwriters and composers.

These significant changes to the music licensing marketplace have led BMI to make substantial effort to maintain and increase the amount of licensed public performances of works of its songwriter, composer, and music publisher affiliates. Over the past decade, BMI has successfully been able to diversify its revenue base nationally and, through its partnering with international PROs, increase the amount of BMI-affiliated music publicly performed outside the

²⁴ For instance, “[l]istener hours for Pandora during the month of May 2014 were 1.73 billion, an increase of 28% from 1.35 billion during the same period last year.” Press Release, Pandora, Pandora Announces May 2014 Audience Metrics (June 4, 2014), available at <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&ID=1937243&highlight>. Likewise, “over 6 billion hours of video are watched each month on YouTube” (YouTube, Statistics, available at <https://www.youtube.com/yt/press/statistics.html>) and YouTube’s “Music” channel is its most popular, with over 86 million subscribers. See <https://www.youtube.com/channel/UC-9-kyTW8ZkZNDHQJ6FgpwQ>. Pandora’s and YouTube’s individualized offerings result in separately calculable performances for each listener or viewer.

²⁵ Billboard Bulletin reported on August 28, 2014 that weekly album sales fell below 4 million units for the first time since 1991. See http://www.billboard.com/articles/business/6236365/album-sales-hit-a-new-low-2014?utm_source=Sailthru&utm_medium=email&utm_term=biz_breakingnews&utm_campaign=Breaking%20News.

United States. As a result of these efforts, BMI's revenues have grown over the past decade, particularly from cable television and from international sources. Our concern, however, is that this growth disguises the fact that our songwriters, composers, and publishers are not receiving fair-market-value compensation for their work in the audio sector, specifically in the fast-growing digital media space that is taking audiences away from traditional royalty paying sources like terrestrial and satellite radio.²⁶

Overall, BMI's largest growth of revenue has come from sources outside the United States. Internationally, BMI's revenues from overseas markets have made up an increasing share of BMI's public performance royalties in recent years, growing from 22% of total BMI revenues in 2003 to over 31% of total revenues in 2013. This growth reflects an increased use of American music overseas, but also the higher value attributed to the works of our songwriters abroad as compared with the value domestically. Over the past decade, our songwriters and BMI's domestic revenues have struggled to keep pace with inflation, but overseas we have grown revenues by almost 12% per year.

Comparatively, however, we note that many of the digital services that distribute musical works online have also experienced record-high revenues and distributions over the past few years. While the consumer price index has increased between 1.5% and 4% annually over the past decade,²⁷ user industries are growing at a significantly faster rate. For example, YouTube has grown within the past five years to be an important source of streaming music online, generating billions in revenue for its parent company Google. Pandora notes that its annual

²⁶ Following a steep reduction in broadcast radio revenues, the RMLC started rate court cases against both ASCAP and BMI demanding – and ultimately obtaining – a large reduction in license fees to recalibrate their license fees to their newly reduced economic circumstances.

²⁷ See Bureau of Labor Statistics on the Consumer Price Indexes, specifically *Table 24. Historical Consumer Price Index for all Urban Consumers (CPI-U): U.S. city average, all items, available at <http://www.bls.gov/cpi/cpid1406.pdf>* at 70.

revenues grew 56% in 2013, to \$637.9 million.²⁸ Spotify's 2012 revenue was \$576.6 million, a 56% increase from 2011.²⁹ And Apple's iTunes, which held 63 percent of the digital music download market in 2012,³⁰ generated \$12.9 billion during that fiscal year, a 38% increase over 2011.³¹ Despite this phenomenal growth, these services have paid relatively little performance rights royalties to the songwriting and publishing community.

Despite the vast sums of money generated by the digital music marketplace, copyright owners and especially songwriters are, comparatively, losing money. The percentage of royalties generated for music licensing in the digital environment remains inequitable and below fair market value.³²

BMI believes that one reason there is relatively low remuneration of songwriters and publishers by digital music services because section 114(i) of the Copyright Act has been read to forbid the rate courts from considering the fair-market-value rates paid or set by the Copyright Royalty Judges for sound recording performance rights as additional benchmarks for musical

²⁸ Press release, Pandora Reports Calendar Q4 and Calendar Year 2013 Financial Results (Feb. 5, 2014), available at <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&ID=1897339&highlight=>.

²⁹ See Sven Grundberg and Johannes Ledel, *Spotify's Chief Stays Confident in Business*, THE WALL STREET JOURNAL, July 31, 2013, available at http://online.wsj.com/news/articles/SB10001424127887324136204578639630203372710?mod=rss_whats_news_us&mg=reno64-sj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887324136204578639630203372710.html%3Fmod%3Drss_whats_news_us.

³⁰ Taylor Soper, *iTunes rival: AmazonMP3 growing with 22% of online music downloads*, GEEKWIRE, April 16, 2013, available at <http://www.geekwire.com/2013/amazonmp3-grow-itunes/>.

³¹ See Apple Inc., Annual Report (Form 10-K) 27 (October 30, 2013). iTunes revenues for 2013 were \$16 billion, a 25% increase over 2012.

³² For example, see *Music Licensing Under Title 17 Part One: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong., 2d Sess. (2014) (written testimony of Lee Thomas Miller, Songwriter, President, Nashville Songwriters Association International, at 2: "The current system is unjust and must be changed. Rules established in 1909, largely to prevent one player piano roll company from becoming a monopoly, require me to grant a compulsory license paying 9.1 cents for the sale of a song, which I split with my co-writers and our music publisher, regardless of what the marketplace might say my song is worth. That's not much of a pay raise from the original two cents paid in 1909.").

works fees.³³ In order to eliminate this obstacle to fair market value, Representative Doug Collins [R-GA] and a growing list of co-sponsors introduced the Songwriter Equity Act (“SEA”) in Congress in 2014.³⁴ As Michael O’Neill, Chief Executive Officer (“CEO”) of BMI, recently testified before Congress,³⁵ the SEA establishes a process that permits the rate courts to consider all relevant benchmark deals. Importantly, the SEA does *not* mandate rate increases for the PROs, nor does it even require the rate courts to give *any* weight whatsoever to sound recording rates.³⁶

If songwriters are not compensated in a manner that reflects the value of their work in the marketplace, the implication necessarily follows that fewer talented people will be incentivized to pursue a career in songwriting.

International Music Licensing Models

9. International music licensing models for the reproduction, distribution, and public performance of musical works differ from the current regimes for licensing musical works in the United States. Are there international music licensing models the Office should look to as it continues to review the U.S. system?

In an increasingly globally-connected market, understanding the methods and models of trading partners is always a useful endeavor. Music appreciation is worldwide, and public performances know no borders, particularly in the digital age. From a comparative law perspective, it is always useful to consider music licensing models that exist outside the United

³³ 17 U.S.C. § 114(i).

³⁴ Songwriter Equity Act of 2014, H.R. 4079, 113th Cong., 2d Sess. (2014), introduced February 26, 2014.

³⁵ *Music Licensing Under Title 17 Part One: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong., 2d Sess. 11-13 (2014) (written testimony of Michael O’Neill, CEO, BMI) (hereinafter “O’Neill Testimony”).

³⁶ We note that certain commenters oppose the SEA. For example, CTIA-The Wireless Association and the National Religious Broadcasters Music License Committee (“NRBMLC”) both criticize the SEA in their comments, calling it “one-sided.” See Comments of CTIA-The Wireless Association (May 23, 2014) at 12; Comments of the NRBMLC (May 23, 2014) at 11. This is a mischaracterization of the SEA.

States. The Berne Convention has minimal standards for membership in the Berne Union.³⁷ The World Intellectual Property Organization’s (“WIPO”) Copyright Treaty, which ninety-two countries including the United States have joined, is built upon the Berne Convention.³⁸ Both treaties require “national treatment,” based on the cornerstone principle of giving others the same treatment as one’s own nationals.³⁹

The performance right in musical works that BMI licenses is viewed internationally as having at least equal if not greater value than neighboring rights for record labels, since sound recordings are built on the underlying musical composition. This approach recognizes the undeniable fact that there can be no sound recording without an underlying musical composition.

Other Issues

10. Please identify any other pertinent issues that the Copyright Office may wish to consider in evaluating the music licensing landscape.

BMI’s growth from its founding in 1939 is attributable to its welcoming of songwriters in emerging genres, like jazz, blues, and country. Today, BMI is the largest music rights organization in the United States and continues to nurture new talent and new music. BMI operates as the bridge between songwriters and the businesses that want to perform their music publicly. Our goal and our responsibility to our affiliate members is to serve as an advocate for

³⁷ See Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), available at http://www.wipo.int/treaties/en/ip/berne/summary_berne.html.

³⁸ See list of contracting parties to the WIPO Copyright Treaty, available at http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16. The WIPO Copyright Treaty also has minimal standards.

³⁹ See Berne Convention for the Protection of Literary and Artistic Works art. 5(1), Sept. 9, 1886: “Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”

the value of music and for the 8.5 million musical works created and owned by more than 600,000 songwriters, composers, and music publishers.

However, BMI is hampered by the terms of its consent decrees and, consequently, so are those whose musical works and public performing rights we champion. The BMI consent decree has its origins as far back as 1941, with virtually all its modern provisions adopted in 1966. In the intervening 50 years, society has seen the rise of a plethora of new media for the transmission of content – including but not limited to cable television, satellite radio, commercial music services and, of course, the Internet. These are not just new distribution platforms operating under traditional rules. Rather, particularly in the case of the Internet, the demands of the market have changed, leaving the current BMI consent decree ill-equipped to meet the goal of collecting and distributing royalties for songwriter, composer, and music publisher affiliates.

BMI has repeatedly called for reforms to its decree. As BMI CEO Michael O’Neill explained to Congress in a June 10, 2014, hearing on music licensing, “BMI is locked into a business model that might have been appropriate when the Beatles first arrived in America, might have been appropriate when you had to get up from the sofa to change the channel on your television – but is not appropriate for the modern world of rights management.”⁴⁰ BMI’s Senior Vice President of Licensing Michael Steinberg pointed out during the New York roundtable that the original BMI consent decree dates to the year of the release of the classic film *Citizen Kane*.⁴¹

⁴⁰ Press release, BMI Outlines Needed Changes for Songwriters, Composers and Music Publishers (June 10, 2014), available at <http://www.bmi.com/press/entry/568097>. See also O’Neill Testimony, *supra* note 33. In his testimony, Mr. O’Neill offered on behalf of BMI four areas of proposed consent decree reform: (1) digital rights withdrawal should be permitted under the BMI decree; (2) BMI should be able to license multiple rights, including mechanical rights; (3) the BMI rate court should be replaced or streamlined; and (4) the BMI consent decree should be periodically reviewed or sunset.

⁴¹ *U.S. Copyright Office Music Licensing Public Roundtable* (New York, June 23, 2014) at 43 (testimony of Michael Steinberg, Senior Vice President of Licensing, BMI), available at <http://copyright.gov/docs/musiclicensingstudy/transcripts/mls-nyc-transcript06232014.pdf>.

BMI recently submitted public comments to the Antitrust Division of the U.S. Department of Justice, which has recently begun reviewing the scope of both BMI's and ASCAP's consent decree in order to determine their operation and effectiveness. In particular, the Department is exploring whether the consent decrees should be modified and, if so, what modifications would be appropriate. In its comments to the Department, BMI advocates for a number of modifications to the consent decrees also discussed in these comments, including permitting partial withdrawal of digital rights (see response to Question 4). BMI is actively cooperating with the Antitrust Division in its review and reconsideration of the consent decrees in light of the realities of music licensing in the digital age.

Additionally, in its comments to the Department, BMI also addressed the issue of modifying the consent decree to permit BMI to license additional rights. The efficiencies of distributions of royalties to affiliates would be greatly improved if the BMI consent decree were modified expressly to permit BMI to license additional rights, such as mechanical, synchronization, and lyric rights, and offer them as a "bundle" to licensees.⁴² Historically, BMI has only licensed public performing rights,⁴³ yet multiple rights are necessary to disseminate music on the Internet. BMI should therefore be permitted, at the option of the rights holder, to license other copyright rights in musical compositions, at the option of the music user – either individually or bundled with the public performing right.⁴⁴ Importantly, BMI proposes to act as

⁴² The BMI consent decree, unlike that of ASCAP, does not contain an explicit provision limiting the rights that BMI can license. However, to the extent any uncertainty exists, the BMI consent decree should be modified to recognize explicitly BMI's ability to license other rights.

⁴³ BMI has also, to a very limited extent, licensed synchronization rights to facilitate broadcasts; it also administers digital audio recording technology ("DART") royalties awarded by the Copyright Royalty Board pursuant to 17 U.S.C. § 1001 *et seq.* for its songwriters and publishers who so collect.

⁴⁴ Permitting BMI to offer bundled rights will also bring the United States into line with collective licensing practices in Europe, where collective music rights organizations ("CMOs") and publisher consortia often handle the licensing of both public performance and mechanical rights. It is a common practice for those CMOs to offer "one-stop-shop" licensing for multiple copyright rights.

an agent for such additional rights, at the election of the owner of the rights and the user, where prices are established in the market. BMI would oppose any effort to impose new compulsory license obligations on reproduction rights beyond the narrow confines of the existing compulsory license in 17 U.S.C. § 115.

In this regard, BMI expressly rejects the suggestion of DiMA that the scope of the section 115 compulsory license be expanded to include the public performing right and that bundled rights should be collected by a unitary agent.⁴⁵ Such a proposal would reduce marketplace opportunities, not expand them, and would further decrease the already below-fair-market-value rates paid to songwriters.⁴⁶

If digital rights withdrawal were permitted under the BMI consent decree, as discussed in response to Question 4, we anticipate that some larger publishers would take the opportunity to license and bundle multiple rights. Most publishers, however, and particularly smaller and independent publishers would likely opt to remain with BMI, as they may lack the personnel, technological, and data collection resources necessary to explore such licensing opportunities or simply may prefer to retain the expertise and value that BMI provides. As discussed in BMI's Initial Comments, it is therefore pro-competitive for the BMI consent decree to be modified so that these smaller and independent publishers, through BMI, are able to bundle rights and therefore compete with the licensing offered by larger publishers. With the ability to license bundled rights, BMI would be able to distribute revenues to its songwriter and publisher

⁴⁵ See Comments of DiMA at 26.

⁴⁶ BMI additionally disagrees with the proposal of the Recording Industry Association of America, Inc. ("RIAA") for a unified music license that would encompass all musical works rights to be administered and licenses solely by the recording industry. See Comments of the RIAA (May 23, 2014) at 16-17. This suggestion is not conducive to obtaining fair market value for the public performance right of musical works.

members more efficiently – all without these songwriters and publishers having to pay additional overhead costs for the administration and distribution of these royalties.

A number of interested parties have advocated in their initial comments to the Copyright Office the need to maintain the consent decrees. BMI does not bother to respond to the stale rhetoric and unsubstantiated allegations of those parties – many of whom represent massive industries that, through their attacks on BMI, are directly attacking the livelihood of songwriters and composers. BMI’s goal in seeking to modify the consent decree is simply to repair the music licensing market for the benefit of songwriters, composers, music publishers, the licensees who perform BMI music, and the listening public.

CONCLUSION

BMI commends the Office for both continuing its study on the effectiveness of licensing music and seeking public input on the topic. Use of information in a report to Congress will not only benefit the Office in its analysis but will also be helpful to the Judiciary Committees of the House of Representatives and Senate as they consider potential revisions to the Copyright Act in light of technological, marketplace, and other developments that impact the creation, public performance, and use of copyrighted works.

Respectfully Submitted,

/s/ Stuart Rosen

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Date: September 12, 2014