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

Notice of Inquiry:	)	
	)	**Docket No. 2014-03**
Music Licensing Study	)	

COMMENTS SUBMITTED BY
INTERESTED PARTIES ADVANCING COPYRIGHT (IPAC)
IN RESPONSE TO JULY 23, 2014, NOTICE OF INQUIRY

Interested Parties Advancing Copyright (IPAC) respectfully submits these Comments pursuant to the Copyright Office's Notice of Inquiry and Second Request for Comments examining Music Licensing issues dated July 23, 2014 (the "Second Notice"). 79 Fed. Reg. 42883. These comments supplement those submitted by IPAC in response to the Copyright Office's first Notice of Inquiry dated March 17, 2014 (the "First Notice"), as well as those opinions presented during the roundtable discussions.

Introduction

The previous comments submitted in response to the First Notice and the opinion expressed in the roundtable discussions revealed an overwhelming consensus on two major issues. First, the current music licensing system is broken. Second, and perhaps a less obvious consensus, most interested parties can agree that music licensing reform should focus on at least the following four over-arching principles:

1. All creators deserve rates based on fair market value, ideally determined in a free market.

2. The license process should be simplified and made more efficient. Collective, blanket and/or bundled rights licensing, where practicable and necessary to avoid separate licenses for overlapping rights, should lead to reduced transaction costs and legal risks.

3. Information on copyright ownership should be improved so that it is clear, accurate, and readily available (e.g., through a comprehensive, authoritative database or other means).

4. Royalty payments should be more transparent and include the mechanisms and audit rights necessary to ensure accurate and timely payments reflecting today's digital marketplace, including direct payments from the services to an agent representing musical work owners and songwriters.

Admittedly, there is and will continue to be disagreement among the interested parties regarding how these principles are best applied and how certain terms within these principles are defined. Yet if music licensing reform efforts can maintain a focus on these four principles, we can develop a contemporary music licensing system that is more fair and efficient for all interested parties and that can adapt to new technologies and changes in the market place. The comments below further highlight the manner in which IPAC believes these issues are best addressed. IPAC has chosen to focus on only certain questions where it feels it has the most insight to provide.

Comments

Data and Transparency

1. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative 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.

A comprehensive and authoritative database of musical works, available to the public, is something all parties involved in the music industry should see as advantageous to the music licensing eco system. Opinions within the industry vary, however. Some organizations have historically taken the position that their data is proprietary and should remain private, especially with respect to specific percentages of ownership in each musical work, as well as specific information as to whom the exact owner(s) is (are). Other organizations and owners of musical works believe their data should be available to certain parties, but not "readily" available to the

public, while there are those who are open to making their information available, but who simply don't know how to accomplish this.

There have been efforts in the past to pull various parties together to agree on the structure and specifications of a centralized, authoritative database, although the completion of such a database was never accomplished, perhaps because too many large companies and organizations differed as to its process and structure. Other entities have worked to acquire this data from various sources over a number of years. However some of this data has ultimately been shown to be far less than 100% accurate, and the position some of these entities currently hold in the marketplace could make it difficult for the industry as a whole to trust them as being an efficient and authoritative source.

Although some of the current efforts may indeed prove to be successful, the answer to this dilemma may lie outside of the usual parties who have unsuccessfully attempted to solve this problem to date. We believe private actor(s), with the cooperation of some current entities, including the U.S. Copyright Office, would be able to accomplish what has not been successful to date.

The entity or entities taking on the role of establishing a comprehensive and authoritative database must achieve the following. First, the party must have the trust of all the players in the music industry. Second, the entity must quickly show its efficiency in gathering, perfecting, and making such information readily available. Third, the information necessary for the comprehensive, authoritative database can exist on multiple levels. For instance, in order for this entity to be an integral part of the music license eco system, the primary information necessary is (1) the exact musical work identification, (2) the controlling parties, and (3) their percentages of that musical work. Finally, this particular level of information needs to include a direct

communication method between a potential licensee and the controlling licensors of the musical work. It is difficult to justify how this level of information should remain proprietary and private.

Additional levels of information can also exist to show writer percentages, ownership, transfer history, payees, and any other applicable and necessary information. But none of the information at this level is necessary simply for songs to be licensed and to receive payments through the music-licensing environment. One option is for some or all information at this level to remain in a more private state, to be available only to those necessary to carry out the license, collection, and payment process.

Within this centralized database, metadata for a musical composition should be organized with unique identifier codes which are assigned, whether through a system that exists today, or through a new identification unique to this database, with such identifier(s) being assigned at the earliest possible time during the process. These identifiers should correspond, or at least connect, with various international standards that currently exist or may exist in the future, to allow for and enhance global trade. These unique identifiers will also need to take into account and accommodate various versions of the musical compositions as they exist, including variations of ownership, controlling parties, and payees. The musical composition database should then be tethered to a separate centralized database containing all sound-recording metadata related to each recording of a musical composition. The obvious connection would be through the current SoundExchange database or similar domestic or global databases if established in the future. A comment stated recently during the Copyright Office round tables was that "the best identifier of a song is the recording itself," if one exists.

In short, a comprehensive and authoritative database should exist, and whatever party or parties are successful at bringing such a system to the marketplace should be able to be rewarded through the free market system, and not saddled with unnecessary restrictions and governance. Of course, reasonable oversight may be a necessary ingredient, but such oversight should be carefully and deliberately debated to ensure a reasonable marketplace to best incentivize such an entity to flourish.

2. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists.

Musical Compositions (or Works) - ISWC (International Standard Musical Work Code): a unique, permanent and internationally recognized reference number for the identification of musical works. Currently, the US National Agency for assigning this code in ASCAP.

Sound Recordings - ISRC (International Standard Recording Code): a unique, permanent and internationally recognized reference number for the identification of sound recordings. Currently, the US National Agency for assigning this code is RIAA.

Musical Compositions (or works) - CWR – (Common Works Registration): developed by CISAC to standardize information exchanges between global copyright societies.

Songwriters/Composers = “CAE” (Composer, Author and Editor) or “IPI” (Interested Parties Information): assigned through the PROs in the United States at the time songwriters and composers register with a US PRO.

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.

To a certain extent, the consequences of potential publisher withdrawals from ASCAP and/or BMI will be determined by the specific publisher (or publishers) withdrawing from a particular performing rights organization ("PRO"). Withdrawal by a relatively small independent publisher, or even a modest number of small independent publishers, will have very limited consequences on the PRO structure, commissions, licenses, and data records. If one or more of the major publishing companies withdraws, however, the consequences could be significant. Because the major publishers collectively represent a significant majority of the music publishing market, their withdrawal from the PROs will result in a minority of the music publishing market paying 100% of the operating costs of the PROs. Yet the operating costs of the PROs will not significantly change as a result of these withdrawals due to the blanket licensing system. The PROs would still issue and administer the same number of licenses to venues, networks, websites, and other platforms, but they would do so for a smaller percent of the market and collect less revenue as a result thereof. The various licensees would also have to anticipate payments not only to the PROs, but also to the major publishers, which might further reduce licensing revenue.

That being said, if publishers, regardless of market share, cannot receive fair market rates for the public performance of their music through the PROs, then publishers should be allowed to withdraw all or some of their rights. Music publishers have the right to ensure the use of their works is adequately compensated. Additionally, the possibility that publishers could withdraw

their rights and negotiate directly with licensees gives PROs leverage in negotiating better rates and terms. This is because a licensee's unwillingness to pay fair market rates to a PRO could result in paying out more money to more parties in the long run if the licensee must negotiate with both the PROs and publishers directly. Publishers will be less inclined to withdraw if they are confident the PROs are receiving fair market rates.

As to whether withdrawal from the PROs is compatible with all agreements between any publisher and all of their writers, as written, it is difficult to answer because publishers' agreements with songwriters have changed over the years and are unique to each publisher. That being said, most songwriter agreements at least recognize the songwriter's right to collect either 50% of all public performance monies related to their compositions or to collect the so-called "writer's share" from his or her PRO. In the case of publisher withdrawals, if PROs cannot continue to represent the so-called "writer's share", publishers will simply have to recognize that they become the organization responsible for paying songwriters their writer's share of public performance monies and that they will have to amend their accounting systems accordingly. In fact, certain current agreements are already beginning to address this potential situation. Depending on the agreements between the publishers and their writers, however, it would seem fair for writers to be able to determine whether their PRO or their publisher administer their writer's share.

Additionally, the PROs have a process in place for publishers to resign their membership. In short, the publisher must notify the PRO of its decision to resign its membership, and then the PRO determines the effective date of such resignation based on existing licenses. That process would likely need to stay in place in order for the licensees to receive the benefit of licenses in existence at the time the publisher decides to withdraw. Furthermore, in the event a publisher

withdraws from the PRO, we see no problem with the PROs continuing to administer those rights on behalf of the publisher for a reasonable fee, as long as the publisher, and potentially the writers, depending on the existing agreements, agree.

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

The PROs each handle distributions differently, but each could improve by doing two things. First, given the current state of technology, the PROs should be able to pay songwriters and music publishers based on actual performance, rather than basing payments on a sampling of certain radio stations and other performance models. Second, the PRO distribution methodologies are somewhat of a mystery to many songwriters and publishers. More transparency with regard to these methodologies would be a significant improvement to the current system.

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?

Dramatically lower album sales is the primary market development that has led to songwriters reporting significant income declines in recent years. During the heyday of the CD, album cuts made almost as much money in mechanical royalties as the most popular single on the CD. Today's music industry is seeing significantly fewer full album purchases and significantly more individual song purchases. As a result, mechanical royalty income generated from the songs on an album has declined dramatically, leading to the decline in songwriter income.

Further exacerbating this is the growing popularity of streaming, which is beginning to replace music ownership altogether for some consumers. Because the royalties generated for

streaming, whether interactive or non-interactive, (i.e. public performance monies) are much less than the mechanical royalties generated for downloads and physical recordings, in large part because of the constraints imposed by the consent decrees for non-interactive streaming and Section 115 compulsory licenses for interactive streaming, songwriting income has decreased while music consumption has increased (i.e. through streaming). Thus, PROs have increased revenue because there is more public performance of music, but the increased public performance revenue does not off-set the resulting loss of mechanical income.

7. If the Section 115 license were to be eliminated, how would the transition work? In the absence of a statutory regime, how would digital service providers obtain licenses for the millions of songs they seem to believe are required to meet consumer expectations? What percentage of these works could be directly licensed without undue transaction costs and would some type of collective licensing remain necessary to facilitate licensing of the remainder? If so, would such collective(s) require government oversight? How might uses now outside of Section 115, such as music videos and lyric displays, be accommodated?

If the Section 115 license were to be eliminated the transition could work as follows:

During an initial two-year period ("Sunset Period") the Section 115 license would continue to be available and function as in the past. The Sunset Period would be a time for private actors to develop centralized, authoritative databases for complete and accurate song information to be readily available and to determine the need for and development of any necessary collective licensing entities to simplify and increase efficiency in the license process, leading to reduced transactions costs and legal risks.

Following the Sunset Period there would be a second two-year period ("Transitory Period"). During the Transitory Period the Section 115 license would no longer be available for new licenses. However, the Section 115 rates will remain in effect during the Transitory Period. Also, any existing Section 115 licenses (secured prior to the end of the Sunset Period) would remain in effect and subject to the provisions of Section 115. New licenses secured after

commencement of the Transitory Period must be acquired in one of the following manners: (1) directly from the copyright owner or copyright owner's agent, and subject to the copyright owner's consent (i.e., no compulsory licenses); (2) via blanket licenses through a licensing collective that includes an option for copyright owners to opt out of the blanket license. During the Transitory Period music users and copyright owners would work together to determine which, if any, rights can be bundled together under a single license for a specific use. Any licenses for uses outside the current Section 115 license would be obtained as they presently are or through a licensing collective if applicable.

At the end of the Transitory Period music licensing would enter the final stage of the elimination of Section 115 ("New Period"). During the New Period, licenses would be secured in the same manner as in the Transitory Period with the only difference being that the Section 115 rates would be replaced with rates established by free market negotiations. Digital service providers will have the opportunity to present their desired license rates to collective licensing agents that will then present those rates to their copyright owner members who will opt in or opt out of the opportunity. If the digital service provider does not secure rights to the number of songs they want, then they can present new offers (to which the copyright owners can opt in or opt out) until they secure rights to enough songs to meet consumer expectations. All accountings should be made monthly, directly to the collective(s) or licensing agents, and include a high level of transparency in the reporting, and should include mechanisms and audit rights necessary to ensure accurate and timely payments reflecting today's digital marketplace. For a period of 5 years beginning with the effective date of the New Period, minimum rates will be established for types of uses defined at that time under Section 115, including mechanical, DPD, and ringtunes.

In order to allay concerns that a minority copyright owner might prevent a song from being licensed, we propose that songs may be license by a majority of the song's owners, similar to the ability of a majority of rights owners to terminate a transfer of copyright under Section 203. Royalties should be paid directly to each owner, and royalties for any unidentified minority owner would be held in escrow by the payor.

Dated: September 12, 2014

Respectfully submitted,

INTERESTED PARTIES ADVANCING COPYRIGHT (IPAC)

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By:
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