

**Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

_____)	
In the Matter of:)	Docket No. 2014-3
_____)	
Music Licensing Study)	Submitted September 12, 2014
_____)	

**REPLY COMMENTS OF THE
NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES**

INTRODUCTION

The National Academy of Recording Arts & Sciences (“The Recording Academy”) appreciates the opportunity to submit these reply comments in response to the Copyright Office’s second notice of inquiry (NOI) for its music licensing study. As stated in our original submission to the Copyright Office, The Recording Academy is the only organization that represents and advocates for all individual music creators: performers, songwriters and studio professionals. The Recording Academy has no company or institutional members. It is a trade association whose voting membership and board leadership consists of individual music professionals with creative and technical credits on commercially released recordings. Accordingly, The Recording Academy provides a unique and important voice for music creators as the Copyright Office completes its work on the study.

The Recording Academy presented three broad principles in its previous filing that should guide necessary reform of music licensing. These principles, expanded below, provide an appropriate framework to respond to some of the specific questions posed in the second notice of inquiry.

FAIR MARKET VALUE

First, **performers, songwriters and studio professionals should always receive fair market value for their work across all platforms.** When a rate-setting body is determining compensation for a musical work or a sound recording, the rates should approximate the fair market value of the creative work as closely as possible. When rates are negotiated in the free market between rights holders and licensees, there should be transparency and accountability to protect individual creators.

Withdrawal of Publishers from PROs

The NOI asks about the consequences of publisher withdrawals from ASCAP and BMI. The long-term viability of Performance Rights Organizations (PROs) is critically important to The Recording Academy's songwriter members. PROs provide an irreplaceable service to songwriters and composers through collective licensing that allows PROs to negotiate for royalties from licensees in an efficient manner. PROs also have the infrastructure necessary to collect and distribute those royalties directly to the songwriter with transparency, and to monitor the use of the songwriter's work for possible infringement.

The individual songwriter or composer depends on the PROs to provide these services, but the rest of The Academy's membership, and the entire music ecosystem, rely on them as well. PROs provide marketplace efficiency and stability. Licensees enjoy the right to publicly perform virtually any musical composition by simply seeking licenses from three PROs. Even more importantly, songwriters and composers enjoy the transparency and direct payment offered by the PROs.

The music economy is changing rapidly, however, and the Consent Decrees overseen by the Department of Justice (DOJ) have hampered the ability of ASCAP and BMI to respond to those changes in a way that provides fair value to their – and The Recording Academy's – songwriter members. Consumers are driving a transition within the music economy from a “purchase-to-own” model based on physical products and digital downloads to a consumption model based on streaming. As streaming steadily becomes the dominant way that music is experienced, revenue from other types of public performances and from mechanical licensing will inevitably shrink. Professional songwriters will only be able to make a secure living if they receive fair compensation for the public performance of their works by digital music services.

Unfortunately, recent rate court decisions made pursuant to the Consent Decrees have resulted in royalty rates for digital music services that are below fair market value. At least one large publisher has signaled that it will withdraw completely from ASCAP and BMI so that it can pursue free market negotiations with digital services.¹ Such a drastic course of action by major publishers would destabilize the two organizations and harm songwriters. Without the support of some of the largest publishers, the PROs would have difficulty operating because the smaller catalogs carried by the PROs would generate significantly less revenue than is commensurate with the cost of the services they provide, and many individual songwriters would lose the protections and benefits of collective licensing that they enjoyed under the PROs. Moreover, the rest of the music ecosystem would lose the efficiency, transparency and stability provided by the PROs. Thus the Consent Decrees, which are intended to protect fair competition in the marketplace, could instead cause harm to all stakeholders: songwriters, composers, licensees, and consumers.

The Recording Academy supports allowing rights holders to grant limited or partial licensing rights to ASCAP and BMI. This modification is necessary to avoid the devastating

¹ See Ed Christman, *Sony/ATV's Martin Bandier Repeats Warning to ASCAP, BMI*, Billboard (July 11, 2014, 3:04 PM), <http://www.billboard.com/biz/articles/news/publishing/6157469/sonyatvs-martin-bandier-repeats-warning-to-ascap-bmi>.

consequences of major publishers completely withdrawing from the PROs. Allowing rights holders to retain the rights to their catalogs for certain licenses while granting their rights to ASCAP and BMI for others will help preserve the long-term viability of the PROs by eliminating the incentive for publishers to leave them entirely. The resulting private market deals would also provide new, relevant evidence to the rate courts on the fair market value of the public performance rights. By allowing partial withdrawal, the PROs will be able to continue to serve songwriters and publishers will be enabled to pursue fair market value for songwriters. When publishers do pursue direct deals with digital music services, they should commit to continuing direct payments to songwriters through the PROs, and to providing transparency and audit rights for songwriters.

AN EFFICIENT MARKETPLACE

The second principle is that **creators and music consumers are best served when licensing is done in an efficient manner that allows the creators to receive the maximum exposure they seek and maximum compensation for their work.** Reforms should allow for a more efficient marketplace, while maintaining the equivalence of fair market rate compensation for creators. Allowing for more collective, blanket, and/or bundled licensing of rights related to musical works and sound recordings may be appropriate avenues for improving efficiency if sufficient safeguards are in place to provide transparency and accountability.

Section 115 Reform

The NOI acknowledges that many stakeholders have expressed frustration with the current system for mechanical licensing under Section 115, and asks what could be done to improve or replace it. The Recording Academy supports allowing publishers and other rights holders the ability to grant PROs the ability to license additional rights beyond public performance rights. Voluntary, non-compulsory blanket licensing for all rights related to musical compositions would lead to efficiencies in licensing just as there are marketplace efficiencies from the blanket licensing regime for public performances. In most cases, licensees can currently gain the performance rights for nearly the entire repertoire of musical works through three agencies: ASCAP, BMI and SESAC. The PROs already possess the databases and procedures necessary to effectuate mass licensing and collection domestically (and internationally through affiliated foreign PROs). However, licensing of mechanical royalties is processed on a song-by-song basis that often requires a more complicated clearance process.

Permitting the bundling of all rights for musical compositions – public performance, mechanical, synchronization, and print reproduction – would result in a more efficient licensing process with more services and more works being available in the marketplace. In addition, this reform would also level the playing field between large publishers and small publishers. While large publishers have the ability to engage in this scale of blanket licensing independently, small and independent publishers would only be able to do so with the assistance of the PROs. As long as the rights for these royalties reflect fair market value, the increased marketplace activity would be beneficial to songwriters as well as to music consumers.

Efficiency Requires Transparency

In its filing, The Recording Industry Association of America (RIAA) explored the concept of a unified licensing regime. Their proposal would eliminate the need for the Sec. 115 compulsory mechanical license and replace it with free market negotiations wherein the record labels would negotiate with licensees for the use of an entire recorded music product and apply a portion of the revenue to the musical work.

Songwriters have since expressed concern with the notion of record label negotiations determining their fate, so in response to the RIAA's request "to engage with our colleagues to explore whether stakeholders could agree to replace current Section 115 with a modern, efficient blanket license,"² The Recording Academy proposes certain conditions to protect songwriters that should be the foundation of any such dialogue.

Naturally, as the RIAA notes, the percentage of revenue allocated for the musical work must be agreed to by all stakeholders. But equally important, revenue must be defined in the broadest possible terms. Simply put, all compensation received from the recorded music product (not limited to direct, track-based royalties) must be shared with the songwriter at the agreed upon percentage split. Further, there may be instances in which a sound recording owner may choose to license at a below-market or even zero rate, in order to capitalize on revenue separate from the recorded music product (for example, touring, merchandise, or sponsorships). In such a case, there should be an agreed-upon minimum payment or "floor" that must be paid to the songwriter for each use of the recorded music product. Finally, there must be complete transparency, and songwriters should have audit rights from the sound recording owners.

Even without such a unified license, transparency should apply to direct deals made by both labels and publishers in the current marketplace. The principle of fair market value for all music creators requires that all direct licensing deals be transparent, and that all revenue received (whether or not direct, track-based compensation) be shared with artists and songwriters. As an early model of such transparency, The Recording Academy would like to highlight the "Fair Digital Deals Declaration," initiated by the Worldwide Independent Network and the American Association of Independent Music (A2IM). The Declaration is a statement of commitment signed by over 900 independent record labels to provide fair accounting of music licensing deals to artists.³ All copyright owners should adopt principles of fairness and transparency so music creators can enjoy the security of knowing they are getting their fair share of all compensation from new digital licensing deals.

² See Comment 65, Recording Industry Association of America, Music Licensing Study NOI, at 14 (May 23, 2014).

³ *WIN Fair Digital Deals Declaration – 900+ Independent Labels Support Fair Accounting to Artists*, AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (July 15, 2014), <http://a2im.org/2014/07/15/win-fair-digital-deals-declaration-independent-labels-support-fair-accounting-to-artists/>.

Accurate Metadata Is Key To Efficient Music Licensing

The NOI also asks about how to create a database of comprehensive and authoritative information about the ownership of musical works and sound recordings. The Recording Academy, and particularly its Producers & Engineers Wing, has been working for some time to improve the systems for providing metadata for music. A comprehensive and authoritative database would provide the important “backbone” to assure proper implementation of The Recording Academy’s (and most other stakeholders’) recommendations for improved licensing. The Academy invites the Copyright Office to utilize the experts in its Producers & Engineers Wing as it determines workable solutions to the metadata question.⁴

A COMPREHENSIVE SOLUTION

The third principle stated in our original submission expressed that current music licensing law is a patchwork of fixes that have accumulated over decades. Therefore, **Congress should act to revise the law through comprehensive “music omnibus” legislation.** In just this year, the Copyright Office, the House Judiciary Committee, the Department of Commerce, and the Department of Justice have all undertaken various efforts to examine our nation’s copyright law, either in whole or in part. Moreover, while some aspects of copyright law can generate great controversy, there is widespread agreement that music licensing in particular needs to be reformed and modernized. As the Register testified before the House Judiciary Committee, music licensing issues “are ripe for resolution.”⁵

With so many policymakers focusing their attention on these issues, there is a unique opportunity for all interested stakeholders to come together to craft a real solution. Legislation that only targets discrete issues for certain constituencies is useful for educating Members of Congress about the complexities of music licensing. But such legislation will not create a music licensing system that is fairer and simpler. Only broad, bold legislation to reform music licensing holistically will suffice.

A comprehensive solution for music licensing requires legislation that affects a wide range of stakeholders, yet no private sector negotiation is currently taking place with all relevant parties. Thus, Congress has an important leadership role to play. Relying on the recommendations of the Copyright Office and the information presented in the hearing record, Congress should establish a broad framework for achieving music licensing reform that identifies key policy priorities, key stakeholders from the music ecosystem, and a timetable for

⁴ Currently more than 6,000 professionals comprise The Recording Academy Producers & Engineers Wing, which was established for producers, engineers, remixers, and other related creative and technical professionals in the recording field. This organized voice for the recording community addresses issues that affect the craft of recorded music, including the development and implementation of new technologies, technical guidelines and recommendations, and archiving and preservation initiatives. For more information, please visit www.producersandengineers.com.

⁵ *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 7 (2013) (statement of Maria Pallante, U.S. Register of Copyrights).

completion. Consensus among diverse stakeholders will be difficult, but is achievable if promoted and encouraged by Congressional leaders.

CONCLUSION

On behalf of the more than 23,000 creative professionals represented by The Recording Academy, thank you for undertaking this important endeavor. The leadership of the U.S. Copyright Office has been the catalyst for the renewed interest in music licensing reform among lawmakers and stakeholders. In particular, thank you again for clearly and consistently calling for the establishment of a public performance right for the use of sound recordings on terrestrial broadcast radio. As the Copyright Office understands well, all music creators deserve the opportunity to receive fair compensation for their work, and the music licensing study is a significant step towards realizing this goal.

Respectfully submitted,

Daryl P. Friedman
Chief Advocacy & Industry Relations Officer
Todd Dupler
Director of Government Relations
The Recording Academy
529 14th Street NW, Suite 840
Washington, DC 20045