

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

_____)	
In the Matter of)	
)	
Music Licensing Study:)	
Second Request for)	
Comments)	Docket No. 2014-03
_____)	

ADDITIONAL COMMENTS OF
THE RADIO MUSIC LICENSE COMMITTEE, INC.

INTRODUCTION

The Radio Music License Committee, Inc. (“RMLC”) hereby submits these additional comments in response to the July 23, 2014 Copyright Office Notice of Inquiry requesting additional public input on the effectiveness of existing methods of licensing music. See 79 Fed. Reg. 42,833 (Jul. 23, 2014) (the “Second NOI”). The RMLC previously submitted comments on May 23, 2014 in response to the March 17, 2014 Copyright Office Notice of Inquiry requesting public input on the effectiveness of existing methods of licensing music (the “Initial Comments”), in which the RMLC described its primary functions and addressed many of the issues raised in this Second NOI. Rather than repeat that background and those comments here, the RMLC respectfully refers the Copyright Office to its Initial Comments. As with our Initial Comments, this submission is limited to the RMLC’s perspective on those issues raised by the Second NOI that relate to those areas of music licensing in which the RMLC is involved.

COMMENTS

I. Complete Repertory Transparency Will Allow For A More Competitive Music Licensing Marketplace

As noted in the Initial Comments, one major stumbling block in creating a more efficient and competitive music licensing marketplace is a lack of transparency. This lack of transparency, however, is not a result of the relevant information being unknown. It is, in large part, because those that control the information go to great lengths to ensure that it is not available to anyone other than themselves.

ASCAP, BMI, and SESAC all participate in the Common Works Registration (“CWR”) process under the auspices of the International Confederation of Societies of Authors and Composers (“CISAC”) – a process that provides for a standardized registration format for each musical work. As part of the registration process, each musical work is assigned a unique identifier – an International Standard Works Code. In addition, as part of the registration process, ASCAP, BMI and SESAC all must reach agreement as to the ownership of each musical work. Without such joint agreement, foreign PROs are able to withhold remittances for the overseas performances of the works at issue. Thus, not only does the CISAC database contain unique codes for each musical work, but it also authoritatively identifies the shares of the works licensed through each of the PROs. ASCAP, BMI, and SESAC, in turn, each maintain databases that identify the actual rightsholders to the works in their repertoires. When combined, this granular information is precisely what is necessary for licensees such as radio broadcasters to identify the correct individuals and organizations with which they can explore the possibility of direct licensing, thereby creating at least the possibility of opening up the music licensing marketplace to some degree of competition.

The PROs, recognizing the potential of direct licensing to place a competitive check on their market power, have gone to great lengths to ensure that users do not have access to any of these databases. Indeed, while CISAC has expressed a willingness to share its databases with the radio industry, it has been unwilling to do so without the consent of the PROs and that consent has been withheld. This anticompetitive practice, which further entrenches PRO blanket licenses and discourages competitive licensing transactions between individual copyright owners and music users, should be eliminated.

There is no rational reason to prevent real-time access to such information about rights ownership. In no other circumstances are radio broadcasters asked to pay for intellectual property that is unidentified. Indeed, the federal district court overseeing the ongoing RMLC antitrust litigation against SESAC has recognized the need for, and competitive benefits of, complete repertory transparency. *RMLC v. SESAC Inc.*, 12-cv-5807, Report and Recommendation, (E.D. Pa. Dec. 20, 2013), at 33 (“SESAC has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no alternatives but to purchase their licenses.”). The ASCAP rate court came to a similar conclusion with respect to the repertories of the publishers that attempted to partially withdraw from ASCAP and BMI. *In re Petition of Pandora Media, Inc.*, ___ F. Supp. 2d ___, 2014 WL 1088101, at **23-28 (S.D.N.Y. Mar. 18, 2014).

II. Partial Publisher Withdrawals Will Not Foster A More Competitive Music Licensing Marketplace

ASCAP’s and BMI’s collaborative interest with their largest distributees in securing rights of so-called partial withdrawal in the ostensible interest of fostering more competitive licensing of music performance rights should be viewed with a healthy dose of skepticism. When subjected to the light of judicial scrutiny, this interest was exposed as little other than a

concerted effort between and among ASCAP and BMI and certain major music publishers to get out from under the constraints imposed by the ASCAP and BMI consent decrees and artificially to create “marketplace evidence” as to the value of music performance rights arising out of direct license transactions at a moment when major publishers have maximum leverage in their dealings with users, and to turn around and use the supra-competitive fees so garnered to bootstrap higher license valuations of the PROs’ remaining repertoires. In short, the goal of the proponents of partial withdrawals has been to fashion a licensing scheme whereby licensees would end up paying supra-competitive license fees to *all* composers and music publishers – both those that withdrew and those that remained with the PRO collectives.

As the recent ASCAP/Pandora rate litigation made plain, the purpose and motivation behind partial withdrawals was not to embrace the workings of a competitive marketplace in which individual composers or music publishers would compete with each another to secure an increased share of the performances made by a particular licensee.¹ To the contrary, the major publishers, each of which has amassed considerable market power as a result of aggregating the copyrights of otherwise competing composers, wish to partially withdraw from the PROs in order to circumvent the protections afforded to users by the ASCAP and BMI consent decrees and exploit their market power as against certain licensees without constraint. As explained by Judge Cote, “[t]he publishers believed that [the ASCAP Consent Decree] stood in the way.... They believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publically perform a composition.”

¹ Such competition can occur – and indeed has occurred – between publishers and composers that are affiliated with the PROs without withdrawals. *See, e.g., BMI v. DMX Inc.*, 683 F.3d 32 (2d Cir. 2012); *BMI v. DMX Inc.*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010); *In re Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010).

In re Petition of Pandora Media, Inc., __ F. Supp. 2d __, 2014 WL 1088101, at *14 (S.D.N.Y. Mar. 14, 2014).

III. Complete PRO Distribution Methodology Transparency Will Improve The Functioning Of The Music Licensing Marketplace

As the Copyright Office has noted, both ASCAP and BMI have announced record-high revenues and distributions in recent years (including hundreds of millions of dollars each year in license fees paid by the radio industry), while, at the same time, at least some songwriters have reported significant declines in income. While the RMLC does not have any particular insight into why this is the case, complete transparency as to the methodologies used by the PROs to distribute license fees to their affiliated songwriters and publishers will almost certainly give those songwriters and publishers better insight into exactly where all of these record high distributions are going, and will enable those songwriters and publishers to make more informed decisions as to how to license their works.

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We thank the Copyright Office for considering these additional comments.

Respectfully submitted,

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