BEFORE THE

U.S. COPYRIGHT OFFICE

LIBRARY OF CONGRESS

WASHINGTON, D.C.

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Docket No. 2014–03

Music Licensing Study Docket **No. 2014-03**

COMMENTS OF THE UNITED KINGDOM MUSIC MANAGERS' FORUM ("MMF") & THE FEATURED ARTISTS' COALITION ("FAC")

The Music Managers Forum and the Featured Artists Coalition thanks the Copyright Office for the opportunity to submit information on licensing practices in the other important English-speaking market for the work of US writers and performers of music, namely the United Kingdom. We have taken the liberty of also commenting occasionally upon practices elsewhere in the European Union as the licensing conditions there impact the market for US writers' and performers' work, just as the music created outside the USA is affected by your national licensing conditions. We respectfully submits comments in response to the U.S. Copyright Office's (the "Office") March 17, 2014 Notice of Inquiry (the "NOI") for written comments and the July 23rd 2014 Request for Additional Comments.

The MMF and FAC's comments respond generally to the following NOI topics: Q 1 to14; 18 and 19; and 22 to 24 of March 17th 2014 and Q 1 to 7; 9 and 10 from July 23, 2014.

The Music Managers' Forum and the Featured Artists' Coalition:

The Music Managers Forum[1] was established in the United Kingdom in 1992. The MMF is the largest representative body of artist managers in the world. The organisation has over 400 members in the UK, representing more than 1,000 of the world's most successful recording artists.

The MMF is allied closely to the UK Featured Artists Coalition[2] ("FAC"), a body founded in 2009 to promote the interests of featured (or contracted) UK recording artists (as opposed to session musicians who are represented by the British Musicians' Union[3]). The FAC aims to educate and advise recording artists in collaboration with the resources of the MMF, to promote the artists' legal and commercial interests in the UK and elsewhere.

The emphasis at both the MMF and the FAC is on implementing positive actions to assist our members with a keen eye on the next generation of creators, innovators and entrepreneurs. Both organisations provide a collective voice and focus on providing real, meaningful information and support for FAC members and, for the MMF, for the authors and recording artists our members represent. We aim to help unlock investment, open new markets, encourage a fair and transparent business environment and drive a global agenda appropriate for this digital age.

The MMF maintains regular contact and shares information with managers in other countries with particular emphasis on the USA – mindful of the market power of the English-language music repertoire. The MMF and FAC are represented via NGOs at WIPO and actively collaborate with the British Musicians' Union on policy matters in Britain and Europe.

The MMF and the FAC have representatives that sit on the board of the UK collecting society that remunerates performers for the communication to the public of the sound recordings embodying their recorded performances, Phonographic Performance Ltd (PPL)[4].

We hold regular meetings with the local authors' collecting societies for musical works (PRS for Music[5] - for the communication to the public right - and MCPS[6] - for certain uses of reproduction). These two author societies together administer licence revenues for musical compositions arising from the exercise of the communication to the public right and its sub-set, that of the right of making available to the public. More recently the MMF has established more

[1] http://www.themmf.net/about-us/
[2] http://thefac.org/about/
[3] http://www.musiciansunion.org.uk/
[4] Phonographic Performance Ltd http://www.ppluk.com/
[5] http://www.prsformusic.com/aboutus/ourorganisation/Pages/default.aspx
[6] The Mechanical Copyright Protection Society

formal dialogue with the International Confederation of Authors and Composers Societies of (CISAC)[7], the international body representing authors' societies worldwide and the party allocating ISWC numbers to the world works repertoire of musical works. Both the MMF and the FAC have developed closer ties with the CISAC music creators' council, CIAM[8], and the US/Canadian songwriters' joint organisation Music Creators North America[9].

FAC members and MMF members' clients are authors and performers contracted to publishers and record labels respectively. Some (but not all) authors and performers we work with have been able to retain their copyrights, simply mandating a third party to manage licences and collect revenues. The MMF members (managers) are not as a rule rights owners. The contractual relationships that MMF members have with their clients are based on an agency model, with commission rates varying but seldom, if ever, more than 20% of a client's income. Our members owe a fiduciary duty to their clients. UK law is such that these management contracts are regarded as ones that regulate the supply of personal services and specific performance cannot therefore be enforced. As a result relations between MMF members and their clients are highly personal. Our members' client are both songwriters and featured performers, as well as studio producers.

Introduction:

The MMF and FAC welcome the broad terms of this review, but participants in the music licensing landscape are only described as "users" and "right owners". For many years the phrase "content owner" has been used to describe the creative community, whereas we prefer the term "creators". FAC members and MMF members' clients are right owners, most of whom have assigned their rights to third parties for exploitation in exchange for investment. But in some territories of the EU, under some droit d'auteur legal regimes, authors are unable to alienate their rights. Even in the UK some creators may reserve some (or all) of their rights to themselves and mandate third parties merely to administer. Consequently, to ensure this submission is clear and unambiguous we propose to employ the following terms in responding to the questions posed.

Author – creator of a musical composition or lyric. Under UK law this party is the first owner of the copyright in the work. As first owner, the author is entitled to licence revenue every time

[7] http://www.cisac.org/CisacPortal/page.do?name=rubrique.1.1
[8] http://www.cisac.org/CisacPortal/page.do?id=29
[9] http://musiccreatorsalliance.com/The_Music_Creators_Alliance/the_music_creators_alliance.html

one of the "acts restricted by copyright"[10] takes place in relation to their copyright musical composition. Where ownership has been alienated by contract these entitlements to revenue are preserved to varying degrees in the terms of the contract. Bi-lateral licences are negotiated by an author's music publisher (if they have one). Multi-lateral licensing of the right of communication to the public and making available is conducted collectively by collective management organisations (CMO) (akin to BMI, ASCAP and SESAC)[11]. Outside the USA, the right of communication to the public is exclusively and globally vested in the local CMO by personal contracts concluded by authors[12]. Music publishers in the USA have no right to issue direct licences for works written by authors who are not direct members of US societies. These authors' music publisher partners do not own this right, and are only entitled to a revenue share[13]. Multi-lateral licences for reproduction are issued via a network of collecting societies (akin to the Harry Fox Agency) operating as either an agency or via an assignment – depending upon the country in which the licence is sought. These blanket licences are in response to a key difference between US law and that of the UK as it relates to co-authorship and co-ownership of copyright. It is expressly provided by statute that consent for the doing of any of the acts restricted by copyright must be secured from all the joint authors (or co-owners) of a work[14] and one joint owner can sue to restrain another joint owner from, eg, publishing without their consent.

Performer/Recording Artist/Session Musician – delivers a vocal and/or instrumental rendition of a musical composition or lyric. Unlike the authorship (and first ownership) of a sound recording which may be granted to a performer under US law, in the United Kingdom, the "author" and first owner of copyright in a sound recording is the record label.[15] A performer in the EU does however have certain property rights by statute, which attach to their right to consent to the recording, reproduction and distribution of their recorded performance and a statutory right to equitable remuneration every time their recorded performance is communicated to the public (secondary income). This latter right to remuneration can only be

[10] Copyright Designs and Patents Act 1988 s 16

[11] See our submission to the Office's Making Available Study

[12] It is possible, however, for non-US authors, in their membership agreements to divide the right territorially, joining a US society direct for local US administration.

[13] In this respect we would refer the Office to our submission to the Anti-Trust Division of the US Department of Justice about the Consent Decrees.

[14] S 10 and s 173 (2) Copyright Designs and Patents Act 1988 ("CDPA")

[15] CDPA 1988 s 9:

"**Authorship of work**

(1) In this Part "author", in relation to a work, means the person who creates it.

(2) 8That person shall be taken to be –

(aa) in the case of a sound recording, the producer;……..

assigned to a CMO[16]. For more detail on this aspect of performers' rights we would refer the Office to our submission in respect of the making available right.

Music publisher – manages the copyright in musical works and may or may not actually own the works in question depending upon the terms of the individual contracts with authors. A music publisher may conclude what is termed an administration deal, whereby an author retains ownership of the copyrights but the publisher issues and administers licences and distributes the revenues. Their global reach of administration is secured through inter-company contracts either within the group of companies in multinationals such as Universal, Sony/ATV or Warner's, or (for the independent sector) via transnational partnerships. Then, access by each local music publisher to the revenue share from the local exercise of the performing right is effected by local membership agreements with each CMO. As co-writing between 2 or more authors may involve more than one publishing company, collective administration is the excellent method by which consensus for licences is secured.

Record label – invests in the creation of and reproduction and distribution of sound recordings – much of the latter two functions have now been annexed by digital distributors. The label may or may not own the sound recording copyright depending upon the terms of the individual contracts with the performer. A performer may pay their own recording costs thereby becoming the producer or "person by whom the arrangements necessary for the making of a sound recording……..are undertaken[17]". The performer/owner will then license the copyright to a label and the label will perform its functions on slightly different commercial terms.

Music user – a party seeking a licence from one of the parties above to make music available to the consumer (whether via an audio service or included in an audio visual work) as part of a commercial venture.

Consumer – the audience.

The UK joint music industry group, UK Music[18] produced a piece of economic research in 2013[19] which examined the economic contribution of the music industry to Great Britain's GVA, exports and employment. The 2012 GVA contribution was estimated at £3.5 billion with

[16] DPA s 182D (2)
[17] S 178 CDPA 1988
[18] http://www.ukmusic.org/about-us
[19] http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry___WEB_Version.pdf

exports valued at £1.4 billion. One infographic[20] illustrates that, of the parties creating these assets contributing to this £3.5billion GVA (£1.6 billion) nearly half arises directly from authors and performers of music, ie the constituencies we represent. From our perspective there is a third key participant in music making and its success: the audience. These three components parts, author, performer and audience, are the focus of our businesses.

Musical Works:

1. *Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works.*
2. *Please assess the effectiveness of the royalty rate setting process and standards under Section 115.*
3. *Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis? If so, what would be the key elements of any such system?*
4. *For uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner? How might such a unified process be effectuated?*

We believe we can most usefully provide an answer to these questions by explaining the systems that operate in our domestic territory. We understand that the original fixed rate of the compulsory licence system in the USA dates back to before World War I and was instituted to prevent abusive market practices taking place as between music publishers and what was the first sound recording – the piano roll. This practice is now outdated and the current fixed rate of 9.1 cents, has neither kept pace with inflation, nor reflects the original contemporary value of the original 2 cents fee. In the United Kingdom and Europe mechanical royalty fees are calculated as a percentage of sale price – therefore a true royalty. Negotiations with different industry sectors are conducted by the international body for mechanical rights societies, BIEM[21], (for example with IFPI) and reciprocal contracts based on the BIEM Standard facilitate international representation between societies.

In the UK, for recorded music on physical media the mechanical rate currently stands at 8.5% of wholesale price and in some Continental European states exceeds 9%. This flexible rate mechanism (while specific levels are subject to appeal at individual countries' copyright tribunals

[20]http://www.ukmusic.org/assets/general/UK_Music_infographic_The_Economic_Contribution_of_the_UKs_Core_Music_Industry_V3.pdf
[21] http://www.biem.org/index.php?option=com_k2&view=item&layout=item&id=20&Itemid=442&lang=en

or equivalents) means mechanical royalties are tied to the music users various business and pricing models, and can thus keep pace both with inflation and technological developments. Mechanical licensing for audio product (ie excluding a copy that is a synchronisation with moving images which is licenced on an individual basis to reflect market power) is conducted on a collective basis by MCPS (in the UK) and by mechanical societies elsewhere in Europe. We would respectfully recommend the introduction of such a flexible calculation base in the USA negotiated by reference to the market place which would benefit authors and their commercial partners, the music publishers. This should accommodate the various business models in operation by different music users and be negotiated with a high level of transparency (and perhaps subject to minima in each sector) being required in respect of the deals – particularly with regard to innovative music services (of which more later).

We have also touched upon this with the Anti-Trust Division of the US Department of Justice regarding the Consent Decrees.

EU authors' societies (which includes the UK) and music publishers are offering online music services pan-territorial performing right and mechanical licences via a combined blanket licensing structure granting licences on behalf of the performing right societies, and not-for-profit publisher collectives. US authors are benefiting from this business model in the EU. The benefits flow back through the EU CMOs to ASCAP, BMI and SESAC and via not-for profit publishers' collectives and are shared onward with US authors[22].

This unified licensing of the twin rights of performing and reproduction is being applied to some 300 plus digital music services across the European Union. While we retain concerns about transparency, the key elements that we see in this model are (i) the preservation of the non-profit element of the administrative bodies, (ii) the use of negotiating strength of both the communication to the public and the mechanical rights in large catalogues and (iii) the alliance between the CMOs which use the same unique identifiers for the works involved, optimising the chances of better data matching. Pre-agreed percentage splits between the reproduction right and the performing right are in place and being applied according to the EU Member State in which the consumer is located – thereby accommodating conditions in local markets and enabling this model's compliance with Article 5 (2) of the Berne Convention[23]. Though with regard to the respective shares between mechanical and performance we would suggest the exact

[22] CISAC Reply to the Public Consultation of the European Commission on the Review of the EU Copyright Rules page pp 10 and 15

[23] Article 5 (2) "…the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed"

percentages are expressly checked with the societies in the EU. Questions also need to be asked as to whether this has effected a shift in the respective financial entitlements between authors and publishers from a growing revenue source - streaming.

This may be a solution that will transfer to the US, and we submit it is a model worthy of closer examination provided total transparency is part of any arrangement – as regards deal terms and as to revenue allocation decisions.

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

In the United Kingdom and Continental Europe the performing right organisations operate as true monopolies, either de jure or de facto. In some countries their dominant position is actually supported by local statute, and by public policy that sees collective licensing as the best and most streamlined way to give the music user certainty and simplicity and the consumer affordable access to the music they love. As the system has developed across more than a century it has become a truly global mechanism ideally placed to address the market demands of what is now a global market place for digital exploitation of music and it is this system which returns considerable value to the USA from the works of US authors and performers.

For every music author outside the USA, the right to issue performing right licences lies solely with the society of which an author is a direct member. The publisher is entitled to a share of the revenue but the performing right will not vest in that publisher unless the author resigns from the local society. A US society (such as ASCAP, BMI or SESAC) issues performing right licences to US music users for non-US writers' works solely because the author's local society passes the rights via reciprocal representation agreements. These agreements are personal to the receiving society and expressly prevent the US society from passing the benefit of the agreement to any other third party[24]. It is only the US society that may issue licences.

We cannot change the fact that copyright regimes across the globe vary – whether it is the economic basis of copyright protection or the droits d'auteur system. The copyright exceptions across different jurisdictions also vary. Tariff levels and contractual entitlements are not uniform from country to country. But where the worldwide catalogue of musical compositions is licensed globally via CMOs we find a degree of harmonisation via inter-operable collective

[24] We believe that an example of this limitation is to be found in Clause XIII of the PRS/ASCAP Reciprocal Agreement

management systems and by this method create some predictability for consumers and licensees alike.

Collective management of musical works gives the music users what we could call licensing comfort. A music service must acquire usage rights to the entire global catalogue of works and this principle is the foundation of the collective management system. In contrast, the failure of a music service to conclude a licence with a record label will not expose a nascent music service to risk of infringement. That service simply does not include the recordings owned by that label in the service. However, even a record label lacks complete control over the musical works that their contracted artists choose to record. A licence to an online radio service of, say, only the Anglo-American catalogue of works is no comfort to a licensee. Any recording artist can elect to record a composition written by a Chilean author, an Italian, a Spanish composer. Music services must have the comfort of having acquired and paid for licences entitling them to play the entire global catalogue musical works. This is particularly important in a legal regime with statutory damages for infringement, such as that which prevails in the USA.

In almost all societies authors take positions of responsibility on boards of directors– the only place in the industry where authors can influence policy and promote transparency. Elections by the membership promote accountability, and the largely non-profit nature of the vast majority of the societies means their operation is refreshingly free from the treatment of revenues that we see in audits we have instituted and which seem to prevail at the profit driven music corporations.

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

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

In our view it is unhelpful that the Consent Decrees' prevent the US societies from considering the wider market for music when setting fees. The requirement of "reasonable" in rate setting

does not appear to us to be supported by guidance as to what exactly constitutes reasonableness. The wider marketplace for music would seem to be the appropriate benchmark. Literary works, and films, television programmes and television formats are all traded and priced on the open market and without this degree of central regulation. Many songwriters and composers are not also performers and therefore cannot supplement their income by live performances and brand associations. The inability of societies to agree rates in a wider market context penalizes an entire constituency of creators expressly protected by the US Constitution – namely authors.

In the UK and elsewhere the standard tariffs for licensees of music are publically available and negotiated with trade associations of users, with a right of appeal to administrative courts and tribunals whose deliberations are public. There is a market-based approach used to set prices by societies and by the government bodies by which they are regulated.

Another aspect of the Consent Decrees that we believe unduly fetters the societies is the fact that, from our reading of the Decrees, applicants for licences are disproportionately well-treated when it comes to the provision of information and by the application process in general. In the United Kingdom an applicant is required to make an interim payment. We do not understand how a US licensee, with no requirement or deadline for an application to a rate court if they are dissatisfied with the level of a tariff, can perform musical works without any payment whatsoever and with no time pressure to participate in tariff settlement proceedings. At the very least US licensees should be required to make an interim payment pending the issuing of a final licence with an agreed tariff.

As far as we know most of the societies in the EU require potential licensees to provide important financial and operational data (and in the case of a start up, their business projections, and projected user numbers) when making their application. To us this seems sound common sense and, coupled with an ability by societies to require an interim payment, would rebalance the negotiating process more fairly

An additional indignity for the songwriter or composer whose work is licensed in the USA is that values are prohibited from being set by reference to true market rates. This unnecessary constraint upon the rate courts has meant that the price for musical compositions is disadvantaged by a factor of 10 or 12 to 1 by the rate achieved for sound recording licences. So, where an iTunes download[25] will deliver about 81cents out of the $1.29 price to the record label, the music publisher and songwriter share approximately 9 cents.

[25] See Annexe

For a useful market comparison, the issuing of a licence by a music publisher to a user to synchronise a song into an audio visual work is negotiated in a free market. As an audio visual producer will also have to acquire rights to the sound recording embodying the musical work, we have an opportunity to compare the relative split in licence fee between the two copyrights. By custom (and by the action of "Most Favoured Nations" provisions in licences) the split is 50% to the sound recording and 50% to the musical composition. From a UK perspective, looking at the US Constitution, it is the authors that the law seeks to reward for invention[26]. Not all music writers are also performers. Many active writers (and the vast majority of classical composers) do not perform and therefore do not have the access to income from live performances, record contracts, sponsorship or merchandise and brand alliances. These authors must be considered in the wider context of the modern music business. The introduction of the Songwriter Equity Act (SEA) is to be welcomed in this respect.

Finally, we note with alarm that the RIAA has made a proposal that the record labels could streamline licensing were they permitted to administer the musical work copyright on behalf of the music publishing industry and apportion licence fees from the "top down". This we submit should be resisted in the strongest possible terms as it would increase the problems that already exist (and outlined below) for creators seeking a fairer share of revenues.

Usage and revenue matching by census is a key element of allocation of licensing monies. In the transcript of the New York Roundtable[27] we note two possibly conflicting statements about the state of recording identifiers, one expressed by the Chief Counsel for Sound Exchange and the other by a representative from Sony. The Sound Exchange testimony reports that 90% of data from music users lacks an ISRC. Later, Sony reports that "everything that is in digital release has an ISRC". Is this also the case with physical product? Is the problem that users are not reporting using the ISRC identifiers? The actual status of allocation and use in reporting would benefit from closer examination. We would respectfully suggest that ISO[28], who gave IFPI stewardship of the ISRC regime[29], be approached to advise the current position regarding penetration of ISRCs and record industry support for their being held in a single centralised data point.

[26] Article 1 Section 8, Clause 8
[27] At pages 409 (Rushing) and 424 (Finkelstein) respectively
[28] http://www.iso.org/iso/home.html
[29] http://isrc.ifpi.org/en/

Also in respect of the RIAA proposal we support the comments made by Mr Bengloff from the American Association of American Music at the NY Roundtable in June[30] who highlighted the fact that smaller players lack the leverage in the marketplace when it comes to claiming a fair share of revenues.

The vertical integration within the industry and the dominance of the three majors (Sony, Universal and Warner's) delivers unacceptable market power which is exacerbated by the problems of Non-Disclosure Agreements (NDAs). Auditors for our clients routinely report the impossibility of accessing the actual construction of the deals concluded by music companies. They cannot determine a true audit trail and contractual wording does not enable fair and accurate shares of lump sum revenues. A single point of licensing would inevitably further penalise an already disadvantaged constituency – the creators.

Songwriters and music publishers can best advance their interests via a direct relationship with those who seek to utilise their work. Based on our long experience of the industry a single licensing point via the labels will not return a fair share of revenues to authors (or performers) and the interests of the creators of the music will be subjugated to the interests of record labels and their shareholders.

Sound Recordings:

8. *Please assess the current need for and effectiveness of the Section 112 and Section 114 statutory licensing process.*
9. *Please assess the effectiveness of the royalty rate setting process and standards applicable to the various types of services subject to statutory licensing under Section 114.*
10. *Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?*
11. *Is the distinction between interactive and non-interactive services adequately defined for purposes of eligibility for the Section 114 license?*
    Platform Parity
12. *What is the impact of the varying rate setting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms. Do these differences make sense?*

[30] At page 79ff

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

We wish to make general comments relating to the questions above and will also address conditions elsewhere in the global marketplace.

In Europe, where most countries are signatories to the Rome Convention[31] , equitable remuneration is granted to performers and sound recording copyright owners where their commercially released sound recordings are "used directly for broadcasting or for any communication to the public"[32]. In initial drafts of the Convention at the International Labour Organisation, prior to World War II, only performers were to be the beneficiaries of the remuneration regime that the Convention established – labels requested inclusion post-War on the basis that their investment in sound carriers justified their sharing in the income stream.

As prevails in the European Union and elsewhere, all broadcasters, terrestrial, satellite, audio or audio visual, recognise the value the sound recording and the performer bring to their services via licence fees shared between label and performer. The performer share of revenue is not subject to the recoupment calculations of the record labels, being paid directly to the performers. As with the Sound Exchange system in the USA, the split of revenues enables session musicians and backing vocalists to share in the income. Such equitable remuneration outside the USA is administered by CMOs, the majority of which are joint label and performer organisations. They are not for profit bodies and in Europe are now subject to the transparency and conflict of interest declaration requirements of the EU Directive on collective management[33].

It seems overly complex and unnecessarily discriminatory to us that any service in the US communicating music to the public should be exempt from paying such remuneration. Elsewhere outside the USA a much more level playing field exists and we would welcome a change in US law which would benefit performers worldwide. For US performers, this failure by the US regime to give them a statutory right to remuneration, such as that established by the Rome Convention, also has the effect of depriving them of revenues generated by their work outside the USA. We respectfully suggest that the Copyright Office enquire of the RIAA,

[31] http://www.wipo.int/treaties/en/text.jsp?file_id=289757 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961

[32] Ibid at Article 12

[33] http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf

Merlin or the individual US labels whether those labels with establishments in Rome Convention countries are being paid revenues for broadcast and communication to the public of the sound recordings, yet NOT sharing revenues with the US performers whose work has generated the income in the first place.

There are many US heritage artists who brought modern music to the rest of the world. By and large they are signed to contracts that contain lower royalty rates than their younger colleagues. Those performers that are still alive, may well be in need of revenue later in their lives from recordings that are continuing to generate income for their labels on contracts that have long, long ago recouped advances. As a related issue, we respectfully submit that the granting of a federal copyright to all sound recordings whether pre-1972 or post is essential and that such protection be accompanied by the right to equitable remuneration across the board irrespective of the medium.

For a digital music service in the USA to be subject to differing rate setting standards by virtue of their respective dates of establishment (pre- and post-1 July 1998) also seems to us to lack logic. And that the USC 17, 801 four factors refer, inter alia, to the "respective contributions of owners and users", making no mention of the performers is equally perplexing. We understand that Sirius for example pay 9% - an unacceptably low level of remuneration for its key supplier. Pandora, on the other hand is paying somewhere in the region of 50% (as against a pittance to authors and publishers) - an unjustifiable differential for two services both of which have music as their core product.

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

As we have said, from our perspective the fettering effect of the Consent Decrees and the terms of s 115 have compromised the ability of authors, CMOs and music publishers in the USA to secure a fair market rate for their work. We also share the very real concerns of music publishers at the low levels of licence fees paid to music authors by the new online music services in the USA. We view with a jaundiced eye the complaints of licensing costs by music services such as online radio, where music sits at the core of their businesses. But we have concerns about the risk of damage to the collective licensing structure and very real risk of losses to our members'

author clients by recent US direct licensing activities particularly by music companies occupying a dominant position in the market place.

When EMI was being broken up, and its publishing division was acquired by Sony/TV and its recording division acquired by Universal, anti-trust hearings were conducted by both the US Department of Justice and by the European Commission. We cannot imagine that these two enquiries took place without both Universal and Sony assuring the federal and EU regulatory authorities that they would not abuse their vastly increased market power created by these horizontal mergers. In the case of music publishing, blanket licensing via the three performing right societies must have been used to demonstrate the way in which market power would not be abused. Sound Exchange's existence should, by implication, provide an equivalent check in the licensing of recordings. Direct licensing appears to run counter to any assurances that may have been given about licensing via the societies and their continued use of the system by major publishers.

We note concerns expressed by the US Department of Justice as to possible collusion or co-ordination between the US author societies and major publishers, and the recent issuing of Civil Investigative Demands for Documents. In our view, the position is more likely that of old fashioned bullying, as societies are facing threats from majors right owners with significant market power that they will withdraw their "entire" catalogues from the US CMOs. (We say "entire" as the catalogues created by authors that are not direct members of the US societies must remain within the system, of which more below). It is not inconceivable however that CMOs outside the USA are being similarly pressured. The damage to the entire fabric of collective administration that this would cause is a matter of grave concern. There is the inability of such major right owners, on withdrawal, to license across the entire market for music usage (clubs, bars retail and other locations, live performance etc).

Direct licensing would be a shift to a licensing model of much greater complexity, differential pricing and less predictability for licensees. Our specific concerns about direct licensing of authors' rights have been outlined in our submission to the Department of Justice, but in summary:

a. US publishers do not own the performing right in any musical compositions written by an author who is a direct member of a performing right society outside the USA. The only instance in which this is possible is where an individual writer has carved out the US territory from the territorial remit of their assignment of the performing right to their local society

and become a direct member of a US society for the USA – in which case they will be subject to that US society's rules.

b. Potential licensees will still have to go via the CMOs as well as the publishers in order to secure valid licences for the entire global repertoire – this could lead to differential pricing and more complicated and more costly transactions.

c. Writers' (and performers') contracts routinely state that they are not entitled to be paid a share of revenue that is paid as advances, lump sums or is not able to be "directly and identifiably" attributed to their work. How confident can creators be that they will be paid shares of direct licence monies. This is income in which they should have a reasonable expectation to share – even if only on the basis of equity, their having created the works that created value? Auditors are rarely given access to values of lump sums or to details of the deals which in any event are routinely the subject of non-disclosure agreements. Is it within the powers of the Office to examine such deals to verify or allay our concerns?

d. Co-writing songs is a common practice. How does a co-writer signed to a different publisher get paid when his writing partner is signed to a publisher who is issuing direct licences? He has no contractual relationship with his partner's publisher to rely upon. And, as under UK law all owners must give consent US/UK co-authored works fall between two stools – how can they be licensed?

e. Smaller independent publishers, non-US writers and US writers signed to publishers that remain within the CMO will all lose the economies of scale and negotiating strength by this fragmenting of the market and damage the interests of writers and publishers alike.

f. The PROs allocate unique identifiers to each song or composition (the International Standard Works Number or ISWC). These have now been allocated to almost all of the world's musical works. Their use across the globe optimises usage and works being correctly matched and writers paid what they are entitled to be paid. Many music publishers operate their own, different identifiers. The lack of common work identifiers between publishers and the PROs compromises accurate revenue allocation and exposes every author to inaccuracies.

The experience of the direct licences concluded with music service DMX by music publishers in the USA has had, in the final analysis, a very costly effect on the value of the music publishing market as a whole. The Office will be familiar with the manner in which direct licence were opportunistically exploited by a powerful music service to argue before the Rate Courts that some 700 music publishers had, by signing the direct licences, asserted that the BMI and ASCAP per location fees were too high. What is less commonly known is that one major, Sony/ATV,

which company's collusion was arguably used to persuade other publishers to sign up, received a multi-million dollar advance, which as an ASCAP pre-trial memo demonstrated, would be impossible for Sony to recoup. And, as a final disaster, the swarm of other background music companies that as a consequence sought and received refunds from ASCAP and BMI, has led to a net loss to the entire author/publisher community over five years of $150 million. (Incidentally, we have learned anecdotally that, in the context of the DMX debacle, the UK, French and German societies formally put ASCAP on notice of the nature of the breach by Sony and some 700 others of the exclusive grant of rights via the reciprocal contracts. We would recommend that the Copyright Office make enquiries to confirm this and determine what action – if any - resulted.)

Recently the Merlin Network[34] announced that it had concluded a direct licence with US online music service Pandora on behalf of its independent label members[35] for cash and "other benefits". We are assured that Sound Exchange will continue to manage the performers' interests, so only the performer constituency revenues will be levied administration fees, already establishing an inequality. This administration of the performers' shares in this way does promote transparency and guarantee direct payment as the payments are made according to statue, without recoupment and based upon a rate that is set by the Copyright Royalty Board. But how much do we really know about the deal terms? Reports state that although financial details are not available (!) the deal is "structured to protect the economics of participating **labels**". What are those "other benefits" in this instance?

By way of example, "other benefits" (attaching to music companies as opposed to the creators) include the case of Sweden-based music streaming service, Spotify. The major labels and the body representing independent labels (Merlin[36]) have licensed their catalogues directly to Spotify but also have shares in the company. It was reported in the Washington Post in August 2009[37] that, according to the Swedish news site Computer News[38] an "unverified capitalization table information, reportedly based on a filing in Luxemburg where the company is headquartered" shows that the labels Sony/BMG, Universal, EMI [now part of Universal] and Merlin collectively own 17.3% of Spotify and that they paid approximately 100,000 kroner (a little over

[34] http://www.merlinnetwork.org/what-we-do
[35] http://www.merlinnetwork.org/news/post/merlin-and-pandora-partner-to-help-independent-labels-and-artists-grow-thei
[36] http://www.merlinnetwork.org/
[37] http://www.washingtonpost.com/wp-dyn/content/article/2009/08/07/AR2009080700891.html
[38] http://www.idg.se/2.1085/1.239983/sa-fick-spotify-skivbolagen-med-sig

US$14,000 at today's rates), a fraction of the price paid by venture capital funds North Zone Ventures and Creandum.

If labels continue to conclude direct deals, as Merlin has just done, not only performers' interests are at real risk.

In the words of George Santayana, "those who cannot remember the past are condemned to repeat it." This deal has the potential to be exploited as a precedent by Pandora. If we are to learn anything from the DMX case and the pleadings by DMX at the Rate Courts, such combined deals between Pandora and Merlin (to which our auditors have little or no access) may be used in future proceedings as evidence that the CRB set the rates too high, because the labels who did these lower rate combined deals were "willing to take less". For music services unashamedly to be exploiting the CRB process to their own commercial advantage is undesirable, especially from a major player in the US market for delivering music online.

In summary, direct licensing as a "solution" will not simplify. In the long term it exposes the entire music industry to the shaving of the value of licence fees by users playing the system. It will serve only to complicate the licensing process for consumer and music user alike, and potentially drive up transaction costs. In addition it exposes authors and performers in the medium term to the risk of being excluded from revenues as profit-driven music companies may use the practice as an exercise in the extraction of capital to the benefit of their shareholders, and their executives' bonuses and share options. There is nothing like the equivalent transparency at a music publisher or label that there is at a CMO.

Global market conditions must be considered in the current climate, especially for online exploitation. US creators rely upon the CMO network outside the USA for the licensing and collecting of revenue arising from their work. If creators from outside the USA are to see the value of their own works being allowed to shift to an inequitable licensing regime via a direct licensing regime in the USA, how long before the principle of national treatment, so long a feature of global rights management by CMOs, is sacrificed abroad in respect of the works created by US creators (or right owners)? US writers still receive national treatment abroad as a result of the CMO network but reciprocity is applied to secondary revenue (equitable remuneration – see below) for US performers. Allowing music users to "play the system" exposes all US creators to losing their right to national treatment abroad and becoming subject across the rest of the world to reciprocity, with attendant effect on incomes.

Societies in the EU have had new stringent transparency requirements placed upon them by a recent EU Directive specifically addressed to CMOs (see below at Question 24). Among the provisions are declarations of conflicts of interest from board members, and clear, public statements of distribution rules. Such requirements do not apply to music publishers (or record labels). In the operating Rules of the UK's PRS for Music is a provision that states: *Every Member shall refrain from doing anything likely to limit or prejudice the success of the Society, and shall co-operate with the Society and its Officers and with his fellow-Members in enforcing the observance of these Rules and in furthering the interests of the Society, and shall render to the Society, its Officers and his fellow-Members all reasonable assistance in that behalf*[39]. It appears to us that actions by publisher members of societies that are motivated by territorial self-interest, such as direct licences, threaten the interests of the society and ultimately the wider, global membership at large. Such attempts should be frustrated.

The current treatment by music companies of direct licence monies is very divisive. Exact deal terms are routinely protected by NDAs and revenue is rarely shared with creators. In addition the institution of Most Favoured Nations principles should also apply in this context so that all right owners and creators whether authors or performers, and including societies, benefit from improved rates that might be achieved by a large right owner negotiating directly.

The perfectly lawful focus of a profit driven corporation is the increase in value of the company's assets and that process is built upon the copyrights of the authors and the efforts of performers. But one can appreciate the frustrations of authors and performers when such companies are not sharing revenues in a transparent and equitable manner.

UK record labels have taken it upon themselves to license the digital right directly to users for lump sums and other benefits. This revenue is firstly, we infer, a lump sum licence fee, though, such is the lack of transparency, we are unable to determine how much and how it is paid. Secondly, as performers' contracts specify that revenue must be "directly and identifiably" attributable to their recordings, we cannot be sure of any direct allocation to performers. In addition, the revenue, while clearly being attributable to a right which is a subset of the communication to the public right, is allocated as if it were sales income i.e. in the percentages of individual contracts (between 3% and 25% depending upon the age of the contract and status of the performer)[40]. Revenue is not shared as a 50/50 split which is the manner in which income for a licence is split, and the way equitable remuneration income administered via PPL is shared.

[39] The Rules and Regulations of the Performing Right Society Ltd, Rule 11

[40] We would also refer the office to our submission regarding the Making Available Right in this respect

Session musicians have utterly lost out here as they have no contractual nexus with the labels and therefore are paid no online monies. To add to the problem, the record industry's use of unique identifiers for individual tracks is a lamentable state – for more of which we refer to questions 22 and 24.

15. *Intentionally deleted*

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

In this respect we would refer the Office to our responses to Questions 22 and 24

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

In this respect we would refer the Office to our responses to Questions 1 to 7

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

There have been "unintended" consequences of the DMCA and the Information Society Directive in Europe. Both pieces of legislation were created during the infancy of the online marketplace and before broadband opened up internet speeds to the rate we see today. The legislation facilitated a situation whereby technology companies could claim safe harbour from liability for copyright works made available via their services without payment. Technological change has enabled a few powerful companies to emerge that have used music both to grow their businesses and to dominate the user landscape. All stakeholders have suffered but the creators (especially authors) most of all. Regulation of technological companies that offer both massive benefits and huge challenges to the world is hard to achieve. There could and should be solutions that accurately record and reward the use of music and other copyright works. These solutions need to be global, streamlined and fair.

A confused response by the music industry historically to illegal filesharing and P2P services by the music industry lost valuable ground that has yet to be reclaimed[41]. Licence fees and pricing models are driven by the music services - even the larger labels having been unable to match the market strength of their new licensees. The wealth and strength of media companies and as a result, the livelihoods of the authors and performers who are their partners (and key suppliers!) are subjugated to the interests of the technology companies that control access to music, to films, to books and to the some of the visual arts. Market prices for other creative works are not as highly regulated as music.

While the actual impact of online piracy upon lawful sales continues to be debated, it is an inescapable fact that there are a plethora of sites offering unlicensed access to music. These sites are often able to generate income by offering ads, many accessed via services from search giants such as Google. Coca Cola and Samsung, by way of example[42] have managed to withdraw their advertisements from sites offering access to illegal music. We have difficulty understanding why it is that all such sites "cannot" be prevented from profiting from unlicensed content.

The situation is not helped by a piecemeal approach to take down notices from music companies as they apply to URLs[43] – individual take down notices being required for every single URL named almost identically. (Though the recent Canadian case - Equustek Solutions v Jack - while referred to as "overreach" by the EFF, appears to have applied a degree of common sense[44].

There are signs in the public arena of these technological superpowers publically "echoing" the concerns of the creative community as to the respective shares of revenues between authors and performers and their corporate partners. This is disingenuous in our view. For better or worse, creators and media companies are partners, and such attempts at division distract from the key issue. The respective shares of revenues between media companies and the authors and performers with whom the contract are as nothing compared with the damage inflicted upon overall industry value by the market power of a few tech giants. That such companies make representations to policymakers via trade associations (eg the DiMA – Digital Media

[41] In particular we refer the Office to the illuminating chapters Two and Three of Robert Levine's book ***Free Ride: How the Internet is Destroying the Culture Business***, The Bodley Head 2011

[42] http://bigstory.ap.org/article/coke-samsung-pull-ads-vietnam-website-citing-concerns-over-unlicensed-music-downloads

[43] http://musictechpolicy.wordpress.com/2014/08/27/4-million-dmca-notices-dont-stop-the-google-piracy-machine-how-google-drives-traffic-to-pirate-sites-through-google-alerts/

[44] https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc1063/2014bcsc1063.html

Association, the CCIA Computer and Communications Industry Association) should not obscure their enormous market might.

It is music (and other "content" as it has been characterised) that has helped these giants become global operations and cemented their power and influence in the lives of consumers and governments alike. And, with that, the balance of power has moved. Music majors such as Universal, Sony, Warners, Sony/ATV, and the worldwide network of CMOs are all subject to regulation under anti-trust and competition laws. It appears that market regulation in both the US and elsewhere to balance the abusive practices of these technology giants is almost non-existent. This damaging imbalance is an important policy issue and one which we hope will be a key consideration in the Office's deliberations. ?

The lowered costs of recordings facilitated by technology has led to increased number of DIY recording and the large numbers of self-published writers and artists who record their own works. These are available through aggregation services such as Tunecore. While the works may not individually be garnering much audience attention or income, the aggregators are at the table with the result that the "pie" is required to be divided into more slices.

The introduction of iTunes meant sales of single tracks as opposed to albums began to dominate sales patterns. The original illegal digital marketplace allowed consumers to download albums but also to much more easily pick and choose tracks. Download speeds alone were a factor in a consumer just taking what they wanted rather than spending time taking a whole album that they might never want. This a la carte model was mirrored when iTunes began operation; in fact iTunes insisted on the unbundling of the album. The resultant track based culture led to consumers buying 3 tracks when they visited an online store as opposed to 3 albums when they visited a physical store. This resulted in a drastic drop of income for rights holders and creators. The mix between physical and digital consumption and between albums and single tracks is different all over the world but is inexorably moving towards the digital in both cases.

Part of the process of repairing the commercial damage is that we focus properly upon the tracking of the usage of music (and other copyright works), and ensuring the revenues find their way in as streamlined a manner as possible to those entitled to their share. The technological capacity for this process already exists. The building of central reliable databases which, as well

as disadvantaging creators and making reporting by users fraught, has been bedevilled by conflict within different industry sectors (See also our comments at Questions 22 and 24) but we welcome initiatives by Sound Exchange in the USA to consolidate recordings data. We also refer the Office to our response to Question 22.

Market Value Examples:

(i) **Artist A – recouped heritage artist and their iTunes income**

Artist A is a departing member of a major heritage act and was, in the original contract, on a sales royalty of 2% of the retail price. This act has long ago recouped its recording advances so should be receiving a cash royalty for every physical unit sold and track or album that is streamed. The 2% royalty rate was converted to 4% of the dealer (ie wholesale PPD) price for the recording in the UK and 3% in the rest of Europe. This percentage is levied on 100% of the actual dealer price in major territories in some but not all counties in Europe (ie excluding Scandinavia, Spain and Portugal). But from the dealer price (£0.44p in the case of iTunes) is first deducted packaging costs of 25% (packaging is non-existent for a digital file). In the rest of the world, including the USA, the royalty rate for Artist A was applied to 85% of the value of the dealer price and therefore, after the deduction of the spurious packaging charges, the royalty rate becomes 2.55% of dealer less the packaging rendering a per unit rate of 1.9125%. This is the value of the royalty paid to the artist for streaming revenue – where it can actually be directly attributed to the artist or track by the label! The sound recording copyright remains in perpetuity with the record label.

So to apply Artist A's deal terms to an iTunes sales[45] looks like this:
The Artist A 2.55% royalty base is applied to the cash value of £0.33pence shown in Annexe 1 in the iTunes example after a packaging deduction. In this instance no record (studio) producer royalty was required to be paid. The cash value to the recouped, world famous artist is thus: £0.33 x 2.55% = £0.008415, or just over three quarters of one penny for each stream or download.

The label will be receiving £0.44 pence less the Artist's share leaving a retained balance of £0.321585p, plus the £0.11 retained for packaging deductions: a total of

[45] ibid

£0.431585. This is **over fifty times** what the Artist receives. Were a studio producer receiving a royalty then the ratio would shift with the label retaining even more, as the studio producer royalty is deducted from the Artist's royalty percentage.

(ii) Value Fluctuation by Virtue of Audience Access Payment Model

Finnish Recording Artist Anssi Kela's reported streaming earnings from his track Levoton tyttö' (Troubled Girl). The song (and sound recording both of which he owned) was streamed more than 1m times between March and June 2013. This usage netted Kela €2,336.00 in royalties or around US$3,160.00.

Payments are broken down as follows (Euros converted to US$ at today's rates):

"Free" users	US$107.30 for 220,571 ad supported service – ie "feels like free" or US$0.000483481 per free stream
Paying subscribers	US$1,072.52 for 194,782 subscriber streams or US$0.00550631 per paid stream

The differential in value that has been placed upon the same work accessed by a paying subscriber as opposed to when it is accessed via an ad supported service (or "feels like free" listener) is 11:1 in favour of subscriber rates.

We believe that licensing mechanisms do need attention in the context of the wider marketplace. Some music services pay by reference to a percentage of revenue. How that revenue is allocated amongst works accessed changes from service to service, from subscriber to subscriber. The varying of the calculation bases used for licence income is an additional problem. For example, where a licence fee is calculated by reference to a fixed percentage of revenues, the composer, performer and rights owners will see the monetary value of their music drop when a business fails, or does not measure up to initial commercial predictions. We do not see the logic in the works created by authors and composers being priced according to the expertise of management or the wider commercial success of a business. Dramatic price fluctuations such as this do not apply to other suppliers to the business and music is the core component of the music services springing up in the digital marketplace. The value of music needs to be valued so that it is a predictable supply cost for music services of all types. So, for example, fixed base values could be set that improved by reference to both usage (individual works' popularity) and the health of the overall business, so that an established value increases incrementally as the business grows and succeeds.

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

We believe that our answer to this question can be drawn from:

(i) Our concerns about how the relationship between the music industry and the tech giants has affected creators (see Question 18 above)

(ii) Our comments about the practice of music corporations retaining revenues paid as lump sums by a combination of NDAs and the application of contractual clauses that prevent works matching by census and sharing with creators (see Questions 1 to 5, 6, 7 and 14)

(iii) Difficulties arising from the condition of the allocation of unique global works identifiers which we address in more detail at Question 22 below.

(iv) The lack of a US performer's right to equitable remuneration means US labels are a paid a revenue stream across the globe for this secondary usage (broadcast and pubic performance) of sound recordings in which the US performers have no right to share.(see also Question 22)

20. *In what ways are investment decisions by creators, music publishers and record labels, including the investment in the development of new projects and talent impacted by music licensing issues?*

We imagine useful responses to this question have been provided by labels and publishers – both better placed than we to provide such information.

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

We imagine useful responses to this question have been provided by labels and publishers – both better placed than we to provide such information.

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

There are two ISO issued unique, permanent international numbering systems already in operation in the music industry – but their penetration into the two repertoires of musical compositions and sound recordings and degree of usage varies. There is the additional ISAN

number – the International Standard Audio-visual Number[46] which is used for tracking usage of film and tv works and also valuable when trying to track music embedded in such works.

Music Publishing:

The International Standard Musical Work Code (ISWC) is administered (under licence from I SO) by the Paris-based organisation, the International Confederation of Composers and Authors Societies[47]. There is also the ISWC International Agency website at www.iswc.org where more information on this standard is available (agencies, etc.). Finally, the ISWC registry is accessible to everyone at www.iswcnet.cisac.org where works metadata and associated ISWCs can be searched for the worldwide musical works repertoire.

The subject was discussed at the New York Roundtable of 23 June 2014[48]. In this respect, we believe we should draw to the Office's attention to two features of this segment of the transcript. Firstly in transcribing from oral testimony the authorised ISWC issuing body has been misidentified as SESAC, not CISAC – an easy mistake to make.

But secondly, the information on this subject provided to the Office by attendees is sketchy and inaccurate. We shall attempt to correct the information here but would also recommend that the Office address enquiries to the CISAC Secretariat for more detailed (and correct) information than that which was delivered in this oral testimony earlier this year.

Decades ago, when major publishing companies and the smaller "mom and pop" publishing companies signed up songwriters and began working with them on their careers, they all had their own internal song identification systems. The company acquisitions that have characterised the music publishing industry over many decades has meant that song catalogues have been consolidated, changed hands many, many times and, as a result many different identifiers operate both within and between music publishing companies. The administrative confusion this was causing was recognised in the 1990s and the ISWC coding solution was launched and the allocation of ISWC numbers has been the focus of CISAC and its member societies' efforts for many years.

[46] http://www.isan.org
[47] www.cisac.org and www.iswc.org
[48] Music Licensing Public Roundtable, 23 June 2014, starting at page 360

The authorship of a work does not change and remains unaffected by changing ownership patterns. ISWC numbers identify the work and represent the abstract musical work. Contrary to oral testimony, only creators' information is needed in order to allocate an ISWC. No commercial exploitation information (such as publisher, sub-publisher or administrator) is required. The ownership position of creators is identified by the IPI number – the Interested Party Identifier (which has replaced the old CAE[49] number), and is used to track payments to individual writers and publishers. Where a writer uses different names for different works, additional IPI numbers will be issued for each additional name that they register with their local society.

Nor, also contrary to the oral testimony, are contractual shares needed before ISWC metadata can be allocated. In the UK we are required to provide copies of contracts to our performing right society so they have verified data. Contractual shares are rightly confidential, business information. Requests by large online music services such as YouTube for access to information about revenue shares between composers and their publishers are inappropriate, should be resisted as these commercial terms must remain confidential

ISWC codes have now been allocated to almost the entire catalogue of the world's musical compositions via CISAC and are used by the performing right society network. In the central ISWC database, there are 40 million ISWCs registered as distinct compositions.

Earlier this year CISAC and Spanish music identification company BMAT concluded an agreement whereby BMAT's tracking technology, Vericast, will operate based upon the ISWC system[50]. Vericast tracks music usage across more than 3,000 radio and television outlets in 50 countries, and is used by over 45 CMOs, and is connected to the digital feeds of major music operations as well as large digital aggregators.

Where the real problem arises is that different bespoke internal identifiers continue to be used by large sectors of the music publishing community and the result is that administration bodies and licensees are being required to operate in an environment where ISWC and Tunecode identifiers are in use along with the bespoke identifiers of various companies. Add to the mix the position for sound recordings (see below) and the allocation of their own bespoke identifiers by online

[49] Composeur Auteur, Editeur (CAE)
[50] http://www.cisac.org/CisacPortal/consultArticle.do?id=1803

services and one sees that accurate usage tracking and correct revenue allocation is guaranteed to be compromised. YouTube[51] , a powerful portal to music, operates Content Identifiers provided owners "meet specific criteria", so we have to assume that identifiers allocated within other systems may be perpetuating this complex identification spaghetti (although, laudably, YouTube has been vocal about the need for the ISWC and ISRC numbers to be linked).

There is no reason why this position should still exist in respect of musical compositions and accompanying lyrics. Since inception in the 1990s, ISWC codes allocation is almost complete and equipped to respond dynamically to new works. At the same time CISAC operates the Common Information System (CIS)[52] that facilitates the protection of repertoire in the digital environment within linked date exchange networks and is designed to standardise information exchange between member societies in real time.

The establishment of a global database of musical compositions (the Global Repertoire Database or GRD[53]) was intended to facilitate combined back office functions for stakeholders but has not been an unqualified success. We would refer the Office to the recently suspended GRD[54] project which, from our perspective, may have failed by virtue of its being wildly overambitious in scope. What is required, as a matter of urgency, is a single data resource hub of cross-linked identifiers that is inter-operable with a sound recording database and with three features:

(i) the public identities of the authors of musical compositors,
(ii) the owners of works (IPI) in every (each) territory,
(iii) and the place from where a licence can be obtained.

Unique, globally accepted identifiers should be compulsory in today's global marketplace. In our view the germ of this resource already exists in the network of data held by the world's CMOs and based upon the ISWC data. We would urge the Office to follow up with CISAC the opportunities to consolidate this data from its various sources to ameliorate some of the concerns being voiced by would be licensees in the technological space.

One corporate participant in the GRD project stated that the project had identified the fact that the music publishing industry "had a data problem" – something that had been evident for

[51] http://www.slideshare.net/carlospacheco74/you-tube-content-id-handbook
[52] http://www.cisac.org/CisacPortal/page.do?id=22
[53] http://www.globalrepertoiredatabase.com/
[54] http://musically.com/2014/07/11/prs-disappointed-at-global-repertoire-database-collapse/

decades and that ISWC was designed to address! When an author signs a music publishing contract it is the responsibility of the publishers to register the works worldwide in order to access revenues. It is the registration and monitoring of licences and income that form the basis of the services that an author receives in exchange for assigning their copyrights to the publisher. The inconsistencies in global works labelling and registration would appear to us to signal a longstanding fundamental failure fully to deliver on the part of the publishing community.

And, one has to wonder whether the more widespread adoption of identifiers might have, covertly, been resisted within the music industry because work by work data and revenue matching facilitates payments from the companies to third parties (authors) to the detriment of revenue retention by the corporations.

Sound Recordings:

Sound recording identification is a slightly different situation. Contrary to oral testimony to the New York Roundtable in June, the equivalent identifier the International Standard Recording Code (ISRC) has not, in our experience, achieved the penetration that is seen with ISWC. These identifiers have a critical role at the CMOs that administer a performer's equitable remuneration for secondary usage (communication to the public). So, these numbers need to be inter-operable with the ISWC data, be allocated globally to all individual tracks and, as session performers can change from mix to mix of an individual track, should be allocated individually to each version and to each version of the track (eg the radio mix as opposed to the dance or club mix).

Record labels have traditionally operated on a territory by territory basis – spreading sound recording copyrights across the globe by intra-company contracts and/or by private agreement with local agents. The CMOs operating secondary revenues for labels and performers do not have the long-standing network of reciprocal contracts that exist when it comes to cross-border licensing of compositions. The 2013 IFPI annual report showed that for the first time the global performance rights income for sound recordings reached US$1 billion. But the market is yet fully to mature; China, India and Argentina, for example, have yet to pay foreign artists. As a result collection and distribution of revenues worldwide is managed CMOs on a country by country basis but with access to money varying slightly from the situation with the authors'

societies[55]. Local offices of record labels can access their local revenues. But for UK performers, access to their international revenues occurs in one of two ways. British performers can either mandate the UK society PPL to collect for them worldwide or they appoint agents in various territories to collect for them locally.

These individual and competing private agencies in different territories use their direct contacts with the local CMO to monitor registrations and chase income that is due[56]. Reports from agencies that MMF members have mandated on behalf of clients to access these revenues convey frustrations at the quality of data and suggest to us that there is little or no incentive for the labels correctly to allocate unique identifiers or correctly register individual tracks. The societies that administer equitable remuneration for record labels and performers across the globe do not use the ISRC uniformly. There is no common registration format in use across societies.

The unsatisfactory nature of the current system is best illustrated by comments recently published from one of these agencies. Canada-based Premier Musik International is a rights agency that has operated in this area for over 29 years. Recently, Premier Musik's CEO Gino Olivieri identified the lack of a common database as a problem, but expressed the view that "not all societies want this to be achieved". A key element of the international landscape is the power of the Anglo-American repertoire – with smaller nations being net exporters when it comes to rock and pop music. In respect of the position for US performers, it is not only the smaller societies that block access to creators' revenues. Olivieri also reported that:

> "*[M]any labels are quick to register songs as not qualifying for neighbouring rights if a performer is American, since the territory's legislation doesn't recognise the right. Many American performers actually record their music abroad, and so their music would qualify for neighbouring rights.*

He also highlighted poor data entry by the majors labels saying[57]:

> *"We recently saw a label register the works of a high-profile performer on an upcoming album,….."The album titles were not registered and songs were down as 'Track 1', 'Track 2' etc. They had outlined the albums as recorded in the US, thus disqualifying any chance of those titles ever receiving any income."*

[55] The history of the implementation of the Rome Convention 1961 that established this revenue stream has been via statutory implementation as well as by international private agreement between labels trade body IFPI and the FIM/FIA collaboration for performers.

[56] Music Week 27 June 2014

[57] http://www.musicweek.com/news/read/premier-muzik-calls-for-international-neighbouring-rights-reform/057149

A clear signal from government to corporations both domiciled and trading within the USA that they are required to use the ISWC and ISRC standard works coding in their dealings with musical compositions and sound recordings respectively would be of enormous benefit globally for data management purposes for authors, owners, societies and users alike. In addition we would recommend a clear message of support from the US Government to the World Intellectual Property Organisation (WIPO) – a body not lacking in resources – that it regards it as a priority that WIPO initiate or monitor and fund a programme to complete the allocation of identifiers numbers to the global repertoire and in a manner that ensures inter-operability between systems.

23. *Please supply or identify data or economic studies that measure or quantify the effect of technological or other developments on the music licensing marketplace, including the revenues attributable to the consumption of music in different formats and through different distribution channels, and the income earned by copyright owners.*

We direct the Office to:

UK Music's Report on the Economic Contribution to GVA:
http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry___WEB_Version.pdf

CISAC 2014 Annual Report:
http://www.cisac.org/FCKeditor/File/WEB2014/2014_CISAC_ANNUAL%20REPORT_VEN.pdf

The 2010 report on The Relationship Between Copyright and Contract Law:
http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf

Licensing Music Works and Transaction Costs in Europe – though this, Google sponsored, study is flawed in some of its data relating to the number of licensing bodies a user needs to deal with
http://www.keanet.eu/docs/music%20licensing%20and%20transaction%20costs%20-%20full.pdf

The 2014 IFPI Digital Music Report - http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf. Note: this report is sponsored by the major record labels

Future of Music Report: Artist Revenue Streams: http://money.futureofmusic.org/

For an interesting perspective on streaming and the determination of audience numbers: https://musicindustryblog.wordpress.com/category/streaming/

We expect shortly a study on Fair Trade Music commissioned by Music Creators North America and conducted by respected economist, and former member of the Canadian Copyright Board, Pierre Lalonde.

Paul Resnikoff's (who writes regularly and authoritatively on music licensing) article about streaming revenues: http://www.digitalmusicnews.com/permalink/2014/06/18/3-easy-steps-screwing-artists-streaming-royalties

We also refer the Office to the 2014 study[58] by Christian Phéline, President of the French Court of Auditors, which was commissioned by the Minister of Culture and Communication late last year. He identified distortion of access caused by large platforms pressuring labels and labels pressuring smaller services, and the different income to owners and creators resulting from this. (This concern is well illustrated by the recent outcry by independent labels offered less advantageous terms by YouTube than those received by the majors[59] and YouTube's subsequent threat that they would not monetise the recordings if they refused to comply[60]) Phéline decried lack of transparency and in particular he criticised contractual terms in agreement between

[58] In its original French here: http://www.culturecommunication.gouv.fr/Ressources/Rapports-administratifs/Musique-en-ligne-et-partage-de-la-valeur.
Press release here: http://www.culturecommunication.gouv.fr/Presse/Communiques-de-presse/Remise-du-rapport-de-Christian-Pheline-Musique-en-ligne-et-partage-de-la-valeur-Etat-des-lieux-voies-de-negociation-et-roles-de-la-Loi

Comment in rough translation here: http://www.griddlemusic.com/music-online-phline-report-claw-producers/

[59] http://www.rollingstone.com/music/news/youtubes-new-subscription-service-indie-labels-speak-out-20140701

[60] http://www.theguardian.com/technology/2014/jun/17/youtube-indie-labels-music-subscription

creators and music companies that disadvantage the creator and asked whether it was fair that royalty provisions for CDs should be applied to digital revenues.

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

The insightful and important questions posed in this Study are long overdue as the music industry struggles for economic traction in the global digital marketplace. We should like to raise two issues in addition to our comments above.

The first relates to the recent introduction of a Directive from the European Commission relating to CMOs and already being implemented across the EU marketplace by CMOs operating there. We hope that by sharing our experience of licensing regulation in general outside the USA, and some detail of the Directive, we can contribute usefully to the Office's study.

The European Commission's new Directive, The Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market" ("Collective Rights Management (CRM) Directive") was approved on 20th February 2014. Although it applies to all EU collective management societies it contains specific provisions intended to help music societies operating in the EU respond to the licensing needs of innovative digital music services operating across national borders – exactly the sort of developments that have so challenged the societies (and their members) which are the subject of this Inquiry.

The Directive requires that all EU societies institute a Code of Practice and a formal Dispute Resolution procedure. These policies must both be made available publically along with:

a. Articles of Association
b. Membership terms
c. Senior management
d. Distribution rules
e. Management Fee rules
f. Any social and/or cultural deductions levied
g. Clear policies as to the distribution of unallocable revenues
h. Identities of persons sought by the societies as entitled to royalties being held for them.
i. Membership criteria

In addition, under Article 8, societies' senior management and their Boards must publish an annual statement designed to eliminate conflicts of interest being undeclared. These statements should contain four elements:

a. Executives and Board Members interests in the society
b. Their level of remuneration
c. The royalties they received as a right holder
d. Detail of any conflict of interest between their personal interests and the society and/or their obligations to the society and their obligations to any other natural or legal person.

Every society must publish an annual transparency report which in the case of larger societies must be externally audited. The Annexe to the Directive identifies the requirements of this Transparency Report, including, significantly, a requirement that a society gives grounds for any refusal of a licence.

Of particular significance for societies operating in a global digital market, the Directive allows for licensing flexibility, acknowledging accelerating technological change. EU societies are not constrained in their negotiations with online distributors of authors' works. While licences must be based upon objective non-discriminatory criteria, Article 16 gives societies the flexibility to accommodate changing market conditions when setting tariffs for online services. This recognition of the fast pace of technological change and the importance of a society being free to adjust tariffs in response is regarded as an important plank in the new EU regime. Article 16 (2) states:

> *Licensing terms shall be based on objective and non- discriminatory criteria. When licensing rights, collective management organisations shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years.*

Not-for-profit societies with representation for authors and performers (and those agencies that operate within the EU to collect secondary income for performers) are to be subject to stringent regulation and transparency requirements, but both licensees and music companies insist on NDAs to prevent creators knowing useful detail of deals struck involving the right in their

works[61]. In contrast, enquiry of a Board member at GEMA, the German authors society, brought this loose translation of the German Courts on the subject of NDAs and Youtube[62]:

> *It is true that as a matter of general policy GEMA refuses to sign non-disclosure agreements with users that would prevent GEMA from disclosing the details of the agreement (in particular concerning the remuneration) to its members. This has been one of the reasons why GEMA still has not signed a licensing deal with Youtube. However, with all other major DSPs (including Google Play and Spotify) GEMA has been able to reach an agreement without being prevented from disclosing licensing terms to its members.*

But NDAs (outside the principled stand taken by GEMA) at CMOs and affecting music companies/licensees' deals are understandably a source of frustration for us. The levels of transparency imposed on CMOs would also be desirable in the handful of highly vertically integrated media companies that have carriage of the rights of the FAC members and the clients of the MMF.

We gave one other comment on transparency as it applies to the right owning community – the labels and the publishers that have carriage of our rights (FAC) and those of our clients (MMF). In the early part of 2014 the European Commission conducted a Copyright Consultation. One question was: *Is there a need to act at the EU level (for instance to prohibit certain clauses in contracts)?* The response by cross-industry body, UK Music[63], was as follows:

> *"While recognizing that no action by the EU may be needed in this regard, it is important that non-disclosure agreements between contracting parties do not prejudice corresponding audit rights that writers and performers may have with those contracting parties."*

This is a tactful understatement. Creators (and their managers) take a more vigorous position. It is the songwriter and the performer that has the contractual right to audit their corporate partners. It is their managers who monitor these audits, discuss ongoing progress and negotiate and authorise the settlement terms on conclusion of the audit process. From a collective position of decades of experience we have to take issue with the assertions made by BMG and Sony in the New York Roundtable in their challenge to Mr Resnikoff's comments about the sharing of lump sum revenues.

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[62] https://www.gema.de/en/press/popular-subjects/youtube.html
[63] http://www.ukmusic.org/

In fairness, we should begin by stating that in a single case the collective pressure of the MMF as a whole did, as far as we are able to determine, produce some effect. In 2006 the online music P2P service Kazaa was ordered to pay over US$100 million to the four major record labels[64]. The MMF secured verbal commitments from all four labels (as there were then) that the excess of the settlement over costs would be shared with artists. All four companies had different methods by which they calculated the distribution and the settlement share would have been slotted into the label's own accounting methods[65]. Basically, however, the labels pro-rated the income against artists who earned digital money during the period Kazaa was operating. And applied individual artists' royalty rate (seldom in excess of 30% and often, for heritage acts, as low as 3% or 4%) and it appeared that a lot of the money went against recoupment of advances. Most of the money was applied to US artists on the basis that it was in the USA that "the internet was most developed at the time" and, as far as we could determine from our member clients, it was difficult to see from royalty statements the value, or even the actual presence, of this gesture.

The MMF has been pressing for major labels to share in "breakages" - the surplus funds that arise when a music service's advance payment, or minimum guarantee, to a record company or publisher exceeds the royalties earned[66]. As at the date of writing Warners say they "pay through all breakages" and Sony has promised to supply the MMF with the equation by which they calculate breakages shares – we are still waiting!

Set against this experience are comments from auditors who conduct audits on behalf of FAC members and MMF clients. Our members routinely raise the issue of lump sum payments during an audit and part of audit settlement monies are labelled as attributable to this element of enquiry. But in the words of an auditor[1] with 15 years' experience in auditing labels and publishers:

> "I have never come across any incidents of UK artists receiving a share of so-called "breakages"."

He goes on to say:

[64] http://www.dailytech.com/Kazaa+to+Pay+100+Million+to+Record+Labels/article3535.htm
[65] https://www.techdirt.com/articles/20100712/23482610186.shtml
[66] http://www.a2im.org/downloads/WSJMusicLicensing_July202014.pdf
[1] Whose identity we must protect – as auditors sign confidentiality agreements and are thus prevented either from commenting upon their experience or, in theory, from applying what they learnt in Audit A to the exercise of Audit B

"I experienced an occasion where a label has asserted that they are not aware of the receipt of lump sum monies from licensees and has insisted that I, as auditor, identify a particular example of such a lump sum before they can comment. However, I am not able to obtain this information as the licensees have signed NDAs. In the case of other types of lump sums received by labels, such as settlements with copyrights infringers or audio and video public performance income, I am sometimes told that it is not possible to share this income with artists as there is no way of breaking the income down by recording. But the systems are NOT incapable of allocating the money. The PRS and other rights organisations can allocate blanket licence fee money to individual songwriters. Data is always available which can be used to make a reasonable allocation.

On the occasions that this income is shared with the artists, I have no ability to verify the allocation as there is no audit trail leading back to the income received from the source. I am told that this financial detail is not available to me as the source amount relates to all artists on the label and I am not entitled to that information as I am auditing at the request of an individual or single band. The company may in some cases describe a mechanism for allocation but I am not permitted to see the various stages of the calculation going back to the source of the funds. Also, where a payment is received in, say, the USA, for a global or a UK/USA deal, often the UK office is simply sent an amount, being the internal UK allocation. They themselves are not being given any detail of the original value of the licence."

In the MMFs experience, having authorised scores of audits on behalf of clients, the sharing by labels and publishers of lump sums revenues with the creative community rarely occurs and we are disappointed that, in this day and age with the technological capacity to allocate funds accurately, this should continue to be the case. We draw a distinction between a lump sum arising because a company has made a cash investment and a deal whereby the catalogue has been used as part of the valuation of the deal. Examples of the former would incoude the Universal investment in Beats which, upon its sale to Apple, generated over US$400 million for Universal. Or the instance where the major labels rescued British high street retailer HMV[2]. These incidents are different from the Spotify investment where, in assisting a start-up, the labels received equity and at a value that appears to be less than that paid by venture capital[3]. Had there been no equity participation the licence fees would have been higher. But without access to the mechanics of the deals, it is not possible for auditors to differentiate between the two.

[2] http://www.thesundaytimes.co.uk/sto/business/Retail_and_leisure/article1197662.ece
[3] http://www.washingtonpost.com/wp-dyn/content/article/2009/08/07/AR2009080700891.html

Second Request for Comments – 23 July 2014

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.*

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?*

We believe we have broadly addressed these 2 questions in our response to Question 22 above save that we failed to suggest any devices that might incentivise right owners and users.

When the ISAN numbers, for audio-visual works, were proposed in the UK there were 2 major objections that worked against its universal adoption in the television industry. One was that of its expense per work (ie the costs of acquiring a package of numbers for allocation). It is possible this might be ameliorated by market forces in that were the attachment of these ISO numbers to be made compulsory demand would drive down price – after all no book is released without the equivalent ISBN number, and barcodes[67] for physical products are cheap to acquire in bulk for allocation to individual products.

The second problem that arose in respect of the ISAN, was one of timing. By coincidence, the Independent Television Company (ITV) the UK's main competitor to the BBC, was at the time about to overhaul its IT systems, so adoption of the ISAN number fitted neatly into its IT planning. This was not the case with the BBC and the corporation continues to use its own works labelling system system to this day. Perhaps the equivalent problem in the music industry might be met via inter-operability requirements. For example, it is our understanding that the Hollywood studios' own works identification system is compatible with ISAN – we would suggest the MPAA is best advised to confirm (or deny) this. Consultation with CISAC, Sound

[67] http://www.gs1uk.org/about-us/Pages/default.aspx

Exchange and the IFPI would, we respectfully submit, clarify the status of inter-operability of the 2 different systems in use today.

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).*

This is a delicate question. In this respect difficulties will be encountered with pre-existing contracts between creators and right owners, and between right owners and users, owing to legal and government reluctance to interfere in contracts freely concluded between parties. In addition there will be sensitivities around revealing commercial terms of private agreements. But, evidence suggests that we are moving towards a marketplace where music dissemination may predominate from a few large services. From an EU competition law perspective contracts concluded by entities with a dominant position in the marketplace (such as Universal, Google, Amazon, Sony, a collecting society) are prohibited from imposing dissimilar trading conditions on equivalent transactions. So, perhaps where music licensing agreements are concluded between dominant players this requirement of similar conditions can be balanced against contractual confidential as a matter of policy.

There is an opportunity presented by a compulsory, single global identifier for works, coupled with the application of technological analysis methods <u>that already exist.</u> Rights owners, administration bodies and users should match on a census basis the works accessed by the consumer. It can be done. We have the technology. What is a disincentive is the corporate obligations to shareholders and the drive to increase company value. These factors combine to create an unhealthy tension between the companies' contractual obligations (on recoupment) to share income with third party creators and the desire of executives to deliver results. There is an old Hollywood riddle that speaks to this tension: Q: Why don't they play tennis at Paramount? A: Because there is no net.

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.

Our response to this is outlined is our answer to Question 14 above. Our recent public statement on the subject is attached as Annexe 2.

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

We would urge the Office to recommend the census method of analysing usage which method would be practicable were global identifiers (ISWC, ISRC and inter-operability required by bespoke systems) to become standard. Investment to improve the societies' technological capabilities should be encouraged and, considering their non-profit status, financial aid for the process should be considered. Registration and monitoring royalty income is the job of a publisher and a label. We find it difficult to understand why writers and performers (within the society system) should bear these costs disproportionately. Evidence demonstrates that the music companies have revenue to spare to invest in other ventures, one wonders why accurate record keeping has not historically been a higher priority for investment by them.

Usage analysis and revenue allocation is the primary function of the CMOs. There is no excuse in today's data rich world for payments from users not to be accompanied by totally accurate usage data. This should be a requirement from all licensees and, as importantly, should be used by licensors to distribute income accurately to creators and right owners. Obviously this has to be proportionate. There is little point spending 100% of the income to distribute it accurately but with modern technology the cost of distribution should be dropping all the time. Unattributable income has no benefit for creators if it is retained by the entities who collect it.

In this context it is interesting to note the contrast between the UK and USA with regard to live performance licence fees and income allocation. In the UK every venue over approximately 500 capacity is required, as a condition of the licence, to accurately fill in (either physically or online) a complete list of works played by all the artists performing at a show. The tariff is a percentage calculated by reference to gross ticket sales and is a cost to the promoter, shown in the tour budget. The list of songs performed is submitted to PRS who collect the income from the

promoter, match usage to authors and publishers and distribute it. Authors and their managers and tour personnel (all of whom know the actual set list, and it is easily verifiable) usually check the inputted data (or submit duplicates) as it is important they receive the income. The works performed by ALL artists (not just the headliners) are paid at the same rate[68]. This is a fair method applied to a valuable income stream for everyone but especially for developing artists who write their own material.

As analysis is labour intensive, and expensive, the UK's CMO (PRS for Music) has imposed a cap on costs of analysis of live revenues, an initiative that was welcomed by members when it was introduced.

In the USA payments for live performance are made at a fixed rate but paid to all the collecting societies based on an annual negotiation. This income is received by each collecting society and only paid out by reference to the top grossing US tours on an annual basis. If an artist during a show performs songs wholly registered with say ASCAP, the remaining portion of the licence fee (ie not the ASCAP part of the fee) will be paid out to the other societies whether or not they have an interest in the songs performed. Obviously there is an amount of balancing out that occurs throughout a year, and licensing methods have to accommodate a nation of great geographical size containing four CMOs for musical compositions. But to license in this manner unfairly benefits CMOs when their music is not used, as they continue to be paid, and the four-way split of the fee drives up costs for promoters and therefore the artists. In addition, the distribution of the live income pot to the top grossing tours is unfair and should be reformed to be far more accurate, better reflecting the market place.

> *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?*

This is a question that, we submit, deserves wider study. The Future of Music Coalition has produced data in this respect as have other studies – see above.

[68] In some European territories there is a headline/support act split that reflects the acts respective successes, and in some cases the headliner will by prior agreement with the support act alter this arrangement

In respect of individual audience member's usage as applied to income levels, payments attributable to a single online play (or stream) by a single individual breaks down as far less in value than that attached to a single audience member of a broadcast (one divides the per minute value of a radio or television tariff and divides it by audience numbers).

As previously mentioned, with the rise of more affordable recording equipment, it has been possible for author and performers to create their work and release it via the online aggregators and supported by social media networks. While individual creators may not each be receiving a living wage, the CMO "pot" has now an extra claimant on it in the form of the aggregators administering their works.

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?*

Outside the USA, in the UK and Europe a simple two track system operates for mechanical licensing. The mechanical societies issue multi-lateral blanket licences via the societies (or via the collectives we have identified issuing EU licences for digital services). In this manner services acquire the right to use the entire world repertoire of musical compositions. We have explained (at Question 5 above) how the comfort of a licence for the entire world's works is essential. The blanket licences ensure this. There are varying tariffs for differing uses (radio, ringtones, tv programme making for example) and usage data supplied by users to the societies enables distribution of revenues. Right owners have the right to limit the range of uses that the mechanical licensing societies can authorise under such blanket arrangements. For example, usage of individual works or authors or certain publishers' catalogues in audio-visual works can be flagged within the society system and individual consents be required for these uses, bilateral licences for individual work synchronised in film, in advertisements, etc being managed by individual publishers. In this way fees can reflect the value of an individual song or writer.

This regime is made possible by a critical difference between US and UK law in relation to co-ownership of copyrights. As stated above, under the CDPA, all the authors or all the owners

must give consent for licensing of co-authored works. From our perspective the ability of one co-owner to issue a licence on behalf of another author (or other owner) without consultation or agreement exposes the latter owner or writer with an interest in the work to exclusion from income, and certainly dilutes their control. The introduction of such a two track licensing system in the USA might ameliorate this problem and would also have the advantage of giving US publishers and writers greater convergence with licensing regimes in the rest of the world.

In the UK prior to the 1988 Copyright Act, there was a statutory phonorecord mechanical rate of 6.25% of retail. The CDPA created a freely negotiated mechanical rate between publishers and users and, the rate for phonorecords was by agreement brokered by IFPI and BIEM[69]. We believe this is a model that could be applied in the US across different usages. Some examples of the rate setting mechanisms that operate in the European Union are briefly outlined in the CISAC submission to the Department of Justice Consent Decree enquiry – including a brief description of some of the transparent public arbitration procedures in operation there.

Sound Recordings

8. *Are there ways in which Section 112 and 114 (or other) CRB ratesetting proceedings could be streamlined or otherwise improved from a procedural standpoint?*

International Music Licensing Models

9. *International 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?*

We hope that in this submission we have usefully outlined aspect of some regimes that prevail elsewhere. We are happy to provide more information to the Office, if this is required.

Other Issues

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

There is a wealth of data demonstrating the financial imbalance between the music industry and the resources of the technology companies that have benefitted so handsomely from music. We

[69] http://www.biem.org/index.php?lang=en

would hope that the wider commercial context of music licensing will be taken into account in deliberations.

We should like to close with a general policy observation in respect of the interests of authors and performers on whose behalf we are submitting these comments. It is the rights of author and inventor that the US Constitution seeks to secure at Article 1, Section 8. It is the author that Article 1 of the Berne Convention sets out to protect. Multi-national corporations, whether copyright owners or copyright licensees, operate across national boundaries and shelter in tax regimes that seem most advantageous for their profits and their shareholders. The natural persons that are music writers and performers and the army of small and medium sized enterprises that surround them (the tape ops, the studio owners, designers, agents, managers etc.) do not necessarily conduct their affairs in this internationally "tax-efficient" way. By and large, with a few exceptions, authors and performers are domestic taxpayers in their local economies. It does not seem to be unreasonable to us that this fact, coupled with statements testifying to their cultural importance in both US and international instruments, should lead authors and performers to expect not to be unfairly economically penalised by technological progress.

Submitted by:
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Annexe 1

iTunes Breakdown

iTunes Download Analysis

UK major record company example		UK (£)
iTunes download retail (average)		0.82
Less Vat (in UK 20%)	0.14	
Retail (after VAT)		0.68
Less authors/ publishers share MCPS/PRS mechanical/performance/making available (currently 8%)	0.05	
Subtotal		0.63
30% to iTunes	0.19	
Net to record company (PPD)		0.44
Less 25% new technology/packaging deduction	0.11	
Artist royalty base		0.33
Artist royalty 20% of Artist royalty base		0.07
Less studio producer royalty (3% Artist royalty base)	0.01	**0.06**
If artist has own label, artist/label get 0.44 less aggregator distribution percentage of 15% (AWAL)		**0.37**

Annexe 2

MMF Public response to the Sony/ATV Statement

The Music Managers' Forum shares the concerns expressed by Sony/ATV as to the complexity of licensing systems in the USA and worldwide. Part of the problem is indeed the constraints in the USA on licensing negotiations imposed by the outdated Consent Decrees that govern ASCAP and BMI and prevent them securing a fair market rate for their members. That the US Department of Justice is currently reviewing the Consent Decrees is a positive development.

However, on behalf of our songwriter clients, the MMF is alarmed at the suggestion by any music publisher, especially one with such considerable market power as Sony/ATV, that they would withdraw from the performing right organisations (PROs) and attempt to issue licences directly to US users thus complicating licensing.

Sony/ATV, cannot withdraw any non-US writers' works from the US PROs and issue licences for their work as they do not own the right in any songs written by any writer who is a direct member of a PRO outside the USA. These non-US writers assign their performing right directly and exclusively to their local PRO on a global basis. The right is owned by the PROs who have the sole authority to issue licences - to the exclusion of the writer and the publisher. These non-US rights are passed exclusively to the US PROs by the non-US societies.

Publishing contracts outside the USA only give the publisher a right to share in the revenue from the performing right, but not ownership of the right itself. For example, as long as The Beatles, the Rolling Stones, Coldplay, Jean Michel Jarre and Adele etc continue as members of their local PRO, no US publisher can issue licences for their work. As far as we're aware, the letter from Sony/ATV was not sent to non US writers, once again highlighting the complications posed for licensees of territorial posturing in a global digital marketplace.

While the MMF is wholly sympathetic to Sony/ATV's frustrations, the threat of withdrawal is an issue for the entire global community of composers and societies. There are at least four other reasons why US withdrawal and direct licensing are a risk to writers' livelihoods.

1. Potential licensees will still have to go via the PROs as well as the publishers – so, differential pricing, more complicated and more costly transactions.

2. Writers' contracts routinely state that they are not entitled to be paid a share of revenue that is paid as advances, lump sums or is not able to be "directly and identifiably" attributed to their work. How confident can writers be that they will be paid their shares of direct licence monies?

3. Co-writing songs is a common practice. How does a co-writer signed to a different publisher get paid when his writing partner is signed to a publisher who is issuing direct licences? He has no contractual relationship with his partner's publisher to rely upon.

4. The PROs allocate unique identifiers to each song or composition (the International Standard Works Number or ISWC). These have now been allocated to over 95% of the world's musical works and their use across the globe ensures that usage and works are correctly matched and writers paid what they are entitled to be paid. Many, music publishers operate their own, different identifiers. The lack of common work identifiers between publishers and the PROs complicates revenue allocation.

The global network of non-profit PROs has served the consumer, the music users and the song writing and publishing community well for over a century. Despite the challenges of the digital environment PROs provide economies of scale and streamlined licensing which keep transaction costs manageable.

Writers sit on their Boards and can influence policy. While the PROs may not be perfect, they allow creators a voice and a direct income stream. Adjustments to this system should be nuanced and carefully thought through. More importantly to our members' clients, solely national focus poses a grave threat to the livelihoods of every writer, American or not.[70]

[70] Once before Sony/ATV led the charge with a direct licence to a US music service. The result has been a disaster for the whole music community. Every song writer and music publisher in the world is still paying back US $150 million to background music services in the US as a result of an ill-advised direct licensing deal concluded by Sony/ATV and other independent publishers in the US. These direct licences agreed a fee 70% less that the licensee was paying via the PROs! It is a matter of public record that Sony/ATV accepted an advance of US$2.3 million and an administration fee of US$400,000 from DMX, a major US background music service. Buried in the agreement was a per location licence fee that was 30% of what DMX was paying the PROs. Bad for business? Not for DMX. The US Rate Court proceedings that followed had the effect of reducing the licence fee for every background music service in the USA. The global music community is still refunding the licence fees to background music services in the USA as a result and licences going forward sit at 30% of the former PRO value.
Writers and publishers will never recover from the damage to the value of their royalty income in this sector of the market. 30% of the former PRO value.