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

Issues Related to Performing Rights Organizations	**Docket No. 2025-1**

REPLY COMMENTS OF THE AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers ("ASCAP") respectfully submits these reply comments in response to the February 5, 2025 U.S. Copyright Office ("Office") Notice of Inquiry ("NOI") for written comments on certain issues related to performing rights organizations ("PROs").

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The many comments filed in response to the NOI by a wide range of music users and licensees share a common theme. They all view the music licensing marketplace through a lens dating back to the 1950s, where the universe of copyrighted musical works was relatively small and essentially represented by only two PROs; and licensing was a simple endeavor without a wide range of choices. A user, then, could gain access to virtually all of the musical works that existed simply by procuring an ASCAP license and a BMI license, and costs were kept artificially low via complete government consent decree regulation over PRO performing rights licensing.

But, the performance rights licensing marketplace, as well as the entire music industry, have drastically changed. And unlike songwriters and publishers and

the PROs that represent them, who have aggressively and consistently evolved to meet and take advantage of those changes, music users refuse to embrace today's realities.

Today, the U.S. PROs license tens of millions of works (with dramatic increases every year hastened by new sound, recording and distribution technologies) and annually process over a *trillion* performances on and via proliferating traditional and streaming music and audio-visual services. Advancements in technology have made licensing and music use reporting much simpler and more efficient in most music user categories. Contrary to the assertions by music users, information regarding practically all recognizable musical works are made available through free online searchable databases. In addition, the emergence of SESAC, GMR and other PRO alternatives has prompted market innovations that have actually increased programming and licensing choices for many music users.

Music users have rehashed numerous arguments made in the past about forced licensing burdens and unfairness. *These arguments, however, grossly ignore, and in some cases outright misrepresent, current realities.*

Here are the facts:

First, music users today have more music licensing options and easier ways to curate their music choices. For example, music users can simply decide to perform and license one, a few, or all of the PRO repertories. ASCAP and BMI each have repertories in the tens of millions of works, and SESAC and GMR have much smaller repertories. All of the above-named PROs offer freely available databases that allow for customized curation, as more fully described in ASCAP's original comments. The argument by

music users that accessing these PRO databases is onerous and complex is a disingenuous one. Indeed, we know that PRO databases are regularly utilized by content producers who are required to clear works for their projects on a copyright owner–by–copyright owner basis. Audiovisual producers have for years effectively programmed around PROs to take advantage of per-program licensing savings. Some background and commercial music services do as well.

If, on the other hand, a music user, such as a digital music provider for example, believes it needs access to *all* music to compete effectively, that is a business decision it makes, and no one would dispute that the business should be prepared to pay the costs for its choice. It is the existence of PROs and their blanket licenses that allows for efficient clearance of all those rights. Negotiating with four or even five PROs is certainly exponentially easier than negotiating separately with dozens, hundreds or even thousands of music publishers, or millions of individual songwriters. Clearly, criticisms raised by these music users are not about the few additional negotiations that newer entrants (like GMR) necessitate. It is about their desire to continue to pay less than fair market value for that access and the benefits blanket licenses provide.

Second, criticism around PRO databases and the call for a new centralized database are unwarranted and are simply based on music users' quest to pay less than the fair market value for licensed music.

The nature of musical work creation and copyright ownership and management is inherently complex and dynamic. This is why ASCAP exists. ASCAP handles thousands of new works every week, many of which entail detailed split share information. Our

work is continuous and complex, with ongoing processing of new work registrations and information changes due to sales, assignments, bequests and other events that impact ownership. For over 100 years we have continuously been at the front end of innovation to improve the efficiency of these systems for the benefit of the entire marketplace – creators and users alike.

More recently, ASCAP and BMI undertook the herculean effort to create an easily accessible and navigable database system: SongView. The launch of SongView was a milestone event for musical works data across the industry. It harmonized all of ASCAP and BMI's collective data processes with daily updates. Our databases include nuanced views of that data, offering licensees the access and opportunity to analyze potential use and programming of PRO repertories. The addition of SESAC and GMR data (which is still separately made available) should definitively shut the door on any claim that repertory data transparency is an issue for music users.

The music users seem to envision a world where registration and maintenance of musical works information is as easy as creating a party invite list – static and never changing. And that somehow a governmental or outside entity can better maintain that information, more accurately and efficiently than the PROs. Some commenters even go as far as to insinuate that the PROs purposefully muddy the musical works repertory data to create some sort of Machiavellian information asymmetry, blurring PRO shares specifically to increase licensing fee costs. These criticisms are simply nonsense. The inefficiency and expense that would result from inserting the government into the process makes it an untenable and unnecessary proposition.

It is incomprehensible that another body or entity, removed from our millions of writers and publishers, and tens of millions of works, could, and would, spend the resources to build and maintain a better database system, more efficiently. And even if that were possible, that database would require the same disclaimers and potential for error that current databases have. Simply, SongView and the PROs' musical works databases are unparalleled in the industry and should be supported by creators and users alike.

Third, competition has helped ensure songwriters get paid what their music is worth. For many decades, music users were given a reprieve from paying market-based fees (*i.e.*, fees negotiated between a willing buyer and a willing seller) for performance rights. Because the ASCAP and BMI consent decrees provide for compulsory access to their repertories, they can never say "no" to a music user. For this reason, no dispute over how much a music user should pay ASCAP or BMI is ever settled by a truly "willing seller". Alternatively, in rate court proceedings, the courts have historically only looked to comparable ASCAP and BMI rates as benchmarks because there were no free-market rates to consider. The emergence of SESAC and GMR as unregulated competitors, for the first time have allowed songwriters and publishers the opportunity to realize value for their repertory set in the free market. Because SESAC and GMR are not subject to compulsory access requirement pursuant to consent decrees, music users must pay those PROs what the value of the PRO repertories are worth to them.[1] If a music user is not willing to pay a fair market price, it will not gain access to those PRO repertories.

[1] It should be noted that in 2015, Radio Music License Committee (RMLC) and SESAC settled an antitrust lawsuit brought by RMLC, agreeing that rates for the public performance by commercial radio broadcasters of the SESAC repertory would, absent a voluntary agreement, be set by binding arbitration.

That overall PRO fees may now be higher for a music user than it was in the "B.C." era (*i.e.*, 'before competition') is due, of course, in large part due to the fact that those users now pay true market value for some of those rights. Moreover, given that the product the PROs sell – their musical works repertories – has only been growing the past number of years (at a fairly astonishing pace given the advancement of music composition tools, services and platforms), it is natural that overall costs for significantly more music would likewise increase.

And, despite that there is now a basis for measuring fair market value for certain repertories (the actual free market), access to ASCAP's repertory is made available to users at very reasonable prices that have not increased over the years relative to the increase in ASCAP's repertory and the increase of other expenses music users must bear to operate their businesses. For music users, for whom music is the main or sole product they offer *(e.g.*, concert promoters, music services etc.), an ASCAP license is simply a fantastic deal, given the size of our repertory, with prices that have been set in the shadow of the consent decree.

Music users, and the commenters in this NOI, already negotiate in the free market for other rights related to the music they use to enhance their businesses, often with multiple rightsholders. It is therefore nonsensical that they would expect the musical works licensing market to stay the same and remain undervalued. That market has evolved; music users need to face those realities.

Fourth, claims regarding PRO distributions are not appropriate for governmental attention or intervention. Without repeating the comments previously filed with respect to ASCAP distributions, ASCAP wants to reiterate two points:

(1) ASCAP's distribution rules are set by its membership. The rules are publicly available. If a music creator believes another PRO will provide better distribution (or other) benefits to them, individually, they are free to choose another PRO. It is this competition that actually drives innovation and advancement, and these matters are between musicians and their PROs.

(2) To the extent that music users have a role in distribution matters, it is in providing comprehensive and accurate data about music usage. For the few music users that assert that they care about accurate distribution of the fees they pay, ASCAP would love for them to expend the time and resources to provide their performance information to ASCAP, so that we can process that information to make more accurate distributions in the most efficient manner for our membership, rather than expending their resources to lower their fees. ASCAP is always open to working with music users to improve music use reporting information.

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AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

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