Submitted by Colin Rushing on behalf of
the Digital Media Association

Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the matter of: **Issues Related to Performing Rights Organizations**	**Docket No. 2025-1**

REPLY COMMENTS OF THE DIGITAL MEDIA ASSOCIATION

The Digital Media Association ("DIMA") is pleased to provide these Reply Comments in response to the Copyright Office's Notice of Inquiry ("NOI") in the above-captioned proceeding. *See* Issues Related to Performing Rights Organizations, 90 Fed. Reg. 9253 (Feb. 10, 2025).

INTRODUCTION

If there is a common theme in the comments filed in this proceeding, it is that the market for performance rights in the United States depends on blanket licensing.[1] Specifically, there is widespread agreement that some form of blanket licensing is essential to the rational and efficient licensing of performance rights, and that the market for those rights may not even exist without the PROs.[2] Where the comments diverge is on the role of regulation in the

[1] As discussed more below, the term "blanket" licensing in the performance rights market in the United States is arguably a misnomer, since there is no license that covers all works. Instead, each PRO offers a blanket license for works or shares thereof in its own repertory.

[2] Some commenters suggested that licensees' sole interest in reforming the market for performance rights is in lowering their costs. As DIMA explained in its opening comments, that is both unfair and belied by the

marketplace for those rights, including whether the consent decrees governing ASCAP and BMI should remain in place, and whether the emergence of "unregulated" PROs is a sign of healthy competition or of cracks in the system. At the same time, the comments do not really leave any doubt on the answer to those questions: The consent decrees remain essential, and while the emergence of new PROs may give writers more choice, the rise of unregulated PROs is making the marketplace for licenses less efficient and less competitive, not more.

A. There is widespread agreement that blanket licensing of performance rights is essential for music creators, rights owners, and licensees

Comments filed on behalf of songwriters, rights owners, and licensees all share a common theme: When it comes to licensing the rights for the public performance of musical works, the role of the PROs is critical, and without the aggregation of rights they make possible, the industry would grind to a halt.

Importantly, it's not just licensees that depend on the blanket licenses; publishers and songwriters would have no efficient way to participate in the marketplace without the PROs. As ASCAP candidly explained, "[i]f not for PRO blanket licensing, it would be virtually impossible for music creators to get paid for the use of their copyrighted works across all the varied ways and means by which people enjoy music today."[3] BMI echoed this view, commenting that "[i]t would be virtually impossible for individual copyright owners to monitor and transact with the hundreds of thousands of businesses in the United States that publicly perform music."[4] NMPA

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evidence. In fact, licensees have a powerful interest in both ensuring the system works fairly and results in songwriters being paid what they are actually owed.

[3] ASCAP Comments at 1-2.

[4] BMI Comments at 8.

concurred, stating that "[w]ithout PRO collective licensing, most music publishers and songwriters would find it virtually impossible to enforce their rights against these types of users, and many of the users, especially small businesses, would find it similarly difficult and time-consuming to obtain the licenses needed to play music lawfully."[5] (It is not clear if it would even be possible to obtain the necessary rights without the PROs.) Finally, songwriters and their representatives have acknowledged the critical role PROs play in ensuring writers participate in the market, including in particular by allowing songwriters to receive royalties directly from their PRO even when they are under contract with a publisher.[6]

All this said, it is important to distinguish between the licenses offered by the PROs for performance rights, and the true blanket licenses created by law such as Sections 114 and 115 of Title 17. As DIMA set forth in its opening comments, the PRO system in the United States is not a single blanket license system at all, but instead a hodge podge of organizations and industry practices that, even together, may not cover 100% of performance rights. In fact, the "blanket" licenses offered by the PROs are not true blanket licenses in the sense that they do not cover all works – nor do they even cover all rights in the works within each PROs repertoire, due to the industry custom of fractional licensing. Instead, there may not be *any* combination of PRO licenses that will ever achieve truly blanket coverage of all performance rights. This is for a number of reasons: Because each PRO only licenses the fraction of the works associated

[5] NMPA Comments at 4.

[6] *See, e.g.,* MAC Comments at 1 ("For many songwriters, particularly independent and non-performing writers, performance royalties represent a significant portion of their income."); SONA Comments at 2 ("[T]he existence and role of PROs is crucial in addressing the complexities of music licensing and payment systems. . . . For songwriters with publishing deals, this stream of revenue represents one of the only uncrossed sources of income - unlike mechanical royalties that flow through the publisher first and are subject to individually-contracted, usually recoupable deals, money for public performances goes straight to the songwriter.").

with the writer they represent, today, there is no way to obtain a blanket license in the United States that covers 100% of works; because there is no reliable, authoritative database of PRO affiliation, there is no way for licensees to be 100% certain they have the right licenses in place at all times; and because of the practice of fractional ownership and fractional licensing, a single song may be controlled by each of the four main PROs, and there may be portions represented by no one at all. An individual PRO license, to the extent it provides only a fraction of the rights needed to actually play a song lawfully, has no value to a licensee. It only has value if a licensee is able to reach agreement with *all* PROs who control a share of that song.[7] By contrast, the licenses administered by SoundExchange and the MLC actually extend to *all* copyrighted works, and are true blanket licenses, giving licensees true certainty of coverage.

Notably, the opening comments filed by PROs and rights owners do not grapple with this reality of the marketplace, effectively ignoring the factors that make the current PRO system so cumbersome and unreliable. Instead, proponents of the status quo suggest that licensees should just obtain the rights they need, from whichever PROs happen to offer them, without any acknowledgment that the once stable system for licensing performance rights is steadily fracturing. But the casual observation that licensees simply need to get licenses from every PRO that emerges ignores the exact problem that is the subject of this inquiry: the fact "that the proliferation of PROs represents an ever-present danger of infringement allegations and

[7] In fact, where public performance *and* mechanical licenses are required to legally operate, such as with digital streaming services, a PRO license has no value even if it does cover 100% of the performance rights in a song—unless the licensee also secures the complementary mechanical rights as well (in addition to any sound recording rights).

potential litigation risk from new and unknown sources."[8] In short, while there is widespread acknowledgment the PROs are essential to a well-functioning market for performance rights in songs, licensors gloss over the growing cracks in the current system.

B. The consent decrees, in their current form, are the foundation of the PRO system

As multiple commenters explained and acknowledged, even though the market depends on collective licensing to function, that activity necessarily implicates significant competition concerns. An agreement between horizontal competitors to pool their products through a PRO in order to establish uniform pricing not dictated by competition would typically constitute horizontal price fixing under Section 1 of the Sherman Act, and also could raise illegal monopolization questions under Section 2 of the Sherman Act. As the NMPA acknowledges, "[w]hen the DOJ brought antitrust actions against BMI and ASCAP in the 1940s, it ultimately decided to preserve the procompetitive benefits provided by collective licensing, **with guardrails against anticompetitive conduct memorialized in consent decrees**."[9] In other words, the consent decrees are the vehicle to mitigate the competitive harm that collective licensing through the PROs would otherwise present.

Nonetheless, some commenters suggest that the real problem is that PROs are subject to *too much* regulation.[10] At least one commenter specifically claimed that the consent decrees

[8] Letter from Reps. Issa, Jordan, and Fitzgerald to Shira Perlmutter, Register of Copyrights, U.S. Copyright Office at 2 (Sept. 11, 2024).

[9] NMPA Comments at 4 (emphasis added).

[10] *See, e.g.,* NMPA Comments at 2-3; Warner Chappell Comments at 2; MAC Comments at 2.

should be modified to permit publishers to withdraw some but not all of their rights.[11] There is no reason to engage with these arguments. The Department of Justice has closely examined the question of consent decree reform twice in recent years, both times declining to modify the ASCAP and BMI decrees. In those proceedings, DIMA and other licensees have provided extensive analysis of the profound competition issues that relaxation of the decrees would cause. This is especially true of any suggestion that publishers should be permitted to "partially withdraw" from the consent decrees – a step that would do nothing to improve competition among rights owners, but would create yet another set of complementary oligopolists attempting to extract supracompetitive rates.[12] In any event, no commenter has identified anything that has changed in the marketplace in the last five years that would warrant revisiting the 2021 decision to leave the current consent decrees in place. If anything, the competition issues have become more pronounced in recent years, not less.[13]

Ultimately, the entire publishing industry fundamentally depends on, and is inextricably intertwined with, the consent decrees (as well as Section 115), and there is no way to unravel the consent decrees without at the same time fundamentally addressing the competition issues that would exist without their protection.

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[11] *See* Warner Chappell Comments at 2.

[12] *See* Joint Public Comments of RMLC and DIMA, DOJ Antitrust Division ASCAP/BMI Consent Decree Review, at 13-15 (August 9, 2019); *cf.* RMLC and MPA Comments at 6, 10-12.

[13] For example, in a recent complaint, LyricFind has alleged that its competitor, Musixmatch, was able to obtain exclusive control over a significant part of the market for lyric services by entering into an exclusive agreement with a single publisher, Warner Chappell Music. *See* Compl., *LyricFind, Inc. v. Musixmatch S.P.A.*, No. 25-CV-2265 (N.D. Cal. 2025). According to the complaint, even though Warner Chappell's market share by revenue was 12%, due to its fractional interests in a huge array of songs, it controlled "approximately 30% of all streams licensed on major platforms" and, as of the end of last year, approximately 60% of the 100 most popular songs according to Billboard. *Id.* at ¶¶ 12, 48.

C. The proliferation of unregulated PROs makes the market for performance rights *less* competitive, not more

A number of commenters suggested that the emergence of new PROs is a sign of competition, and should be encouraged, rather than discouraged. The NMPA, for example, asserted that "[t]he creation of new PROs is an indication of a competitive marketplace,"[14] and MAC argued that "[t]he competitive marketplace has resulted in varied offerings of products and services, as well as increased choices for creators and for music users."[15] SGA, MCNA and SCL claimed that competition among PROs gives writers more choice, provides a bulwark against the power of major publishers, and somehow "promot[es] efficiencies that maintain predictability and sustainability throughout the creation, licensing and royalty collection structure."[16] Comments by PROs echoed this theme even when they were critical of the practices of some new entrants.

Simply put, this is not the case. As DIMA explained in its opening comments, the proliferation of PROs is not a sign of a healthy market but, instead, a sign that the current system is breaking down. The emergent PROs are a rational but unintended response to a number of different factors – including in particular the fact that the consent decrees cover most but not all rights in the marketplace.[17] Nor is the proliferation of PROs making the market for performance rights more competitive. To be sure, competition between PROs may be beneficial *for some writers*, as PROs compete with each other for the most valuable catalogs

[14] NMPA Comments at 5.

[15] MAC Comments at 1.

[16] SGA Comments at 3.

[17] DIMA Comments at 13-18.

based on level of service, distribution rules and practices, royalty advances, or similar terms.[18] But when it comes to the market for the sale of performance *licenses* – which is the market that is at issue here – the emergence of new PROs has not improved the market in any discernible way. As DIMA explained in its opening brief, and as other comments have echoed, the PROs simply do not compete with each other for licensees.[19] Emergent PROs have themselves acknowledged that this lack of competition is at the core of their reason for existence.[20] *No* PRO or rights owner participating in this process makes any serious effort to dispute that it is functionally impossible for a licensee to operate with only a single PRO's repertoire, or that most licensees need licenses from *all* major PROs. Furthermore, many licensees do not even have the ability to determine usage based on an individual rights owner; they depend on a system that provides all the rights they might need. [21]

Nor is there any evidence that the proliferation of PROs has improved efficiency in the market for licensing performance rights. To the contrary, proliferation has dramatically increased transaction costs, reduced transparency, and made licensing music more complicated,

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[18] It is not obvious that competition between multiple PROs is always in writers' best interest, or that creators are worse off when there is a single collective administering a particular right. For example, SoundExchange and the Mechanical Licensing Collective both have cost-royalty ratios that are significantly lower than those assessed by the PROs, and very good reputations among their payees, and yet neither faces a competing collective for their respective functions.

[19] DIMA Comments at 13-14; *see also* RMLC and MPA Comments at 10-12.

[20] GMR, for example, was intended to be the licensor of repertoire that "nobody can, shall we say, comfortably exist without." https://www.billboard.com/pro/new-pioneers-irving-azoff-stubhub-live-music-business

[21] *See, e.g.,* Marriott International, Inc. Comments at 2-3; MIC Coalition Comments at 1-2; RMLC and MPA Comments at 9-10.

not less.[22] Again, no PRO or rights owner makes any serious effort to dispute this. In short, the proliferation of PROs does nothing more than increase transaction costs, while at the same time creating the opportunity to extract supracompetitive rates.[23]

D. Statutory damages play an enormously distorting role in the market for performance rights in the United States

As numerous commenters have noted, the availability of statutory damages under the United States Copyright Act creates an enormously distorting effect in the marketplace and may be the single biggest distinction between the United States and other countries. As one court has noted, the availability of statutory damages can incentivize rights owners to avoid rational commercial activity in favor of pursuing a litigation strategy, based on the opportunity to recover damages well in excess of "its own loss."[24] And there is little doubt that the availability of statutory damages has played an essential role in the decision of new PROs to enter the marketplace; irrespective of merit, they routinely use the threat of statutory damages in their outreach to licensees.

Importantly, the typical policy arguments for statutory damages do not apply in this context. Often, statutory damages are defended on the ground that proving actual damages can be too difficult in copyright infringement cases, and that without statutory damages, a

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[22] *See* DIMA Comments at 10-12.

[23] Some commenters have suggested that the right approach to deal with these concerns is the pursuit of antitrust claims against unregulated PROs. *See, e.g.*, NMPA Comments at 4. While that view helpfully acknowledges the lingering competition issues that exist in the context of the licensing of performing rights, litigation is a highly inefficient way to resolve complex policy issues affecting the entire structure of the market. Stakeholders across the board realized this in supporting the Music Modernization Act, which created solutions for *both* the licensing of mechanical rights by streaming services *and* the treatment of sound recordings fixed before February 15, 1972, both of which were areas previously subject to extensive and disruptive litigation.

[24] *See Eight Mile Style, LLC v. Spotify USA Inc.*, 745 F. Supp.3d 632, 664 (M.D. Tenn. 2024) (appeal pending).

rights owner may have no way of obtaining economic relief. While that concern may make sense in some contexts, it does not apply here: When it comes to performance rights, there is a robust and well-established marketplace that has been functioning for decades and would provide ample evidence of the actual damages to which an aggrieved licensor may be entitled. Similarly, statutory damages are often justified as a deterrent against those who simply refuse to obtain permission to use copyrighted works. That, of course, is not the issue in this context, in which licensees are simply trying to navigate an increasingly convoluted system.

Thus, contrary to their claims of overregulation, music publishers and "unregulated" PROs are in fact the beneficiaries of unique pro-rightsowner regulations in the United States that have driven enormous value to their copyrights. The litigation hammer available in the United States allows rights owners to threaten damages far exceeding actual economic harm and thus to extract supracompetitive licensing fees absent countervailing protections. In their comments, rights owners largely if not entirely ignore the role of such pro-rightsowner regulations. In fact, rights owners and their representatives downplay the risk of litigation altogether, suggesting that any such concerns are overblown.[25] But the risk is real and present for licensees. Even though blanket licensing is supposed to provide licensees with assurance of coverage, the combination of fractional control of rights, lack of clarity regarding ownership, and the threat of statutory damages undermines if not vitiates entirely any such assurances they may hope to achieve. The availability and threat of statutory damages plays a key role in the proliferation of PROs and is an ongoing factor in the destabilization of the market for performance rights.

[25] *See, e.g.,* ASCAP Comment at 14-15.

CONCLUSION

We appreciate the Copyright Office's review of this important issue, as well as the thoughtful comments provided by other stakeholders, and look forward to further engagement on these topics.

Respectfully submitted,

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