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By email: ASCAP-BMI-decree-review@usdoj.gov

Re : American Society of Composers, Authors and Publishers (ASCAP)
Broadcast Music Inc. (BMI)
Antitrust Consent Decree Review

The Music Managers' Forum thanks the United States Department of Justice for the opportunity to contribute to the Review and we hope that by sharing some of the practices elsewhere in the global marketplace we can be of assistance to the Department's deliberations. Every US songwriter and composer is subject to the practices of administration by collective management organisations outside the USA. And it was the global network of these societies that brought American music to audiences across the world. Authors writing music in countries outside the USA depend upon the health and vigour of the American society licensing landscape for continued protection of their rights and access to their revenues generated in the USA, just as American writers depend upon the societies elsewhere. This is truly a global issue.

Introduction

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 organization has over 400 members in the UK, representing more than 1,000 of the world's most successful recording artists. Our emphasis is on implementing positive actions to assist our members with a keen eye on the next generation of entrepreneurs and innovators. The MMF provides a collective voice

[1] http://www.themmf.net/about-us/

and focuses on providing real, meaningful information and support for our members and the authors and recording artists they 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. The MMF is allied closely to the Featured Artists Coalition[2] ("FAC"), a body founded in 2009 to promote the interests of featured (or contracted) UK recording artists. The MMF and the FAC are represented via an NGOs at WIPO, collaborates with the United Kingdom's Musicians' Union. We have representatives that sit on the board of the UK collecting society that remunerates performers for the broadcast and public performance of the sound recordings embodying their recorded performances (Phonographic Performance Ltd – PPL) and we hold regular meetings with the local collecting societies for musical works (PRS for Music[3] for the performing right and via its operational link with MCPS[4] certain uses of reproduction). More recently the organization has established dialogue with the CISAC music creators' council, CIAM[5], and the US/Canadian songwriters' organization Music Creators North America[6].

The MMF members are not customarily right owners. Where rights acquisition does occur is where management has adapted to the changing market and evolving responsibilities of a manager. Managers today are increasingly required to be investors and CEOs of companies perform a multiplicity of functions in the development of an artist's career bringing branding expertise as well as sourcing commercial partnerships outside the traditional label/publisher model.

FAC members and MMF members' clients are authors and performers some (but not all) of whom have been able to retain their copyrights, simply mandating a third party to manage licences and collect revenues. The contractual relationships that our members have with their clients are usually based on an agency model, with commission rates varying but seldom, if ever, a rates more than 20% of a client's net 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

[2] http://thefac.org/about/
[3] http://www.prsformusic.com/aboutus/ourorganisation/Pages/default.aspx
[4] The Mechanical Copyright Protection Society
[5] http://www.cisac.org/CisacPortal/page.do?id=29
[6] http://musiccreatorsalliance.com/The_Music_Creators_Alliance/the_music_creators_alliance.html

supply of personal services and specific performance cannot therefore be enforced. As a result, relations between MMF members and their clients are highly personal, some would say, intimate.

Authors amongst our members' client base enjoy considerable success in the USA, just as the writers of the American repertoire of popular and classical music do here in Europe (and elsewhere). American and British writers have a unique bond in that both are responsible for the creation of the most economically powerful music repertoire in the world – that which uses the English language. As a result our members and their clients are keenly interested in the features of the US licensing landscape and any proposed changes

Music is created in every society and is shared by audiences throughout a global market. It was the administration by ASCAP and BMI of music licences and revenues via the international network of reciprocal contracts with foreign collective management societies (CMOs) that enabled the songs from the Broadway musical, American blues, gospel, soul and rock and roll to rampage across the world inspiring writers from Liverpool to Lesotho. British writers and every other music author outside the USA is dependent upon the US societies (ASCAP, BMI, SESAC and now Global Music Rights - GMR) to be able to access their US performing rights income. The outcome of deliberations about the two Consent Decrees will have an effect worldwide on the wellbeing of the authors of music in every corner of the globe.

Executive Summary:

The MMF believes the US Consent Decrees that govern ASCAP and BMI are no longer able to meet the needs of either the marketplace nor the changing delivery methods for music (and other creative works) that are a feature of the digital world. In particular changes should be effected in the following respects:

1. **Rights Bundling:** The CMOs should have the ability alone or in association with other rights administration entities (such as the pre-existing Harry Fox agency) to bundle the performing and the mechanical right for blanket licensing to music users in a transparent manner using common unique works identifiers for the musical compositions to promote transparency and facilitate accurate data matching.

2. **Valuation:** That valuation of music rights administered by the societies should be permitted by reference to wider market factors including consideration of prices established by identical licensees for use of sound recording copyrights and the recorded performances embodied thereon.

3. **Licensing Processes:** In common with societies' requirements of licensees elsewhere in the world, applications for licences should be accompanied by the submission of comprehensive corporate financial and operational data and an interim payment pending the setting of a tariff and a society should be permitted to refuse a licence provide such refusal is on publically justified grounds.

4. **Partial Rights Withdrawal:** The societies should <u>not</u> be compelled to permit rights withdrawal that divides individual copyrights into sub-strands of usage. This is a practice that would, in the US market place, increase market complexity for licensees and beneficiaries of rights alike. Instead, unusually for a territory, right owners in the USA have the option of four societies that are empowered to issue licence and administer revenues. This market choice appears to offer sufficient flexibility for right owners, many of whom already have membership of at least two US societies (if not more) determined by the administrative choices of the individual writers they contract.

5. **Arbitration and Regulation:** A system of mandatory arbitration via panel should be introduced to remove the financial burden of expensive rate court decisions that so penalise the societies and to mitigate the burden of licensing and regulatory decisions falling upon just two (unarguably learned) members of the US judiciary. Arbitration should apply to disputes arising in relation to all societies and their collective management licence terms and tariffs.

1. Rights Bundling:

In the United Kingdom and Europe mechanical rights and performing rights have long been managed in co-operation in the analogue world - often by a single society. Such bundling has now moved into the digital licensing space as well. In Germany, GEMA manages copying and performance, as does SGAE in Spain. The Scandinavian countries have long mandated a single

bureau, NCB[7] in Denmark, which administers multi-lateral mechanical licences on behalf of the associated societies in the region[8]. In the United Kingdom, PRS for Music[9] which manages the performing right, operates in tandem with the Mechanical Copyright Protection Society (MCPS)[10] (which operates as an agency), and together they issue multi-lateral licences for the reproduction right and the performing right. This collaboration between performance and mechanical societies (the father of the pan-territorial arrangement for digital licensing which we will touch upon below) is not viewed as anti-competitive because it is balanced by conditions instituted in the 1970s[11] by the Court of Justice of the European Union

The pan-European licensing framework for online music services was facilitated by these European judicial rulings. The so-called GEMA case decisions were designed to temper the market power of the German society, which by implication affected all European societies. These conditions allow EU society members to withdraw from their local society certain categories of exploitation. This dilutes the monopolistic effect in the individual territories in the European Union Member States where the societies operate - Europe is not a federal system.

Some 300 plus digital music services are operating across the European Union licensed in a manner that enable music services to acquire both the performing and the reproduction right. In 2005, the European Commission issued a Recommendation[12] to Member States that multi-territory music licences should be granted without going through the network of reciprocal representation agreements – justified upon the policy aim of granting right owners more licensing choices.

A collective of independent music publishers and European CMOs have been granting multi-territory licences for online music from a series of collaborative non-profit entities set up specifically for the purpose of granting on-line and mobile licences throughout the EU. These collaborative entities include:

- IMPEL – licensing of Anglo-American repertoire owned by independent music publishers on a pan-European basis - http://www.prsformusic.com/impel/Pages/default.aspx

[7] https://www.ncb.dk/
[8] STIM in Sweden, TONO in Norway, STEF in Iceland, TEOSTO in Finland and KODA in Demark
[9] http://www.prsformusic.com/aboutus/Pages/default.aspx
[10] http://www.prsformusic.com/creators/memberresources/MCPSroyalties/Pages/MCPS.aspx
[11] Case C-125/78 GEMA v Commission (1979)
[12] Recommendation 18th October 2005

- Various entities set up to issue pan-European licences of the catalogues of the major publishers of the Anglo-American and Latin American catalogues, for example, DEAL for Universal's Anglo-American repertoire and the SACEM (France) catalogue
- Additional cultural diversity is provided with the addition of Armonia, licensing the catalogues of France, Spain, Luxembourg, Italy, Portugal, Hungary, Belgium.

These 300 plus licences across a variety of digital music services contribute to a vigorous and varied range of online music available in the EU for the consumer/music lover. The three 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 societies which use the same unique identifiers for the works involved, optimizing the chances of better data matching. Pre-agreed percentage splits between the reproduction right and the performing right are in place and pricing is calculated according to the EU Member State in which the consumer is located – thereby accommodating both market conditions locally and enabling this model's compliance with Article 5 (2) of the Berne Convention[13].

Unlike the position in the USA where (now) there are four performing right societies, the societies in Europe operate in their domestic territories as monopolies, some *de jure* and some *de facto*. Reciprocal representation contracts between societies pass repertoires throughout the EU (indeed the world) thereby making Society A solely responsible for the administration of the right of Society B in Society A's territory. So irrespective of whether a party resigned from membership of one country and joined one in another country (made possible by the free movement of goods and services enshrined in the EU Treaty establishing the European Union) the territorial structure of the licensing model means that a resigning member could not escape the domestic administration practices of the society from which he had resigned[14].

The organizations that are capable of managing a bundled licensing regime already exist in the USA. Unlike the multi-territory complexity of the European Union which justified partial

[13] 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"

[14] **Case** C-127-73 BRT v SABAM (1974)

withdrawal, the pre-existing choice of society means competition issues are mitigated and the principle of block assignments of catalogues to the CMOs is preserved.

It appears to us that the existence of the Harry Fox Agency and the choice of four performing right societies places the US societies in an excellent position to administer bundled performance and mechanical rights for the convenience of licensees and consumers.

We would recommend the exercise of caution, however, that such bundling be effected in such a manner that there is no perception that these twin rights have become conjoined. Once two strands of the copyright bundle are coalesced into one, the natural response of the "willing" buyer will be to negotiate on the basis of there being a single right to be licensed and thus priced accordingly. Music publishers and the writers of whose works they have custody, have already suffered markedly from the significant drop in mechanical royalties by the fall in demand of physical product. There should be no further erosion of the market value of the mechanical licence permitted simply because the societies and the publishing community wish to implement measures that make licensing more streamlined and convenient for the marketplace and the user.

Such multi-purpose entities should be not-for-profit, be permitted to act as agencies for the mechanical right and the use of the common works identifier, the International Standard Works Code (ISWC)[15] managed by CISAC, should be mandatory upon all parties (societies, users and music publishers alike).

2 and 3 Market Rate Valuations and Rate Setting Procedures:

Our members and their author clients share the frustration of the music publishing community at the pitifully low rate on offer from digital music services. And, in our view it is unhelpful that the Consent Decrees' prevent the two 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 who are not also performers

[15] http://www.iswc.org/en/iswc.html

and thus cannot supplement their income by live performances, sponsorship and other branding exercises. 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.

We find it almost inconceivable that authors and publishers in the United States (and, as a result of the convenience of global administration by societies, authors worldwide) are, by virtue of the terms of the Consent Decrees, disadvantaged to the extent of a factor of 10 or 12 by comparison with the pricing of rights in recordings. This disparity takes place in circumstances where it is an identical licensee securing a licence for the repertoire of compositions!

In the UK and elsewhere the 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. There is a broad approach taken to the benchmarks used to set prices in the market place 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. 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.

Most of the societies with whom our members are familiar require potential licensees to provide important financial and operational data 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

In the European Union since February 2014[16], CMOs have had new transparency requirements imposed upon them. As well as formal requirements about public availability of membership criteria, distribution policies, conflicts of interest in governance and rights of refusal of a licence

[16] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026

the societies have been given express flexibility in licensing decisions that are directed at digital landscape. Article 16 (2) states:

> *"Licensing terms shall be based on objective and non- discriminatory criteria. When licensing rights, collective management organizations 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."*

This flexibility in rate setting is an important contributor to the process whereby CMOs can adapt to a changing marketplace for, in this case, music.

One last observation we wish to make is that, while the transparency requirements imposed upon CMOs are unlikely to be imposed on major corporate players in the music industry (however much we might long for them), common standards of transparency and a common regulatory framework should be applied uniformly across all the US societies administering music copyrights, whether for musical compositions or sound recordings and for both the reproduction right and the bundle of rights comprised of broadcast, performance and making available.

4. Partial Rights Withdrawal Is Neither Necessary Nor In the Interests of the Music User

It is our understanding that licensees in the USA (and in the digital space in particular) resent the complexity they assert is a feature of music licensing. The solution cannot, we submit, be found in changes that further fragment the market and therefore complicate the licensing process.

In the United Kingdom, our members' author clients assign their public performance right to their local society under personal contracts that grant the society a global, exclusive licence to exercise the performing right in their musical compositions. (In local legal parlance the right is now the right of communication to the public.) An author's music publishing contract carves out this strand of the performing right. The right to issue performing right licences lies solely with the society of which an author is a direct member. 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 U2 in Ireland, Ulvaeus and Andersson in Sweden, Coldplay and Adele in the United Kingdom, Michel Legrand in France, Lorde in New

Zealand, Björk in Iceland etc. continue as members of their local CMO, no US publisher can issue licences for their work.

A US society (such as ASCAP, BMI, SESAC or GMR) is exclusively entitled to issue performing right licences for foreign works to US music users solely because the author's local society passes the rights to the US societies 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. It is only the US society that may issue licences.

Fragmentation of the market caused by partial rights withdrawal (or indeed by withdrawal of a US publisher's entire catalogue) will mean that potential licensees, while securing direct licences from major rights owners, will still need to acquire licences from the CMOs for foreign-originated works as well as those remaining within the society system. This which could lead to differential pricing and more complicated and more costly transactions.

There are other excellent reasons why partial rights withdrawal will confuse the market, make licensing much more complex and conceivably drive up both transaction costs and prices for the music user and consumer. And this is attributable to the inescapable global nature of the market and the relationships between creators and their societies worldwide.

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.

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. Writers must be able to feel confident that they will be paid their shares of direct licence monies?

And, the CMOs allocate unique identifiers to each song or composition (the International Standard Works Number or ISWC). These have now been allocated to almost the complete global repertoire of the world's musical works and their use across the globe by societies ensures that usage and works are correctly matched and writers paid what they are entitled to be paid. Yet, many music publishers operate their own, internal bespoke identifiers. Where direct licences

are issued, the lack of common work identifiers between publishers and the CMOs complicates revenue allocation, erodes transparency and works against the rationale of granting authors any right to protection and remuneration in national legal regimes.

The right allow partial rights withdrawal (or partial assignment) is not required in the USA. There is not a single choice in the market for performing right societies, as in most other countries, there are four to choose from. The USA is a single market and any member can escape from membership as they have a choice of society in which to entrust their rights. Tariffs are set nationally. Furthermore many music publishers are already members of all four societies, because the choice made by a writer as to the society to which they wish to entrust their rights must be accompanied by the membership of the music publisher to whom the particular writer is contracted.

6. Expedited Arbitration:

In countries outside the USA, there is government oversight of CMO activities to varying degrees. In many countries accounts must be submitted to government and on occasion's so must tariffs[17]. Arbitration is a common feature of dispute resolution.

In the United Kingdom dispute resolution of CMO tariff matters is the preserve of the Copyright Tribunal[18]. The Tribunal is established by the Copyright Designs and Patents Act of 1988[19]. The Tribunal currently has a Chairman, two deputy Chairmen and 8 "ordinary members". Individual proceedings are considered by a Chairman and two or more "ordinary members". The Tribunal has recently instituted a fast track procedure for consideration of lower costs hearings to streamline proceedings and make them more affordable.

From our perspective the expense of the current US Rate Court system seems unfairly to burden two of the four societies. This expense is disproportionately borne, by the society for each and every case, whereas a licensee bears only their own costs. It is also our understanding that there is no compulsion for either party to make an application to the rate Courts. As no interim

[17] For a more comprehensive view of the various regulatory systems we would direct the Department to CISAC, the global regulatory body of the world's CMO network http://www.cisac.org/CisacPortal/security.do;jsessionid=844E56487DBDC28356FEEF9ECC900FB6?method=beforeAuthenticate

[18] http://www.ipo.gov.uk/ctribunal.htm

[19] CDPA 1988 Chapter VI ss 116-s135 and Chapter VIII ss 145 to 162

licence fee is currently permitted to be imposed this has the effect of enabling licensees to use the music of every author in the world without any payment whatsoever and for an unconscionably long time. We believe a more affordable, and swifter mechanism would benefit both societies and licensees alike.

We recognize that the Department has many interests and considerations to balance. The United Kingdom work is a nation without a written constitution. In this respect we envy the USA in that it is a fundamental principle of your nation's legal regime, enshrined in the very first Article of your Constitution[20] that authors should enjoy the protection of the state for their writings. We trust that in formulating the Department's recommendations, it will be the interests of American and the world's authors of music that are at the forefront of your minds during deliberations.

Music Managers' Forum August 2014

[20] Clause 8, s 8