



SERVING AUTHORS WORLDWIDE
AU SERVICE DES AUTEURS DANS LE MONDE
AL SERVICIO DE LOS AUTORES EN EL MUNDO

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Neuilly Sur Seine, 05/08/2014

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

The international confederation of authors' societies (CISAC) thanks the Department of Justice for this opportunity to submit its views in this review. As detailed below, because of the nature of the global market for music and the characteristics of the international network of collective management organizations (CMOs), the outcome of this enquiry will affect both US and foreign authors and authors' societies around the world.

The goal of this submission is to emphasize the importance of a properly-functioning collective licensing system in the US for local and international creators. We also address necessary changes to the Consent Decrees that would better equip ASCAP and BMI to meet today's licensing needs and market challenges.

Executive Summary

- CISAC, as the umbrella organization for authors' Collective Management Organizations, promotes and protects the rights of authors around the world. CISAC counts 230 CMOs from 120 countries as its members, including ASCAP and BMI. We also manage the ISWC works identifier system for musical works and operate databases that serve our CMOs around the world.
- The network of reciprocal representation agreements developed by CISAC and signed by its members ensures that authors' rights are protected and administered around the world and that each CMO is in a position to offer licensing solutions that cover broad repertoire. This system also ensures that royalties flow to authors wherever they are in the world.
- Because of the unique nature of the collective management system, both American and foreign authors rely on the effective operations of ASCAP and BMI.
- In order to allow ASCAP and BMI to operate efficiently and offer licensing solutions that match today's market needs, amendments to the Consent Decrees are needed. These include, in particular:

- Ability for rates to be set by reference to the market value.
- Potential licensees should be required to disclose financial and business model information, and other relevant facts, when applying for a licence, to assist societies in determining the license rate.
- Rights owners should be allowed to grant partial assignment of rights to the societies, and to bundle rights so that the societies can act as agents for a combination of the reproduction and the performing right, thereby enabling them to respond to the needs of potential licensees.
- Tariff setting and dispute resolution procedures should be made swift and affordable.

1. INTRODUCTION

CISAC and its role

CISAC (*Confédération Internationale des Sociétés d'Auteurs et Compositeurs*) is the umbrella organization representing CMOs for authors and music publishers worldwide. Founded in 1926, CISAC is a non-governmental, not for profit organization based in Paris, France, with regional offices in Hungary, Chile, Burkina Faso and China. CISAC has 230 authors' societies as members. These societies are based in 120 countries, including the United States¹. Together, CISAC societies around the world represent over 3 million authors from all artistic disciplines including music, film, literature, drama and visual arts.

Music composers and lyricists, filmmakers, screenwriters, painters, illustrators, sculptors, writers, journalists, playwrights and other creators shape the world in which we live and enrich our lives with their creativity. CISAC's key mission is to promote the interests of these creators and safeguard the future of creative activity and cultural diversity, across the world.

As the global organization for authors' societies, CISAC fosters the global network of collective management and promotes good governance, transparency and best practices among its members. We also strive to enlarge the global network of authors' societies, by supporting the creation of new societies and offering them its political, legal, logistical and technical expertise and assistance. In addition, we constantly work to facilitate and improve accurate identification of works and prompt distribution of royalties. This is achieved through the operation of both central and inter-operable distributed databases containing creative works' information for both musical and audio-visual repertoires.

CISAC also developed, maintains and promotes industry standards for information exchange via the worldwide coverage of our Common Information System (CIS). This enables CISAC members to protect their repertoire in the physical as well as digital environment and since 2004, member societies have been able to exchange information concerning works in real-time. CISAC works to standardize the works identifiers and information exchange between societies through its management of the ISO international standard numbers for the identification of works and the parties linked to the creative process. For musical compositions, this is the allocation of unique identifiers that are allocated to each musical work in the form of the International Standard Works Codes (ISWC)².

¹ ASCAP, BMI, SESAC Inc., Writers' Guild of America, Directors' Guild of America, American Mechanical Rights Agency, Artists' Rights Society, The Authors' Registry Inc.

² In addition, CISAC operates the ISAN numbers for audio visual works and the ISTC for literary works

Our member societies operate across all author' disciplines. However, the collective administration of rights and revenues for musical works is by far the most developed sector of CISAC members. Out of the overall revenues collected by CISAC members in 2012, 87% were collected for music – over US\$9.25 billion. A key to securing market rates in royalty collections worldwide is ensuring that all media and uses, whether as live performance, traditional broadcasting or digital streaming, are effectively licensed. Gross royalty collections worldwide for 2012 (the latest figures we have at present) reached a new record high of over US\$10.46 billion³; however the digital sector has only started to break through. Revenues collected for digital uses rose by 7% to US\$404 million⁴ in 2012, yet digital revenues still represent only 4% of global royalty collections.

CISAC supports its members across differing legal and regulatory regimes, working and advising members operating in an authors' rights/*droit d'auteur* systems (for example, Latin America and many European Union countries) as well as in countries where the copyright regime (e.g. the United Kingdom and the USA), founded upon an economic right, applies. The different legal systems for the protection of creators' rights have an impact on the structure of collective management of rights, and in particular on the position of publishers within this framework. In some territories (such as the United Kingdom and Continental Europe) the music publisher has a contractual right to a revenue share, but will not actually own the performing right while the author remains a society member.

2. FOREIGN AUTHORS AND SOCIETIES DEPEND ON THE EFFECTIVE OPERATIONS OF ASCAP AND BMI

CISAC societies can administer and license in their territories both local and foreign repertoire thanks to a sophisticated network of reciprocal representation agreements. The reciprocal agreements concluded between music societies enable each society in each country to license the entire world repertoire of compositions and secure national treatment for all repertoires, regardless of its origin. This makes it simpler for music users to acquire licenses for the global repertoire in as streamlined a manner as possible. The contracts enable royalties to flow to creators via their societies wherever they are in the world.

It was this network of reciprocal contracts that ensured US writers and publishers were rewarded as American music was carried out across the world. And, this multi-territory licensing framework is ideally situated to provide some administrative uniformity across different legal regimes, to deliver licensing solutions in a global marketplace and support the development of new business models for the delivery of music. The global reach of the society network is such that non-US writers and right owners are as dependent upon the strength and market responsiveness of ASCAP and BMI as those societies are upon CISAC members in other countries.

The terms of many of the reciprocal representation contracts in the global network are based upon a CISAC Model Contract. In addition to the CISAC Model Contract, the EU authors' societies network (for all copyright works) has recently become subject to a European Commission Directive with mandatory provisions upon licensing practices, transparency and accountability. The administration of licensing and revenues in the EU of the works by US authors is subject to the Directive's conditions, of which more detail is provided below in the context our comments about licensing practices.

CISAC is proud that many of its music societies are those established and operating in co-operation between music authors and their commercial partners, the music publishers. It was the vision of these two

³ Figures are available from the CISAC 2014 "Royalties Report - Sustaining Creativity", available from CISAC.org website. CISAC publishes its figures in Euros. Gross royalty collections worldwide for 2012 were €7.8 billion.

⁴ £301 million

constituencies, composers/songwriters and music publishers, which led to the formation of the world's first music authors' society, SACEM, in France in the early 1850s and ultimately provided the model for societies worldwide, including those working in the US today. It is important to ensure the continued balance between the interests of both communities and the current review should ensure that this balance is maintained in the US.

3. WHY MODIFICATIONS ARE NEEDED TO THE CONSENT DECREES

The terms in which the Consent Decrees are currently framed are preventing ASCAP and BMI from effectively licensing musical works on behalf of their US members and the foreign authors they represent. The limitations contained in the Decrees mean the two societies cannot respond with the needed flexibility to music's changing delivery systems and to the effect these changes are having upon the market.

To address the challenges ASCAP and BMI are facing as a result of the existing terms of the Consent Decrees, the following areas should be addressed:

(a) Relevant Information from Potential Licensees

Potential licensees should be required to submit relevant information upon applying for a license.

When determining license fees, societies depend on relevant information provided by the party seeking the license. Approaches made to the UK's PRS for Music by potential users, for example, require those users to provide detailed financial and corporate information (which can include audited accounts where they are available) to accompany the application, as well as estimates of the envisaged music usage. In Germany, where GEMA manages both the performing and the reproduction right, applicants are required to provide estimates of music use, declare earnings and, in the case of web-based radio services, the number of dedicated URLs and listener numbers. These elements are taken into account when the society establishes the license fees, which are set on a sliding scale depending upon audience numbers.

We understand that under the US Consent Decrees potential licensees have no express obligation to assist a US society determine the appropriate level of license fee by providing supporting commercial or operational data. In our view, the obligation to license by request corresponds necessarily with the obligation by the user to provide data for the purpose of calculating the license fee⁵. If the confidentiality of business data is given priority, the obligation to license would be a disproportional burden for the societies.

(b) Tariffs Levels

ASCAP and BMI should be in a position to set rates that reflect the market value of the rights they administer.

CISAC understands that the ASCAP Consent Decree authorizes the rate court to set a "reasonable fee" without clarifying the requirement with guidelines as to what constitutes "reasonable". US Courts have interpreted this vague language by unduly limiting the society's ability to set a tariff that reflects the market value of the rights licensed. This puts music creators at an inferior position, in particular in view of the ability of other copyright owners to set their own tariffs. The inability of an authors' society to conclude licenses with reference to the fees paid by the same licensee to the owner of the sound recording copyright (the producer), in effect blindfolds an already disadvantaged society in every new licensing transaction.

⁵ Art. 17 of the EU Directive on Collective Management Organisations (2014/26/EU) from February 26th, 2014, implements this obligation for those who request a license.

These features of the existing US system appear to us to unfairly hamper the local societies' ability to collect equitable remuneration on behalf of their members and the foreign authors they represent. The disadvantage at which music authors are placed as a result of the Consent Decrees is unusual and unjustified, particularly when other intellectual property rights (such as literary works, audio-visual works, and sound recordings) can be valued in the open market and are not subject to government regulation.

CISAC is of the opinion that provisions in the copyright international treaties signed and implemented by the US prevent the adoption of a remuneration system based on a "reasonable fee" for authors. Article 11 of the Berne Convention grants authors of dramatic, dramatico-musical and musical works the exclusive right of authorizing the public performance of their works by any means or process, as well as any communication to the public of the performance of their works. This exclusive right should include the ability of these authors to set a tariff that reflects the market value of the rights licensed.

Licensing guidelines adopted outside the US recognize the importance of a society's ability to set rates which can respond flexibly to market developments and reflect the market value of the rights licensed. This approach is now explicitly established under EU law, with the new Directive (*the Directive on "Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market"*) which was adopted on 26th February 2014. This Directive contains specific provisions intended to help music societies operating in the EU respond to the licensing needs of the digital market – exactly the sort of developments that have so challenged the societies (and their members) which are the subject of this Inquiry.

While the Directive provides that licenses 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. This is reflected in Article 16 (2), which 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."

In contrast with this approach, the current framing of the Consent Decrees does not, in our view, provide a sufficiently responsive licensing framework that allows US societies to accommodate either technological developments or the wider music market in a realistic or contemporary manner.

(c) Dispute Resolution

Swift and affordable dispute resolution procedures are necessary.

Arbitration of and appeals against license fees are, as in the US, a feature of the music societies' environment elsewhere. However, lengthy and expensive legal proceedings in the US are particularly onerous for not-for-profit entities such as ASCAP and BMI, and result in unnecessary financial burden on the authors themselves. In other territories, workable and less costly procedures are in place. For example, in Germany there is a set affordable procedure in the national law (*Urheberrechtswahrnehmungsgesetz*) for tariff arbitration. A licensee may refer a matter to an arbitration court specializing in the matter (*Schiedsstelle*). This specialist court will decide what license is considered adequate or, alternatively, whether there are any legitimate grounds for an appeal. While the decision of the court is not binding, it serves to set the guidelines for further negotiations and agreement. Where the parties cannot reach an agreement on the basis of the specialist court's finding, the matter can be brought to the mainstream German courts. In Italy there are 12 specialized sections established by law at the Tribunals (and Courts of

Appeal) - usually one per region- with exclusive competence in the field of industrial and intellectual property, as well as unfair competition and antitrust. Dispute resolution procedures such as arbitration and media-conciliation, provided by the Civil Code and by a recent Law Decree, can also be activated with regard to disputes on IP rights, usually on the basis of an agreement between the parties and separately. As in the US, Italian representative bodies negotiate on behalf of their members (e.g. organizations of shopkeepers, restaurants, concert organizers or whatever) and, whether included in the agreements with the representative associations, the members can address their association for a preliminary verification on the accuracy in the application of the tariff rules. In a few cases, related for instance to the right to access to the documents pursuant Law 241/1990, the licensee, or the trade body acting on behalf of him, can file a claim before the Italian Administrative Tribunal; in this event the three tiers of civil procedures available are reduced to two in the interests of swift and cost effective solutions (but with the usual right of appeal to the *Consiglio di Stato* - State Council). In the Netherlands an arbitration committee is operating for disputes between users and CMOs concerning tariffs. There is no obligation to be represented by an attorney in the arbitration procedure, which reduces costs. The arbitration committee does not have jurisdiction where the financial interest is higher than € 100.000. Furthermore, the decision is only binding if parties do not file a claim before the court within 3 months of the decision.

It remains a concern to CISAC that costs of the US rate court proceedings are so high. Licensees bear only their own costs, while the societies must bear the costs of every hearing. CISAC hopes that the Inquiry will include in their recommendations the establishment of a mandatory, expeditious and less costly procedure for the determination of disputes.

(d) Partial Assignment or Rights Withdrawal

Flexible rights management and the ability for societies to accept a partial grant of rights will invigorate the market.

The ability of licensees to secure valid licenses for the entire global repertoire of musical works is the foundation of the collective management system. Music services must be confident of having acquired and paid for valid licenses entitling them to play a broad catalogue musical works. An effective collective rights licensing system provides music users with exactly this comfort.

CISAC understands that under the Consent Decrees, as interpreted by the Courts, partial rights withdrawal is impossible. In addition, it appears that the situation is not entirely consistent as between the two societies. Flexibility is necessary for the system to function properly. Without needed flexibility in the terms of a member's assignment to a US society, the system is faced with the prospect of the wholesale withdrawal of entire catalogues. This issue has been the subject of significant attention recently in the US, following announcements and court decisions concerning some major publishers' catalogue withdrawals.

Complete withdrawal of whole catalogues is undesirable for a number of reasons. First, it would complicate licensing as it would force potential licensees to approach a larger number of licensors. It would also increase transaction costs for the music user, which would inevitably be passed to the consumer. Finally, it would increase uncertainty and likely result in an increased number of disputes.

Within the global marketplace for musical compositions, the nature of the author's relationship with their society varies. Where a society such as ASCAP takes a non-exclusive assignment, in Europe, Latin America, Canada and other territories outside the US, authors assign or give a mandate to exercise their performing right exclusively and globally to their local society. These societies then mandate ASCAP BMI (and SESAC) on a non-exclusive basis to license the performing rights of their author and give authorization for licenses issued for the US territory only. These reciprocal representation contracts expressly prevent the US society from assigning the reciprocal agreements. As a result of this fundamental difference between the non-exclusive nature of assignments in the US and the exclusive assignments common outside the US, the withdrawal of rights or catalogues is bound to raise significant barriers to the licensing system. The wholesale withdrawal and direct licensing of a music publisher's entire catalogue would also be a Herculean

administrative task and will increase licensing complexity. Such complications would arise from a number of factors:

- (i) Licensees would still need to acquire blanket licences from the societies for works written by writers that are direct members of societies outside the US.
- (ii) The wholesale withdrawal of a catalogue places a publisher in the unenviable (and expensive) position of having to conduct public performance licensing activity across multiple venues, and music services throughout the US marketplace,
- (iii) US authors (in common with their colleagues around the world) are concerned that in the case of complete withdrawal of rights by music publishers, they may not be contractually entitled to share in any lump sum revenues. In other words, these authors may not obtain a share in a payment negotiated directly by their music publisher with a music service, following the withdrawal of that publisher's catalogue.
- (iv) Co-writing is a common phenomenon among songwriters, even where the writers are contracted to separate publishers or to no publishers. Under US law where a copyright is co-owned, a licence can be issued by either owner. This is not necessarily the case in the rest of the world. In the UK, for example, where co-authors or co-owners have a shared interest in a copyright work, licensing consent must be secured from all the parties having an interest in the work.
- (v) Pricing differentials arise. One co-writer may find their part of the copyright valued as X via the society system, while the other is valued as 2X under a direct licence. This is confusing for creators, for licensees and for the market as a whole.

When it comes to online dissemination of musical works, the marketplace is no longer territorial but global. Within the context of rights withdrawal we would urge the Department of Justice also to consider conditions outside the US for guidance. A bundled rights solution, employed in Europe for online licenses, appears to be a workable solution for publishers and societies alike. This - as explained below - demonstrates how both flexibility and transparency could be achieved in the US market.

(e) Bundling of Rights and the Pricing of Mechanical Licences

Authors and their publisher partners should be in a position to bundle rights, so that ASCAP and BMI can act as agents for a combination of the reproduction and the performing right, thereby enabling them to respond to the needs of potential licensees.

The accelerating rate of technology presents new and exciting opportunities for music lovers to access their favorite music. It also requires both swift and imaginative solutions in the area of licensing. As a matter of international treaty and local laws, two rights - performance and reproduction – are involved in the digital dissemination of copyright works. Within the composing and music publishing community, these rights are licensed both separately and together, depending upon the usage. This has seldom been questioned in terms of operational convenience in the analogue world.

The mechanical right in compositions by US writers is already being licensed using a bundled, collective solution when the works are exploited outside the US. For example, In the Nordic countries, a shared bureau (NCB⁶) based in Denmark manages mechanical licensing for the four Scandinavian territories. In many parts of Continental Europe, where the *droit d'auteur* legal tradition prevails, both performing and reproduction rights are, by and large, vested in the local CMO for collective licensing via non-exclusive blanket licenses. GEMA in Germany, SIAE in Italy and SGAE in Spain are all mandated to license the

⁶ <https://www.ncb.dk/>

combined rights of copying and performance; and by virtue of the reciprocal contracts, these countries are licensing works by BMI and ASCAP members using this bundled method. Indeed, works created by US songwriters and composers are already being made available to consumers elsewhere via pan-territorial, bundled mechanical and performing rights licenses.

Major music publishers, a collective of independent music publishers and European performing right CMOs have been granting multi-territory licenses for online music from a series of collaborative non-profit entities set up specifically for the purpose of granting on-line and mobile licenses throughout the EU.⁷ These collaborative entities include, in addition to operating CMOs -

- Various non-profit organisations established by the major publishers to issue pan-European licences of the Anglo-American and Latin American catalogues, for example, DEAL for Universal's Anglo-American repertoire and the SACEM (France) catalogue;
- IMPEL, an entity owned by independent music publishers and licensing the independent Anglo-American repertoire on a pan-European basis.⁸
- Armonia⁹, licensing the catalogues of France, Spain, Luxembourg, Italy, Portugal, Hungary, Belgium.

These solutions should be examined and considered by the Review, as useful examples for the benefit of licensing which involves the bundling of rights.

Conclusion

We would like to conclude with one additional observation about the music publishing environment as a whole. As we have noted, the music author and the music publisher are partners – both constituencies avail themselves of the convenience of collective licensing by societies. Both parties are suffering from the effects of an outdated mechanical royalty and unbalanced value placed upon their copyrights in the US (and elsewhere) as opposed to the values attached to the sound recording rights. Both parties are victims of the high costs of fees borne by societies of the current US rate court system.

Authors need to be paid for their work if their lives and their livelihoods are not to be fundamentally threatened. Their publisher partners require constructive support, to help them solve the problems they face in securing fair value for the works of which they have custody. Consumers want to enjoy the music they love in the myriad ways that new technologies are now providing. Uncertainty and undue complexity in the way audience access music lawfully and affordably, have the potential to damage the variety and vigor of the cultural life of every nation. Also, they threaten the continued development of the digital market worldwide.

CISAC understands the difficult task facing the Department of Justice in this Review. We also see in the Review a huge potential for improvements to the existing system that would benefit all parties – the authors; music publishers; their societies; commercial users; and, importantly - the audience.

We hope our comments will be useful, and thank the Department of Justice for taking them into consideration. We would welcome the opportunity to elaborate on information contained within this submission, were the Department to consider this of use in their deliberations.

⁷ Some 300 plus offerings are currently in play, contributing to a vigorous and varied range of music services in the EU for the consumer/music lover.

⁸ <http://www.prssformusic.com/impeL/Pages/default.aspx>

⁹ http://www.armoniaonline.eu/homeLayout_en