

August 5, 2014

To: Chief, Litigation III Section  
Antitrust Division  
U.S. Department of Justice  
450 5<sup>th</sup> Street NW. Suite 4000  
Washington, DC 20001

Dear Sir,

Comments of the Japanese Society for Rights of Authors, Composers and Publishers

The Japanese Society for Rights of Authors, Composers and Publishers (“JASRAC”) hereby respectfully submits its comments in relation to the U.S. Department of Justice’s solicitation of public comments regarding the ASCAP/BMI Consent Decrees.

**1. Contractual relations with ASCAP and BMI**

JASRAC was founded in 1939 to protect the copyrights of Japanese authors and composers for their musical works. In 1951, ASCAP became the first foreign music copyright society to give JASRAC a mandate to administer the public performance rights of its repertoire in Japan. JASRAC concluded a reciprocal representation contract with ASCAP in 1963. JASRAC concluded a reciprocal representation contract with BMI in 1953.

JASRAC represents the public performance rights of both the ASCAP and BMI repertoires in Japan, while ASCAP represents the same rights of JASRAC repertoire in the US, except for those works published by BMI affiliate music publishers, which are represented by BMI.

Under the reciprocal representation contracts, JASRAC collects performing right royalties in Japan on behalf of ASCAP and BMI, and pays them to these US sister societies for the benefit of their members, while similarly ASCAP and BMI collect performing right royalties in the US on behalf of JASRAC, and pays them to JASRAC for the benefit of JASRAC members.



## **2. Copyright Administration by JASRAC in Japan**

JASRAC was established in 1939 as the sole intermediary business operator in the field of music copyrights approved under the Law on Intermediary Business concerning Copyrights. JASRAC was entrusted to administer all categories of rights of its members' musical works, including performing rights, mechanical rights and print rights. For foreign repertoire, JASRAC entered into reciprocal representation contracts for performing and/or mechanical rights with sister societies. This ensured that the performing rights and mechanical rights of JASRAC repertoire were protected by sister societies in foreign territories, while JASRAC provided foreign repertoire with the same level of protection as was afforded JASRAC repertoire in Japan.

The Law on Intermediary Business concerning Copyrights was repealed and the Law on Management Business of Copyright and Neighboring Rights (hereafter referred to as "the Management Business Law") was enacted in 2001. JASRAC was registered as a management business operator under the Management Business Law, and continued its collective management business, maintaining the copyright trust contracts with its own members and reciprocal representation contracts with sister societies abroad. Since other management business operators for music copyrights were also registered, a multiple-CMO environment emerged in the field of music copyright administration in Japan.

Coinciding with the enactment of the Management Business Law in 2001 and the emergence of multiple CMOs, JASRAC introduced a system of selective partial entrustment of rights. Under this system, JASRAC members may continue to entrust all rights to JASRAC, or they may exclude any of 4 categories of rights (performing rights, mechanical rights, lending rights and print rights), and 7 categories of utilization types (recording in films, recording in videos including rental videos, recording in game software, recording in advertisements for transmission, broadcasting and cable transmission, interactive transmission, and online karaoke) from JASRAC's administration. This amendment to JASRAC's copyright trust contract allowed members to consign rights that were excluded from JASRAC's administration to other management business operators, or to administer such rights by themselves.

When JASRAC intends to set or amend its tariff rates, JASRAC is required to hear in advance the opinions of the representative of music users in the relevant category of music exploitation, in accordance with the Management Business Law. In cases where JASRAC cannot come to an agreement with the representative of music users, either party may apply for arbitration by the Commissioner of the Agency for Cultural Affairs.

### **3. Issues with the ASCAP and BMI Consent Decrees**

Japan is said to be the second largest music market in the world. That the licensing of music usage and the collection and distribution of copyright royalties are carried out smoothly, are a reflection of the firm establishment of the collective management system of music copyrights, in which JASRAC plays a leading role, as well as the rules of copyright clearance between rights holders and music users. As mentioned above, JASRAC members are allowed to exclude the “interactive transmission” (digital music use) usage category from their entrustment of rights, and this would include both the performing and mechanical rights involved. Because other copyright management business operators offer their own members the same choices for interactive transmissions, Japanese right holders can choose how they wish to administer their rights regarding interactive transmissions, and digital service providers can obtain the necessary licenses without confusion. Under this environment, Japanese consumers can enjoy music from around the world with ease.

In the US, restrictions applied to the collective management operations of both ASCAP and BMI by the Consent Decrees, particularly the inability of both CMOs to offer licenses covering both performing and mechanical rights for digital music use, is a disadvantage to both music users and consumers, as well as to US and non-US rights holders.

Also, the inability of ASCAP and BMI to receive partial mandates from their members deprives those members of the ability to choose. If the Consent Decrees are not amended, and the major music publishers withdraw entirely from both CMOs as a result, detaching themselves from the international network of collective management, this could mean that the rights of the creators of such musical works could also be excluded from the scope of collective management. Such a situation could bring a great amount of confusion and

disadvantages to music users and consumers.

It can be said that, there are intrinsic aspects in the Consent Decrees of ASCAP and BMI that hinder competition and efficiency. Under the principles of competition, it should be a basic rule that each of the competitors are allowed to operate under the same conditions. However, the Consent Decrees under which ASCAP and BMI operate do not have the same content, and both are forced to compete with CMOs that are not subject to any similar restrictions. Therefore, this cannot be considered a fair competitive environment. At the same time, the prohibition of licensing rights other than public performance rights (*United States v. ASCAP, Civ. Action No. 41-1395 Second Amended Final Judgment (AFJ2) IV (A)*), the prohibition of licensing the right of public performance for music synchronized with motion pictures (*AFJ2 IV (E)*) and other restrictions which over-constrain CMOs, hinder competition by restraining CMOs from providing services that they are capable of providing, and furthermore hinder efficiency in fields of rights clearance in which collective management is potentially possible. Especially with regard to the theatrical exhibition of motion pictures, it is common for the CMO operating in the country where the theatrical exhibition takes place to collect and distribute royalties separately from the synchronization rights clearance that takes place when the film is being produced. Practices in the US are uncommon in this respect.

It is apparent that these restrictions adversely affect rights owners outside of the US, who are reliant on the CMOs for the enforcement of their rights, more so than the rights owners in the US who are capable of enforcing their rights themselves if necessary. As a CMO representing rights owners of Japanese musical works, JASRAC anticipates the deregulation of constraints placed on ASCAP and BMI in the US through the fundamental revision of the Consent Decrees.

#### **4. Conclusion**

JASRAC supports the revisions of the current ASCAP and BMI Consent Decrees which ASCAP and BMI have proposed, and specifically requests the US Department of Justice to 1) allow their members to partially grant their rights to CMOs, 2) not limit their licensing to the public performance right, but to allow them to license other rights including mechanical rights, 3) allow rate-setting

procedures other than through the judicial rate court, and also 4) allow them to collect public performance royalties from motion picture theater exhibitors for the right of public performance for music synchronized with motion pictures.

Contact:

Satoshi Watanabe

Senior Administrator

General Affairs Bureau

Japanese Society for Rights of Authors, Composers and Publishers

3-6-12 Uehara, Shibuya-ku

Tokyo, Japan 151-8540

Phone: 81 3 3481 2144