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By email: [ASCAP-BMI-decree-review@usdoj.gov](mailto:ASCAP-BMI-decree-review@usdoj.gov)

## **Antitrust Division Requests Comments on PRO Licensing of Jointly Owned Works**

### **1. Introduction**

Performing Right Society Limited (“PRS”) is a collective management organisation (“CMO”) in the United Kingdom. PRS manages and administers the performing right in the musical works of its members throughout the world either directly or through representation agreements with overseas CMOs. In the US, PRS has representation agreements with ASCAP, BMI and SESAC. PRS is one of the largest CMOs in the world, representing over 114,000 members and distributing over £400m (or US\$700m) to its membership in 2014.

PRS is grateful for the opportunity afforded by the Department of Justice to comment on the issue of partial licensing in the US.

We have seen the 5 questions the Department of Justice has posed. As we do not carry out any licensing operations in the US directly, we are not proposing to answer the specific questions as such but do wish to comment on three aspects as set out below. We believe, however our observations are directly relevant to your first question and may shed light on the others. The principal issues on which we will comment are:

- The experience to date of PRS and its writers in relation to partial licensing by US PROs including ASCAP, BMI and SESAC;
- the likely impact on PRS writers of the Department of Justice’s potential decision on partial licensing; and
- PRS’s experience of partial or share level licensing in the EEA of online services (the so-called Option 3 licensing model).

### **2. The Rights granted to PRS and how these rights flow to US Societies**

Writer or publisher members register their individual works with PRS in a variety of ways. Where writers’ works are published it is usually the publisher that registers the work details on behalf of the writers they represent.

A significant proportion of the works that are registered with us are co-written by two or more composers/writers and often the different writers and composers have individual publishing arrangements with completely different publishers. When members register their works or interest in a work, the details are recorded on our database in such a way as to identify specific ownership and administration shares. As the principal CMO in the UK, even if there are multiple writers and publishers with an

interest in any particular work, it is relatively rare that PRS would not still represent 100% of the rights in the work for most licensing purposes in the United Kingdom (other than for multi-territorial online services, see section 5 below), but there are instances where there may be a co-writer who is not a member of PRS (or any other CMO whose rights we represent) and who is not published by a music publisher which is a member. In such circumstances, while PRS represents less than 100% of the work, it nevertheless licenses the share it does represent and the licensee must make separate arrangements to license the remaining share from the relevant rights owner[s].

As stated above, PRS has representation agreements with over 90 CMOs across the world which represent and administer PRS's rights in their local territory. In many territories there is only one CMO and therefore if PRS controls 100% of a work the whole of that work will also fall part of the repertoire that the other CMO is authorised to administer.

In the US, the position is different, of course, with three music PROs having existed for many years, namely ASCAP, BMI and SESAC. PRS has a representation agreement with each of them. When PRS members join PRS for the world (or multiple territories including the US), they have a choice as to which PRO in the US they wish PRS to appoint to represent and administer their works (or share of works) in that territory. This choice may be exercised by the writer or by the publisher.

The affiliation is usually made at the time of joining PRS and then all works or shares of works which are registered follow that designation unless and until the writer or publisher notifies us of a change in affiliation. It is possible, however, that the affiliation can be made on a work by work basis, to the extent of the interest held in that work. Writers or Publishers may make that choice based on a preference for a particular PRO because its licensing coverage or its distribution rules may be favourable to the genre of the work, or because they have received an advance from the PRO or simply because they believe they are better administrators of the rights.

The fact that any individual writer or publisher can elect which US PRO can be appointed is important. This form of competition for administration services towards rightsowners means that co-writers of any particular work or their publishers designate the affiliation to a US PRO only in respect of their share of any work. We have many examples of well-known works where the co-writers are signed to different publishers and are affiliated to different US PROs.

### **3. The flow of royalties from US PROs to PRS**

The US market is very important for PRS. As referred to in our submission of 5 August 2014, ASCAP and BMI are key trading partners for PRS, collecting over \$100m for PRS repertoire in the US in 2013.

When the US PROs respectively report to us the revenue they collect for our repertoire they do so in relation to the specific shares in works for which they have been mandated by PRS. The reality is that from a PRS perspective fractional licensing (and the distribution of royalties on that basis) has been happening in the US and it has worked perfectly well over the long period of time for which PRS has simultaneously mandated the US PROs.

### **4. The potential impact of the Department of Justice's proposal**

PRS believes that if the US PROs are obliged to grant licenses for the whole of a work even where in reality they are mandated to represent only a share of that work, this will cause significant harm to PRS and its writer members in particular because:

- Music users will inevitably seek to license 100% of any work from the PRO to whom they pay less;

- A PRO therefore may find itself obliged to account for an unspecified share of royalties to writer or music publisher with whom it has no contractual relationship or even adequate details to be able to identify them;
- A PRO will not necessarily be able to increase fees charged to music users to compensate writers that they do not represent and therefore, even if a PRO can assess what may be due to other writers it will potentially dilute royalties that would have been due to the writers they do represent.
- A PRO may not be incentivised to continue to invest in improving its administration systems if there is no certainty that it will administer its own repertoire. The competition between the US PROs for the provision of administration services to PRS members may therefore be reduced.
- A PRO may not be incentivised to invest in enforcement activities for the rights it has been given if there is no certainty that the enforcement activity will result in a licence.
- We understand that under US law, although a joint owner of a copyright can bind others to a licence he grants, it is also possible that the joint owners agree otherwise. How will any PRO know whether such an agreement exists? For them to investigate the actual position will add significantly to their administration processes and costs.
- PRS itself will have no idea which PRO may account for royalties for any particular writer member. If it seeks to track royalties that are due from known exploitation, there will inevitably be utter confusion as to whether royalties have in fact been accounted for by the PRO contractually obliged to license it and account for royalties or some other PRO. How can PRS enforce its own contractual terms with a PRO in such circumstances?

PRS sees the Department of Justice's proposal as fundamentally distorting the competitive market to provide services to rightsowners. As referred to above, rightsowners elect to appoint a particular PRO in the US for several reasons including: administrative efficiency, licensing coverage, beneficial distribution rules, excellent service standards, ability to enforce rights etc. The proposal risks the US PROs continuing to invest in improved systems to more efficiently administer rights and also risks the US PROs taking steps to enforce rights: why would a US PRO invest in bringing proceedings against an unlicensed service if at any time the unlicensed service could obtain a license for that repertoire from another US PRO.

Encouraging a competitive market for the services provided by US PROs to rightsowners is of paramount importance to PRS and its members. The Department of Justice's proposal would appear to render rightsowner choice meaningless if a rival PRO may still in effect license their copyright, with not even any contractual safeguards to account for their actions. It further removes any election a rightsowner may make to not appoint a PRO at all.

We would also draw the Department of Justice's attention to the principles outlined in the February 2015 US Music Licensing Report

(<http://www.copyright.gov/docs/musiclicensingstudy/> )

"The Copyright Office's study revealed broad consensus among study participants on four key principles:

- Music creators should be fairly compensated for their contributions.
- The licensing process should be more efficient.
- Market participants should have access to authoritative data to identify and license sound recordings and musical works.
- Usage and payment information should be transparent and accessible to rightsowners"

Our concern about the proposal on partial licensing is that while it might be presented as more efficient (for DSPs) it is less efficient or accurate or transparent for rightsowners. In particular:-

- It would make it possible for a licensor without accurate data on rightsowners in a musical work to issue a licence.
- Payment information could become less, not more, transparent jeopardising fair payment (and increasing back office costs in terms of tracing monies and/or audit of licensor or DSP)
- The likelihood of black box (or undesignated royalties) would increase (either at DSPs or at intermediary level) running counter to the current focus on transparency (see the 2014, EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market, Berklee College of Music, Fair Music Report, and the Dissecting the Digital Dollar report, commissioned by the Music Managers' Forum in the UK).

## 5. Share-level licensing of online services in the EEA

As referred to above, in the UK, PRS is the one CMO for the performing right in musical works and therefore in most instances even if works are held in shares by different underlying rights holders, it can still license 100% of the work.

The exception is in relation to the licensing of multi-territorial online services. Following Recommendation 2005/737/EC of the EU Commission, rightholders were given the opportunity to appoint one collecting society to license their online rights across Europe (thus allowing societies to compete for mandates from right holders – whose interests they represented - rather than force them to compete for licensees).

In keeping with the Recommendation, major rights holders, especially the larger publishers of International and Anglo-American repertoire appointed specific societies or special purpose vehicles set up by societies to license their online rights across Europe. Over the last few years this has developed into the following picture:

<b>Publisher</b>	<b>Licensing Vehicle appointed</b>	<b>Society controlled</b>
EMI	CELAS (until 2014)	PRS/GEMA
Sony ATV	PAECOL (until 2014)	GEMA
SONY ATV+EMI	SOLAR (from 2015)	PRS/GEMA
Universal	SDRM/DEAL	SACEM
Warner-Chappell	PEDL contract	STIM and PRS
PEER and other UK indies	IMPEL	PRS for Music
Kobalt	K-STAR (to July 2015)	STIM
Kobalt	AMRA (from 2015)	
BMG Rights	ARESA	GEMA

These societies or licensing vehicles can only license the rights they are mandated to license and that includes in many instances partial shares in works. As such fractional licensing for online services has been in place in the EEA since 2007, and while complex, services providers are well used to dealing with it. From the data provided as to usage of music, the licensing entities produce what are called CCID files which are detailed line by line files used to generate the invoices for the particular works or shares (including whether mechanical or performing rights) of works they represent.

We would also point out that this system of licensing, and the ability of each rights owner to exercise and enforce rights through a vehicle of their choosing, has not prevented a flourishing online market. There are over 40 licensed multi-territory online services operating across Europe.

### **Conclusion**

PRS urges the Department to: (i) consider the effect of its proposals on partial licensing on CMOs that rely on ASCAP and BMI as trading partners being able to accurately distribute royalties due to individual co-writers in a work; and (ii) ensure consistency with the approach taken in Europe, particularly given the Department's long history of cooperation with the Commission in aligning the competition laws of the US and the EU.

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