

7-2019

United States Response to Questionnaire Concerning *Managing Copyright*

June M. Besek

Columbia Law School, Kernochan Center for Law, Media and the Arts

Jane C. Ginsburg

Columbia Law School, jane.ginsburg@law.columbia.edu

Philippa Loengard

Columbia Law School, Kernochan Center for Law, Media and the Arts

Ralph Peer

Columbia Law School, Kernochan Center for Law, Media and the Arts

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

June M. Besek, Jane C. Ginsburg, Philippa Loengard & Ralph Peer, *United States Response to Questionnaire Concerning Managing Copyright*, (2019).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3950

This Document is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

**United States Response to Questionnaire Concerning
ALAI 2019 Congress
Prague, Czech Republic
Managing Copyright**

By June M. Besek, Jane C. Ginsburg, Philippa Loengard and Ralph Peer¹

***Authors' Note:* The U.S. Copyright Act is contained in Title 17 of the United States Code and is available on the Copyright Office website, <<http://www.copyright.gov>>. Statutory references in this response are to Title 17, unless otherwise indicated.**

1. General Overview of the Collective Management

We believe it is helpful first to describe the principal collective management organizations in the United States before turning to the specific questions posed by the questionnaire.

Collective management in the U.S. is most prevalent in music-related licensing.

Public Performance Rights in Musical Compositions

In the U.S. there are two principal Performing Rights Organizations (PROs) which administer blanket licenses for non-dramatic public performances of the copyrighted musical compositions within their repertoires. These are the American Society of Composers, Authors and Publishers (ASCAP), founded in 1914, and Broadcast Music Inc. (BMI), founded in 1939. Throughout this Questionnaire Response, any discussion of PROs will focus on the two largest PROs, ASCAP and BMI.

There are two additional, smaller, for-profit PROs: the Society of European Stage Authors and Composers (SESAC) and Global Music Rights (GMR). SESAC was originally formed in 1931 to facilitate the payment of royalties to European authors.² It is considerably smaller than ASCAP or BMI. GMR, founded in 2013, is a small, privately-held organization that focuses on well-known singer-songwriter catalogues. The terms of these organizations' licenses are not publicly available.

"Members" of PROs include composers and lyricists (collectively, "writers") and publishers. A writer is generally associated with a single PRO (this is not a legal requirement, but it facilitates payments), while a publisher will be a member of multiple PROs. It is not mandatory for the owners of public performance rights in musical compositions to join a PRO, but most do so, since it is impractical to administer these rights individually.

ASCAP and BMI may set the rates for public performance of their respective repertoires of musical compositions, but must treat similarly situated licensees alike. A licensee who objects to the rate may

¹ June M. Besek, Jane C. Ginsburg and Philippa Loengard are, respectively, the Executive Director, Faculty Director and Deputy Director of the Kernochan Center for Law, Media and the Arts at Columbia Law School. Ralph Peer is a member of the LL.M. Class of 2019 at Columbia Law School and was a Kernochan Center Research Assistant.

² In 2015, SESAC acquired the mechanical rights clearinghouse Harry Fox Agency (HFA), discussed below. In 2017 the Blackstone private equity group acquired SESAC and HFA. Business Wire, "Leading Music Rights Organization SESAC to Be Acquired by Blackstone" (Jan. 4, 2017), <https://www.businesswire.com/news/home/20170104005784/en/>.

initiate a rate proceeding in federal court in New York, and the court will determine the rate.

Reproduction Rights in Musical Compositions

Reproduction of non-dramatic musical works (commonly known as “mechanical rights”) was long governed by a compulsory license in section 115 of the U.S. Copyright Act, although the law has changed with the passage of the Music Modernization Act of 2018 (MMA), discussed below.³ Originally the compulsory license covered the making of “hard copies” (e.g., vinyl, tape, CDs), but in 1995 the law was changed to embrace digital downloads, or “digital phonorecord deliveries (DPDs).”⁴ (The physical embodiment of a recorded musical composition is referred to as a “phonorecord.”) The compulsory license is available only if the primary purpose of making phonorecords of the musical work is to distribute them to the public for private use, including by means of a DPD, and phonorecords of the musical work have previously been distributed to the public in the United States under the authority of the copyright owner of the work. In other words, the compulsory license is not available for the initial release of a musical work on a phonorecord. 17 U.S.C. § 115(a)(1)(A). It is not available for recording music onto the soundtrack of an audiovisual work. Nor is it available for creating recordings for purposes such as distribution to commercial establishments for background music through services such as Muzak®.

Because some terms of the compulsory license were inefficient (e.g., frequency of accounting and payment) or the parties were dissatisfied with the statutory rates, most rightholders opted instead to enter into voluntary, privately negotiated licenses between the rightholder (usually a music publisher) and the licensee. Under the negotiated private licenses, licensees often seek rates lower than the statutory minimum rates, which do not apply to negotiated agreements. The statutory rate thus has acted as a ceiling, and not a floor. The rates for the mechanical license are determined by the Copyright Royalty Judges (CRJ) (see 17 U.S.C. § 801 et seq.). The MMA does not change the current rate for compulsory licenses, but requires the CRJ to apply a market-based willing buyer/willing seller rate-setting standard, replacing the policy-oriented § 801(b)(1) rate-setting standard. The current statutory rates for the mechanical license are available at <https://www.copyright.gov/licensing/m200a.pdf>.

Many music publishers use The Harry Fox Agency (HFA) as a clearinghouse for mechanical rights. HFA is a private entity that licenses mechanical rights on behalf of the rightholder (usually a music publisher); the HFA itself does not negotiate licenses. See <https://www.harryfox.com/#/history>.

To take advantage of the compulsory license for mechanical rights for individual compositions, an entity must file a Notice of Intent (NOI) on the rightholder. If the name and address of the rightholder cannot be identified from the Copyright Office records, the entity may file an NOI with the U.S. Copyright Office. If a rightholder later comes forward, the entity must pay for all subsequently made

³ ORRIN G. HATCH-BOB GOODLATTE MUSIC MODERNIZATION ACT, Pub.L. No. 115–264 (2018) (hereinafter “MMA”). The effective date of the MMA as a whole is the date the president signed it, Oct. 11, 2018 (MMA §106), but blanket licenses are not available until Jan. 1, 2021. See generally MMA, § 102, § 115 (e)(15).

⁴ DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995, Pub. L. No. 104-392, 109 Stat. 336, 344 (1996) (codified as amended at 17 U.S.C. §§ 106, 114-115 (1996)).

reproductions at the statutory rate. If the putative licensee fails to serve or file the required NOIs, it is not eligible for the statutory license and its reproduction of the musical composition in phonorecords is actionable as infringement. MMA, § 102, § 115(b)(4).

This regime, until modified by the MMA (see note 3, *supra*), required potential licensees to seek licenses on a composition-by-composition basis. But with the advent of online digital music providers, the section 115 license became increasingly onerous, because these entities sought to license reproduction rights for hundreds of thousands of musical compositions.⁵ Record labels (who owned the copyright in the sound recordings) were delivering their catalogues to the digital music providers, often without any information regarding the owners of the copyrights in the musical compositions. Some digital music services were expending a great deal of money in attempting to perform the necessary due diligence to obtain compulsory mechanical licenses; others simply used the songs without meeting the requirements for the mechanical license.

These problems led Congress to amend section 115 again in 2018 through the Music Modernization Act of 2018 (MMA).⁶ The MMA reformulated the mechanical license with regard to digital music providers – referred to in the MMA as “digital service providers” (DSPs), so we will use that term hereafter. While the prior rules remain in place for the manufacture of physical products, the MMA establishes a blanket compulsory license system for DSPs to engage in downloads and on-demand streaming. MMA, § 102, §115(d)(1)(B). The MMA essentially updates the compulsory licensing process for the digital age. DSPs will no longer be required to send NOIs to the Copyright Office. Instead they provide funding for a mechanical licensing collective, discussed below, whose responsibilities include the creation of a large database of mechanical rightholders. MMA, § 102, § 115(d)(7)(A); § 102, § 115(d)(3)(E)(i)(IV). DSPs will also pay a royalty fee. MMA, § 102, § 115(c)(1)(A), (B).

This license in effect frees DSPs from the time and expense of seeking licenses composition by composition. The MMA provides for the appointment of a mechanical licensing collective (MLC) made up of writers and publishers that will administer the blanket license, receive and distribute royalties generated through the streaming of compositions for which no copyright owner can be found, develop and maintain a musical works database, and administer voluntary licenses. The MLC is funded by the DSPs, so the MMA also provides for the appointment of a digital licensing coordinator (DLC), to coordinate the activities of the DSPs and oversee and assess the MLC’s budget. When the MMA becomes effective, DSPs and rightholders may enter into voluntary licenses administered by the MLC privately, or through any entity and at any rate they agree upon, or DSPs may pay a statutorily set rate to stream works for which they have not entered voluntary licenses (either because the rightholder is unknown or an agreement could not be reached). Both the MLC and the DLC will be nonprofit entities. See MMA, § 102, § 115(d)(3)(A)(i) and § 102, § 115(d)(5)(A)(i).

The MMA gave the Copyright Office responsibility for designating the MLC. Effective July 8, 2019, the Office named a coalition of music publishers and songwriters to act as the MLC. U.S. Copyright

⁵ Digital Music Providers require a mechanical license since streaming requires making copies, and more copies are made if the customer is allowed to pause or download a streamed composition for use offline.

⁶ MUSIC MODERNIZATION ACT, § 102.

Office, Designation of Mechanical License Collective and Digital Licensing Coordinator, 84 Fed. Reg. 32274 (July 8, 2019), available at <https://www.federalregister.gov/documents/2019/07/08/2019-14376/designation-of-music-licensing-collective-and-digital-licensee-coordinator>.

Public Performance Rights in Sound Recordings

Sound recording copyright owners have the right “to perform the work publicly by means of a digital audio transmission,” as described below.⁷ Analog transmission of sound recordings is not restricted by copyright. In broad brush, the law sets up a three-tiered system of protection for performances of sound recordings.⁸ The first tier consists of certain types of public performances that are exempt from the performance right and may be made for free, such as analog transmissions and “live” performances of sound recordings at public venues (such as nightclubs).⁹

The second tier encompasses certain digital audio transmissions subject to a compulsory license. The sound recording copyright owner may not prevent these public performances, but the transmitting party must pay royalties to the sound recording copyright owner and performers at the rate set by the Copyright Royalty Judges.¹⁰

Finally, the third tier consists of certain digital audio transmissions that fall neither under the exemption (first tier) nor the compulsory license (second tier) and thus require negotiating a license with the sound recording copyright owner. These are performances such as interactive digital audio services (on-demand streaming).¹¹

Our focus in this response is the digital audio transmissions subject to a compulsory license. Although the rates for this compulsory license are set by the Copyright Royalty Judges, SoundExchange, a non-profit entity, administers collection and payment for these rights. See <https://www.soundexchange.com/about/our-work/mission-values/>.

⁷ 17 U.S.C. § 106(6).

⁸ DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995, Pub. L. No. 104-39, 109 Stat. 336, *amended by* DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2899 (1998) (codified at 17 U.S.C. § 114).

⁹ Also included in this first tier are traditional AM and FM broadcasts, public radio, background music services, and performances and transmissions in business establishments such as stores and restaurants. 17 U.S.C. §§ 106(6), 114(b), (d)(1). Although public performance of a sound recording may be free, it may still be necessary to pay license fees for the underlying work.

¹⁰ MUSIC MODERNIZATION ACT, § 103, § 114(d)(2). The performances in the “second tier” include subscription digital transmissions (i.e., those limited to paying recipients) and certain eligible nonsubscription digital transmissions. A transmission may be made pursuant to the compulsory license if it (a) is not in the first tier (in which case a license is unnecessary because it is exempt), (b) is accompanied, if feasible, with the title, name of copyright owner and other information concerning the sound recording and underlying musical work, and (c) the transmitting party meets a number of specific statutory requirements that diminish the risk that the transmissions will be copied or will substitute for having copies, e.g., it does not publish its program in advance, does not play more than a specified number of selections by a particular performer or from a particular phonorecord within a specified time period, does not seek to evade these conditions by causing receivers to automatically switch program channels, etc. *See also* REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 46-49 (Feb. 2015), *available at* <http://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

¹¹ *See* MUSIC MODERNIZATION ACT, § 103, § 114(d). This category also includes nonsubscription transmissions that do not meet the conditions for the compulsory license (second tier) because, for example, the transmitting party publishes the program in advance, or does not abide by the limitations concerning the number of selections from a particular phonorecord or performer that can be played in a specified time period.

Prior to the MMA, only post-1972 sound recordings enjoyed a public performance right (or, indeed, *any* rights under federal copyright law). Pre-1972 sound recordings were protected by a patchwork of state laws and remained so when sound recordings were prospectively granted federal protection in 1972. In some states, protection for pre-1972 sound recordings exists for a term longer than they would have had if they were covered by federal copyright law. Moreover, unless a state has limited the term of protection, it may protect sound recordings from the time of their creation, which in most cases results in a term longer than the Copyright Act would protect works. (For example, a sound recording created in 1920 might still be protected by state law, while a musical work created the same year would be in the public domain for purposes of federal copyright law.) However, state laws generally provide no public performance rights, which created hardship for creators of pre-1972 sound recordings, particularly as the primary means of exploitation of sound recordings has shifted from sale of phonorecords to digital streaming. Title II of the MMA alters this regime so that pre-1972 sound recordings protected only by state law will now generate royalties from non-interactive DSP music services under federal law. The duration of the public performance right provided to pre-1972 sound recordings varies with the age of the recording. See MMA, § 201, § 1401(a)(2)(B).¹²

Reproduction Rights in Sound Recordings

When Congress granted federal copyright protection to sound recordings, effective February 15, 1972, it did so only on a “going forward” basis. Most states have laws protecting the unauthorized reproduction and distribution of pre-1972 sound recordings. Licenses to reproduce pre-1972 sound recordings are negotiated privately and directly between licensees and rightholders (usually the record labels).¹³ There is no central body, clearinghouse, or administrator for these licenses.

Levies in Connection with Copying of Digital Audio Recordings

When Digital Audio Tape (DAT) technology was introduced, rightholders perceived it as a serious threat to the reproduction right, and persuaded the U.S. Congress to pass the Audio Home Recording Act (AHRA) in 1992.¹⁴ Now codified in chapter 10 of the U.S. Copyright Act, it provides for a levy on sales of Digital Audio Recording Devices and Media. The levy is a minimum of \$1.00 and a maximum of \$8.00 or \$12.00, depending on the type of device. Rightholders may petition the Copyright Royalty Judges for an increase in the levy amount. 17 U.S.C. § 1004(a)(3). Royalty payments are deposited with the Copyright Office and distributed to owners of rights in musical works and sound recordings in accordance with 17 U.S.C. § 1006(b).

Because DAT technology was rapidly bypassed by other means of copying, the AHRA has never had a significant role. General purpose computers are excluded from the AHRA’s ambit, so the internet is largely outside the scope of the law.

Other Rights Management Organizations in the United States

¹² See note 3, *supra* re effective date of the MMA.

¹³ After the MMA, the reproduction of a pre-1972 sound recording may be made to the extent it falls within the ambit of the performance license.

¹⁴ Pub. L. No. 102-563, 106 Stat. 4237 (1992).

There are a number of quasi-collective licensing societies in the United States outside the field of music, but most represent only a fraction of the rightholders in the field. Generally, they are broken up by the genre(s) of work they represent. For works of visual art, there is the Artists Rights Society (ARS).¹⁵ ARS represents a roster of visual artists.¹⁶ In general, it represents all the primary rights in the works of the artist, including an exclusive right to negotiate all reproduction and licensing of the artists' works, although there are some artists for whom this is not true.¹⁷ There is no firm rule; each artist or his or her estate negotiates individually regarding what rights they will grant to the prospective licensee. Although ARS represents artists, each licensing opportunity that arises is discussed with the artist (or his or her representatives). ARS does not represent the entire market; many artists do not participate.

Copyright Clearance Center, Inc. (CCC) is a not-for-profit rights broker, representing copyright holders of all kinds of text-based works (including in- and out-of-print books, journals, newspapers, magazines, blogs and ebooks), in licensing the right to reproduce their works.¹⁸ These licensees include for-profit and not-for-profit businesses, academic institutions, government agencies and individuals. CCC offers both digital-use and photocopy-use licenses in pay-per-use form and repertory form (one payment for all covered uses for a year). It collects royalties from licensees and remits them to the applicable rightholder. CCC's services are entirely voluntary, opt-in and non-exclusive for both rightholders and users; that means that, unlike somewhat similar organizations in most other countries, CCC operates pursuant to no statutory license or levy system. It is important to note that CCC is not currently as widely representative of rightholders as are RROs in many other countries.

The Authors' Registry is an organization based in New York that collects and distributes to U.S. authors royalty payments collected abroad.¹⁹ The Registry acts as a clearinghouse or payment agent for certain foreign organizations with whom it has agreements. It receives payments from those organizations and distributes them to U.S.-resident authors. Primarily it works with book authors, who cover the full spectrum, including trade, academic, and technical books, but will collect royalties for any author of the written word. It does not represent the rights of the authors to whom it distributes these payments; it is merely assigned the duty to collect and distribute revenues collected from foreign collective management societies. The organization has an agreement with each payee to authorize the Registry to collect and disburse these payments. All usage tracking and calculation are done by the foreign organizations in the context of their local laws and corporate requirements.

1.1 Can collective management organizations be described as monopolies (natural monopolies or monopolies set by the law) in your jurisdictions?

Note: We combine our responses to questions 1.1 and 3.4 here.

Whether CMOs can be considered "monopolies" depends on how they are constituted and how they

¹⁵ www.arsny.com.

¹⁶ The list of artists that ARS represents can be searched at <https://www.arsny.com/searchartists>.

¹⁷ ARS does not handle sales of the works of art done by its members.

¹⁸ www.copyright.com.

¹⁹ www.authorsregistry.org.

operate. We focus on whether CMOs have run afoul of U.S. antitrust laws rather than on whether they are referred to as “monopolies” in common parlance.²⁰

ASCAP and BMI. As technology and consumption of music advanced in the 1920’s and 30’s, ASCAP had a contentious, and litigious, relationship with many public performance venues, including dance halls, restaurants, hotels, movie theatres/cinemas, and radio stations. In 1939 radio stations resisted ASCAP’s attempt to increase the prices of its blanket licenses for radio stations (based on a percentage of the radio station’s revenue), leading to the creation of BMI by a consortium of broadcasters, and charges from the U.S. Department of Justice regarding ASCAP’s monopolistic behavior. This resulted in the organization being subject to a “consent decree.” See *UNITED STATES V. ASCAP*, Civ. Action No. 41-1395 (WCC), 2001 U.S. Dist. LEXIS 23707 (S.D.N.Y. June 11, 2001).

Consent decrees are a form of injunction used in the United States as a way to regulate monopolistic industries. In a consent decree, a court will absolve the organization of prior antitrust violations so long as its future conduct meets court-specified criteria. For example, under ASCAP’s and BMI’s consent decrees, these PROs are forbidden to obtain exclusive licenses from rightholders for public performance rights, meaning that rightholders are free to negotiate their own licenses if they wish, even for works that are part of ASCAP or BMI’s repertoires.

BMI is also subject to a consent decree. See generally *UNITED STATES V. BMI*, 275 F.3d 169, 171-72 (2d Cir. 2001) (describing BMI’s history in connection with consent decrees). The two consent decrees are similar, mandating judicial review of proposed rate increases and restrictions on their relationships with members. In 2013 SESAC was accused by the Radio Music Licensing Board (RMLC) of monopolistic behavior. While the RMLC’s request for an injunction against SESAC was denied, in a preliminary hearing the judge did find that RMLC was likely to succeed in its accusation if the parties went to a full trial. See *RADIO MUSIC LICENSE COMM., INC. v. SESAC, INC.*, No. 12-cv-5807, 2013 U.S. Dist. LEXIS 201298 (E.D. Pa. Dec. 20, 2013). With the possibility of a consent decree on the horizon, SESAC and the RMLC settled.

MLC under the MMA. Due to the historical regulation of collective rights management in the United States through antitrust laws, the creation of the MLC under the MMA brought with it antitrust concerns. The MMA makes the MLC exempt from antitrust laws regarding its administration of voluntary licenses. The exemption has conditions: the copyright owner must be the one who negotiates the terms of the license; it may not do so in concert with any other copyright owner; the licensee likewise may not act in concert with any entity entitled to a compulsory license; and the MLC must keep the terms of voluntary licenses confidential. MMA, § 102, § 115(d)(11)(C)(i)-(iii)

Rightholders may designate common agents, who will be exempt from antitrust laws, on a non-exclusive basis, to conduct negotiations for setting royalty rates. MMA, § 115(c)(1)(D). This common agent may not be the MLC nor the DLC, however. MMA, § 102, § 115(d)(11)(B). There is one exception to this; the MLC (or any digital music provider) may agree to an interim rate for “any

²⁰ See the discussion of U.S. antitrust laws in the context of U.S. PROs in REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 34-40 (Feb. 2015), available at <http://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

covered activity for which no rate or terms have been established by the Copyright Royalty Judges.” Such rates/terms will be considered nonprecedential in any rate-setting and will automatically expire when a rate for the activity is set. MMA, §102, § 115(d)(8)(C). There will be only a single MLC designated by the Copyright Office, although in the future the Office could designate a successor entity. Rates for the “blanket” license which the MLC will administer will be set by the Copyright Royalty Judges. Neither the MLC nor the DLC may engage in lobbying or try to influence the rate setting process.

SoundExchange. SoundExchange does not set rates for the compulsory license for the digital performance of sound recordings. It is the sole body authorized to collect licensing fees in this area, but is not itself subject to antitrust scrutiny.

1.2 Does your system make a difference between the voluntary, extended (if any) and mandatory collective management? Which rights are managed under which regime?

The U.S. currently has no voluntary extended licenses in existence.

1.3 Is the competition between collective management organizations permitted in your jurisdiction? If so, under which circumstances, how often and in which fields (e.g. tariffs, service for users, available repertoire, service for right holders, amount of deductions) the competition may occur.

Competition is permitted (and encouraged) among PROs. Competition may occur in connection with repertoires, distribution formulas, etc.). For collective management of mechanical rights by means of a blanket license, there will be only a single CMO under the MMA (referred to as the MLC) to be designated by the Copyright Office, although the designated licensee may change over time. Similarly, SoundExchange is the sole agency designated to collect and distribute royalties from the compulsory license concerning public performance rights in sound recordings.

1.4 How is extended (if any) and mandatory collective management regulated and applied where, for the management of a given right, there are more than one organization?

The U.S. currently has no voluntary extended licenses in existence. There is competition among the PROs, although membership in a PRO is not mandatory. As mentioned in the previous answer, Sound Exchange, MLC, etc. are the sole designated collective management organizations in their fields.

1.5 Is the collective licensing of rights conducted by non-profit CMOs or a different type of agency or entity (profitable entities such as business corporations), or by the state agency (such as the IP Office)?

ASCAP, BMI and SoundExchange are nonprofit CMOs, as the MLC will be. The Copyright Office, Copyright Royalty Judges, and the federal courts, all government institutions, also have a role in administering certain collective licenses.

1.6 *Are the collective management organizations obliged to contribute to cultural development of the society? If so, in which areas and how is the cultural support implemented (e.g. management of social or cultural funds)? Is the creation of such funds and their allocation limited by law?*

CMOs in the United States are not required to contribute to the cultural development of society.

2. Collective Management Organizations and Authors (Rightholders)

2.1 *Do the authors/rightholders have a legal right to become represented? To become members? If they are rejected, what kind of remedy do they have at their disposal?*

Performance Rights Organizations (re musical works)

ASCAP and BMI's consent decrees both impose minimum membership requirements for writer and publisher members. For writers, the sole requirement is that they have at least one published work. Publishers must have been engaged in the business of publishing, distribution, and commercial sale for at least one year and assume financial risk through the publication of musical works. See *U.S. v ASCAP*, supra, 2001 U.S. Dist. Lexis 23707 at 12, XI (A) and *UNITED STATES v. BROADCAST MUSIC, INC.*, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. 1966), amended, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994) (See section V(A) of BMI consent decree).

Mechanical Licenses

Under the compulsory licensing regime for mechanical licenses sought individually there are no requirements for "membership." Registration with the Harry Fox Agency is voluntary and normally done by publishers.

In connection with the blanket license under the MMA, it appears that the MLC does not have membership requirements for a rightholder to receive its share of the royalties. MLC will develop a process by which copyright owners can claim ownership of works or a share thereof. MMA, § 102, § 115(d)(3)(C)(i)(V). Copyright owners of musical works must use reasonable efforts to provide, for musical works in the database, names of sound recordings in which its works are embodied. MMA § 102, § 115(d)(3)(E)(iv).

SoundExchange (re royalties from the compulsory license for digital public performance of sound recordings)

One must register with SoundExchange to collect digital performance royalties. One is not required to become a member, but membership provides additional benefits. See <https://www.soundexchange.com/artist-copyright-owner/registration-membership/member-benefits/>

2.2 *How does the CMO resolve a conflict between rightholders in case of a "double claim"? Are the rightholders referred to court or is there an ADR at hand?*

Performance Rights Organizations

ASCAP differentiates between Disputed Claims and Adverse Claims. Disputed claims occur when the disputants are both members of ASCAP, while Adverse Claims involve an outside claimant. The language used for dealing with both is identical: if ASCAP believes there is a reasonable basis for either claim, ASCAP may withhold royalties at its discretion. ASCAP may release the withheld royalties if the member agrees to indemnify ASCAP or give a suitable bond, but again this is at ASCAP's discretion. ASCAP makes no referrals to either arbitration or courts. It is up to the parties to resolve the dispute. See Compendium of ASCAP Rules and Regulations, and Policies Supplemental to the Articles of Association, at 2.8.1 and 2.8.3, ASCAP. (April 20, 2019), <https://www.ascap.com/~media/files/pdf/members/governing-documents/compendium-of-ascap-rules-regulations.pdf>.

Similarly, BMI will use its discretion whether to pay royalties on a disputed work. If it pays royalties for a work that are later disputed, BMI maintains the right to recoup such payments from future royalties. If a legal case is pending, BMI will not make any payments on the composition in question. BMI does not refer affiliates to either arbitration or courts. See BMI Royalty Policy Manual (Updated Apr. 24, 2019), at "Royalties Withheld Due to Litigation" and "Overpayment of Royalties," BMI. (April 20, 2019), https://www.bmi.com/creators/royalty_print.

SoundExchange

The agreement between Sound Exchange and its members provides that any claims arising out of the agreement "shall be settled in the District of Columbia by arbitration administered by the American Arbitration Association in accordance with its commercial arbitration rules." SoundExchange Performer Membership Agreement, para. 11.c., available at <https://16s09sqd21j3mrlbf1sti2if-wpengine.netdna-ssl.com/wp-content/uploads/2016/03/Performer-Membership-Agreement-07-20-15.pdf>. The agreement further provides that any royalty disputes between SoundExchange and a member "shall be treated in accordance with then-current SoundExchange policies and procedures." Id., para. 10.

Mechanical Licenses

Mechanical rights for individual compositions are often licensed on a private basis. In the event of a double claim, where one publisher gave a license which a second publisher then disputed, the second publisher's remedy would be through the courts. The MMA provides that the MLC's dispute resolution committee will devise policies and procedures for rightholders to address "disputes relating to ownership interests in musical works licensed under this section" and the allocation and distribution of royalties. MMA, § 102, § 115(d)(3)(K)(i).

2.3 *How can the authors (rightholders) participate in the activities of the collective management organization? Under which circumstances can they be elected into the management or controlling boards? Are there pre-conditions, such as a minimal amount of remuneration from CMO, to become elected?*

Performance Rights Organizations

Generally speaking, rightholders have very little participation in the day-to-day governance of the PROs. However, as there are multiple PROs, this choice allows authors to “vote with their feet.” Publishers may be members of as many PROs as they wish.

ASCAP’s Board of Directors is made up of writers and music publisher executives. The President and Chairman is Paul Williams, a well-known and respected songwriter. Individual members do not exercise control over the board. However, there are 12 writer board members of the 25 (not including the Chairman). These writer board members are songwriters who have enjoyed high degrees of success and are meant to represent the interests of the PRO’s writer membership. In addition, there is an ASCAP Board of Review, which is an independent panel of writers and publishing members, elected by ASCAP’s members for four year terms, who oversee complaints by members who believe their royalty payments were not made in accordance with the rules and regulations adopted by the Board of Directors. See ASCAP Governance, <https://www.ascap.com/about-us/governance>.

BMI’s Board of Directors is elected by BMI shareholders at regular shareholder meetings. BMI shares are not publicly traded, and their exact ownership is not known. Historically the shares were held by radio stations and media groups. The current Chairman is Michael Fiorile, CEO of the Dispatch Printing Company (a newspaper/magazine publisher) and Dispatch Broadcast Group (a small conglomerate of midwestern TV and radio stations). All other board members, except for Mike O’Neill, who is the president and CEO of BMI, are executives within the media industries. See, e.g., BMI, “BMI Re-Elects Six Members to Board of Directors” (Sept. 26, 2018), https://www.bmi.com/news/entry/bmi-re-elects-six-members-to-board-of-directors_

Mechanical Licenses

Due to the compulsory licensing system, rightholders exercise little if any control over the mechanical reproductions of their works. The HFA will administer contracts negotiated between rightholders and licensees, but they themselves do not grant licenses or negotiate terms. Similarly, the future MLC may also act to administer mechanical rights licenses (although only with regard to DSPs). As for the distribution of unclaimed mechanical royalties, the makeup of the MLC’s Board of Governors, unclaimed royalties oversight committee and dispute resolution committee are specified in the MMA as follows. MMA, §102, § 115(d)(3)(D)(i),(v),(vi):

Board of Governors:

- 10 voting representatives from the music publishing industry
- 4 voting representatives who are professional songwriters
- 1 non-voting representative from a music publishers trade association
- 1 non-voting representative from the digital licensee coordinator
- 1 non-voting representative from a songwriter advocacy group

Unclaimed Royalties Oversight Committee:

5 publishers

5 professional songwriters

Dispute Resolution Committee

Minimum of 6 members, half of which represent publishers and half songwriters.

2.4 How is the remuneration distributed amongst authors? How can the authors interfere in the process of the formulation of distribution schemes? In which phases of the collecting process are the fees taxed and by whom?

Performance Rights Organizations

Both ASCAP and BMI have similar distribution policies for royalty payments, each set by their respective boards. The formulas, while similar, are proprietary to each organization and not publicly available. The minimum accrued royalties in order to make payment for both organizations is \$USD 25. The sources of income are broken down into two main categories, monitored and unmonitored sources, with different methods of allocating royalties. The PROs strive to make payments based on actual performance of musical works, but when information about actual use is unavailable, they may resort to extrapolation from existing information, or surveys and samples.

Monitored Sources (TV, Radio, Websites/Services)

As a condition of their licenses these entities must report performances (e.g., cue sheets). Payment to authors and rightholders will be proportional to total licensing fees divided by plays. In addition, both organizations conduct surveys and randomly monitor licensed TV and radio stations.

Unmonitored Sources (Bars, Nightclubs, Restaurants, Hotels)

Both BMI and ASCAP distribute income from these sources according to proprietary formulas which are not publicly available. Generally, they extrapolate data from monitored sources and apply it to income from unmonitored sources. One exception is that of large public performances at concert venues/stadiums, which will report their usage for specific live performances (e.g., set lists), but may not do so for other uses (e.g., background music during sporting events). In the past, both BMI and ASCAP would conduct surveys by sending representatives to licensed establishments to record which songs were being played and use this information when determining royalty distributions. While neither organization has stated that they no longer rely on this method, it is generally understood that this practice is no longer employed due to the time and expense required and the growth in available data from other sources.

Royalty payments collected by the PROs are divided equally between music publishers on the one hand and writers on the other. Royalty payments are taxed as income to the recipients.

Mechanical Licenses

Under the § 115 compulsory licenses, remuneration is set by the Copyright Royalty Judges. *See* 3.3 below.

Under the new MLC, unclaimed mechanical royalties will be paid out on a market-share basis to publishers, who must then pay (or accrue to their account) 50% of the unclaimed royalties they receive to authors (MMA, § 102, § 115(d)(3)(J)(iv)(II)). Unclaimed royalties will be held for at least 3 years before being distributed (MMA, § 102, § 115(d)(3)(H)(i)). Market shares for a given period will be “determined in a transparent and equitable manner based on data indicating the relative market shares of such copyright owners as reflected in reports of usage provided by digital music providers for covered activities for the periods in question.” MMA, § 102, § 115(d)(3)(J)(i)(II).

2.5 How does the law or legal practice reflect the will of the author (“autonomy of will”) to grant licenses individually? Is it allowed for the user to obtain the license directly from the represented author? Are such direct licenses null and void or are they valid, while the user still pays remuneration to the CMO? Please elaborate for each regime of the collective management.

Performance Rights Organizations

Under the consent decrees, neither BMI nor ASCAP is allowed to secure exclusive performance licenses. Authors or rightholders therefore may grant valid licenses for performances of their works to whomever they wish, but must inform the relevant PRO to insure no “double claiming.” They may also withdraw their performance rights from BMI or ASCAP at any time.

Mechanical Licenses

In contrast, under the compulsory licensing regime, writers have no discretion as to who makes and distributes recordings of their compositions, as long as licensees meet the statutory conditions.

Rightholders are allowed to negotiate their own mechanical licenses. Under the modifications to section 115, any licenses rightholders enter into with parties eligible for the new § 115 collective license will be given effect. MMA, §102, § 115(c)(2)(A)(i).

2.6 Do CMOs allow the rightholders to grant a non-commercial license for their work? Are so called “public licences” used in this context? Are there any examples concerning the non-commercial distribution of the protectable subject matter by the CMOs in your country?

Rightholders are not restricted from granting licenses, commercial or noncommercial. ASCAP, BMI, and other CMOs will grant commercial and non-commercial licenses. Rightholders themselves are free to negotiate any form of license they wish, however, and the rights organization will honor these.

Creative Commons (CC) licenses (which vary as to terms) can be at odds with other licenses provided by the rightholder. CC licenses facilitate distribution without payment, while the licenses under §114 and §115 of the Copyright Act are designed to collect and distribute royalties due to rightholders for uses of their works. *See* Joan McGivern, “10 Things Every Music Creator Should Know About

Creative Commons” (Sept. 1, 2007), https://www.ascap.com/playback/2007/FALL/FEATURES/-creative_commons_licensing

Mechanical Licenses

Rightholders can grant mechanical licenses for any price they wish, including below the minimum rate of the compulsory licenses (termed “reduced rate licenses”). The HFA will honor and collect on these (if collection is necessary). *See* FAQs at Reduced Rate License, Harry Fox Agency (April 20, 2019), <https://www.harryfox.com/#/faq>.

3. Collective Management Organizations and Users

3.1 *How does your jurisdiction prescribe private copying remuneration (“levies”)? Is the general principle of freedom of a contract respected in this area (i.e. is the remuneration a subject of the negotiations between users and collecting societies) or is the size of the private copying levy stipulated by any legislative act (such as governmental decree)?*

The United States has no private copying levies except as discussed above in our response to Question 1 (re DAT).

3.2 *Nowadays, the major use occurs on the Internet. Has there been any attempts in your country to set a private copying levies collected by CMOs or by different entities or state for the use of protected subject matters on the Internet (e.g. in the form of a so-called “flat fee” or a special tax)?*

No.

3.3 *How are the tariffs set (by decision of the CMO, by negotiation with users, consumers or others?)? What are the statutory criteria for the tariffs (e.g. assessing the value of the rights by experts, proportionality etc.)? Do they require approval of a regulatory authority (such as an IP Office, Ministry of Culture etc.)? How can they be contested by the users? By general courts, by special ADR procedure or specialized tribunals?*

Rate setting for public performance licenses for musical works

ASCAP and BMI set their own licensing rates, but their discretion is restricted under the consent decrees. They are prohibited from price discrimination between licensees, and must offer blanket licenses, per-program licenses and per-segment licenses. These latter two licenses must be priced in order to present the potential licensees with a genuine choice. With regard to monitored sources (e.g., radio, television, etc...), license fees will be based on a percentage of income (generally advertising income). For unmonitored sources, licenses are granted according to the expected number of patrons. Prior to the MMA, the consent decrees were administered by specific judges in New York, one for ASCAP and one for BMI. The MMA has changed this to a rotational system in which a new judge from within the Southern District of New York (which retains jurisdiction as it was the forum of the initial actions under which the consent decrees originated) will be assigned for each dispute. The two

previous judges that oversaw the consent decrees and subsequent rate disputes are barred from participating in any such new dispute. MMA, § 104, 28 U.S.C. § 137(b)(1)(B).

Rate setting for mechanical licenses for musical works under the MMA

The rates under the compulsory mechanical licenses are set by the Copyright Royalty Judges, three judges chosen by the Library of Congress. The “rates and terms shall distinguish among the different types of services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers...” on a “willing buyer” and “willing seller” basis. The Judges must base their decisions on “economic, competitive, and programming information” presented by interested parties (i.e., music publishers, record labels, and potential licensees) and issue written, reasoned opinions. Interested parties may submit evidence of experts. The Judges may also take into account rates set in voluntary licenses when determining the compulsory license rates. The process for setting the rates is adversarial. Hearings are announced, with time allowed for the submission of public commentary, and interested parties then able to argue their cases. If any party feels the rates were set incorrectly, it may then request a rehearing. Rates are set for 5 year periods. 17 U.S.C. § 804(b)(4).

Rate setting for public performance licenses for sound recordings

The Copyright Royalty Judges also set the rates for the §114 license for digital performance of sound recordings, described above.

3.4 *Does the competition law in your country recognize abuse of dominant position of a CMO? Are there any examples (cases) that the CMO has been held responsible for the distortion of the competition?*

See our response to question 1.1, above.

3.5 *In some jurisdictions the problem may be the non-transparency of tariffs. Are there any rules on the statutory level or as the outcome of the self-regulatory activities which concern the transparency of the tariffs? Has there been any development in this area in recent years?*

In general, the rate-setting processes and the rates themselves are public and transparent.

9 July 2019
New York, New York