Submitted by Colin Rushing on behalf of
the Digital Media Association

Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the matter of: **Issues Related to Performing Rights Organizations**	**Docket No. 2025-1**

COMMENTS OF THE DIGITAL MEDIA ASSOCIATION

The Digital Media Association ("DIMA") is pleased to provide these Comments in response to the Copyright Office's Notice of Inquiry ("NOI") in the above-captioned proceeding. *See* Issues Related to Performing Rights Organizations, 90 Fed. Reg. 9253 (Feb. 10, 2025).

Introduction and Background

DIMA represents the world's leading music streaming services.[1] Our members generate the majority of revenue for recorded music and are the driving reason that the music industry has experienced years of growth instead of the precipitous decline faced in the early part of the century.[2] Our members operate globally and deliver the world's music worldwide.[3]

Streaming services must obtain almost every right associated with music in order to operate. They obtain those rights from every conceivable source: directly from rights owners and their representatives, via voluntary collective management organizations such as the performing rights organizations that are the focus of this proceeding, and via statutory licenses administered by government-appointed entities. As a result, our members have comprehensive

[1] See https://dima.org/about-us/ (identifying DIMA's members).

[2] See data reported at https://www.riaa.com/u-s-sales-database/.

[3] Many artists now receive the majority of their royalties from outside of their home countries. For example, of the artists who generated $1K+ in royalties on Spotify in 2024, more than half saw most of their royalties come from listeners outside of their home countries. https://loudandclear.byspotify.com/#takeaway-7.

exposure to, and understanding of, the global music licensing system, and direct experience with the vast network of music licensing bodies that are, simultaneously and paradoxically, interlocking and disjointed. They also have a strong interest in improving the overall music licensing landscape by making it more efficient. An efficient licensing system benefits streaming services, music creators, and fans alike by lowering operational barriers, timing hurdles, and costs, and maximizing the royalties that flow to music creators.

Our members have a track record of seeking and obtaining reforms that improve music licensing. One need look no further than the landmark Music Modernization Act, which created a simplified licensing system for mechanical rights and delivered a number of other reforms long sought by songwriters and publishers. DIMA and its members were at the forefront of crafting this legislation – an essential step towards bringing music licensing into the digital age. [4]

We therefore appreciate the Copyright Office's decision to commence this Notice of Inquiry focused on performance rights licensing in the United States. As we set forth in these comments, the PRO "system" is not a system at all but a patchwork of practices and customs that, "after a long period of stability,"[5] is facing significant challenges. While the Music Modernization Act brought much-needed reform to music licensing as a response to the growth of streaming, the reforms were primarily focused on mechanical rights. The system for licensing performance rights, which was largely unaffected by the MMA, is increasingly *unstable* and not delivering the transparency, clarity, and certainty that all stakeholders have come to expect in the digital music age.

The inquiry focuses on two distinct aspects of the current PRO system. First, the inquiry seeks comments about the growing phenomenon of the proliferation of PROs. As we explain below, proliferation is indeed a significant and destabilizing factor in the marketplace today, driving up costs, creating additional uncertainty, reducing transparency, and erecting barriers to

[4] Notably, and for reasons beyond the scope of this NOI, the MMA did not address the fundamental paradox of licensing the rights for music compositions by streaming services: The fact that publishing rights are divided between the performance and the mechanical right, administered in entirely different ways, and subject to entirely different processes for setting and determining rates. This is true even though the two rights are being licensed for the exact same uses, and even though the rights are almost always owned by the exact same person.

[5] NOI at 9254.

efficient licensing and payment of royalties. Second, the inquiry probes challenges related to the collection and distribution of so-called general licensing revenue. While we are limited in our ability to shed light on the practices of the PROs, we offer some observations about the reporting of usage generally, and the challenges that exist when the distribution rules vary among intermediaries.

DIMA's comments are not intended to advance a specific legislative or policy proposal at this time. DIMA does believe, however, that challenges in the PRO system are one of the interconnected issues that must be resolved to bring licensing fully into the digital age. It is clear that now is the time for additional study and consideration of these complex issues, and we are interested in the perspective of all stakeholders. As a general principle, any such review of the licensing and operations landscape must prioritize transparency, clarity, and certainty for those paying and receiving music royalties – including the many intermediaries who administer rights on behalf of music creators. (This is true for both mechanical and performance rights.) Our comments focus on the root causes of the issues that underpin inefficiencies in today's system, and we welcome the opportunity to continue collaboration with stakeholders to develop appropriate and meaningful ways to modernize music licensing in the United States.

A. The PRO "System" Fails to Address Today's Music Licensing Needs

As the Copyright Office's Notice of Inquiry explains, PROs emerged in the United States to address a problem that to this day has not been solved: there is no effective way for publishers or their licensees to license compositions on a work-by-work, or even catalog-by-catalog basis, at the scale required for a world in which music is ubiquitous and the decisions for which songs to perform is often extemporaneous, without some form of blanket licensing. That was true when ASCAP first opened its doors in 1914, when the predominant exploitation was limited to live performances of songs. The need is exponentially more pronounced today, when tens of millions of songs are streamed billions of times a month.

As the context of the modern digital music economy makes clear, however, the system for licensing performance rights in the United States is not a designed system at all but, instead, a mishmash of organizations, formed in response to industry practices, and subject to varying degrees of regulation. The history of the PROs has been set forth in several places and we do

not rehash it here. In general, however, the current performance rights landscape is best understood as the result of a series of actions taken to limit the competitive harm of voluntary PROs, and reactions by industry players to those steps.[6]

The foundation of the current system is the consent decrees governing ASCAP and BMI. Established decades ago in response to those organizations' businesses practices, the consent decrees, with some subsequent modifications, remain in effect today. For decades, ASCAP, BMI, and SESAC were the only PROs operating in the U.S. – ASCAP and BMI subject to consent decrees governing their conduct, and SESAC subject to general antitrust laws. In 2013, a fourth PRO began operating – Global Music Rights (GMR) – and in the last decade, other PROs have emerged.[7] Observers have characterized PROs other than ASCAP and BMI as engaging in a type of "regulatory arbitrage" – taking advantage of the fact that some, but not all, participants in the marketplace are subject to regulation.[8] Central to the business model of the new PROs is promising prospective songwriters and publishers the ability to extract supracompetitive rates specifically because they are not subject to any form of the consent decrees.[9]

The U.S. therefore presents a paradox: Even though streaming services require licenses for all the world's repertoire, and performance rights are in general licensed on a blanket basis, there is in fact no blanket license that covers the repertoire almost any licensee needs. Instead, there are two very large PROs, subject to regulation in the form of consent decrees, and at least four smaller PROs. While these "unregulated" PROs are subject to the antitrust laws and the outcome of case-specific litigation, that is both costly and could lead to inconsistencies. And the current model leaves a certain unknown share of performances that may not be licensable through *any* PRO.

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[6] *See generally* U.S. Copyright Office, Copyright and the Music Marketplace 34-42 (2015) ("Copyright and the Music Marketplace").

[7] Other US-based PROs that have demanded licenses in the last decade include AllTrack, PRO Music Rights, and ACEMLA.

[8] See Copyright and the Music Marketplace at 95.

[9] As discussed in more detail below, these new PROs do not in fact compete for licenses, even if they are competing for writers.

Critically, and as explained below, obtaining a license from each PRO will *not* provide certainty that licensees can verify that they have obtained 100% of the rights that they need, because not all writers are affiliated with a PRO, and not all PROs have knowledge of what they can license at any point in time. And, PROs are unwilling to provide 100% of the rights in their own repertoire, but rather only the fractions of the compositions owned by their publisher and songwriter members.[10] With each PRO operating licensing procedures based on separate databases and systems, subject to different timings of when works are registered and overlapping claims as a result of the complexity of licenses in effect, the result is an obscure and incomplete picture of licensing coverage.

This is not a system that one would have designed. In fact, the PRO system in the United States stands in stark contrast to systems that policymakers and industry stakeholders *did* design. The most obvious example is the system for licensing mechanical rights set forth in the Music Modernization Act. In Title I of the Act, Congress repaired the statutory license for mechanical rights, which had been in place for decades, and had only been designed to facilitate low-volume, work-by-work licensing—a mechanism that was entirely dysfunctional at the scale of rights needed for music streaming.

Under the old system, Congress created a statutory license for recordings of previously released music, subject to a statutory rate, but did not create a way to obtain the necessary rights in a single, simple way. Instead, licensees were required to send notices (and attendant royalties) to rights owners on a song-by-song basis, or, in the case of certain unregistered musical works, to the Copyright Office itself (at a royalty rate of zero). That system did not even function well for physical music and MP3 downloads, resulting in acrimony and ultimately settlements between record labels and music publishers arising from information deficits,

[10] The United States Department of Justice, at the conclusion of a review of the consent decrees in 2016, concluded that they "require ASCAP and BMI to offer full-work licenses" in order to achieve the pro-competitive effects of the consent decrees. *See* United States v. Broadcast Music, Inc., No. 16-3830-CV, 720 Fed. Appx. 14, 15 (2d Cir. Dec. 19, 2017) (summary order). The Second Circuit ruled against DOJ, however, on the grounds that the consent decrees did not explicitly prevent fractional licensing, without considering whether fractional licensing did in fact present anticompetitive risks. *See id.* 16-18.

fractional ownership, and other complexities discussed below.[11] The system completely fell apart in the context of streaming, where the volume of works was increased by orders of magnitude, and record companies declined to "pass through" to DSPs the musical works rights necessary to stream music but instead required streaming services to deal directly with musical works owners – the labels' own direct suppliers of songs to record, who are only indirect, upstream suppliers for the services themselves.

This fundamental shift in the market naturally led to information deficiencies and failed connections. The law did not provide a single blanket license to handle the huge volume of mechanical rights streaming services needed. The voluntary mechanisms that various private parties attempted to devise were not meeting the market needs. Everyone – rights owners and licensees alike – agreed that the system needed to be fixed.

The solution Congress devised was the establishment of a blanket mechanical license administered by a single organization – the Mechanical Licensing Collective (MLC). [12] Under this system, administration costs are borne by licensees, not rights owners; music rights owners need not keep track of song-by-song notices; and licensing and administration of rights at the scale of streaming services is actually possible. With the blessing of digital distributors, rights owners, and music creators alike, Congress transformed a system designed for the age of physical distribution of records into one suitable for the streaming era.[13]

While the PRO system is currently not the product of design, and is instead the product of history and long-standing industry practices developed in the pre-digital era, it nonetheless

[11] *See* http://nmpalatefeesettlement.com.

[12] Similarly, the separate statutory license for the digital performance of sound recordings in 17 U.S.C. § 114 is administered by a single organization – SoundExchange, Inc.

[13] Interestingly, the MLC is not permitted to license or administer public performance rights. That matters because, for streaming, mechanical and performance rights are functionally indistinguishable. A service cannot stream music lawfully without obtaining *both* types of licenses. Indeed, in this context, mechanical and public performance rights are valuable only in combination. Neither component alone has any standalone value. (This principle is reflected in the mechanical royalty rate structure established by the Copyright Royalty Board and agreed on by licensors and licensees alike, which establishes an "all-in" rate inclusive of both mechanical and public performance royalty costs.)

serves an essential purpose. As set forth above, some form of blanket licensing is necessary to ensure performance rights can be licensed at all, and the PRO system is, for better or worse, what exists in the United States and what the music industry tries to work with. In addition, the PRO system delivers real value to writers in the form of the direct payment of the writer's share. DIMA thus supports the system, so long as it is subject to an appropriate regulatory framework that recognizes the complexities of the music licensing system. For now, that framework includes the consent decrees governing the two largest PROs, and the application of competition law more generally to all others. At the same time, it is important to acknowledge the cracks in that system because, as set forth below, those cracks can give rise to significant unintended consequences, potentially destabilizing the entire system to the detriment of music creators, fans, and others in the marketplace.

B. PRO Distributions Are a Function of Usage Reporting by Licensees and Distribution Rules and Practices of the PROs

The NOI is directed to a significant extent to the distribution of general licensing royalties by PROs. Music licensing by general licensees is different in most respects than by DSPs. Among other things, general licensees are not expected to provide reporting of the actual music they perform, which means general licensing revenues are, as a general rule, received by the PROs without any information about how they should be distributed.

While our members are not general licensees, their experience may nonetheless be of assistance in addressing the challenges associated with PRO distribution practices generally. When considering these issues, it is important for the Office to consider the *reporting* of usage by licensees separately from the *distribution* of royalties by PROs. While the two go hand in hand, these are two different issues, and the experience of the DSPs can help illustrate why it is important to draw that line clearly.

DSPs provide highly detailed reporting to the PROs about billions of performances per year. The information includes metadata about every single piece of recorded music they perform, with specific information about the track, including standard identifiers such as track's International Sound Recording Code, or ISRC. ISRC is the single best standard identifier for

identifying commercially released music and, when used by stakeholders, can be critical to matching usage properly. The ability to provide this detailed information is a direct result of the relationships that DSPs have with their suppliers – the owners and administrators of the sound recordings that they distribute – and associated standards and requirements for delivery of metadata. That information often does not include publishing information of any kind – i.e., information about the record companies' own suppliers, the publishers who provide the songs for the recording. To the extent record companies provide publishing information to streaming services, it rarely if ever includes information about writer splits or PRO affiliation.

In addition to information about the specific track, the DSPs typically provide detailed information about the usage of that track – including the number of times that it was streamed – along with other information relevant to the terms of the license (whether it be revenue, number of subscribers, and so forth). Importantly, the same usage is generally reported to each of the relevant licensors.

That usage information could theoretically be used by the PROs to distribute royalties on an incredibly precise, pro-rata basis, allocating royalties to each musical work based on the actual usage of that work. In practice, however, the DSPs do not know what the PROs do with the information they receive. The PROs are voluntary organizations with enormous discretion over the rules and policies they adopt and the transparency around how they operate. Each PRO has its own distribution rules and practices, providing varying degrees of disclosure to their members, to licensees, and to the public about those practices.[14] For example, each PRO may weigh different performances differently, have different thresholds for allocation of royalties to streams, and have different procedures and practices for bonuses, advances, and other royalty distribution functions. They may also have different rules for resolving conflicts and holds.

[14] This is in stark contrast to the practice of CMOs that have been established through a policy making process. The MLC, for example, is subject to very specific rules governing how its royalties are to be distributed. *See* 37 C.F.R. § 385.21(b)(4). Similarly, SoundExchange is required to distribute "on a basis that values all performances by a Licensee equally based upon the information provided under the Reports of Use requirements for Licensees." *See* 37 C.F.R. § 380.4(a)(1).

Sometimes, PROs may not be able to handle or process the volume of data supplied by DSPs, and some PROs are not interested in receiving usage reporting at all.[15]

While it may be their prerogative to adopt their own distribution rules, a direct consequence is that each PRO may distribute royalties for the same usage in different ways. For example, when it comes to streaming royalties, ASCAP and BMI set forth slightly different (albeit general) descriptions of how they distribute streaming royalties. ASCAP explains that "[e]ach DSP has a different play count threshold for payment, based on many variables including license fees, total number of performances reported, etc.," and that "[t]hese thresholds change each quarter."[16] BMI explains that "[a]ll works in the BMI repertoire that are performed on a digital music service will be *eligible* for a Current Activity Payment," and it "calculates a unique royalty rate for each work, which is based upon the license fees collected from the service that performed the work in combination with the number of times each work streamed on the service."[17] (BMI also describes a bonus system for streamed works funded "from a general licensing pool, not directly from digital music service fees."[18]) Other PROs like SESAC, GMR, and AllTrack, have their own distribution rules and procedures. It is unclear to what extent these organizations' practices result in similar outcomes for their respective members when processing the exact same usage.

Unfortunately, the lack of clarity around distribution rules can generate substantial confusion in the marketplace, and songwriters may not have a complete picture of how much services are actually paying for the use of their works. It is not uncommon for songwriters to question the performance royalties paid by DSPs, when in fact the PROs' distributions do not match the performance royalty rates negotiated by the DSP. At some level, the confusion may be because of the incredible complexity of the flow of money paid by DSPs: Publishing royalties

[15] AllTrack, for example, explains to prospective licensees that they do not even "need[] to report any of the music played." https://licensing.alltrack.com

[16] https://www.ascap.com/help/royalties-and-payment

[17] https://www.bmi.com/creators/royalty/internet_music_mobile_entertainment (emphasis added).

[18] *Id.*

are split between the performance and the mechanical right; and the performance royalties may be split among several different PROs, each assessing its own admin rate, and each paying publishers and writers their respective shares. Writers often are not aware of how much their royalties are divided among fellow writers and their publishers, how the distribution rules are applied, and how much is retained in the form of admin rates, before it reaches their statements. The confusion could also be a product of each PRO's unique distribution rules. If a PRO's distributions are not pro rata, based on the exact usage reported by the licensee, then a writer may in fact not be receiving royalties for all performances of their work.

C. Copyright Office Questions on the Proliferation of PROs

In this section, we address the Office's topics related to the proliferation of PROs:

1. To what extent, if any, have there been increased financial and administrative costs imposed on licensees associated with paying royalties to additional PROs

Although difficult to measure, the proliferation of PROs has unquestionably imposed unnecessary financial and administrative costs on all licensees, including streaming services.

At the most basic level, every time a new PRO emerges, a licensee incurs new expenses to negotiate and implement an agreement with yet another stakeholder, increasing the costs to distribute the same songs that would have been licensed by the other PROs. It is necessarily more costly to deal with four PROs, than with three; and to deal with six than with four. And because there is no minimum size for a PRO to enter the market, nor minimum rules of operation and responsibilities that a PRO must perform, there is no limit on the number of such PROs that may emerge, and no end to the associated transaction costs.

In addition, the increase in costs with each new PRO is not linear. To the contrary, every new PRO adds considerably to the overall complexity of the entire licensing system. *First*, the licensee must determine whether the PRO is in fact legitimate – that it actually represents who it claims to represent. In some cases, this can be as simple as asking the PRO to provide a list of all the repertoire they represent, although even that request often goes ignored or is declined, or the PROs send incomplete data.

Second, the licensee must reconcile the new PRO's claims with those of existing PRO licensors. It is not uncommon for PROs to claim to represent the exact same writers – and even the exact same repertoire – especially in light of the role of licenses in effect.[19] Even if the new PRO is legitimate, writers commonly move between PROs, meaning there is complexity to what period the claim is for and at which PRO the writer resides for the period in question. Even when there are overclaims, PROs do not have an incentive to resolve or shift the value of royalties paid for that repertoire from one PRO to the other. DSPs often end up simply paying for the value of the overclaims to both PROs.

Third, and relatedly, the licensee must enter into a set of negotiations not only over the underlying rate economics, but over the share of public performances attributable to musical works or shares thereof actually controlled by that PRO. PROs – especially the unregulated PROs – have a strong incentive to inflate their pro rata share, either in aggregate or through various "cuts" of data done at their own discretion, *and* the relative value of their repertoire, leading to the untenable situation of various PROs claiming market shares that, when added together, are significantly more than 100%. This matters for a number of reasons, including that many PRO licenses are negotiated on a flat-fee basis, where one of the key assumptions driving the flat fee to which the parties need to agree is the licensor's pro rata share of the overall performance market.

Fourth, each new PRO demands additional financial obligations as well as reporting practices. If a new PRO has entered the market, then their share needs to come from an existing PRO, but often times, even if there is alignment on market share adjustments – which is unlikely as noted above – there is usually a period of time in which a DSP is paying both the new

[19] When a writer disaffiliates with ASCAP or BMI and moves to a different PRO, that writer's works may continue to be covered by the DSP's agreement with the writer's former PRO under the "license in effect" provisions of the consent decrees. Nonetheless, the writer's new PRO may base its own licensing demands on that writer's pro rata share of usage, declining to issue a license that excludes "license in effect" repertoire. And even if, as a result of such demand, the DSP wants to license through the new PRO rather than the ASCAP or BMI license in effect to avoid paying multiple PROs for the same repertoire, ASCAP and BMI maintain that the repertoire should continue to count towards *their* pro rata share, not the new PRO's, for purposes of calculating a reasonable fee. This leaves a DSP caught in the middle of a dispute between licensors, bearing the financial burden of duplicative claims with no effective process to reconcile them.

entrant and the existing PRO for the same market share, at least until the existing PRO's license has been terminated or expires.

Fifth, streaming services that rely on the Section 115 statutory license for mechanical licenses face an additional complexity. The Section 115 license rate structure set by the Copyright Royalty Board and long agreed to by industry participants features an "all in" rate encompassing both mechanical and performance rights, according to which licensees are credited with the amount of performance royalties they have paid when calculating what they owe under the statutory mechanical license. While that basic structure is well accepted, because of the uncertainty in the market for performance rights, as well as the fact that DSPs may be operating under interim PRO licenses, the actual performance right obligation may not be known until deep into, or even after, the relevant period. That leaves the final amount of mechanical royalties that are owed to the MLC also uncertain for a needlessly long time. This situation is further exacerbated by the fact that, under the MLC's interpretation of the operative regulations, services that make good faith estimates of their PRO obligation are subject to late fees if they overestimate their PRO liability.[20] As a consequence, services face the choice of either *overpaying* mechanical royalties (i.e., underestimating performance royalties) or facing the risk of late fees.

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If all of these additional costs were otherwise accompanied by improved efficiency in the overall music licensing system, increased transparency, or other benefits, then it might be possible to argue that the costs are worth those added benefits. But the opposite is true. The proliferation of PROs has increased friction in negotiations, reduced certainty, introduced substantial confusion, and has dramatically diminished transparency. As discussed more below, rather than incentivizing greater clarity, the current system actually encourages the creation of

[20] *See* Interpretive Rule, Fees for Late Royalty Payments Under the Music Modernization Act, 88 Fed. Reg. 60587 (Sept. 5, 2023).

PROs that *exploit* ambiguity and information asymmetry, instead of fixing it. We are further away from having a stable system for licensing performance rights, not closer.

2. Factors that may be contributing to the formation of new PROs

The proliferation of PROs is the direct result of the interplay of skewed incentives in the current system, all of which on their own – and especially when combined – encourage new PROs to throw up a shingle and demand license fees. The key factors are the following:

***ASCAP and BMI cover most, but not all, performances*:** As discussed above, the consent decree "system" emerged as a result of investigations and lawsuits by the Department of Justice of ASCAP and BMI. ASCAP and BMI still represent most public performances, and the consent decrees give them an express right to engage in conduct that would otherwise violate the antitrust laws subject to certain safeguards, including rate court proceedings designed to ensure reasonable license rates that would prevail in a free and competitive market between willing buyers and sellers.

Other PROs are subject only to the antitrust laws and the willingness of licensees to undertake the cost and effort required to enforce them. As a result, PROs other than ASCAP and BMI have found they can build a compelling business by attracting writers with the promise that the writers will be paid more than they would by ASCAP and BMI and then extracting supracompetitive rates from licensees in order to deliver on that promise.

Critically, the ability to extract supracompetitive rates is entirely a function of the fact that the other PROs are not subject to the same protections from anticompetitive conduct as ASCAP and BMI, even though their activities present the same risks.[21] For example, while ASCAP and BMI must offer licenses on a nonexclusive basis, unregulated PROs may not face that same restriction – meaning a licensee's *only* option may be to go to those PROs for the rights

[21] For example, SESAC was sued by both the Radio Music License Committee and the Television Music License Committee. In both cases, settlements were reached after the courts found evidence that SESAC had engaged in concerted action and violated the Sherman Antitrust Act. *Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014) (denying SESAC's motion for summary judgment); *Radio Music License Committee, Inc. v. SESAC, Inc*., 29 F. Supp. 3d 487 (E.D. Pa. 2014). Similarly, RMLC brought antitrust claims against GMR, a case that also settled after the district court denied GMR's motion to dismiss. *See Radio Music License Cmte, Inc. v. Global Music Rights, LLC*, 19-CV-3957 (C.D. Cal. Feb. 13, 2020) (denying GMR motion to dismiss).

that they need. Similarly, ASCAP and BMI are not permitted to withhold licenses in the course of negotiations; the other PROs do not face the same constraint. And while PROs may compete with each other for writers, they *do not* compete with each other for licenses. For a digital streaming service with a broad catalog of sound recordings, PRO offerings are complements to each other, not substitutes. Thus, a PRO with even a relatively small pro rata share may be a "must have" for a licensee because it is offering rights that no one else can provide and without which the service cannot safely operate or effectively compete. And, in the absence of complete repertoire information – something notoriously difficult and sometimes impossible to obtain – a licensee may face no choice but to obtain a license from a PRO to eliminate the risk of infringement and potential for existential statutory damages, discussed below. Thus, even a small PRO has the potential to affect an enormous portion of commercially valuable repertoire.

***Musical composition rights are unusually fragmented*:** The market for music publishing rights is especially fractured, and the market for *performance* rights associated with musical works even more so. As the Office is aware, songs typically have multiple writers or co-owners. That, in and of itself, is not unique; having co-authors is relatively common, and explicitly contemplated in the Copyright Act. What makes compositions unique, however, is that each writer's rights are also separately managed: Each writer has their own PRO affiliation, as well as their own publisher affiliation, and, as a matter of industry practice, PROs and publishers only license the *share* represented by their affiliated writer.[22] To license a single song, a licensee may need to go to multiple PROs, and, in some cases, a writer's PRO affiliation may not even be known. In fact, a writer may not even yet be affiliated at all.

As discussed above, the fragmentation happens across time as well. In some cases, the same writer, for the same work, may be claimed by two different PROs, due to the phenomenon of licenses in effect. A licensee may have rights to a song for one period of time, by virtue of a relationship with a PRO. If the writer switches affiliation, however, the new PRO may count that

[22] This is to say nothing of the fact that mechanical and performance rights are also separately administered, even when, as in the case of streaming services, the same licensee needs both rights for the exact same usage.

writer's share toward their own market share – increasing costs and creating the potential to duplicate PRO payments to songwriters.

This creates a scenario in which a PRO can demand a license simply by representing writers, or other copyright owners such as heirs or investors, that have a small share of popular songs, even if those shares do not come close to a majority of the song's shares. And, as explained above, because every PRO has the potential to become its own monopoly – controlling "must-have" rights no other PRO has – they are all complementary to each other, and not competitors with respect to licensing.[23]

There is no authoritative, scalable, and networked database solution providing definitive information of who controls what performing rights. When it comes to performance rights, there is no single authoritative reconciled source of information over which PRO control which share of which songs, and for which periods of time.[24] While some PROs have made recent efforts to list their repertoire publicly, and ASCAP and BMI have made their data available jointly via Songview, those databases have significant limits and do not address this defect. Because there is no single source of truth, it may be impracticable if not impossible for licensees to avoid the use of a particular PROs repertoire – creating a risk of liability for licensees who are acting in good faith.

First, there is no single database or networked database solution that contains every song, much less every share of every song, or every PRO affiliation for every such share. While Songview contains the repertoire of ASCAP and BMI, this is a privately controlled solution that does not have information from all the other PROs and is not reconciled with mechanical rights

[23] Because of the custom of fractional licensing, pro rata share greatly understates a licensor's bargaining power. Pro rata share, as commonly understood, means the sum total of the fractions controlled by the licensor in relation to all the music played by the licensee, weighted by the number of times each song is played. However, those fractions may pertain to a very large number of songs. For example, a licensor with a 10% fractional ownership share in every song a licensee wishes to play would have a 10% pro rata share with respect to that licensee (i.e., it would be entitled, at least in theory, to 10% of the royalties), but would have hold-up power – the power to threaten the licensee with infringement unless it obtains a license – for 100% of the licensee's desired repertoire.

[24] Importantly, a database alone would not solve all of the problems associated with the licensing of performance rights. But increased transparency would go a long way towards improving the system and reducing the ability of new PROs to destabilize that system.

ownership information housed in the MLC database. Even if all other PROs' repertoire were added to Songview, there is always the chance that another PRO would emerge, some writers may have no PRO affiliation at all, and the mechanical ownership picture can remain out of sync.[25]

Second, as the Copyright Office has noticed,[26] Songview is accompanied by extensive disclaimers of accuracy and usefulness. To be sure, some PROs have claimed that they will not pursue infringement claims about the use of songs that are not included in their own database. But that is cold comfort given the number of PROs in the market, including PROs that have not – and may not – make any such assurances.

Third, even if the data were authoritative and reliable, it is not presented in a way that is operationally useful. Unlike the MLC database, which must be made available in bulk upon request, licensees cannot obtain bulk access to Songview data, at least in a useful format, and it is subject to significant usage restrictions in its terms of use.

Fourth, the database lacks key information that would be essential to ingesting and operationalizing the data. In particular, Songview does not include ISRC information – even though that is the standard identifier for commercially released music. Without the ISRC, there is no way to effectively incorporate Songview data into a DSP's repertoire data.[27] DIMA members strongly suspect that PROs' own internal databases contain this information. Unfortunately, PROs are able to exploit the information asymmetry that exists between

[25] The MMA requires the Mechanical Licensing Collective to maintain a database of musical works, and to make that database available at either low or no cost. 17 U.S.C. § 115(d)(3)E). As the Copyright Office explained, that database *could* include PRO affiliation, but the MLC has declined to do so at this time, and the Copyright Office declined to require it to include such information. *See* Interim Rule, The Public Musical Works Database and Transparency of the Mechanical Licensing Collective, 85 Fed. Reg. 86803, 86810-11 (Dec. 31, 2020). That said, as the Office explained, "not requiring the MLC to include PRO affiliation does not inhibit the MLC from optionally including such information." *Id.* at 86811.

[26] NOI at 9256.

[27] The lack of ISRC is puzzling. Under the standards that have been in place for over a decade, every recording delivered to any digital music service must include the ISRC. Unlike ISWC, ISRC's are assigned before distribution, meaning they are an identifier that can be used to identify a recording from the very moment it is introduced into commerce. Moreover, usage is measured at the recording level; it makes little sense to have two different systems for tracking use of the same asset.

themselves and the DSPs (and other licensees) – using the lack of information possessed by the DSPs (and other licensees) in order both to inflate assertions about their market share to make it very difficult for a DSP to avoid using the repertoire of an emergent PRO.

***There is no combination of PROs that can, with certainty, cover exactly 100% of performance rights for all compositions*.** The two largest PROs cover roughly 90% of the market for tracks that have been "matched" with the owners of their underlying musical works (because many tracks remain "unmatched," their actual pro rata shares are significantly lower). The market share of the remaining PROs is unknown and in great dispute. One thing that is clear – the disputed amount seems to add up to over 10% of matched tracks, the expected 'rest of market' assuming ASCAP and BMI still control 90%.

This creates an environment of uncertainty in which licensees know their PRO licenses may not cover the entire market, but do not – and cannot – know with certainty what percentage is not covered. The description of the current landscape by AllTrack is not that far from the mark: "The *only* way to obtain complete copyright compliance and protection in the U.S. for performing rights is to obtain music licenses from *all of the U.S. PROs*"[28] – even those that did not exist a few years ago, and including those that may spring up over the next two years. Of course, even then, a licensee cannot be confident they have all the rights they need, because many songs may be owned in part by persons who are unaffiliated with any PRO.

The availability of statutory damages provides an enormous incentive for new PROs to emerge. The remedies available under the Copyright Act provide a powerful incentive for upstart PROs to destabilize the existing PRO blanket licensing system, in a way never contemplated by Congress. A PRO claiming to represent even a relatively small part of the market can credibly assert that ignoring them could cost a licensee up to $150,000 per work controlled (or partially controlled) by that PRO. The impact of this threat is not hypothetical; it is, in fact, a significant part of new PROs' demand for attention.[29] Importantly, the U.S. is

[28] https://licensing.alltrack.com (emphasis added)

[29] *See, e.g.,* https://licensing.alltrack.com ("Failure to obtain proper advance permission places any business using music at risk of violating US Copyright Law, which can carry statutory penalties of up to $150,000 per song played."); https://globalmusicrights.com/faq ("If you are found to be in violation of the Copyright Act, you can

unusual in the world for its statutory damages regime, and that alone could explain the reason that upstart PROs have found this to be an attractive market in which to launch.

PROs do not need approval from a licensing body or other governmental organization before operating. In the United States, there is no licensing or governing body that oversees performing rights organizations to ensure new organizations are, in fact, legitimate: No one to ensure that a new PRO represents a significant part of the market, meets certain minimum standards, or is otherwise contributing to the proper functioning of the licensing system. As a consequence, anyone who wants to declare themselves to be a PRO can do so – potentially disrupting the entire music licensing marketplace – something that has been made all too clear in recent years.

* * *

These factors, alone and in combination, have created a situation in which PROs have found they can build a business based on the ambiguity and uncertainty inherent in the current system, in a way that could ultimately undermine the integrity of the existing performance rights infrastructure. The deeply fragmented and uncertain rights landscape, the lack of a comprehensive regulatory regime governing blanket licensing of performance rights, and the availability of statutory damages in claims against licensees have created a scenario in which new entrants can extract supracompetitive rates and nuisance fees. Rather than addressing the issues related to ambiguity and uncertainty in the current PRO system, new entrants can exploit those defects, convincing licensees to obtain a license at supracompetitive rates, in order to mitigate risk.

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be fined for damages, as well as for the copyright owner's legal fees. If the court finds your infringement to have been willful, you may be subject to statutory damages of $150,000 for each song performed without proper authorization."); https://promusicrights.com/q-a ("If you are found to be in violation of Copyright Law, you can be fined for damages, as well as for the copyright owner's legal fees. If the court finds your infringement to have been willful, you may be subject to statutory damages of $150,000 for each song performed without proper authorization."); https://www.sesac.com/frequently-asked-questions ("Those who perform copyrighted music represented by SESAC without the required permission may be determined by the courts to be willful infringers. This status subjects the unlicensed music user to damages ranging up to $150,000 for each song performed without proper authorization.").

Unfortunately, the losers in this situation are all the other stakeholders: Licensees face increased administrative costs not to mention information deficits, which has created an inefficient marketplace with very real risk of overpaying for performance royalties, and writers' and rights owners' revenue streams are reduced because of an ever-increasing number of intermediaries, steadily diminishing everyone's confidence in the overall system. The proliferation of PROs creates more uncertainty, not less, and damages the very PRO system that the industry depends on.

3. Recommendations on how to improve clarity and certainty for entities seeking to obtain licenses from PROs to publicly perform musical works

To the extent the Copyright Office or Congress wants to explore policy solutions, DIMA believes the above factors provide an appropriate guide. In particular, we think those factors point to the following basic guiding principles:

1. Good actors – such as DIMA's members – that are trying in good faith to obtain performance licenses from the existing PRO system should not face the risk of crushing liability, without a corresponding clarity and certainty from that same system.

2. Music licensing should be simpler and more transparent, and any reform should reward those who bring greater clarity into the system, correcting existing information deficits, and reduce the incentives to increase ambiguity and dysfunction.

3. Blanket licensing of performance rights is essential to the proper functioning of the market, and should be preserved, subject to appropriate protections designed to guard against the potential for competitive harms.

4. Royalty rates should be transparent and clear, and the rates for Section 115 services should reflect the fact that performance and mechanical rights are inextricably intertwined.

In short, the licensing of performance rights is a critical part of the entire music ecosystem. Performance royalties represent approximately half of publishing income, and for many writers, their PRO distributions may be their most reliable form of revenue. This part of the market depends on a well-functioning system for licensing those rights, and it is critical to bring more transparency, clarity, and certainty, not less.

Conclusion

DIMA appreciates the opportunity to provide comments in this proceeding and hopes these have been helpful for the Copyright Office as well as other stakeholders in the music community. We are available to discuss any of the above comments with the Copyright Office if so requested.

Respectfully submitted,

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