

FUTURE OF MUSIC COALITION: SECOND REQUEST FOR COMMENTS IN THE COPYRIGHT OFFICE'S MUSIC LICENSING STUDY

Docket No. 2014-03

September 12, 2014

I. Introduction

Future of Music Coalition (FMC) is pleased to submit the following to the Copyright Office in its Second Request for Comments in its Music Licensing Study.

FMC is a not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities. FMC seeks to educate the media, policymakers and the public about issues at the intersection of music, technology, policy and law while bringing together diverse voices in an effort to identify creative solutions to challenges in this space. FMC documents historic trends in the music industry, while highlighting emerging structures that may empower artists and establish a healthier music ecosystem.

As performing artists, composers, independent label owners, music publishers and advocates, FMC has paid close attention over the past 14 years to developments in the technology space and their impact on music creators. Having responded in depth to the questions raised in the Copyright Office's initial inquiry, the following comments will focus on the direct licensing of performances for musical works and sound recordings and the mechanisms for creator remuneration within each.

II. Musical Works

The trend towards direct licensing of musical works for public performance is troubling.

Songwriters not under contract with the bigger publishers could find themselves in weakened PROs that are less effective in rate-setting negotiations. The PROs themselves may become the administrative functionaries of just a handful of major publishers who will utilize them as mere administrative functionaries. While the multinational, consolidated music publishers may have a large enough market position to successfully negotiate with licensees, independent publishers will certainly not be in the same position and will be unable to compete in an uneven marketplace. Songwriters that are with the bigger publishers may find themselves at the mercy of the owners of their songs when it comes to direct and equitable distribution of revenue. While it is somewhat encouraging to see BMG enter an agreement with Pandora due to the fact that it at the very least shows that deals are possible to achieve without the so-called “nuclear option” of full catalog withdrawal, it nonetheless raises questions about transparency and leverage for songwriters.

As we have pointed out in our original filing in this inquiry, as well as our statement to the Department of Justice in its review of the PRO consent decrees, there are possible solutions that don't involve diminishing the ability for ASCAP and BMI to effectively serve smaller songwriters and publishers. We recognize the frustrations of those in the musical works community over rates, but we caution those who would sacrifice crucial leverage and the guarantee of fair splits for the mere possibility of higher rates when it is just as likely that rates could go *down* for many publishers and songwriters under a direct licensing regime. Even the big publishers should be wary: if the marketplace for the performance of musical works becomes Balkanized, there is a higher likelihood of market failure, and therefore the possibility of eventual Congressional intervention. We can't imagine the major publishers being excited to be placed under legislative oversight, but it very well may be the only solution if they continue to run roughed over the marketplace for musical works.

Strong PROs are crucially important to songwriters. They provide leverage to artists who

wouldn't otherwise have it in rate negotiations with music services; they pay their songwriter members directly under fair splits (50-50 between writer[s] and publisher,[s] paid directly to the writer[s]); and they allow music to be efficiently licensed to AM/FM, Internet and satellite radio, giving listeners more opportunities to hear music while providing songwriters with more opportunities to get paid. PROs also include songwriters in within their governance structures, which cannot be said about the major music publishers.

The Department of Justice is right to conduct an examination of the existing consent decrees with an eye towards potential modification. We see potential in moving to an arbitration model for rate dispute resolution, but would again suggest that transparency not be abandoned in favor of speedy determinations. Interim rates are also a solution worth exploring, provided that they balance the interest of all parties and allow for music consumers to continue to enjoy an array of licensed content.

Partial rights withdrawal may seem like a workable proposition until one more closely considers the details. There is also a practical risk to songwriters under partial publisher withdraw of rights in that there are often numerous songwriters within a single musical composition. If publishers are allowed to withdraw partial rights and directly license, a co-writer not under a contract with the withdrawing publisher and thereby not covered by the direct license is left in a highly vulnerable position. This would be an unacceptable situation for songwriters, and runs counter to the objectives of collective licensing, in which multiple parties receive maximum benefit by pooling resources under mutually agreed-upon standards. Allowing partial or limited grants of rights to PROs may achieve some of the benefits of collective licensing by sacrificing transparency and oversight, which is a fundamental component for encouraging competitive practices. The major consolidated publishers will benefit while songwriters, independent publishers and small music platforms that are not in a strong position to negotiate will be unfairly disadvantaged.

FMC is on record in suggesting that Congress may want to consider relocating the rate-setting for musical works to the Copyright Royalty Board and sunsetting the DOJ consent decrees. This way, there would be a baseline of transparency, and publishers and songwriters would have less distance between the rate standards employed for sound recordings and their own processes. Absolute parity may still be difficult to achieve, but it would certainly be a step in that direction, as the CRB judges have direct experience in evidentiary proceedings for a range of uses, from mechanical royalties to the digital public performance of sound recordings. Until the day comes when Congress is in a position to redraw the lines for rate-setting, we believe that any modification to the consent decrees must be done so thoughtfully and with the utmost care so as not to create an permanently tilted playing field for songwriters and independent publishers.

III. Sound Recordings

Future of Music Coalition supports the Section 114 statutory license because of the mechanisms through which it compensates performers. Under current provisions, royalties generated from the performance of sound recordings on non-interactive services are paid out via the nonprofit SoundExchange, which provides direct and simultaneous delivery of monies to performing artists and rightsholders under equitable splits. Also significant is the fact that the performers' share is paid directly and not held against an artists' debt to a label for costs incurred in the manufacturing, distribution and marketing of a recording. Furthermore, we appreciate that a percentage of the money collected for digital transmissions of sound recordings (5 percent tabulated from SoundExchange performance data) is apportioned for background musicians and singers for distribution through the AFM/SAG-AFTRA Intellectual Property Rights Distribution Fund.

Direct licensing has been put forward as a "solution" by some in the space, particularly terrestrial broadcasters that continue to enjoy an unfair exemption that allows them to not pay performers and sound copyright owners under law. Currently, there are a handful of

deals between major labels, indie labels and even a superstar band to be compensated for AM/FM on a percentage of revenue calculation. However, this is not a panacea for the lack of a public performance right. It is important to understand that these deals will not make a difference to the vast majority of performers who lack the leverage to be at the negotiation table. Furthermore, these deals are not transparent. We have heard that as part of these deals, the major broadcasters and rightsholder parties have agreed to trade *some* compensation for terrestrial plays for reduced per-digital-play rates. This means that compensation for musicians and labels could actually be lower if such deals become commonplace, or if digital radio achieves greater market share than its terrestrial counterpart.

By contrast, under the statutory license for digital performances of sound recordings, splits are equitable, easy to understand and paid out directly to performers by the nonprofit SoundExchange. The SoundExchange board is evenly split between labels and artist representatives, which gives artists legitimate power and collective leverage in future rate-setting proceedings. Direct licensing undermines these important artist protections.

We note the recent deal between Pandora and Merlin, a licensing body for independent labels. While we are pleased that the nation's largest webcaster recognizes the value of independent music and that the deal reportedly preserves the artist payment structures of the statutory license (performer money is paid through SoundExchange), the deal raises many of the same questions about transparency as are common to other direct licensing agreements. We also wonder about the possibility of "algorithmic payola" on a service that has done so much to highlight musicians based in listener preference rather than commercial favoritism. Furthermore, we recognize the potential for unattributed income that rankles the independent labels when majors make direct deals with services under non-disclosure agreements.

IV. Conclusion

Future of Music Coalition appreciates the opportunity to be a part of this important process and offer our organization as a resource in further inquiries into music licensing and the impact of copyright and technology on musicians and composers.

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