



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

5 August 2014

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

**Antitrust Division Review of American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") Consent Decrees ("Review")**

We, Performing Right Society Limited ("PRS"), thank the U.S. Department of Justice, Antitrust Division ("Department"), for inviting interested persons to provide information or comments relevant to whether the Consent Decrees continue to protect competition as part of the Review. As detailed further below, we are writing to make the following submissions, which we hope will be of value to the Department:

- ASCAP and BMI are key trading partners for PRS, collecting over US\$100m for PRS's repertoire in the US last year. Any restrictions on ASCAP or BMI's ability to administer PRS's repertoire effectively in the US will directly prejudice the royalties flowing to PRS's members and undervalue PRS's members' musical works in the US
  - ASCAP and BMI should each be permitted to accept partial grants of rights – this is in the best interests of rightholders and will better protect and promote competition in the US
  - ASCAP and BMI should each be permitted to participate in the licensing of rights beyond the performing right – this is in the best interests of all stakeholders and will better protect and promote competition in the US
1. **ASCAP and BMI are key trading partners for PRS, collecting over US\$100m for PRS's repertoire in the US last year. Any restrictions on ASCAP or BMI's ability to administer PRS's repertoire effectively in the US will directly prejudice the royalties flowing to PRS's members and undervalue PRS's members' musical works in the US**
    - 1.1. PRS is a collective management organisation ("CMO") in the UK which manages and administers the performing right in the musical works of its members throughout the world, either directly or through representation agreements with overseas CMOs: in the US, PRS has representation agreements with ASCAP, BMI and SESAC. PRS is one of the largest performing right CMOs in the world, representing over 100,000 members and distributing over £400m (or US\$700m) to its membership in 2013.
    - 1.2. PRS is in a unique position: it is one of the largest "net exporters" of musical works, meaning that PRS gets more receipts from overseas exploitation of its repertoire than it pays out for the exploitation of foreign repertoire. As a result, it is imperative to PRS that its repertoire is licensed overseas by its partner CMOs in the most effective way possible in order to maximise royalties due to PRS members.
    - 1.3. PRS's view is that the Consent Decrees directly affect the market for the provision of copyright administration services to CMOs ("inter-CMO services market"), and not just the market for the licensing of the public performance right to users<sup>1</sup> in the US. Generally, any

<sup>1</sup> The European Commission has identified that there are three relevant product markets in the collective management of copyright: the provision of copyright administration services to rightholders; the provision of copyright administration services to

restrictions on the ability of PRS's partner CMOs to license PRS's repertoire overseas will directly impact (i.e. limit and reduce) PRS's receipts and the royalties flowing to its members, who PRS must ensure are properly remunerated for any exploitation of their musical works wherever in the world.

- 1.4. Specifically, if the Consent Decrees do not allow members to decide whether it would be more efficient to appoint ASCAP or BMI for certain types of exploitation of the performing right but not others (for example, see below in Section 2), there is a real risk that major members will withdraw completely from ASCAP and BMI, which would result in ASCAP and BMI's repertoire becoming less valuable: this could lead to a reduction of rates achieved in the market on PRS's behalf by ASCAP and BMI and the application of higher commission rates in order to meet their costs. Clearly, this would be to the detriment of members who may continue to be represented by the US CMOs and by CMOs internationally, particularly the members of PRS<sup>2</sup>.
  - 1.5. PRS is therefore very concerned about the way in which the Consent Decrees, if not revised to reflect the changing market conditions, could prohibitively restrict ASCAP and BMI's ability to license PRS's repertoire effectively in the US and prejudicially impact the inter-CMO services market to the detriment of PRS's members. PRS urges the Department to consider the relevance and the impact of the Consent Decrees not only on ASCAP and BMI in the US market, but also on the inter-CMO services market and overseas CMOs including PRS.
2. **ASCAP and BMI should each be permitted to accept partial grants of rights – this is in the best interests of rightholders and will better protect and promote competition in the US**
- 2.1. The European Commission ("Commission") investigated whether GEMA (the performing right CMO in Germany) was abusing its dominant position in contravention of EU competition law in the 1970s, following which the Commission published two decisions in 1971, known as *GEMA I*<sup>3</sup> and *GEMA II*<sup>4</sup>. Essentially, the Commission held that it was necessary for members to be able to withdraw certain categories of rights and/or forms of utilisation of rights ("GEMA Categories") (as opposed to work-by-work withdrawal or complete withdrawal) from CMOs.
  - 2.2. The Commission further issued a Recommendation<sup>5</sup> on the management of online rights in musical works in 2005, which advocated the ability of rightholders to authorise a CMO of their own choice to manage and administer online rights for the entire EU. Consequently, the ICMP/CIEM (the world trade association of music publishers) and GESAC (the umbrella organisation for CMOs in Europe) issued a Common Declaration<sup>6</sup>, which recommended that the existing GEMA Categories should be amended to also include withdrawal for online exploitation from CMOs. How this partial withdrawal of rights for online exploitation was played out in Europe is further explained in Section 3 below.
  - 2.3. In Europe, CMOs gave effect to the GEMA Categories in their constitutions, as originally described in *GEMA I* and *GEMA II* and further advocated by the Recommendation and the

---

other collecting societies; and the licensing of public performance rights to commercial users. See, for example, para. 49 of the (now partially annulled) decision in Case COMP/C2/38.698 – CISAC ([http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38698/38698\\_4567\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf)).

<sup>2</sup> PRS has enjoyed long relationships with ASCAP and BMI and, today, considers ASCAP and BMI to be two of its most important partner CMOs: in 2013, ASCAP and BMI together collected more royalties for PRS than any other two CMOs for exploitation of PRS's repertoire - they are clearly a significant source of income for PRS's members. PRS is, however, not compelled to appoint ASCAP or BMI to license on its behalf and will always choose the most efficient way of representing its members' rights in the US. In the event that the effect of the Consent Decrees leads PRS to consider it more efficient to license its repertoire directly rather than via an intermediary such as ASCAP/BMI, this would not only have an adverse impact on ASCAP/BMI but may also have the effect of increasing transaction costs for users as they would also be required to negotiate a licence with PRS in addition to ASCAP/BMI. Such an outcome is not desirable for PRS, ASCAP/BMI or commercial users.

<sup>3</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31971D0224>

<sup>4</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31972D0268>

<sup>5</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:276:0054:0057:EN:PDF>

<sup>6</sup> [http://www.authorsocieties.eu/library/download/21/document/icmpgesacdeclaration\\_final\\_en\\_070706.pdf](http://www.authorsocieties.eu/library/download/21/document/icmpgesacdeclaration_final_en_070706.pdf)



- Common Declaration. Specifically, PRS's Articles of Association<sup>7</sup> allow members to withdraw the GEMA Categories as set out in Articles 7(cc) and 7(cd) by giving three months' written notice in accordance with Article 9(f). PRS's constitution therefore allows PRS to accept a partial grant of rights from PRS's members.
- 2.4. PRS urges the Department to align its thinking with the Commission and consider the pro-competitive effect of allowing rightholders to grant rights partially to CMOs: it is in the best interests of rightholders to choose the most efficient way in which to license their intellectual property (i.e. either directly or via an intermediary). Moreover, as further explained in Section 1 above, the consequences of not allowing a partial grant of rights to ASCAP and BMI in the US could have a prejudicial effect on the inter-CMO services market.
  3. **ASCAP and BMI should each be permitted to participate in the licensing of rights beyond the performing right – this is in the best interests of all stakeholders and will better protect and promote competition in the US**
    - 3.1. In Europe, there has been significant change in the multi-territory licensing of rights for online/new media exploitation, which has led to the ability for CMOs to license performing and mechanical rights together (directly or via joint ventures such as CELAS<sup>8</sup>), therefore responding to the needs of online/new media services and enhancing competition for rightholder mandates between CMOs in Europe.
    - 3.2. Specifically, many publishers reorganised the way in which they were operating, and chose to appoint one or more CMOs to administer centrally the licensing of their mechanical rights for online/new media services. In parallel, it was necessary for such publishers to conclude agreements with performing right CMOs to license the performing right alongside the mechanical right in licences with online/new media services. As a result, this enhanced competition between CMOs to win mandates from the publishers, therefore incentivising CMOs to improve the efficiency and effectiveness of their services in Europe.
  4. **Conclusion**
    - 4.1. PRS urges the Department to: (i) consider the effect of its review on CMOs that rely on ASCAP and BMI as trading partners; and (ii) ensure consistency with the approach taken in Europe, particularly given the Department's long history of cooperation with the Commission in aligning the competition laws of the US and the EU.

---

<sup>7</sup> <http://www.prsformusic.com/SiteCollectionDocuments/About%20MCPS-PRS/PRSMEMART.pdf>

<sup>8</sup> <https://www.celas.eu>