

August 6, 2014

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U.S. Department of Justice  
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By email: [ASCAP-BMI-decree-review@usdoj.gov](mailto:ASCAP-BMI-decree-review@usdoj.gov)

**Re: American Society of Composers, Authors and Publishers (ASCAP)  
Broadcast Music Inc. (BMI)  
Antitrust Consent Decree Review**

The Society of Composers, Authors and Music Publishers of Canada (SOCAN) appreciates this opportunity to submit comments to the Department of Justice (DOJ) concerning the above-noted matter.

SOCAN is Canada's music performing rights society. Pursuant to the applicable provisions of the Canadian *Copyright Act* (the "*Act*"), SOCAN carries on the business, on a not-for-profit basis, of granting licences for the public performance and communication to the public by telecommunication of musical works in Canada. Essentially, SOCAN owns and/or administers in Canada the performing rights in the world repertoire of copyright protected music, including the works of U.S. authors, composers and publishers.

As a general comment, SOCAN submits that amendments to the Consent Decrees are needed in order to allow ASCAP and BMI to operate properly and effectively and, in the process, to better serve all stakeholders, including creators, publishers and their societies, as well as the commercial enterprises that use their music as part of new technologies to generate new sources of revenue from customers. Simply put, the Consent Decrees have long ago ceased to be relevant in the modern era of online music distribution services. New measures and initiatives that recognize the reality of the new landscape are required if ASCAP and BMI are to remain relevant and continue to fulfill the fundamental role that they play in the worldwide system of collective administration of copyright.

In this respect, SOCAN wishes to emphasize that the DOJ's review of the Consent Decrees has significant implications going far beyond the borders of the United States. ASCAP and BMI are central players in the worldwide system of collective administration of copyright. Using Canada as an example, a great number of musical works originating from the U.S. are administered by SOCAN in the Canadian territory pursuant to reciprocal agreements with ASCAP and BMI. Conversely, the American societies administer in the U.S. the works created and published by SOCAN's Canadian members. It is for this reason that SOCAN and the dozens of other performing rights societies around the world have a real and substantial interest in the DOJ's current review of the Consent Decrees. The outcome stands to impact significantly the ability of ASCAP and BMI to operate efficiently and, in the process, generate reasonable compensation for the use of the world's repertoire of music in the very significant market that is

the United States. The DOJ's review stands to affect us all.

In addition to the above, SOCAN wishes to comment briefly on rate court proceedings and the importance of access to all relevant information for the purpose of establishing reasonable fees. Each issue is discussed below.

#### A. Rate Court Proceedings

It is SOCAN's understanding that, in U.S. rate court proceedings, ASCAP and BMI always have the burden of proof to establish the reasonableness of the fees that they seek. More specifically, the task is to determine the fair market value of blanket licenses for the public performance of music. Should the societies not succeed in establishing that the proposed fee is reasonable, the Court is to determine a reasonable fee based upon all the evidence.

SOCAN submits that the current approach to valuing the rights of the societies in the U.S. is flawed, for a number of reasons. First, experience continues to show that establishing the fair market value of performing rights is typically a very difficult and subjective exercise. To saddle the societies with such a burden without exception appears arbitrary and baseless, particularly when the users of their repertoire have a legal right to a license for that use upon request, a licence which may be free of charge or at low interim fees for lengthy periods of time pending a decision of the rate court. SOCAN suggests that the burden associated with the establishment of a reasonable fee should rest with both parties equally, as both have a significant, albeit different interest in the outcome as payor and payee, respectively.

Moreover, as a general principle of copyright law, a user requires the authorization of the copyright owner prior to engaging in any protected use. Without prior authorization, the user infringes the owner's rights. The authorization can be and usually is the subject of conditions, including payment of a fee, which can be made payable prior to or during the use in question. Yet, in U.S. rate court proceedings, not only is the right of the societies to withhold use taken away from them, they are also charged with the burden of proving the nebulous concept of what constitutes fair market value of the music performing rights at issue. This clearly puts the societies at a disadvantage vis-à-vis their user counterparts, who have the less onerous task of responding to the societies' evidence and arguments with what appears to be a much lesser evidentiary burden.

A fairer and more balanced approach would be to treat disputes by way of private arbitration between the parties. That is similar to the approach that the Copyright Board of Canada takes for the purpose of valuing SOCAN's performing rights. An arbitration style proceeding has proven to be more conducive to an efficient means by which to elicit probative evidence in support of the various positions being advanced before the Board.

#### B. Bundling of Rights

Strictly speaking, the administration of performing rights and reproduction rights in Canada is conducted separately by SOCAN (performing rights) and CMRRA-SODRAC Inc (CSI) for reproduction rights. However, there are no regulatory obligations on either SOCAN or CSI to restrict their respective licensing activities to a single right. Each

collective has the full flexibility to offer services in one or both of these areas of licensing, in a manner consistent with most other jurisdictions of the world.

Particularly in the environment for digital music uses, licensees are looking to streamline their activities in order to effect cost savings and advance their business opportunities on a timely basis. Permitting collective societies to organize themselves in a way that can accommodate the needs of users in this respect has become increasingly important. SOCAN suggests that the DOJ amend the Consent Decrees to allow ASCAP and BMI to administer music rights on a bundled basis should they so choose, without restriction

We hope our comments will be useful, and thank the Department of Justice for taking them into consideration. We would welcome the opportunity to elaborate on the contents of this submission as may be required by the Department.

Yours truly,

A handwritten signature in blue ink, appearing to read 'Gilles Daigle', with a long horizontal flourish extending to the right.

Gilles Daigle

GMD / jb