BEFORE THE

U.S. COPYRIGHT OFFICE

LIBRARY OF CONGRESS

WASHINGTON, D.C.

Study on the Right of Making Available Docket No. 2014-2

The Music Managers' Forum (MMF) and the Featured Artists' Coalition (FAC), both of the United Kingdom wish respectfully to submit brief comments to the Office in response to the Request for Additional Comments Notice of July 15, 2014 and more particularly in response to Question 6.

Introduction:

The Music Managers Forum[1] was established in the United Kingdom in 1992. The MMF is the largest representative body of artist managers in the world. The organisation has over 400 members in the UK, representing more than 1,000 of the world's most successful recording artists.

The MMF is allied closely to the UK Featured Artists Coalition[2] ("FAC"), a body founded in 2009 to promote the interests of featured (or contracted) UK recording artists (as opposed to session musicians who are represented by the British Musicians' Union[3]). The FAC aims to educate and advise recording artists in collaboration with the resources of the MMF, to promote the artists' legal and commercial interests in the UK and elsewhere.

The emphasis at both the MMF and the FAC is on implementing positive actions to assist our members with a keen eye on the next generation of creators, innovators and entrepreneurs. Both organisations provide a collective voice and focus on providing real, meaningful information and support for FAC members and, for the MMF, for the authors and recording artists our members represent. We aim to help unlock investment, open new markets, encourage a fair and transparent business environment and drive a global agenda appropriate for this digital age.

[1] http://www.themmf.net/about-us/
[2] http://thefac.org/about/
[3] http://www.musiciansunion.org.uk/

The MMF maintains regular contact and shares information with managers in other countries with particular emphasis on the USA – mindful of the market power of the English-language music repertoire. The MMF and FAC are represented via NGOs at WIPO and actively collaborate with the British Musicians' Union on policy matters in Britain and Europe.

The MMF and the FAC have that sit on the board of the UK collecting society that remunerates performers for the communication to the public of the sound recordings embodying their recorded performances, Phonographic Performance Ltd (PPL)[4].

We hold regular meetings with the local authors' collecting societies for musical works (PRS for Music[5] - for the communication to the public right - and MCPS[6] - for certain uses of reproduction). These two author societies together administer licence revenues for musical compositions arising from the exercise of the communication to the public right and its sub-set, that of the right of making available to the public. More recently the MMF has established more formal dialogue with the International Confederation of Authors and Composers Societies of (CISAC)[7], the international body representing authors' societies worldwide and the party allocating ISWC numbers to the world works repertoire of musical works. Both the MMF and the FAC have developed closer ties with the CISAC music creators' council, CIAM[8], and the US/Canadian songwriters' organisation Music Creators North America[9].

FAC members and MMF members' clients are authors and performers contracted to publishers and record labels respectively. Some (but not all) authors and performers we work with have been able to retain their copyrights, simply mandating a third party to manage licences and collect revenues. The MMF members (managers) are not as a rule right [RIGHTS] owners. The contractual relationships that MMF members have with their clients are based on an agency model, with commission rates varying but seldom, if ever, more than 20% of a client's income. Our members owe a fiduciary duty to their clients. UK law is such that these management contracts are regarded as ones that regulate the supply of personal services and specific performance cannot therefore be enforced. As a result relations between MMF members and their clients are highly personal. Our members' client are both songwriters and featured performers, as well as studio producers.

[4] Phonographic Performance Ltd http://www.ppluk.com/
[5] http://www.prsformusic.com/aboutus/ourorganisation/Pages/default.aspx
[6] The Mechanical Copyright Protection Society
[7] http://www.cisac.org/CisacPortal/page.do?name=rubrique.1.1
[8] http://www.cisac.org/CisacPortal/page.do?id=29
[9] http://musiccreatorsalliance.com/The_Music_Creators_Alliance/the_music_creators_alliance.html

Executive Summary:

1. Revenues arising from the making available right are shared 50/50 between authors and publishers in an administrative business model centred around non-profit collective administration bodies. This benefit extends to US authors whose works are accessed in this manner outside the USA.

2. Performers have not been so fortunate. The UK government implemented the making available right in a manner that expressly excludes all performers from equitable remuneration for this sub-set of the communication to the public of their recorded performances.

3. The UK government has failed, in this respect, to honour its obligations as signatory to the WIPO Copyright Treaty which treaty was expressly established to clarify the communication to the public right and ensure revenue from online dissemination flows to music creators as well as to right holders. The right should not distinguish between streams or downloads and should place the emphasis upon the access to the work, not the nuances of direct or indirect methods of access, the device or the business model.

4. The statutory implementation of the making available right in this manner has had the effect of enabling record labels to collect and retain from online monies between twenty and as much as fifty times – see Artist A example below – as much as that which is paid to performers, US and UK performers alike.

5. The statutory implementation of the making available right in this manner has also disenfranchised an entire constituency of performers, the session musicians and backing vocalists, who participate in no revenue whatsoever when music is distributed online. This penalises US session musicians and backing vocalists as well and should be challenged.

6. By flagging "unintended" consequences, we hope that the USA can prevent these damaging practices being allowed to prevail if changes are to be initiated; and the Sound Exchange model for the management of performers' remuneration should be the continued mechanism for licensing and distribution in the online dissemination of music (especially if the right to remuneration is extended to terrestrial and all online delivery

platforms). Direct licences by publishers and labels are opaque and inequitable as between creators and right owners.

Question 6: Please provide any additional comments or suggestions regarding recommendations or proposals the Copyright Office might wish to consider as it concludes its study.

We do not intend to comment on the substance of either US statutory provisions as they touch upon the making available right laid down in the WIPO Treaties[10] or the US case law that has considered issues surrounding the exercise of the making available right. Save for the clarification delivered by the June 2014 Supreme Court decision in *Aereo*, the current US position appears to us to be usefully set out in the Joint Comments of ASCAP, BMI, the SGA, SESAC and the NMPA[11](the Joint Comments). In the Joint Comments we particularly endorse the text on page 14[12] that highlights the fact "that the focus is on access to works [our emphasis], not performances or transmissions, thereby eliminating any difference between streams or downloads and placing the analysis of who may access the work, not the specific transmission".

As representative bodies directly and indirectly promoting the interests of authors and performers, when approaching any policy or proposed statutory developments our starting point is always by reference to two specific factors within the general landscape of deliberations. These two factors are the obligations that arise by statute and those that are imposed by contract. It is our intention in commenting, therefore, to describe the commercial and practical impact upon our respective constituencies of the introduction of the making available right into United Kingdom law broadly by reference to these two factors.

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[10] WIPO Copyright Treaty art. 8, Dec. 20, 1996; WIPO Performances and Phonograms Treaty arts. 10, 14, Dec. 20, 1996.

[11] JOINT COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC., THE SONGWRITERS GUILD OF AMERICA, SESAC, INC., AND THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION Pages 4 to 12.

[12] The broad nature of the right was drafted to ensure: (1) all on-demand transmissions are covered ("in such a way that members of the public may access these works from a place and at a time individually chosen by them"); (2) that the focus is on access to works, not performances or transmissions, thereby eliminating any difference between streams or downloads and placing the analysis of who may access the work, not the specific transmission ("in such a way that members of the public may access these works from a place and at a time individually chosen by them"); and (3) that the action is formulated in the permissive such that mere offering of works – whether or not actually received by the public – triggers the right ("in such a way that members of the public may access these works from a place and at a time individually chosen by them.") Rome Convention for the protection of Performers, producers of Phonograms and Broadcasting Organisations (1961)

First we shall touch upon the position of authors and the UK making available right. Secondly, we shall outline of the wording of the statute and how the wording has impacted performers, the manner in which the right is being administered within the licensing framework in the UK and the impact of these licensing practices upon the livelihoods of performers. We include an illustration of the UK position of the financial consequences under a recording contract for a UK heritage artist. We shall report how US and UK session musicians have been utterly excluded by the policies of the UK record labels from any participation in revenues arising from the digital dissemination of the music they helped to create. From the perspective of the FAC this disenfranchisement of their musical colleagues is a matter of profound concern

We hope that the USA, as a nation with an express constitutional protection for creators (authors), may avoid causing the equivalent damage to the livelihoods of an important sector of the nation's creative community were any changes be recommended as result of this Study by the Copyright Office.

Authors: The UK, Europe, Making Available and CMO Administration

The Office will be familiar with the operation of authors' societies (such as ASCAP, BMI, SESAC) and the international network of reciprocal agreements that enable authors and owners of musical works to issue licences for the use of musical works worldwide for the entire global catalogue of songs and compositions. It is this network of agreements that enables US authors to be paid for the use of their works outside the USA. Societies in Europe issue licences and collect revenue for the communication to the public of musical works (broadcast, public performance). The introduction of the making available right as a sub-set of the communication right has been incorporated into the activities of these societies and we would draw the Office's attention to our recent Submission to the US Department of Justice[13] (attached as an Annexe 1) which illustrates the way in which the twin acts of reproduction and communication to the public (as making available) are currently being managed across Europe for authors and their publisher partners. This system of collective licensing enables revenues from the exercise of the making available right to flow back to the USA for the benefit of US authors in transparent, balanced 50/50 author/publisher shares.

Were direct licensing contracts (outside the CMOs) to be concluded, such as those that ultimately so penalised the entire author and music publishing community in the well-publicised

[13] In particular to Section 1 at pages 4 to 7

DMX case in the USA and which are now being sought by major publishers in the US digital sphere, we cannot be sure of authors being paid their full 50%[14] or that their shares will be calculated by reference to the full value of the monies paid by licensees.

Performers: Statute - the UK, Making Available and Performers' Remuneration

Authors whose works are exploited in the EU are, as far as we can determine, receiving a 50% share by direct payment from the CMOs of monies arising from the exercise of the making available right. However, the situation for the British performer is nothing like as simple, transparent or as positive. And, while the nugatory levels of payment to featured performers are to be decried, the total exclusion from this revenue of the session musician by the UK record labels is unacceptable.

The United Kingdom became a signatory to the international treaty, the Rome Convention[15] in 1961. The Convention, in addition to granting performers certain rights of consent, granted qualifying phonogram producers or performers or both [our emphasis] a right to a "single equitable remuneration"[16] when a commercially published phonogram was "communicat[ed] to the public"[17]. Absent specific implementing domestic legislation the participation in revenues by UK performers took place under private international agreements known as the IFPI/FIM/FIA Agreements. These set down the respective shares between performers and phonogram producers of the equitable remuneration revenue pool created by the blanket licences issued to music users.

In the UK the IFPI/FIM/FIA Agreement was applied by PPL and the revenue was shared as to 66% to labels, featured performers received 21% with the balance of 12% being paid to the British Musicians' Union for the benefit of session musicians and backing vocalists. So, although the split was weighted in the producers' favour, at least the entire constituency of performers (featured or contracted artists and session musicians/backing vocalists) shared in licensing revenue.

In 1992 the European Commission Directive 92/100 obliged the British Government, inter alia, to grant a specific statutory right to equitable remuneration to the performers. At this point and,

[14] We refer the Office to a recent public statement issued by us and attached as Annexe 2
[15] Rome Convention for the protection of Performers, producers of Phonograms and Broadcasting Organisations (1961)
[16] Ibid Article 12
[17] Ibid – current text

regrettably, as a result of what could be described as "sleight of hand" the UK's 1996 implementing legislation is framed in terms that renders the UK performer subservient to the labels when accessing this revenue stream. In every other Rome signatory state the right is vested equally in label and performer and together the two constituencies negotiate and administer licences. But, the UK statute requires the performer's right to equitable remuneration for communication to the public to be asserted against the phonogram producer and not directly against the user[18].

The communication to the public right was then fleshed out, via the sub-set of the making available right, in response to the WIPO Copyright Treaty. The UK's Copyright Designs and Patents Act 1988 introduced the concept of making available and the amendments affected performers as follows. Section 182 states:

S 182 D (1) Where a commercially published sound recording of the whole or any substantial part of a qualifying performance –

(a) is played in public, or

(b) is communicated to the public otherwise than by its being made available to the public in the way mentioned in section 182 CA(1),the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording.

(1A) In subsection (1), the reference to publication of a sound recording includes making it available to the public by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

Section 182 CA (1) reads:

S182 CA (1) (1) A performer's rights are infringed by a person who, without his consent, makes available to the public a recording of the whole or any substantial part of a qualifying performance by electronic transmission in

[18] In this respect we note with regret that the framing of the current US statutory royalty for performers leaves them vulnerable in an equivalent respect, the labels able to elect to use Sound Exchange. This creates a situation whereby it is possible for performers to be excluded from income by the labels in an inequitable manner, increasing their financial vulnerability.

> such a way that members of the public may access the recording from a place and at a time individually chosen by them.
>
> (2) The right of a performer under this section to authorise or prohibit the making available to the public of a recording is referred to in this Chapter as "making available right."

The making available right as framed in the WCT neatly works around any perception that "public" might need to be interpreted as a collective expression requiring many persons to be present for the audience to qualify as such. But it will be observed that the UK wording has specifically been constructed to remove a performer from any entitlement to equitable remuneration revenues arising from "making available"! Article 8 expressly defines making available in the context of communication to the public and reads:

> Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(ii), 14(i)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

It appears to us that the UK statute is contrary to both the spirit and the letter of Article 8 of the WIPO Copyright Treaty (WCT) which was intended to clarify the requirement for a licence to access copyright works and performances over the internet. This UK legislation separates performers from their right to an equal share with labels in important and growing income stream - equitable remuneration when their works are communicated to the public in instances where an individual accesses the recorded performances. More sleight of hand! And, weirdly, not a mechanism that applies to revenue arising from the making available of musical works which is, as shown, shared between authors and publishers. Why the distinction? And what has been the financial impact for performers of music?

Technology companies have long been benefitting from giving online access to copyright works (either directly or indirectly via search results) without payment to creators or right holders – adopting the distasteful moniker of "content" to describe the results of the creative efforts of

thousands of citizens. Of course, we share the frustrations of music companies (publishers and record labels) at the way in which technology companies, some now extremely powerful indeed, have routinely and disingenuously interpreted and lobbied for copyright laws in a manner that has enabled them to build their enormous commercial might upon access to copyright works without payment to either creator or right owner. Licensing of these behemoths is in its infancy and current revenue levels do not reflect the true value of creators' works nor the value that copyright works have irretrievably created for these tech powerhouses. Not unexpectedly the right owners are attempting to fight back, to regain the lost ground. What causes the MMF and the FAC (and other creator focussed organisations worldwide) is the opaque nature of the licensing solutions and inequitable sharing of revenues between creator and right owner.

Performers: Contracts - the UK, Making Available and Performers' Remuneration

Under the authority of the statute's wording, and supported by the so-called GEMA cases[19] UK record labels have withdrawn the right to issue licences for digital exploitation from PPL, and assumed responsibility themselves, concluding direct deals with the online music disseminators in Europe. In addition, the major labels and Merlin used their large catalogues as leverage to take shares in online music services (eg Spotify as reported in The Washington Post[20]) No benefits from shareholdings will be shared with creators signed to the music companies).

We cannot know the detailed construction of direct deals. What we do know is that they include elements such as technology set-up fees, minimum annual payments, promotional benefits, administration fees, equity shares, so-called" breakages (whereby it appears to us that some music companies are trading lower rates for huge advances). These direct deals are covered by nondisclosure agreements so neither our FAC members nor the MMF members auditing[21] on behalf of clients can determine what has been paid across for the right to use the works. We cannot know whether other beneficial elements were factored into the valuation of the deals. We cannot know the figure forming the basis (the royalty calculation base) upon which an individual artist's entitlement may be calculated. Where lump sums are shared between, say, a US division and a UK division, we have no way of determining the respective shares between the

[19] Which - as almost all EU Member State operate CMOs as de facto or de jure monopolies - permit right owners in the EU to withdraw certain defined categories of rights from CMO for direct licensing purposes - Cases 125/78 and 47/71

[20] http://www.washingtonpost.com/wp-dyn/content/article/2009/08/07/AR2009080700891.html

[21] We would refer the Office to statements by an experienced international music royalty auditor about the impossibility of accessing bona fide audit trails when auditing music companies on behalf of creators, which statements are contained in our comments to your Office for the Music Licensing Study.

different divisions and cannot know the terms of inter-company contracts governing payments, which may also have been constructed to address transfer pricing issues.

As the Copyright Office will be aware US performers do not participate in this revenue stream generated outside the USA, whereas US labels with UK (or European) offices do receive it and retain all the income. The IFPI 2013 Digital Music Report[22] showed that this revenue source has now reached an annual total of US$1 billion, 7.3% of global record industry income[23]. (This imbalance should be corrected by the introduction in the US of a right for performers to remuneration from all uses of their recorded performances by music services, whether terrestrial, online, interactive or non-interactive. This change would trigger reciprocity abroad to the benefit of the entire US performer community.)

So how is this revenue shared with British performers?

Firstly, it should be highlighted that individual artist contracts routinely state that revenues will only be payable to the artist where they are "directly and identifiably" attributable to the recordings. So lump sum revenues (say, a share of advertising revenues paid by search engines) are usually retained because, as auditors report to us, the labels will assert they cannot be attributed to a particular recording or recording artist. This is disappointing as the technological capacity to track user access does exists. For example, we believe that in the context of the Google Book project, Google's algorithms can determine what page of a particular book a reader accesses, how long they stay there and where they move to next. With improved data capabilities we are finding it increasingly difficult to accept that data matching is not possible. In this instance, we would draw the Office's attention to our remarks about unique global works identifiers in our comments in the Music Licensing Study.

In addition to the difficulties of establishing a verified audit trail, where revenue is shared with UK performers it is shared not 50/50, in the way such making available revenue is usually shared between authors and publishers. Instead, UK labels pay featured artists in accordance with the sales royalty percentage contained in their recording contracts. This royalty rate can be as low as 3% or 4% and seldom will exceed 25% or 30% of the wholesale, or dealer price (PPD – published price to dealer). The royalty set by contract can itself be subject to further deductions. Payments may be made only on 90% or 85% of unit sales, for example. Or royalties may only be payable on 90% or 85% of the value of the PPD (so-called net PPD). Or a so-called "packaging

[22] http://www.ifpi.org/downloads/dmr2013-full-report_english.pdf
[23] http://www.ifpi.org/facts-and-stats.php

deduction" may be levied, often referred to as a technology deduction, at 25%! These are all devices that erode the value to the artist of the royalty ultimately either applied to recoupment or paid across as a cash royalty payment.

This calculation method by the labels is applied irrespective of whether the income arises from, in the US parlance[24] employed by the Harry Fox Agency, a permanent download (which arguably may be akin to a traditional physical sale) limited downloads, tethered downloads, interactive streaming, or simply online radio and irrespective of the device delivering the music[25].

To illustrate using iTunes[26]:

Artist A

Artist A is a departing member of a major heritage act was, in the original contract, on a sales royalty of 2% of the retail price. This act has long ago recouped its recording advances so should be receiving a cash royalty for every physical unit sold and track or album that is streamed. The 2% royalty rate was converted to 4% of the dealer (ie wholesale PPD) price for the recording in the UK and 3% in the rest of Europe. This percentage is levied on 100% of the actual dealer price in major territories in some but not all counties in Europe (ie excluding Scandinavia, Spain and Portugal). But from the dealer price (£0.44p in the case of iTunes) is first deducted packaging costs of 25% (non-existent for a digital file). In the rest of the world, including the USA, the royalty rate for Artist A was applied to 85% of the value of the dealer price and therefore, after the deduction of the spurious packaging charges, the royalty rate becomes 2.55% of dealer less the packaging rendering a per unit value of 1.9125%. This is the value of the royalty paid to the artist for streaming revenue – where it can actually be directly attributed to the artist or track by the label! The sound recording copyright remains in perpetuity with the record labels.

So to apply Artist A's deal terms to an iTunes sales[27] looks like this:
The Artist A 2.55% royalty base is applied to the cash value of £0.33pence shown in the Annexe 2 iTunes example after a packaging deduction. In this instance no record (studio) producer

[24] http://www.harryfox.com/public/DigitalDefinitions.jsp
[25] We acknowledge that simplification of the definition of digital delivery (making available) is attractive - and to this end we support an end to the distinction between non-interactive and interactive services in the USA for the purposes of payments for labels and performers – all services, including terrestrial communication to the public should pay fees.
[26] See iTunes breakdown at Annexe 3
[27] ibid

royalty was required to be paid by the artist(s) from the artist's royalty percentage. The cash value to the recouped, world famous artist is thus: £0.33 x 2.55% = £0.008415, or just over three quarters of one penny for each stream or download. The label will be receiving £0.44 pence less the Artist's share leaving a retained balance of £0.321585p, around thirty-eight times what the Artist receives. Were a studio producer receiving a royalty then the ratio would shift to the label retaining fifty times the amount the performer receives.

Disenfranchisement of Session Musicians and Backing Vocalists

This direct licensing by the labels does not just disadvantage featured or contracted artists as demonstrated above. There is another disquieting consequence. This direct licensing policy utterly disenfranchises an entire sector of musical performers.

Session musicians and backing vocalists are contracted on a "buy out" basis with no ongoing entitlement to revenue from exploitation. The equitable remuneration as distributed by PPL in the UK is therefore a vial source of income for these creators. But the direct licensing sleight of hand regarding online licences has the effect that these session musician members of the musical creative community receive no income whatsoever from the online exploitation of their recorded performances. This is neither acceptable, nor sustainable in our view. From the perspective of the FAC particularly, that our musical colleagues, upon whom we rely creatively, are being routinely excluded from the benefits of digital exploitation is an outrage.

We respectfully suggest that, in the Copyright Office's deliberations about the making available right, the destructive licensing policies that prevail on this side of the Atlantic are not permitted to prevail. There already exists in the USA the model of Sound Exchange, with a direct payment to performers of a 50/50 split being an ideal mechanism to be applied to online revenues. Its Board composition ensures excellent creator representation in terms of balance. We recently saw independent record label body Merlin conclude a deal direct with US-based music service Pandora for recordings on independent labels and that form the core of the Pandora business. We are assured that Sound Exchange will continue to manage the performers' interests. But how much do we know about the deal terms? Reports state that although financial details are not available the deal is "structured to protect the economics of participating labels."

Sound Exchange guarantees transparency as the payments are made according to your US statute, without recoupment and based upon a rate that is set by the Copyright Royalty Board

(CRB). With direct deals, such as that by Merlin, money no longer necessarily must be split according to statute and the label can attempt to apply revenues to recoupment. This is not in the spirit of the US legislation. What also concerns us is that should labels agree to take less than the CRB statutory rate the value of the recorded music industry as a whole is at risk. In a direct reflection of the DMX proceedings for authors' rights, we are exposed to the risk of licensees using such a reduced rate in future proceedings to assert that the industry "agrees" that the CRB set the rates too high.

In the words of electronic music pioneer and CISAC President, Jean Michel Jarre:

> "A smartphone is much less smart if you get rid of music, films, images and all the rest of our content. We [creators] are responsible for the smart part of smartphones, and that should be taken into consideration."

It is our hope that were the Office to make recommendations that altered the manner in which the making available right is defined, framed or applied in the USA, and in particular guidelines as to the treatment of revenues, that collective licensing, transparency and accountability are placed at the forefront of recommendations and that the interests and livelihoods of the creators are protected.

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For

Featured Artists' Coalition
Music Managers' Forum

September 2014

ANNEXE 1

MMF Submission to the Department of Justice Review of the ASCAP and BMI Consent Decrees

A PDF of the MMF comments can be found at:

http://www.justice.gov/atr/cases/ascapbmi/comments/307761.pdf

ANNEXE 2

MMF statement in response to Sony/ATV letter to US writers.

The Music Managers' Forum shares the concerns expressed by Sony/ATV as to the complexity of licensing systems in the USA and worldwide. Part of the problem is indeed the constraints in the USA on licensing negotiations imposed by the outdated Consent Decrees that govern ASCAP and BMI and prevent them securing a fair market rate for their members. That the US Department of Justice is currently reviewing the Consent Decrees is a positive development.

However, on behalf of our songwriter clients, the MMF is alarmed at the suggestion by any music publisher, especially one with such considerable market power as Sony/ATV, that they would withdraw from the performing right organisations (PROs) and attempt to issue licences directly to US users thus complicating licensing.

Sony/ATV, cannot withdraw any non-US writers' works from the US PROs and issue licences for their work as they do not own the right in any songs written by any writer who is a direct member of a PRO outside the USA. These non-US writers assign their performing right directly and exclusively to their local PRO on a global basis. The right is owned by the PROs who have the sole authority to issue licences - to the exclusion of the writer and the publisher. These non-US rights are passed exclusively to the US PROs by the non-US societies.

Publishing contracts outside the USA only give the publisher a right to share in the revenue from the performing right, but not ownership of the right itself. For example, as long as The Beatles, the Rolling Stones, Coldplay, Jean Michel Jarre and Adele etc continue as members of their local PRO, no US publisher can issue licences for their work. As far as we're aware, the letter from Sony/ATV was not sent to non US writers, once again highlighting the complications posed for licensees of territorial posturing in a global digital marketplace.

While the MMF is wholly sympathetic to Sony/ATV's frustrations, the threat of withdrawal is an issue for the entire global community of composers and societies. There are at least four other reasons why US withdrawal and direct licensing are a risk to writers' livelihoods.

1. Potential licensees will still have to go via the PROs as well as the publishers – so, differential pricing, more complicated and more costly transactions.

2. Writers' contracts routinely state that they are not entitled to be paid a share of revenue that is paid as advances, lump sums or is not able to be "directly and identifiably" attributed to their work. How confident can writers be that they will be paid their shares of direct licence monies?

3. Co-writing songs is a common practice. How does a co-writer signed to a different publisher get paid when his writing partner is signed to a publisher who is issuing direct licences? He has no contractual relationship with his partner's publisher to rely upon.

4. The PROs allocate unique identifiers to each song or composition (the International Standard Works Number or ISWC). These have now been allocated to over 95% of the world's musical works and their use across the globe ensures that usage and works are correctly matched and writers paid what they are entitled to be paid. Many, music publishers operate their own, different identifiers. The lack of common work identifiers between publishers and the PROs complicates revenue allocation.

The global network of non-profit PROs has served the consumer, the music users and the song writing and publishing community well for over a century. Despite the challenges of the digital environment PROs provide economies of scale and streamlined licensing which keep transaction costs manageable.

Writers sit on their Boards and can influence policy. While the PROs may not be perfect, they allow creators a voice and a direct income stream. Adjustments to this system should be nuanced and carefully thought through. More importantly to our members' clients, solely national focus poses a grave threat to the livelihoods of every writer, American or not.[28]

[28] Once before Sony/ATV led the charge with a direct licence to a US music service. The result has been a disaster for the whole music community. Every song writer and music publisher in the world is still paying back US $150 million to background music services in the US as a result of an ill-advised direct licensing deal concluded by Sony/ATV and other independent publishers in the US. These direct licences agreed a fee 70% less that the licensee was paying via the PROs! It is a matter of public record that Sony/ATV accepted an advance of US$2.3 million and an administration fee of US$400,000 from DMX, a major US background music service. Buried in the agreement was a per location licence fee that was 30% of what DMX was paying the PROs. Bad for business? Not for DMX. The US Rate Court proceedings that followed had the effect of reducing the licence fee for every background music service in the USA. The global music community is still refunding the licence fees to background music services in the USA as a result and licences going forward sit at 30% of the former PRO value.
Writers and publishers will never recover from the damage to the value of their royalty income in this sector of the market. 30% of the former PRO value.

Annexe 3

iTunes Download Analysis

UK major record company example		UK (£)
iTunes download retail (average)		0.82
Less Vat (in UK 20%)	0.14	
Retail (after VAT)		0.68
Less authors/ publishers share MCPS/PRS mechanical/performance/making available (currently 8%)	0.05	
Subtotal		0.63
30% to iTunes	0.19	
Net to record company (PPD)		0.44
Less 25% new technology/packaging deduction	0.11	
Artist royalty base		0.33
Artist royalty 20% of Artist royalty base		0.07
Less studio producer royalty (3% Artist royalty base)	0.01	**0.06**
If artist has own label, artist/label get 0.44 less aggregator distribution percentage of 15% (AWAL)		**0.37**