

**BEFORE THE  
U.S. COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
WASHINGTON, D.C.**

**Issues Related to Performing Rights  
Organizations**

**Docket No. 2025-1**

**COMMENTS OF THE AMERICAN SOCIETY  
OF COMPOSERS, AUTHORS AND PUBLISHERS**

The American Society of Composers, Authors and Publishers (“ASCAP”) respectfully submits these comments in response to the February 5, 2025 U.S. Copyright Office (“Office”) Notice of Inquiry (“NOI”) for written comments on certain issues related to performing rights organizations (“PROs”).

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**INTRODUCTION AND SUMMARY STATEMENT**

American songwriters, composers and music publishers are some of the most heavily regulated business owners in the country. The royalties they earn when their copyrighted music is performed publicly account for a significant portion, if not *the sole source*, of their livelihoods.

In the United States, those who want to publicly perform copyrighted musical works must have the permission of the copyright owners – the songwriters and composers who wrote the works and their music publishers. Without obtaining permission and licensing the performance of those works, they are violating the law.

If not for PRO blanket licensing, it would be virtually impossible for music creators to get paid for the use of their copyrighted works across all the varied ways and

means by which people enjoy music today. Moreover, it would be equally impossible for music users to efficiently secure the legal rights to use millions of copyrighted musical works. ASCAP provides a vital service to businesses that publicly perform our members' music by offering them the right to perform over 20 million works in our repertory efficiently and at a reasonable cost.

Founded by songwriters and publishers 111 years ago as the nation's first PRO, ASCAP stands out in today's PRO landscape. We are the only U.S. PRO governed by a member-elected Board of Directors comprised, equally, of 12 writers and 12 publishers of music, who set our distribution rules and oversee our payment system. ASCAP is also the only U.S. PRO that operates on a not-for-profit basis, delivering 90 cents of every dollar we collect in licensing fees back to our members as royalties.

ASCAP works tirelessly to protect the rights of music creators, uphold the value of music, and help our more than one million members thrive alongside the businesses that use their music every day. In service of our mission, ASCAP goes to great lengths to license, monitor and process payments on trillions of performances each year efficiently and accurately. While this is increasingly challenging and costly as the music marketplace becomes more and more fragmented, ASCAP has consistently invested in and modernized our ability to effectively and efficiently track trillions of performances while maintaining one of the lowest overhead rates in the industry.

However, over the course of the last century, many of the industries that depend on music to bring them paying customers and listeners have tried various legal and legislative schemes to avoid paying for music. The questions posed in this NOI show that some are still in pursuit of that goal.

The complaints levied by some music users about the lack of transparency of PRO song ownership are particularly disingenuous. Today, ASCAP and the other leading PROs have invested significant resources to make detailed repertory information freely available and easily searchable online – and yet little evidence suggests these licensees ever use that information.

Recently, some music users have questioned whether PROs are paying the wrong songwriters and composers, especially when it comes to live performances. Meanwhile, these businesses actively resist paying songwriters and composers fairly at all. Notably, the vast majority of live music venues take no responsibility for reporting performances, leaving PROs and their members to bear the entire cost of tracking what is performed.

ASCAP is constantly in the process of refining and improving its distribution policies. To the extent that they can be improved, it is a matter best resolved between PROs and their members through their contractual relationships – not licensees, not the Copyright Office and certainly not Congress or the federal government.

Should newer PROs adhere to the same level of repertory transparency as ASCAP in their dealings with licensees? Absolutely. Are PRO fees putting music venues out of business? Absolutely not. In reality, PRO fees represent a small fraction of overall costs and revenues for businesses that profit from the use of music. And yet, music users are still determined to pay songwriters even less, despite that the market for, and volume of, music grows year after year.

As a collective, ASCAP's success depends on making business decisions that serve the best interests of our membership as a whole. Our top priority is ensuring our music creator members are paid fair market rates for the use of their music. Accurate and

fair distribution is one of the factors that attracts new members and keeps existing members firmly committed to the organization.

We understand that businesses that use music would like to control costs by paying less for music, but in reality, PRO fees represent a tiny fraction of overall costs and revenues for businesses that profit from the use of music. By insisting that government intervention is needed to solve “problems” that do not actually exist in the fair and competitive PRO marketplace, these businesses reveal their true intent – they are not serious about helping songwriters and composers succeed in the modern music economy, but rather looking to save costs and pay them less.

As our comments discuss in detail, ASCAP believes further regulation of the performance rights marketplace is not only unnecessary, but it would cause immeasurable harm to the very group the copyright law was meant to protect – our nation’s music creators.

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A great deal has been written about ASCAP and the public performance right<sup>1</sup> and the benefits of collective licensing through ASCAP and other PROs have long been acknowledged.<sup>2</sup> We have provided to the Office materials about ASCAP in connection with previous studies, including its 2014 comprehensive study of the music marketplace.<sup>3</sup> We refer the Office to all such materials. Nevertheless, prior to responding to the questions raised in the NOI, we provide a very brief overview of PROs and ASCAP.

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<sup>1</sup> For a comprehensive history, we recommend Bruce Pollack, *A Friend in the Music Business: The ASCAP Story* (2014). *See also*, I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Organizations, Revisited*, 50 *J. Copyright Soc'y U.S.A.* 355 (2002-2003).

<sup>2</sup> *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

<sup>3</sup> Copyright Office, *Music Licensing Study*, Docket No. 2014-03.

### **The Benefits of Collective Licensing**

It is often said, if PROs like ASCAP didn't exist, they would need to be invented. Collective licensing through PROs generates valuable procompetitive efficiencies for both the creators and users of music. Most of ASCAP's members are individual songwriters, composers and small music publishing businesses that otherwise would not have the resources to navigate the legal complexities of music licensing. These members are freed from individual licensing, enforcement and royalty collection obligations, and are thus able to focus their attention on creating music. Licensees are, through one license with one entity, authorized to perform any or all of the many millions of songs in ASCAP's repertory (including songs that enter the repertory during the term of the license and works of affiliated foreign PROs<sup>4</sup>). Without ASCAP and other PROs, music users that perform more than a few musical works would face the prohibitive expense of countless negotiations with a multitude of copyright owners. Less well-intentioned services, when faced with the prospect of complicated piecemeal negotiations, might simply skip the licensing process altogether. Copyright owners would also bear the burden of inefficient catalog-by-catalog, if not song-by-song, direct negotiations. Even the largest music publishers lack the information, resources and experience necessary to negotiate with each of the numerous nightclubs, restaurants, broadcasters, concert promoters, hotels and other users that regularly perform their copyrighted works publicly.

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<sup>4</sup> ASCAP represents not only American songwriters and publishers, but also hundreds of thousands of foreign songwriters and publishers through reciprocal license agreements with nearly 100 foreign PROs, which represent, in the aggregate, nearly every developed country in the world. Under such reciprocal agreements, foreign societies authorize ASCAP to license their repertories on their behalf, and ASCAP remits a portion of its domestic receipts to the foreign societies for performance of their members' works in the U.S. Similarly, ASCAP authorizes foreign societies to license the ASCAP repertory in their territories. Considering the importance of U.S. music around the world, ASCAP's ability as a PRO to negotiate these reciprocal agreements provides substantial benefit to the U.S. economy.

Moreover, apart from a PRO, no entity could *efficiently* monitor the trillions of performances that occur annually – in a plethora of ways and across various media – in order to distribute the fees paid for such performances. Collective licensing permits copyright owners to spread the costs of licensing and monitoring music usage among all members, thereby reducing costs to a manageable level and ensuring that more of the money collected is paid to songwriters and publishers as royalties.

Of course, licensees also benefit tremendously from their own ability to negotiate for the right to perform music on a collective basis. PROs routinely negotiate licenses with larger industry representatives or associations that represent thousands of individual licensees, including associations or committees representing commercial radio and television broadcast stations, hotels, concert promoters, universities and other businesses.<sup>5</sup>

PRO collective licensing did not evolve without challenges. Numerous bills and laws have been proposed over the decades, on both the federal and state levels, the purpose and effect of which would be to create obstacles to the effectiveness of ASCAP and other PROs, and, in most cases, mask intended motivations of simply paying less (or not at all) for the right to perform the copyrighted musical works of songwriters and composers.<sup>6</sup> A multitude of organizations have been formed over the years for the purpose of lobbying the government to pass legislation to benefit music users across all

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<sup>5</sup> Examples include the American Hotel and Lodging Association, Radio Music Licensing Committee and Television Music Licensing Committee.

<sup>6</sup> *See, e.g.*, Fairness in Musical Licensing Act of 1997, H.R. 789, 105<sup>th</sup> Congress (Feb. 13, 1997); Wis. Stat. § 100.206.

sectors of the music marketplace and usually to the detriment of PROs and their affiliated songwriters, composers and music publisher members.<sup>7</sup>

Ultimately, undue regulatory impediments on PRO licensing deprive America's songwriters and composers, including ASCAP members, of the ability to earn a living creating music. Nonetheless, ASCAP nimbly continues to successfully serve as the leading means by which American songwriters and composers can enforce their rights and earn a living from their music. And however the public performance licensing system evolves in the future, it is safe to say that collective licensing by ASCAP and other PROs will remain a necessary component if that system is to operate efficiently and smoothly for the benefit of music creators and licensees.

### **ASCAP Operations**

ASCAP's core mission and not-for-profit-making membership structure has remained unchanged since its founding. However, nearly everything else about ASCAP and its licensing operations has changed. ASCAP now represents more than 1,000,000 composers, songwriters, lyricists and music publishers of every genre and type – from celebrity Grammy and Oscar winners to unknown young songwriters and composers just beginning their careers. ASCAP licenses a repertory of over 20 million copyrighted musical works on a non-exclusive basis to hundreds of thousands of different music users. The types of music users that ASCAP licenses have evolved, over the years, with changes in the types of media and devices driven by technology. Today, the total royalties collected by ASCAP from physical venues like bars, restaurants, and small

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<sup>7</sup> The MIC Coalition lists 19 member entities that represent a wide range of music licensees, from broadcasters and digital music services to restaurants, hotels, concert venues and wineries. See <https://mic-coalition.org/#members>.

businesses has been dramatically eclipsed by royalties from audio and audiovisual streaming services, terrestrial, satellite and digital radio, and broadcast, cable and local television and concert tours.

Likewise, PRO competition has changed dramatically. For the better part of a century, ASCAP primarily competed for members with two other U.S.-based PROs: BMI and SESAC. BMI started small as an alternative, non-profit, licensing source to ASCAP, but now, a for-profit entity recently sold to private equity investors<sup>8</sup>, manages a repertory of musical works that is as large, and performed about as often, as ASCAP's. SESAC, founded in 1930 as a niche private family-owned business, has become a more significant competitor to ASCAP and BMI, after it was purchased by private investors in the 1990s.<sup>9</sup> In addition, in 2013, a new U.S. PRO, Global Music Rights ("GMR"), was launched by longtime music industry executives as a for-profit business.<sup>10</sup> These organizations actively vie and compete with ASCAP, as well as with each other, to attract songwriters and their publishers for the right to license their public performance rights to music users.

What makes ASCAP unique, however, is that (1) unlike SESAC and GMR, it and BMI are governed by antitrust consent decrees with the U.S. Department of Justice (the "DOJ") and (2) unlike *every* other PRO, all of which operate on a for-profit basis for the benefit of their private owners and investors, ASCAP is the only PRO in America that operates on a not-for-profit making basis, existing *solely* for the benefit of its members and governed *by its members*. As it did in its earliest years, based on rules set by its

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<sup>8</sup> BMI was sold to New Mountain Capital, for a reported \$1.7 billion. See <https://www.musicbusinessworldwide.com/iheartmedia-to-receive-100m-from-sale-of-bmi/>

<sup>9</sup> SESAC was sold again in 2017 to BlackRock, the world's largest private equity firm, for a reported \$1 billion. See <https://musically.com/2025/01/17/blackstone-reportedly-exploring-potential-for-3bn-sesac-sale/>

<sup>10</sup> GMR was originally launched with the backing of Madison Square Garden and former Cablevision owner, James Dolan and in September 2024, Hellman & Freidman acquired a new equity position in GMR for a reported \$3.3 billion See <https://www.musicbusinessworldwide.com/irving-azoffs-gmr-just-sources/>

elected Board, ASCAP distributes all license fees collected, less operating expenses (and a small reserve), as royalties to its songwriter, composer and music publisher members whose works are publicly performed. Despite operating on a not-for-profit basis, ASCAP has made the significant investments in technology and systems needed to be a PRO market leader in technology innovation and efficiency. In 2024, ASCAP distributed to its members, as royalties, approximately 90% of all license fees it collected, making it the one of the most efficient PROs in the world.

The majority of ASCAP's songwriter, composer and publisher members are working composers and songwriters and small business owners who depend on the performing right royalties collected by ASCAP as a major source of their income, if not their only source. It is therefore critical to ASCAP's members that ASCAP is not burdened with any additional regulations that decrease the efficiency of its operations and, as a consequence, diminish the amount of royalties available for distribution to its members.

The distribution of royalties by ASCAP and other PROs is a central focus of the NOI. Key to understanding ASCAP's distributions is understanding its governance. ASCAP's fundamental purpose and structure are set forth in its Articles of Association ("ASCAP Articles").<sup>11</sup> Pursuant to the ASCAP Articles, ASCAP is governed by a Board of Directors, equally divided between writers and publishers of music, elected by and from the membership.<sup>12</sup> The Board establishes the rules and regulations that govern

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<sup>11</sup> See ASCAP, Articles of Association of the American Society of Composers, Authors and Publishers, available at <http://www.ascap.com/~media/files/pdf/members/governing-documents/articles.pdf> ("ASCAP Articles")

<sup>12</sup> ASCAP Articles, Section IV

ASCAP membership and royalty distribution<sup>13</sup> and are set forth in ASCAP’s Compendium of ASCAP Rules and Regulations and Policies Supplemental to the Articles of Association (“Compendium”)<sup>14</sup> and ASCAP’s Survey and Distribution System: Rules & Policies (“S&D Rules”)<sup>15</sup>. Importantly, the rules set forth in the ASCAP Articles, the Compendium and the S&D Rules are binding contractual obligations by and between ASCAP and its members.

A more detailed description of ASCAP’s distribution policies is set forth in answering the applicable questions below. The core point of these rules should be stressed – distribution matters should be decided between music creators and their chosen PROs, not by licensees or government entities. Songwriters and composers should have the agency to choose between PROs based on their needs and the factors that matter to them, including distribution policies. In ASCAP’s case, ASCAP’s membership approves its internal means and methods for operating and distributing royalties among themselves. ASCAP is the only PRO in America to operate in this manner, as it has continuously since its inception: *for and by its membership*.

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<sup>13</sup> See ASCAP Articles, Sections III, IV and XVII

<sup>14</sup> See ASCAP, Compendium of ASCAP Rules and Regulations, and Policies Supplemental to the Articles of Association, available at <https://www.ascap.com/~media/files/pdf/members/governing-documents/ascap-compendium.pdf>.

<sup>15</sup> See ASCAP, ASCAP’s Survey and Distribution System: Rules & Policies, available at <https://www.ascap.com/~media/files/pdf/members/governing-documents/ascap-survey--distribution-rules--10322.pdf>

**ANSWERS TO SPECIFIC QUESTIONS**

**Q1. To what extent, if any, have there been increased financial and administrative costs imposed on licensees associated with paying royalties to additional PROs.**

A1. ASCAP cannot comment on the costs to music users with respect to any other PRO's license as license fee information of other PROs is generally non-public and confidential. Critically, in addition, antitrust laws prohibit competitors from sharing competitively sensitive information. Since licensing fees are competitive information, ASCAP does not generally make such information public, share such non-public information with other PROs or seek to learn such information from other PROs.

Nonetheless, based on publicly available information, the complaints by many music users of impending doom driven by the new PROs are exaggerated as the aggregate cost of all music licenses amounts to a small fraction of a venue's revenues.

The Congressional letter received by the USCO that prompted this NOI states:

...licensees have reported receiving demands for royalties from new entities claiming to represent songwriters and threatening litigation if their demands are not met. Considering that the possibility of substantial statutory copyright damages poses an existential risk for most [General Licensees], many feel compelled to pay these entities on top of what they already pay for blanket licenses from the traditional PROs.

In response, we must point out that a music user's licensing costs are a product of the market; given the increasing volume and growth of the market for music, it is not unreasonable for overall costs to increase. Moreover, music users are not required to take a license from any or all PROs. The increased number of PROs and the dozens of licensed, digital background music services provide music users with greater options to structure their music usage and licensing needs. Those competitive options could ultimately result in lower costs. Furthermore, pursuant to the so-called Fairness in Music

Licensing Act of 1998 (the “FMLA 1998”)<sup>16</sup>, many thousands of food service, drinking and retail establishments are exempted from the requirement to obtain any public performance licenses for playing music contained in radio or TV broadcasts within their premises, depriving our members of their rightful compensation.<sup>17</sup> Regardless of the license fees music users pay to other PROs, the fees paid to ASCAP represent an extremely high value for relatively low fees.

### **Music Users Can Program Around PRO Licenses.**

All venue owners have the right to choose whether or not they play any music and can similarly choose the music they play. If a music user wishes to limit or reduce its PRO licensing fees, the music user can do so by programming around the need to take a given PRO’s license. If a music user decides that it will only perform works from one or more PRO’s repertoires, it only needs to take a license from the PRO(s) that control(s) the works it will perform. In this way, the music user will not only secure the right to perform that PRO’s repertory an unlimited number of times but will also avoid any potential infringement liability resulting from its performances of that repertory. Coupled with the use of pre-licensed background music services, repertory choices provide music users with options to control its licensing costs.

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<sup>16</sup> Pub. L. No. 105-298, 105th Cong., 2d Sess., 112 Stat. 2830 (1998), codified at 17 U.S.C. § 110(5)(B).

<sup>17</sup> The FMLA specified the size and number of devices that are permitted to be used in order to be eligible for the exemption. In the case of a food service or drinking establishment, either the establishment has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment has 3,750 gross square feet or more (excluding space used for customer parking and for no other purpose) and does not exceed certain broadcast device/speaker limitations. For other establishments, the threshold is 2,000 gross square feet. *See* 17 U.S.C. § 110(5)(B). Because obtaining specific size measurements and device usage at any venue requires conducting a physical inspection, which PROs cannot reasonably accomplish due to the inherent costs in visiting every venue in person, ASCAP generally affords this exemption to all restaurants, bars and retail stores that it believes is likely to satisfy the size requirements of the FMLA 1998.

Of course, the option to select specific PRO repertoires depends on a music user's ability to access a transparent public list of PRO repertoires. The major PROs provide this transparency. As it pertains to ASCAP and BMI, which together comprise an overwhelming majority of the market for musical works, those two PROs offer a voluntary, market-based licensing solution for music users through innovations developed in connection with the SONGVIEW™ project ("Songview"), discussed in more detail *infra* in connection with Q6. ASCAP and BMI now each display on their free, publicly accessible repertory websites, all of the works in which the respective PRO controls 100% of the shares (each a "100% Work"). By taking an ASCAP license, a music user secures the right to perform all 100% Works in the ASCAP Repertory without the need to take any other license. By taking a BMI license, a music user secures the right to perform all the 100% Works in the BMI repertory. Moreover, if a music user chooses to take both an ASCAP and a BMI license, but not any other license, the music user secures the right to perform all the ASCAP and BMI 100% Works and all ASCAP-BMI "split works" (*i.e.*, all of the works in which ASCAP and BMI together control 100% of the shares in that work). By making reconciled licensable work shares for ASCAP and BMI via Songview available, ASCAP and BMI have facilitated the ability of all music users to program around the need to take a license from any PRO whose works it does not intend to perform. While music users and policymakers do not often discuss the option to program around the need to get one or more PRO license, it is a licensing approach used by various music users, including radio stations, background music providers and local television stations.

Ultimately, whether a music user opts to program around PRO repertoires to limit their licensing requirements, depends on whether the user believes simply obtaining blanket licenses from all PROs is worth obviating the need to monitor their music play and research song ownership. While, in the past, few establishments chose to expend their resources on license-dependent music programming to lower costs, thereby confirming the value of PRO blanket licensing, the emergence of reliable, easy and free database searching of the PRO data provides a very meaningful option to reduce licensing needs.

**The Effects of Litigation Costs Are Often Overstated.**

While the Congressional letter refers to the possibility of copyright damages posing an “existential risk” for most “bars, restaurants, and other small businesses”, the reality is that most venues comply with their legal obligations to license the music they perform. The typical defendant in an ASCAP bar or restaurant infringement lawsuit has been previously contacted numerous times by an ASCAP licensing representative and advised of the legal requirement to obtain a performance license to perform any music in the ASCAP repertory. The ASCAP representatives have been trained to be courteous and respectful, are required to live up to a written Code of Conduct for continued employment and must comply with the detailed state laws that apply to PRO licensing activities.<sup>18</sup> And when a music users still refuses to comply with the copyright law and lawsuits are instituted, the music users, understanding the consequences of not obtaining the necessary license, tend to settle and obtain the license. The only rare cases that proceed to a full trial are those in which the defendants refuse to engage in good-faith

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<sup>18</sup> See, e.g. *Wis. Stat. § 100.206*.

settlement talks, even though incontrovertible evidence has been shown of the venue's copyright infringement. ASCAP is not aware of any case involving a bar, restaurant or other small business, where the imposition of an ASCAP legal judgment drove the licensee into bankruptcy or to close the doors on the business. Indeed, the purpose of litigation is to ensure compliance with the copyright law and permit music performances to continue.

**Live Music Licensees Do Not Overpay PRO Fees.**

Even with the addition of the newer PROs, the rates and fees paid for the public performance right are certainly fair to venues, representing a small fraction of venue costs and revenues. This is certainly the case for presenters of live music, where the main product they offer is performances of the songs the PROs license.

Based on publicly reported revenue data, bars and restaurants will pay on average a fraction of a percent of its annual revenues for the right to perform music.<sup>19</sup> Concert presenters, for whom music is *the sole* product being offered to its customers, have for many years similarly paid a fraction of a percent of its ticket revenues for complete access to the ASCAP repertory. And indeed, many promoters of concerts at music venues will deduct the fees paid to PROs from the settlement payout to the performing artists, *ultimately bringing their own PRO fee exposure down to zero*. Yet, there is no auditing of these venues to ensure they are not overcharging the performing artists for these license fees.

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<sup>19</sup> For industry revenue information, see Ibis World, 72241: Bars and Nightclubs in the US, IBIS World, August 2024 <https://help.ibisworld.com/en/articles/8155961-how-to-cite-an-ibisworld-report>.

Ultimately, for the music users, these fees are completely reasonable for blanket access to millions of copyrighted songs, providing exceptional, if not below-market, value.

**Q2. Factors that may be contributing to the formation of new PROs.**

A2. There are a number of factors that may be contributing to the formation of new PROs. First, with the widescale adoption of music streaming services by paying consumers and advertisers, music industry revenues have grown substantially. As a result, financial investors in recent years have focused their attention and appreciation on music – particularly musical works and publishing – as an asset class. Private capital and global commercial banks such as Blackstone, KKR, Apollo, BlackRock, JP Morgan and others have invested billions in music catalogs in recent years.<sup>20</sup> Similarly, private capital has invested in PROs as described in the introductory section of this submission.<sup>21</sup> The lure of future buyouts by financial investors may be motivating entrepreneurs to form and launch new PROs, and financial investors to fund them.

Second, the emergence and adoption of independent music distributors, such as Distro Kid, CD Baby, Tune Core and Landr, have provided vehicles for a tsunami of new independent and self-published artists and songwriters to have their music distributed on major streaming services (such as Spotify, Apple Music and Amazon Music). Without a professional and experienced music publisher to guide them, the new independent songwriters may be more willing to sign-up with a PRO with no track record or history.

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<sup>20</sup> See <https://www.forbes.com/councils/forbesbusinesscouncil/2023/06/15/the-new-golden-age-of-the-music-business/>

<sup>21</sup> Performance royalties have traditionally comprised the largest percentage of total music publishing revenues. See [https://www.youtube.com/watch?v=eb-VKTu8Fzc&list=PLG-sRINXX-u2hMTvscZ2dBQ\\_KJuYmHogE&index=3](https://www.youtube.com/watch?v=eb-VKTu8Fzc&list=PLG-sRINXX-u2hMTvscZ2dBQ_KJuYmHogE&index=3) (NMPA 2023 State of the Industry)

Third, advancements in technology have lowered the barriers to entry in the PRO space. A start-up PRO may be able to sign songwriters and music publishers without ever meeting them in person or even hearing their music. Agreements and registrations can be completed by using only personal computers and smart devices via the internet. Also, advancements in the technology have made it easy to upload sound files to register them for copyright with the Office. For example, in 2018, when ASCAP was asked by licensees to investigate the musical works registered for copyright with the Office by PRO Music Rights, we discovered copyright registrations for literally *millions* of “musical works” that were apparently either computer-generated sounds or merely random titles. Of course, these “online” PROs do not and cannot offer the full range of benefits and services that ASCAP provides to its members.

**Q3. Recommendations on how to improve clarity and certainty for entities seeking to obtain licenses from PROs to publicly perform musical works.**

A3. U.S. copyright law is not self-enforcing. It requires a user of music to proactively ensure its use of copyrighted music is properly cleared. To avoid infringing, a music user must (1) know what music it will be performing and (2) have information regarding the copyright owner(s) of that music. We believe that music users have this information with respect to virtually all music commercially used in American establishments.

ASCAP has been at the forefront of music repertory transparency. ASCAP has long maintained a comprehensive and updated repertory website accessible to music users displaying works in the ASCAP repertory.<sup>22</sup> And, in 2016, ASCAP became the first

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<sup>22</sup> See Second Amended Final Judgment, *U.S. v. ASCAP*, Civ. Action No. 41-1395 (DJC) (June 13, 2001) (“AFJ2”), Section X (Public Lists).

U.S. PRO to display the licensable shares controlled by ASCAP members and licensed by ASCAP.

In 2017, ASCAP and BMI – together representing the overwhelming majority of copyrighted music – started to invest considerable resources in the Songview project to ensure that detailed information regarding their vast repertoires is easily and freely searchable online, and that the data they make available has been checked and reconciled for conflicts. A detailed description of ASCAP’s repertoire databases and Songview is set forth *infra* in response to Q6. Likewise, we understand that GMR and SESAC also make their repertoires publicly searchable. ASCAP believes that repertoire transparency is a valuable tool for promoting copyright protection of our members’ works and facilitating licensing flexibility for music users. The major PROs have been, and continue to be, the best resource for musical works performing rights repertoire information.

**Q4. How PROs currently gather information concerning musical works publicly performed at live music venues, on music services (e.g., digital music providers), and by other general licensees (including bars, restaurants, stores, hotels, and similar venues).**

A4. ASCAP’s distribution system, described in more detail *infra* in response to Q7, relies on ASCAP gathering massive volumes of information and data from a wide multitude of licensees, as well as other sources. However, as required by the ASCAP Articles, ASCAP’s collection of this data and data processing for royalty distributions are consistent with ASCAP’s core principles and S&D Rules set by the ASCAP Board. These distribution policies are shaped by factors of accuracy, efficiency and costs relative to the license fees it collects to ensure ASCAP can operate as efficiently as possible to maximize distributions to its members.

Advances in technology have provided immense efficiencies for, and improvements to, PRO data collection. Whereas decades ago, ASCAP employed people to literally listen to the radio and log songs played on paper, today, modern technologies and data sources allow ASCAP to process trillions of bytes of music usage information using the most up-to-date technologies available in the market. However, the investments in the new technologies and staff required for ASCAP to effectively manage and process such vast amount of data are costly and increasing. As a result, and in order to remain efficient, ASCAP needs to be selective in the investments and business process changes that it makes as part of its data collection practices.

In the best cases, if the performances are digital in nature, the licensees typically are able to readily provide electronically lists of all music performed by the licensees with embedded metadata on rights holders. Examples would include digital music services that transfer, by FTP site, massive computer files to music rights holders with the metadata they have for all the music performed on those services during a given time frame. In other cases, third-party services provide technologies that monitor real-time performances and make available that data to ASCAP for a fee. For example, services employing fingerprinting technologies can monitor thousands of terrestrial radio transmissions and make available performance information for those radio stations within ASCAP's applicable radio station survey. While the costs of acquiring this radio data are not insignificant, they are more than justified by the many tens of millions of dollars collected annually by ASCAP from the commercial radio industry.

In some instances, where digital technologies are not currently able to provide adequate information automatically, ASCAP relies on other reporting processes and

purchased data. Television performances have long been tracked by first acquiring television schedule information for all channels tracked by a trusted vendor. After identifying all the programs reported to have been broadcast or transmitted by a television licensee or group of licensees, ASCAP matches the programs with the cue sheets for those programs that indicate the music that is included in a program, minute-by-minute. Producers of television and motion pictures are responsible for delivering cue sheets to ASCAP mainly via electronic means<sup>23</sup> but on occasion manually, in writing. The costs of gathering and processing all the performance data for television media are, again, quite substantial but amply warranted due to the hundreds of millions of dollars of annual revenues generated from the television industry.

Many of the recent licensee complaints regarding PRO distributions focus on “live concerts.” With respect to the gathering of information with respect to live music performances<sup>24</sup>, we request setlists directly from managers, promoters and venues where available, but, more frequently than not, they do not provide them. As a result, ASCAP is required to obtain the setlist information ourselves, concert by concert, from various sources such as setlist.fm, a leading platform that makes available reported setlists for popular concerts. This type of manual information gathering is not only time-consuming, but expensive. Additionally, our members send us music usage information directly, which is a key means by which members receive distributions for performances of their

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<sup>23</sup> ASCAP and BMI years ago developed a common cue sheet submission process called Rapidcue® to ensure consistency and efficiency in cue sheet processing.

<sup>24</sup> We note that ASCAP’s discussion of live performances in these comments focus on non-symphonic performances. ASCAP licenses and distributes fees from symphonic and orchestral performances separately. With regards to symphonic performances, orchestras submit setlists of works performed at symphonic concerts directly to ASCAP.

music at live popular music concerts. We more fully discuss distribution with respect to live concerts, including ASCAP's survey, in response to Q7, *infra*.

ASCAP is constantly researching new and developing methods and sources to provide or supplement performance information. Of course, the usage of any of these sources must comply with ASCAP's core principle of economic efficiency. As most licensees do not assume responsibility for tracking performances and reporting them to ASCAP, the financial burden of monitoring performances falls on ASCAP's members. ASCAP must ensure its operational costs are as low as possible, and therefore we research and analyze each opportunity carefully to ensure it can provide reliable information, economically and fairly, for the benefit of ASCAP members. We discuss more fully the employment of new technologies *infra* in response to Q8.

**Q5. Whether the manner in which the PROs gather information regarding public performances adversely impacts lesser-known artists and smaller publishers.**

A5. Key to ASCAP's distribution policy is that of being objective and agnostic. From the standpoint of our distribution, each performance of a work performed in each medium is assigned a single value, in the form of a base credit (or portion thereof). One performance of a song by an unknown songwriter is given the same value as one performance of a song by a chart topper. It is agnostic. The chart topper will receive a higher distribution from the royalties received from a medium if the chart topper's song was performed more times than the unknown writer, but not because the song was assigned more inherent value by ASCAP.

A song and member will get paid if it is properly registered, performed on a surveyed medium and reported to ASCAP.<sup>25</sup> As explained in our answers, if a licensee is within a surveyed medium, ASCAP will endeavor to collect as much performance information as is cost effective to ensure a reasonable distribution.

Whether the works of “lesser-known artists” are performed and captured on such surveyed media depends on the media. (We note that the NOI mentions “artist”, we presume this refers to songwriters that record and/or perform their own music). As described in ASCAP’s easy-to-understand online explanation of its payment process (<https://www.ascap.com/help/royalties-and-payment/payment>) ASCAP, based on its S&D Rules and weighting formulas, calculates a distribution value known as a credit. ASCAP converts the value of credits into dollars based on the license fees received. ASCAP will assign a credit value to members’ registered works if the performances are captured in a survey, and performance information is obtained by ASCAP.<sup>26</sup> In 2024, hundreds of thousands of individual ASCAP members earned distribution credits. This number does not account for distributions to foreign societies due to foreign works performed by members of foreign PROs for which ASCAP collects and submits to such PROs, and in which case, if included, the number of ASCAP royalty recipients increases by tens of thousands.

Clearly, performances of works of “lesser known” members are being captured and credited. Given the existence of independent music distributors and the technical

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<sup>25</sup> As discussed *infra*, ASCAP also will pay directly members for performances at unsurveyed concerts through its OnStage program.

<sup>26</sup> For efficiency reasons, ASCAP will only make a distribution to a member if the distribution dollar amount (after conversion from credits) exceeds \$1.00. This threshold is if payment is made via direct deposit. If a member opts to receive a check, which few do, the threshold for distribution is the accumulation of \$100 in royalties.

capabilities of the largest music streaming services, performances of lesser-known writer-artists by music streaming services are much more commonplace. Those digital platforms submit comprehensive music use information to PROs, thereby allowing PROs to capture performance information for a much wider group of writers than ever before. However, given the enormity of the performances on those platforms (in the billions), the credits and distribution dollars for writers on the end of the longtail are bound to be diluted.

Furthermore, the songwriters of songs performed by lesser-known artists in concerts not included in ASCAP's live concert survey will nevertheless receive a distribution of royalties for those performances if they are included in the proxy performances from other media (discussed *infra*). Moreover, ASCAP is sensitive to the fact that some live music may not be captured in a survey. It is for this reason that ASCAP created and maintains its OnStage platform, which allows members who have performed unsurveyed live performances to submit a list of those works to ASCAP for distribution. The process is laid out for members at <https://www.ascap.com/music-creators/ascap-onstage>.

Via the OnStage online portal, members submit information about the concert, its venue and the works performed. ASCAP will then pay all ASCAP writer and publisher members for all works reported as performed (and not solely the member that submitted the information). It is important to note that this process permits any member whose works were performed in an unsurveyed venue to receive a distribution. ASCAP

publicizes this important stream of revenue to its membership and encourages its members to proactively report to ASCAP through OnStage.<sup>27</sup>

**Q6. What information PROs currently provide to the public, including with respect to: (a) repertoire information and metadata (e.g., song titles, songwriter and publisher information, ownership shares, and unique identifiers); and (b) royalty distribution practices and policies.**

A6. ASCAP is transparent with respect to both repertoire and royalty distribution practices.

Distribution Information. All of ASCAP’s S&D Rules, together with the ASCAP Articles and Compendium are available online for members and non-members alike at <https://www.ascap.com/about-us/governingDocuments>. Additionally, ASCAP members are entitled to review ASCAP records pertaining to their own distributions.

Repertoire Information. As required by Section X of the current ASCAP consent decree (“AFJ2”)<sup>28</sup>, ASCAP is obligated to make available online a public list of all works in the ASCAP repertoire and, upon request, inform a music user if a certain work identified by writer and title is in the repertoire (and make a good faith effort to identify the work by artist or other common identifier). ASCAP complies with this requirement by making available on its website its entire repertoire through a comprehensive database, which has been made available via Songview.<sup>29</sup>

ASCAP had for many years provided public online access to its repertoire. Likewise, BMI has made available their own online repertoire database. Nevertheless,

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<sup>27</sup> It is important to note that the value of the payment depends on the license fees paid by the applicable venue in which the performance occurs, with performances at larger venues that pay higher fees resulting in higher OnStage distributions. A distribution for a single performance at a single show at a small venue paying merely a few dollars a day to ASCAP in license fees will be quite small.

<sup>28</sup> Second Amended Final Judgment, *U.S. v. ASCAP*, Civ. Action No. 41-1395 (DJC) (June 13, 2001)

<sup>29</sup> See <https://www.ascap.com/repertory#/>.

over a decade ago, ASCAP and BMI understood that given the vast size of their respective repertories and the number of individual works that contain split ownership between ASCAP and BMI members and affiliates, it would benefit both PROs, and more importantly the public, to develop a method whereby the song data for all songs in each of their repertories were reconciled to cure any inaccuracies. This would obviate the occasional instances where the data was in conflict, such as when each of an ASCAP member and a BMI writer on a split work separately and inconsistently registered the work with their respective PRO.

Today, after a time consuming and capital-intensive cooperative effort, each of ASCAP and BMI now offers a Songview-powered database search function that displays aggregated information regarding over 28 million works that are in the aggregate available in the ASCAP repertory and in BMI's repertory (whether 100% controlled by BMI or jointly controlled by BMI with one or more PROs other than ASCAP) and the fractional shares represented by the ASCAP and BMI writers and publishers. Songview-reconciled works are clearly marked.

Each Songview search will identify in addition to the title: (1) all known writers (regardless of the writer's PRO affiliation); (2) their PRO (if applicable); (3) Interested Party Information ("IPI") number<sup>30</sup>; (4) publisher identity and publisher contact information;<sup>31</sup> (5) aggregated shares;<sup>32</sup> and (6) performing artists<sup>33</sup>. A search query may

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<sup>30</sup> IPI and ISWC are, respectively, standard international party and musical work identifiers. *See* <https://www.cisac.org/services/information-services>.

<sup>31</sup> Publisher contact information in a publisher query is intended for music users solely within the U.S. Additionally, the publisher name and address provided in database may be the contact information for the publisher or administrator of only certain rights in a work, and, therefore, may not necessarily be the contact information for the copyright owner of that work.

be made using one of six identifiers: (1) work title; (2) writer; (3) publisher; (4) ISWC; (5) ASCAP work identifier and (6) performing artist.

We understand that SESAC and GMR likewise make their repertory available for public search, and ASCAP, BMI, SESAC and GMR are currently exploring the inclusion of GMR and SESAC data to enhance Songview's reconciled view of copyright ownership information.

ASCAP additionally makes available three other repertory search functions: (1) ACE; (2) ASCAP 100 and (3) Restored Works.

ACE. ACE is a database search function that contains the same data information as contained through the Songview-powered database search, but results are limited to works that are in the ASCAP repertory.<sup>34</sup> This search view, which was in place prior to the advent of Songview, is useful for a music user who simply wants to determine if a work is in the ASCAP repertory.

ASCAP 100. The ASCAP 100 view simply shows works in the ASCAP repertory that are controlled entirely by ASCAP and its members, or otherwise licensed solely by ASCAP. This is useful for a music user who wishes to limit its music usage to that covered under an ASCAP license (foregoing licenses from other PROs).

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<sup>32</sup> There may be instances where the individual ownership shares represented by PROs other than ASCAP and BMI are not definitively known, and in such cases the aggregates share attributable to such third-party PROs are displayed as "other".

<sup>33</sup> As a song may have been recorded by numerous artists (*i.e.*, "covers"), a single work title may connect to multiple artists.

<sup>34</sup> Specifically, ACE contains information (1) on works in the ASCAP Repertory that have appeared in ASCAP's domestic performance surveys, including foreign works licensed by ASCAP for public performance in the U.S., and most works registered with ASCAP since January 1, 1991, whether surveyed or unsurveyed; and (2) relating to musical works that were formerly in the ASCAP repertory, but remain licensed by ASCAP for Licenses-in-Effect (as that term is defined in the Compendium).

Restored Works. The Restored Works view provides a search of works in the ASCAP repertory to which copyright protection has been restored pursuant to the Uruguay Round Agreements Act of 1992 (URAA) for the balance of the current 75-year copyright term. For example, much of the music of such prominent composers as Shostakovich, Prokofiev, Stravinsky, and Khachaturian is now copyrighted in the U.S.<sup>35</sup> A search may be conducted to view title, composer or year of publication.

ASCAP receives the work information from third parties – generally the writers or publishers themselves via their work registrations. And, as with any database, the data in ASCAP’s repertory database is constantly being updated as new works enter the repertory, as ownership shares change and as songwriter splits are revised, among other reasons. We point the Office to the terms of use connected with use of ASCAP’s repertory search features at <https://www.ascap.com/help/legal/ace-terms-of-use> (which includes a link to ASCAP’s main website Terms of Use that are also applicable to the repertory search features).

ASCAP has confidence in its databases and data searches. We will promptly correct mistakes known to us, as well as make changes for updated copyright information as it becomes available.<sup>36</sup> And, via the Songview process, we reconcile our data with that provided to BMI. As mentioned, the performing rights information at ASCAP is updated nightly; a licensee should have full confidence with respect to the data. Indeed, as mandated by AFJ2, ASCAP would not and may not institute an infringement lawsuit against a licensed music user for the performance of a work not contained in the database

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<sup>35</sup> <https://www.ascap.com/ace-title-search/restored-works>

<sup>36</sup> It should be stressed that ASCAP’s work information is submitted by our members, and accordingly we rely on their representation of the veracity of their submitted information.

at the time of performance.<sup>37</sup> Simply, we believe our Songview-powered database is the gold standard for public performing rights. Indeed, the DOJ, in reviewing ASCAP's consent decree, itself commended the value of Songview and our databases.<sup>38</sup>

**Q7. Whether any gaps or discrepancies occur in royalty distributions, including circumstances where it is likely for performance data to be unavailable or incomplete and where PROs must rely on proxy or survey data for royalty distributions.**

A7. Key to this question, focused on PRO distribution practices, is an understanding that ASCAP's distribution of royalties to its members is guided by certain basic principles. ASCAP's goal is to design and implement an efficient distribution system that enables ASCAP to track music use and ensure that royalty payments to members reflect fairly the value of performances in the various surveyed media, and that the methods and formulas employed for such distributions are disclosed fully and clearly to all members. An easy-to-follow explanation of ASCAP's distribution system is available online at <https://www.ascap.com/help/royalties-and-payment/payment> and a more detailed explanation is contained in the governing ASCAP S&D Rules, which are set by ASCAP's member-elected Board, and are contractually binding on ASCAP and its members.

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<sup>37</sup> See AFJ2 at X(D). ("After the date on which ASCAP makes the public electronic list available pursuant to Section X(B)(2) of this Second Amended Final Judgment, ASCAP shall not institute or threaten to institute, maintain, continue, sponsor, fund (wholly or partially, directly or indirectly) or provide any legal services for, any suit or proceeding against any music user for copyright infringement relating to the right of nondramatic public performance of any work in the ASCAP repertory that is not, at the time of the alleged infringement, identified on the public electronic list..."). Note that ASCAP's repertory includes a member's work upon creation, and an ASCAP license covers such works and provides assurance to the licensee prior to the work's inclusion in the database upon registration.

<sup>38</sup> See <https://www.justice.gov/archives/opa/pr/justice-department-commends-ascap-and-bmis-launch-songview>

## Use of Surveys and Proxies in Distributions

### Census and Sample Surveys

ASCAP believes that distributions should be made on a basis that gives primary consideration to the actual performance of members' works as indicated by regularly conducted, objective and statistically valid surveys of performances made by ASCAP licensees. These surveys, designed and monitored by independent survey experts, are of two types, each designed with the purpose of reflecting accurately the number and identification of performances and the license fees attributable to those performances: census and sample.

Whenever it is economically sensible, ASCAP will conduct a **census survey**, or complete count, of performances in a medium. ASCAP can count all performances in a medium when the cost of collecting and processing accurate data is a low enough percentage of the licensing revenue that the medium generates. Where a census survey is impractical, we conduct a **sample survey** designed to be a statistically accurate representation of performances in a medium. All times of the day, all days of the year, every region of the country and all types and sizes of licensees are represented in the ASCAP sample surveys. Both our census and sample surveys are conducted using state-of-the-art technology to collect performance data, as described *supra* in response to Q4. As technology becomes more sophisticated and economical, ASCAP can expand our complete count of performances and put more money in the pockets of ASCAP members.<sup>39</sup>

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<sup>39</sup> ASCAP'S website outlines where census and sample surveys are employed. See <https://www.ascap.com/help/royalties-and-payment/payment/surveys>.

Given the importance of live concerts, ASCAP includes live concert performances within its surveys. The live concert survey has been developed in furtherance of ASCAP's distribution policies of accuracy and efficiency relative to license fees. Accordingly, ASCAP reviews overall industry revenue information and creates a survey basis from the higher grossing popular concert tours and festivals, as well as numerous larger and notable music venues. The survey includes all opening acts, stages and headliner acts at these events. In addition, ASCAP tracks performances at all other concerts by those artists who perform at the higher grossing events, even if they fall outside the survey parameters (*e.g.*, if an opening act for a major band plays its own concert at a small venue not captured in the survey, ASCAP will retrieve setlists for those smaller concerts).

#### **Use of Proxies**

However, there are certain situations where an analysis of relevant factors – including the amount of license fees from a given licensee class, the availability and/or costs of accurately tracking performance data, and other factors including the type of performances involved (*e.g.*, mechanical-over-speaker, or live) – lead ASCAP to determine that even a sample survey is impractical and inefficient and to consequently make use of a proxy in its distribution. With respect to live performances occurring at smaller bars and clubs, it is important to understand that each of these licensees does not relatively represent significant license fees, and therefore, coupled with ASCAP's costs of gathering the data, the inclusion of these performances within the survey has been found to be economically impractical. In the aggregate, license fees from venues that offer live music and that are not licensed on a concert form of license (*i.e.*, bars,

restaurants, hotels) represent a very small percentage of ASCAP's total revenues.<sup>40</sup> Therefore, given the economic impracticalities of surveying these licensees, fees paid by these establishments are paid through a proxy.<sup>41</sup> Nevertheless, as discussed *supra*, ASCAP will make distributions for all these performances via the OnStage process.

### **Ensuring Accuracy in Distributions**

In order for ASCAP to make a distribution to a member in connection with a performance, ASCAP requires at a minimum that (1) the work be registered by the member; (2) the performance of the work be licensed; (3) the performance of the work be reported to ASCAP and (4) ASCAP be able to match the information in the report with the information contained in ASCAP's database records with respect to the work.

Given the advances in technologies, ASCAP will, if possible, endeavor at the outset to perform an automatic match between the information it receives and its internal data. ASCAP uses standard industry identifiers to make and process the automated match. In the event a match is not made at the outset – for instance due to an error in the title – ASCAP will analyze the error and use efforts to fix it (in which case, such cures advance the confidence levels for future matching).

The rate of initial accuracy depends on the medium and means of reporting. With respect to some license classes, reporting is quite complete due to historical practices or the technologies present in the reporting. For example, with respect to distributions of

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<sup>40</sup> It is important to note that the fees paid by bars and restaurants that present live music also cover performances of music played by non-live means such as digital audio playlists, karaoke and nonexempt audiovisual devices.

<sup>41</sup> In addition to fees paid for performances at bars and restaurants, fees paid for performances licensed pursuant to many other ASCAP "general licenses", for which the collection of performance data is likewise inefficient relative to license fees, including, for example, roller rinks, retail stores, museums and fitness facilities, are distributed on a proxy basis.

audiovisual programming, PROs historically obtain more complete cue sheets for produced episodic programming and movies, where producers traditionally clear synchronization rights and have cue sheet processes in place, but less complete cue sheets for live broadcast programming such as sporting events, where it is not business practice to have a monitor in the stadium logging music play, or programming produced and aired by local broadcast stations (*e.g.*, a public affairs news program). Additionally, ASCAP receives more robust reporting by services that rely on electronic data monitoring. Digital audio services are legally obligated to track and report music usage with respect to various rights, and maintaining and transmitting that information to rights holders including PROs is built into their systems.<sup>42</sup> Fingerprinting technologies, employed by some services that provide data, are also very sophisticated, resulting in more complete reporting.

Where logging music usage is not a traditional process by music users or technology is not efficiently available, we may see more data omissions and ASCAP will be required to exert more resources to fill those gaps. For example, as is most relevant to this NOI, live concert promoters have generally placed the burden on ASCAP to obtain that information. But sources do exist that provide concert event information for larger popular concerts and ASCAP will endeavor to use these resources to complete a census of music play of the performances in its live concert survey, to the extent that information is possible. And, as mentioned *supra*, for unsurveyed concerts, ASCAP's members provide to ASCAP such information for popular music performances through OnStage.

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<sup>42</sup> For example, Section 114 and Section 115 of the Copyright Act requires reporting of music information to SoundExchange and the Music Licensing Collective, respectively.

ASCAP also utilizes quality assurance protocols to enhance its data completeness. For example, ASCAP will have individuals manually review cue sheets against the actual programming to catch errors and omissions of reported information. As always, any cures will be uploaded into our overall databases to improve confidence for future matching.

What is key to understand is that ASCAP attempts to automate and streamline its matching and distribution process as much as possible and will expend resources efficiently to ensure that errors are fixed and gaps filled. ASCAP provides very detailed distribution statements to our members that are available through ASCAP's online member portal, and we ask our members to thoroughly review their statements to check for any omissions or issues. We work fervently with our members to cure those issues promptly. And in the instance where a performance has not been matched in a surveyed media and/or included within a member's distribution for such media, ASCAP provides an ability and process for a member to notify ASCAP of the performance after the fact, and ASCAP will make the necessary adjustments and pay the member. To that end, ASCAP recently launched the ASCAP Data Health Check, an innovative application that permits members through their mobile phones to scan their catalogue for missing meta data to enable ASCAP to better match and pay on performances of a member's works.

**Q8. What technological and business practices exist or could be developed to improve the current systems for usage tracking and royalty distribution.**

A8. ASCAP explores every solution to improve its tracking and royalty distribution. Again, however, our decision to expend resources and employ the practice or service is directly influenced by many factors, including the class of license, the license fees associated with such class, the quality and confidence level of the data and most

importantly the resource and financial costs to ASCAP's members to implement the practice or technology.

It may be that new technologies, such as those associated with artificial intelligence, may offer benefits and efficiencies in the future to enhance ASCAP's distribution process. ASCAP is open to exploring all options. However, the cost of acquiring and implementing any new technologies and any costs incurred by ASCAP to do any additional matching and processing work will need to be borne either by ASCAP's membership or its licensees. This is certainly true with respect to performances at venues.

Given the relatively small amount of fees collected from each venue where music is performed, if PROs were required to perform census or sample surveys of the live music performances occurring at the many thousands of venues across the country, it would only be fair for the venues to pay for the technology and assume the responsibility to submit accurate setlists to ASCAP and other PROs in a format usable by the PROs' systems on an automated basis, as the digital music services currently do.

For example, ASCAP is aware of new companies that are developing means to monitor performances in physical establishments. In examining these opportunities, we first need to be comfortable about tracking reliability. Can the service provide consistently reliable information? Are there adequate guardrails to prevent fraud? For example, ambient noise in an establishment or venue (think of a loud bar or sports arena) creates issues for audible fingerprinting technologies that rely on waveform matching. Even if the technology were not affected by noise (*e.g.*, it was plugged into a soundboard), and the match rate was acceptable, the cost of acquisition and

implementation of such technologies, as well as added data processing costs, must be weighed by the applicable license class and their revenues to determine efficiency. Examine bars and restaurants, for example. Tens of thousands of bars and restaurants of varying sizes around the country provide live music performances. Clearly, in such a situation, a sample survey would be required to track music usage in the establishments. That survey would need to be statistically representative, requiring a considerable number of establishments throughout the country in all strata to agree to employ the technology in their locations, to ensure it is on and functioning properly. Moreover, to enforce the requirement to use the technology and not tamper with it, ASCAP would have to expend additional resources. Even still, because every performing artist is unique, and the songs they perform vary from one another and even from performance to performance, even the best formed sample survey would likely result in an unacceptably high rate of performances being missed. Further, we must consider that bars and restaurants pay relatively low license fees. Therefore, the cost of acquiring and implementing any new tracking technology, the substantial cost of processing the voluminous additional performance data from those venues, and likely high rate of missed performances would be very hard to justify.

If PROs were required to perform census or sample surveys of the live music performances occurring at the thousands of venues across the country, it would only be fair for the venues to pay for the technology and assume the responsibility to submit accurate performance data to ASCAP and other PROs, as the digital music services currently do.

**Q9. The extent to which current PRO royalty distribution practices are the result of existing legal and regulatory constraints.**

A9. ASCAP's distribution process is at the discretion of ASCAP's membership, as represented by ASCAP's Board of Directors, and a function of its prized self-governance. ASCAP's distribution practices are not currently regulated.

**Copyright Law**

The copyright law does not address PRO distribution. Of course, ASCAP will only allow works to be registered and made a part of the repertory – a precondition for distribution – if they are subject to copyright protection in the first instance. ASCAP, for example, will not include in its repertory a public domain work. It will, however, allow registration of an arrangement of a public domain work that is of sufficient originality to warrant copyright protection.

**Antitrust Law**

In 1941, ASCAP entered into a consent decree with the DOJ to comply with federal antitrust laws. Given changes over time, the ASCAP consent decree has only been amended twice – in 1950<sup>43</sup> and 2001. Much has been written about the ASCAP consent decree and its changes over time. For general background, we direct the Office to our prior comments in the Music Licensing Study.<sup>44</sup>

The last amendment to the decree – AFJ2 – which took effect in 2001, removed certain requirements and obligations in the decree with respect to ASCAP's distribution

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<sup>43</sup> *United States v. Am. Soc'y of Composers, Authors & Publishers*, 1950-51 Tr. Cas. (CCH) ¶62,595, 63,756 (S.D.N.Y. 1950).

<sup>44</sup> Copyright Office, Music Licensing Study, Docket No. 2014-03.

system.<sup>45</sup> The government concluded that the changes in the marketplace, and the availability of competitive PRO alternatives for songwriters and publishers, warranted eliminating the regulation of ASCAP's relationship with its members and the manner by which ASCAP determines royalty distributions to the members.<sup>46</sup>

Currently, Section XI(B) of AFJ2 does retain certain provisions regarding distribution, including the mandated use of surveys. However, AFJ2 provides that each of these provisions become effective only when the consent decree entered by BMI provides a substantially identical provision to ensure that ASCAP is not put at a competitive disadvantage vis-a-vis BMI, its most significant competitor.<sup>47</sup> As BMI's consent decree does not have analogous provisions, AFJ2 therefore does not currently regulate ASCAP's distributions.

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<sup>45</sup> Those distribution provisions were added in 1960. *See United States v. Am. Soc'y of Composers, Authors & Publishers*, 1960 Trade Cas. (CCH) ¶69,612 (S.D.N.Y. 1960). Among other provisions, the 1960 Order imposed requirements with respect to the way ASCAP surveys music use for purposes of distribution; imposed various obligations on ASCAP with respect to the way it allocates royalties to members, including requirements that certain changes to the formulas and rules it uses be filed with and/or approved by both the Department of Justice and the court overseeing the consent decree.

<sup>46</sup> *See* Memorandum of the U.S. in Support of the Joint Motion to Enter Second Amended Final Judgment in *U.S. v. ASCAP*, Civil Action No. 41-1395) at 40. ("The restrictions and reporting requirements in the 1960 Order were intended to prevent ASCAP from exercising market power over members by discriminating against them in the distribution of revenues. \* \* \* In practice, however, the 1960 order has been an ineffective way of constraining ASCAP. There are no practical standards under which the Department or the Court can determine whether changes that ASCAP makes to its formula and rules in fact reflect the relative values of different music and music uses to licensees. \* \* \* The requirements of the 1960 Order thus impose costs on ASCAP (and consequently its members), on the Department, and on the Court, but provide little if any protection to members. \* \* \* Moreover, the market for administering performance rights on behalf of writers and publishers has changed significantly since the 1960 Order was entered. BMI now has a market share roughly equivalent to ASCAP's and provides rights holders with a significant competitive alternative to ASCAP. SESAC, although still substantially smaller than the other two PROs, has been growing rapidly and has succeeded in attracting a number of well-known songwriters. Competition from BMI and SESAC is likely to be far more effective in disciplining ASCAP's distribution practices than regulation by the Department or the Court. If a member becomes dissatisfied with the way ASCAP distributes its revenue, it can move to one of the other PROs. The AFJ2 thus focuses on ensuring that ASCAP cannot impede its members' ability to move to a competing PRO.")

<sup>47</sup> AFJ2 at XI(C).

Nevertheless, it is important to note that ASCAP's distribution rules and policies in any event generally comply with those obligations.

**Q10. Additional recommendations for Congress to address these issues.**

A10. ASCAP and BMI are already the most regulated entities in the U.S. entertainment industry.<sup>48</sup> Long subject to consent decrees as well as numerous state-enacted PRO licensing laws, ASCAP and BMI, and to a lesser extent the other PROs, must navigate a tightly woven regulatory maze to enforce our members' rights. ASCAP firmly believes that legislative action or regulatory action with respect to these issues is unnecessary and would ultimately disserve music creators.

We believe the free market and open competition benefits music creators and users alike. A PRO's internal distribution policies are likely the main factor in distinguishing one PRO from another and supporting such competition. As the DOJ concluded at the time AFJ2 was entered, if ASCAP members do not like ASCAP's distribution or other rules, those members are free to resign and reaffiliate with another PRO. Further, for music users, having access to information that enable them to program around PRO licenses, more PROs with unique repertoires, and more availability of pre-licensed digital services, provides them with a wider variety of licensing choices.

And, as evidenced by the immense success of the ASCAP's and BMI's Songview-powered repertory databases, the PROs are fully capable and are in the best position of making available transparent public access to their works. Given the complex interconnected and dynamic nature of maintaining and harmonizing worldwide PRO

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<sup>48</sup> In addition, songwriters and publishers are further regulated in connection with mechanical rights pursuant to Section 115 of the Copyright Act.

repertory data, the PROs are truly in the best position to continue administering this data for the benefit of the industry.

Moreover, music users are well protected from unscrupulous PRO entrants by virtue of numerous state and federal laws that address fraudulent and deceptive business practices to protect music users, in addition to the PRO licensing legislation already passed by states at the request and lobbying of music users.

Any further regulation of ASCAP and its members, including by means of compulsory licenses set at below-market royalty rates, would only serve to harm music creators and impede the Copyright Act's ability to incentivize and protect the creative efforts of ASCAP's members and provide consumers with a wider variety of affordable choices. Indeed, the Department of Justice criticized the use of compulsory licensing.<sup>49</sup>

The Office has in the past recognized the limiting nature of such regulation. The Register of Copyrights has opined against past proposals, advocated by many of the same music users complaining about PRO practices today, that would limit the reach and effectiveness of PRO and performance rights, reasoning that further regulation would both negatively impact creators, including the practical ability for composers and authors to enforce their rights (through collective licensing) and obtain a fair return for the use of their works.<sup>50</sup> Moreover, the Office has had deep concerns that regulation of PROs and

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<sup>49</sup> See Remarks of Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, January 15, 2021, available at <https://www.justice.gov/archives/opa/speech/remarks-assistant-attorney-general-makan-delrahim-future-ascap-and-bmi-consent-decrees#:~:text=The%20ASCAP%20and%20BMI%20consent%20decrees%20should%20be%20reviewed%20every,technology%20and%20the%20music%20industry> (“The third principle that should guide \* \* \* the Division's—and Congress's—efforts with regard to music licensing more generally, is the recognition that compulsory licensing is not the answer. \* \* \* Compulsory licensing also runs counter to the principles that form the very foundation of the free market and rights in intellectual property.”)

<sup>50</sup> See Prepared Statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress, at Hearing Before the Subcommittee on Courts, and Intellectual Property of the Committee on the Judiciary, House of Representatives (July 17, 1997) at 10.

limiting the public performance right would interfere with U.S. international obligations under various treaties, including the Berne Convention for the Protection of Literary and Artistic Works. Any further imposition of a limitation on PROs and the performing right, including by the addition of a compulsory license, would need to be consistent with our international obligations.<sup>51</sup>

Dated: April 11, 2025

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<sup>51</sup> Those last concerns were apt. The passage of the FMLA 1998 was determined by a World Trade Organization (WTO) Dispute Panel to be in violation of certain Articles of the Trade Related Aspects of Intellectual Property Rights provisions of the WTO Agreement (also known as the General Agreement on Tariffs and Trade, or “GATT”). *See* WTO, Report of the Panel, United States - Section 110(5) of the U.S. Copyright Act, WT/DS160/R, 2000 WL 816081 (June 15, 2000).