Enjoy your online music carefully: collective management of music copyrights in the USA

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Abstract: Collective management organisations (CMOs) are essential to the online provision of music. They can achieve an economy of scale and greatly facilitate the commodification of music works. However, due to the excessive market power held by these organisations, it is also possible for CMOs to harm both copyright holders and their licensees. Consequently, consent decrees between ASCAP, BMI and the US Department of Justice (DOJ) aim to deter CMOs from abusing their market power. Additionally, individuals are also entitled to take private actions against CMOs' anticompetitive behaviours. Further, faced with the fragmented online music copyrights, challenged by the common use of digital equipment, the collective management of copyrights in the USA calls for substantial reforms.

Keywords: copyright; collective management organisations; CMOs; online music; the USA; musical composition; sound recording; blanket licence; consent decree.


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1 Introduction

The first developed collective management began in 1847, when two composers, Paul Henrion and Victor Parizot and a writer, Ernest Bourget, supported by their publisher, brought a lawsuit against les ‘Ambassadeurs’, a ‘cafe-concert’ in the Avenue des Champs-Élysées in Paris. Over the past centuries, CMOs have not only developed an efficient way to enforce copyrights in situations where large number of right holders and users are involved, but also succeeded in balancing the market power of both copyright holders and users. Specifically, in the USA, organisations such as American Society of Composers, Authors, and Publishers (ASCAP), SoundExchange and Harry Fox Agency (HFA) greatly facilitate the collective management of music copyrights and the commercialisation of music. However, for many diverse reasons, which will be discussed later on, CMOs can also do harm to licensors and licensees.

The past decade has also witnessed the development of the internet, which has grown from a novel technical application into a central feature of the developed world economy. However, the advent of digital era, together with the accelerating transformation of information into digital form, may throw market of music completely out of balance. As a matter of fact, the development of digital technology has already led to the confluence of three developments: the changing nature of publication in the digital world, the increasing use of licensing rather than sale, and the use of technical protection services. Faced with these challenges, it is essential for the government, right holders, publishers, cultural heritage institutions and technology providers to convene to begin a discussion on new models for public access to information.

Part II of this paper is an overview of the rights collectively managed by US CMOs in the field of music, i.e., the music composition and sound recording copyright. In the first part of this section, I analyse the musical composition copyright in detail, explaining the performance and mechanical licenses needed in exploiting this kind of copyright. Further, I focus the second part of this sector on the development of sound recording copyright in the USA, from its roots in 1972 to the current efforts for its further expansion.

I will explain the management of CMOs in detail in Part III of this paper. Firstly, I analyse the advantages and disadvantages of collective management of copyrights. Next, because of the drawbacks of managing copyrights collectively, I explore the antitrust regulations posed on CMOs.

In the last part of this paper, I will propose and evaluate possible solutions to the problems caused by the developing online provision of music. The first proposal is related to the equal compensation of musical works and sound recording copyrights. The second suggestion is to consolidate the current licensing system by establishing new organisations named ‘Music Rights Organizations’ (MROs). Last, it is also noteworthy that, although it is possible to transform nearly all kinds of music works into digital forms without difficulty, certain music works can only be better protected when stay off-line.

2 The fragmented landscape of collective management of copyrights in the USA

As it is defined by the World Intellectual Property Organization (WIPO), collective management organisations are established by authors and artists in many fields “to manage their copyrights, to facilitate clearance of those rights and to ensure that
obtain economic reward for their creative output.” Generally speaking, CMOs have the following three features: A CMO must acquire the ability to
a license from a plurality of rights holders, or some other authority to get paid
b find a way to offer a license or other rights to users, and this necessarily includes negotiating or setting prices
c obtain usage data or other data from users for purposes of distribution.

Besides the general characters which are the same to all of the CMOs around the world, managing copyright in the realm of music collectively in the USA, as to be discussed below, also involves other elements such as antitrust regulations.

Before analysing the detailed issues in relation to collective management organisations, it is of great importance to be familiar with the rights and parties involved in collective management of music in the USA. In the following sections, I will explain the fragmented US music copyrights in detail.

2.1 Music copyright

By virtue of 17 US Code §102, copyright exists in a world of dualities. There are two separate copyrights within each musical work: the musical composition copyright and the sound recording copyright. Each type of copyrighted work is licensed separately depending on whether it is being ‘publicly performed’ (i.e., broadcast) or reproduced and distributed. Although the rights described above may initially vest in the creators of the songs and their recordings (depending on the existence of certain contractual obligations), in many cases those rights are administered by other entities. In this situation, potential licensees must contact each of those entities to obtain the appropriate clearances to use the song. Understanding these two copyrights is the first step in understanding this complicated legal system.

2.1.1 Musical composition

Musical works are composed of notes and lyrics that might be written out on paper. In other words, as soon as the notes and lyrics of a new song hit the page, the author has created a copyrightable work known as a ‘musical work’ or ‘musical composition’. In the USA, musical composition right holders are granted comprehensive protections by the rights enshrined in 17 U.S.C. § 106(a) (1)–(5). Namely, right holders are entitled

1 to reproduce the work
2 to prepare derivative works based upon it
3 to distribute copies or phonorecords of the work
4 to perform the work publicly
5 to display the work publicly.

In case that other musicians wish to further exploit the authors’ musical composition copyright, these musicians usually need to obtain a performance license or a mechanical license.
However, it is typical for musical composition right owners to assign the copyright to a publisher in pursuit of representation. During the past decades, the functions of publishers have gone through fundamental changes. Publishers used to work as salesmen and dedicated to commercialising their principals’ musical works. In return, composers or authors typically either assign to the publishers 50% of all the musical work copyright royalties, or totally transfer the ownership of copyrights in the songs to publishers. However, with the decrease of sheet music and the rise of singers who write their own songs, publishers shrink their business scope mainly to royalty collection and accounting. Moreover, two sets of copyright-licensing collectives have also replaced publishers in issuing licenses. Namely, in relation to public performing rights, performing right organisations (PROs), which also belongs to the category of CMOs, focuses specifically on issuing licenses to musical composition. Noteworthy, four major PROs represent the interests of songwriters and publishers in the USA nowadays, namely, ASCAP, the Broadcast Inc (BMI), Nashville-based SESAC, Inc (SESAC) and Global Music Rights (GMR). Additionally, third party administrators such as HFA and Music Reports, Inc. handle the mechanical licensing.

I will explain these two kinds of licenses in detail in the following paragraphs.

2.1.1.1 Performance license

In order to become a member of these PROs, composers, lyricist and publishers need to assign to the PROs non-exclusive right to license non-dramatic public performances of their works. Typically, PROs will achieve economies of scale by means of ‘blanket licenses’, enabling the licensees to perform the entire repertoire of a PRO’s songs (or some pre-set subgroup of songs) throughout the term of the license.

Since the establishment of ASCAP in the US in 1914, PROs have long been regarded as an indispensable way to efficiently license and enforce certain types of copyrights in the face of otherwise prohibitively high transaction costs. They not only unify the methods of collecting and distributing royalties, but also undertake to oversee copyright compliance, fight piracy and perform various social and cultural functions. Taking ASCAP for an example, ASCAP has already gathered over 400,000 members and attracted foreign PROs to affiliate with it (sometimes referred to as the ‘ASCAP Repertory’). Therefore, ASCAP blanket licenses are incredibly efficient means for giving users blanket access to perform over 8.5 million copyrighted songs and musical works contained in its repertory.

2.1.1.2 Mechanical license

As mentioned above, HFA handles a great majority of mechanical licensing in the USA. Besides issuing mechanical licenses, HFA also represents over 27,000 music publishers and more than 160,000 songwriters when organising infringement actions and ensuring proper and timely payment of royalties. The current statutory mechanical royalty rate is 9.1 cents per song per unit for recordings of compositions of up to five minutes in length. HFA also licenses the publishing mechanisms for full album downloads, on-demand streams, limited downloads, digital jukeboxes, and digital background music services. In return, HFA subtracts 8.75% of the royalties collected before distributing the balance to copyright right holders.
Notably, in the 1990s, the US Congress subjected the reproduction right of music composition to compulsory license, which means that once the owner allows someone to make and sell phonorecords of a musical work, anyone else is entitled to make his or her own phonorecords of that work. Interestingly, as to be discussed below, given that this compulsory license regulation applies only to musical composition rather than sound recordings, the right holders of music composition copyright are not free to negotiate the royalty rates in the open market, which leaves the creators unfairly treated. At present, the US Copyright Office holds the opinion that licensing parity between these two music copyrights needs to be achieved in the overhaul of the current music licensing system. (To be discussed in detail below)

2.1.2 Sound recording

Another copyright contained in a piece of music is sound recording. Sound recording is defined as a fixation of sounds, including a fixation of a performance of someone playing and singing a musical work, other than those accompanying audio-visual works.

In USA, most sound recordings, especially the sound recording right of musical performances, are owned by five major record labels – Universal Music Group, Sony Music Entertainment, Warner Brothers Music, BMG Entertainment, and EMI Group. These record labels are the holders of musical sound recording by means of work-for-hire agreements or assignments of ownership by artists and producers.

In 1971, the Congress granted federal copyright protection to sound recordings for the first time. However, although five exclusive rights for copyright holders are specified in 1976 Copyright Act, record labels and artists were only entitled to exercise distribution and reproduction rights. It is believed that this anomaly resulted from the broadcasters’ powerful lobbyists, arguing that since artists and labels could be well compensated by the promotional consideration provided by free radio airplay, payment for sound recordings shall be excluded from the Copyright Act. As a result, when a radio station performs a recording over the airwaves, or a production manager plays a recording to a stadium full of football fans, neither the station nor the production manager need permission from or pay royalties to the copyright owner of the sound recording (although they must, of course, seek permission from the owner of the underlying musical composition).

Since the 1990s, the emergence of the internet and the advent of online music streaming have been both a blessing and curse to the holders of sound recording copyright: On the one hand, music streaming online seriously threatens the sale of physical records, which have long been the main revenue source of sound recordings; while on the other hand, in order to stimulate digital transmission and provide consumers with higher-quality online recordings, the US Congress enacted an amendment to the 1976 Copyright Act, i.e. the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA), which granted copyright holders exclusive right “to perform the copyrighted work publicly by means of digital audio transmission”. Consequently, by virtue of DPRSRA, although a radio station still do not need to pay performance royalties to sound-recording owners for conventional radio broadcasts, they must obtain licenses and pay royalties to sound-recording owners for digital performance, such as webcasting their programs over the internet.

It is also noteworthy that although Congress recognised second-recording right holders’ digital performance right, it limited this right in significant ways in order to
balance the various industry interests. For example, non-subscription broadcast transmissions are completely exempt from the sound-recording digital performance right, which means that the right holder of an ad-based sound recording cannot be fairly compensated. Another evidence indicating the effort of balancing industry interests is that the US Congress connected the probability of infringement with the strength of protection for sound recording copyright. When the likelihood of infringing reproductions increases, a special judicial mechanism is designed to provide stronger protection on performance right in the field of sound recording.

Because of the further development of streaming technology, the Congress sped up the enactment of the Digital Millennium Copyright Act of 1998 (‘DMCA’). Notably, DMCA differentiates between ‘interactive’ and ‘non-interactive’ streaming transmission, which also aimed at balancing various industry interests. The following paragraphs will extend on these two kinds of transmissions.

Interactive transmission indicates the transmission of a particular sound recording requested by the recipient or a program specially created for the recipient. Given that it is very likely that interactive transmission would replace the purchase of physical music and result in the loss of reproduction royalties, transmitters are obliged to negotiate with the holders of the sound recording rights individually. Albeit numerous limitations, sound recording copyright owners are able to demand any price for the license or even entirely deny the permission.

Non-interactive transmission, moreover, is further divided into three categories:

1. **Non-subscription broadcast transmissions**: These are “transmissions made by a terrestrial broadcast station licensed as such”. They are completely excluded from copyright owner’s digital transmission performance right. In other words, there is no need for transmitters to obtain permission from sound recording copyright owners.

2. **Compliant eligible non-subscription transmissions**: They are not exempted from the digital transmission performance right in their entirety, and are adhere to a long list of detailed conditions to qualify for the compulsory license, they will be subject to a compulsory license of the digital transmission performance right.

3. **All other non-interactive transmissions**: Non-interactive transmissions are within this third category so long as they are exempted from the first two categories. In such case, transmitters usually obtain permissions from copyright owners.

Like the licensing of music composition copyright, performance and mechanical licenses are required in the exploitation of the sound recording copyright. Specially, in this digital age, while various PROs typically administer performance rights in non-digital musical works, SoundExchange, a specialised CMO, administers the performance right in digital sound recordings. It is a non-profit digital performance rights organisation, which collects and distributes performance royalties from non-interactive digital music services on behalf of recording artists and labels. So far, this organisation has contributed much to the thrive of music and creative community. For instance, by the year of 2012, SoundExchange had reached a major milestone of $1 billion in digital royalty payments to recording artists and record labels since its inception.
3 Challenges posed on CMOs by the online provision of music

Online provision of music takes various forms. To specify, downloading and streaming audio are two major types of internet music transmissions today.⁵⁵

Albeit the overlapping rights and organisations mentioned above, digital transaction of music is likely to create further uncertainty. In the following sections, I will first analyse the advantages and disadvantages of managing copyrights collectively in this digital age. Then, I will focus on how the antitrust law tries to offset the drawbacks of collective management of copyrights and the outcomes of such regulation.

3.1 Collective management of copyrights in the digital age

3.1.1 The advantages of CMOs in the digital era

First of all, transaction costs will be substantially reduced with one single organisation licensing a bulk of music performing rights under just one blanket license.⁵⁶ Although it is possible for copyright holders to license their music composition copyright individually, such transactions are likely to incur enormous transaction costs because it is extremely burdensome to identify and locate individual copyright owners, to negotiate individual contracts and to collect royalties.

Moreover, the costs of copyright enforcement can also be largely reduced. In principle, the enforcement of copyright individually by copyright holders is unfeasible for the following two reasons: to begin with, unauthorised performance of copyrighted music is of a transitory nature, it is difficult and costly for copyright holders to detect infringements. Second, musical work and sound recording copyrights resemble ‘public goods’ in that once they are created, the marginal cost of additional use is zero.⁵⁷ An infringer can play a song without deteriorating other users’ right to enjoy this song, making it even more difficult to enforce copyright individually.

In order to protect and compensate copyright holders efficiently, CMOs can work efficiently to monitor users’ behaviour and detect infringement. Notably, the blanket license used by CMOs makes the enforcement of copyright even more effective. Since holders of blanket license are entitled to exploit all musical composition copyrights within the CMOs’ repertories, CMOs only need to focus on the behaviours of non-licensees to detect illegal exploitation of copyrights, which will further reduce copyright enforcement costs.

Additionally, CMOs play an important role in balancing the bargaining power of users and copyright owners.⁵⁸ Taking PROs for example, the blanket licenses granted by them effectively enhance the market power of musical work copyright holders. With blanket licenses, composers are furnished with certain leverage power to negotiate with comparatively powerful users, who are the main source of their royalties. For instance, without the blanket licenses of ASCAP and BMI, television networks undoubtedly hold superior market power vis-à-vis individual composers. Making use of the intensive competition among copyright holders who desire to make their works performed on televisions, television networks can set the royalty rate at a low level. By contrast, by joining a collective organisation that blanket licenses music performance rights, even an individual composer can counterbalance such market power to assure receipt of fair compensation.⁵⁹
CMOs, if operated properly, may as well inspire cultural innovation. They cannot only provide an expeditious means of the remuneration to rights holders, but also encourage creation through specific financial support mechanisms (e.g. distributing royalties for ‘culture reasons’).

Admittedly, the dawn of this information age is demolishing the careful balance of public good and private interest within the existing US intellectual property legislation framework. Moreover, because of slow adaptation of CMOs to the rapid internet technology, the benefits brought about to CMOs by the internet are yet to be seen. However, if the US Congress can take measures such as consolidating the fragmented copyright licensing system (to be discussed below), it is possible that the Congress will may actually find a world order like this to be more manageable in the long run. Consequently, it is fair to say that the revolution of CMOs has now become an imminent issue.

3.1.2 The harms caused by CMOs: monopolistic conducts

Due to the excessive market share held by CMOs such as ASCAP and BMI, efforts have been taken to prevent them from conducting monopolistic behaviour. Like most monopolists, CMOs often pursue profit for themselves at the expense of both artists affiliated to them and users. In particular, ASCAP and BMI have been sued for ‘price fixing and/or unlawful tying.’ In response to the alleged antitrust conducts, two measures are taken to prevent ASCAP and BMI from conducting monopolistic behaviours. On the one hand, the said PROs entered into antitrust consent decrees with the US DOJ in 1941 and 1966 respectively, which made it possible for broadcasters to obtain blanket licenses on a per performance basis. On the other hand, the US District Court for the Southern District of New York maintains a rate court to ensure the fees charged by ASCAP and BMI are fair.

However, the consent decrees fail to deter ASCAP and BMI from abusing their market power. Although multiple lawsuits are brought against these two CMOs, alleging monopolistic conduct in the aftermath of consent decrees, it seems that Courts in the US are reluctant to restrain the CMOs. As a result, despite the restrictions posed by consent decrees, ASCAP and BMI still drive the vast majority of licensees into purchasing expensive blanket licenses.

3.2 Regulation on CMOs in the digital age: the legitimacy of the antitrust law interference

Because of the aforementioned anticompetitive conducts carried out by CMOs, major CMOs in the USA have been challenged by both private licensees and the Government under antitrust laws. In the first part of this sector, I concentrate on how consent decrees and private enforcement of antitrust law affect CMOs. Then, I analyse in the second part why it is improper to control the market power of CMOs by the enforcement of antitrust law.
3.2.1 The enforcement of antitrust law

As mentioned above, consent decrees were entered between the US DOJ and ASCAP, BMI. Specifically, the Antitrust Division of DOJ began the investigation on ASCAP’s price fixing and/or unlawful tying practices in the 1930s. Further, the investigation was followed by two federal court actions against ASCAP in 1934 and 1941. Although the first case was never thoroughly litigated, the second one was settled with a consent decree in 1941. Afterwards, the consent decree between DOJ and ASCAP was modified in 1950 and 2001. Similarly, the consent decree between BMI and the DOJ was entered in 1941. Although the ASCAP and BMI consent decrees are not identical, they do share a number of same features: from the perspective of acquiring copyrights, neither of them can acquire non-exclusive rights to license members’ public performance rights. In addition, when granting licenses to users, they are obliged to grant a license to any user that applies. Also, they are prohibited to discriminate similarly situated licenses. It is also notably that, in practice, neither of these two PROs licenses rights other than their members’ public performance rights.

Nevertheless, the consent decrees left certain potential licensees unsatisfied. As a result, PROs are also subject to several private antitrust actions. To specify, in the 1979 Supreme Court case *BMI v. CBS*, faced with the claims filed by CBS, alleging that the blanket licensing violated antitrust law because of “illegal price fixing, an unlawful tying arrangement, a concerted refusal to deal and a misuse of copyrights”, the Supreme Court established that the consent decree should be evaluated under the ‘rule of reason’ test. On remand, the court of appeals ruled in favour of the blanket license, in view that the CBS was able to obtain direct license from copyright owners. After the *BMI v. CBS* litigation, a number other courts also examined the legitimacy of blanket licenses, and all of them sustained it against antitrust challenges because of the ‘rule of reason’ analysis.

Besides, there is also a recent litigation between the PROs and Pandora, an internet radio service supplier. In 2011 and 2013, respectively, ASCAP and BMI, because of the demands from major publishers, amended their rules to allow music publishers to withdraw from PRO representation the right to license their public performance rights for ‘new media’ uses – i.e., digital streaming services – while still allowing the PROs to license to other outlets on their behalf. Pandora, in response, challenged the publisher’s partial withdrawal of rights before both the ASCAP and BMI rate courts. In view of the terms of consent decrees, the Court ruled that music publishers could not withdraw selected rights; on the contrary, their music catalogue must be ‘all in’ or ‘all out’ of the PROs.

3.2.2 The improperness of antitrust regulation on CMOs

Without the supervision of antitrust laws, CMOs such as PROs could exploit their monopoly powers by means of blanket licensing to force users to accept supracompetitive licensing fees or completely exclude them from using any of the music within their repertory. Nevertheless, neither antitrust legislation nor private antitrust actions succeeds in controlling abuses of PROs’ monopolistic bargaining power. As a matter of fact, it is believed that the goal of antitrust regulation, namely, the promotion of reasonable rates through the introduction of price competition, is inappropriate and misguided in a market where price seldom affects the desirability of a composition. In the following two
sectors, I will introduce the three reasons accounting for the inability of antitrust regulation as well as the wrongfulness of introducing price competition.

3.2.2.1 The inability of antitrust law regulation

Three reasons account for the inability of antitrust law regulation:

To begin with, for both personal and governmental antitrust law challenges, the antitrust actions taken against the blanket licenses often involve extensive and expensive litigation, and therefore such recourse is only limited to users who can afford it. For instance, in the aforementioned CBS case, the litigation lasted for eleven years, incurring substantial litigation expenses and significant revenue losses.80

Second, antitrust challenges against blanket licenses can hardly provide users with adequate judicial remedies. From the perspective of personal litigation, although the litigants object to the fees of blanket licenses, they nevertheless would like to continue licensing performance rights through blanket licenses because of the more favourable transaction cost. However, instead of compelling PROs to issue blanket licenses at a reasonable price, rulings of the courts tend to completely exempt potential users from performance right licenses. As for governmental regulation through consent decree, although District Court for the Southern District of New York is capable of determining reasonable fees in the case of disputes,81 the excessive cost entailed, together with the problem of its limited jurisdiction,82 discourages users from resorting to it. In fact, the District Court for the Southern District of New York has never made a final determination of what constitutes a reasonable blanket license fee.83

In addition, the uncertainty of legal proceedings is another factor that leads to the failure of antitrust regulations. In antitrust legal proceedings, different judges with varying experience and expertise may render contradictory decisions, which may consequently undermine the equity of antitrust law enforcement.

In sum, enforcement of the consent decrees can merely work as a limited mechanism for protecting users against abuses of monopoly powers by PROs.84

3.2.2.2 The wrongful introduction of price competition

As indicated, the underlying reason for the inefficiency of antitrust regulation is that, due to the unique market conditions of music licensing, price competition is ordinarily not a significant factor in the performing rights market.85

For purchasers, price differentials are unlikely to have a significant effect upon their selection of music. For one thing, each musical composition or recording is of unique quality, they are actually not substitutable. For another, in choosing a piece of music, listeners are exercising their aesthetic preferences.86 Both of the factors result in the inelasticity of the demand for music. Radio stations and bars, for instance, can hardly be induced to select cheaper but less popular music at the risk of losing customers, especially when the license fees to be saved by the alternative choice are trivial.

Regarding composers, since the majority of their income is obtained from performances, lucrative sales of phonograph records, prerecorded tapes and sheet music, they are not inclined to charge higher performance fees in pursuit of the increase of earnings. Instead, they are eager to license the public performance right of their music and stimulate more lucrative transactions mentioned above.
Therefore, the concept of price competition between different compositions is inappropriate to the online music market, in which the selection of works to be performed depends much more on the quality and popularity of the composition rather than the price of it. Instead of sacrificing the acknowledged advantages of blanket licensing by an awkward attempt to promote price competition, the regulation of CMOs shall be carried out in a way that, on the one hand, ensures the grant of blanket licenses to potential users; while on the other hand, properly controls the monopoly power of these organisations.

4 Possible solutions

In view of the changes in the way music has delivered and consumed in the recent years and in response to the request by CMOs such as ASCAP and BMI, the US government has been taking measures to combat the impacts brought about by this digital age. For instance, DOJ’s Antitrust Division announced in June 2014 that it would evaluate the consent decrees again. Up to now, it has received extensive public comments on the ways in which the decrees might be amended. In the following paragraphs, I will analyse the possible solutions to counter the challenging new era.

4.1 Musical work versus sound recording: a path to equitable treatment

As addressed in Section II, in the current US music copyright system, musical work and sound recording are treated differently. To illustrate, sound recordings are licensed by their owners after negotiating in a free market (except in the case of non-interactive streaming uses) while core segments of musical work market (namely, mechanical reproduction and performance uses) are subject to government oversight. As a result, substantially higher rates are paid for sound recording than for musical works.

Guided by a principle, saying that “music creator should be fairly compensated for their contributions”, the US Copyright Office proposes to offer musical work copyright holders a mechanical opt-out right. Such right would enables musical work copyright holders to withdraw from blanket performance licenses in relation to interactive streaming downloading activities. In this regard, instead of totally eliminating section 115, the US Copyright Office endeavours to transform this section into a basis for flexible collective licensing system, where sound recordings and the underlying musical works can stand on more equal footing at least in the digital realm.

In addition, publishers that chose to opt out from PROs should be obliged to provide a list of their withdrawn works and other pertinent information to the public, which will make the market participants more accessible to authoritative data when it comes to identifying and licensing musical works.

4.2 Consolidation of fragmented music copyright licensing: MROs and more

In order to reduce transaction cost and solve the problem of fragmented copyright licensing, a merger of the licensing of songs and recordings is a good option. What the US Copyright Office proposes it to establish organisations named MROs.

The effort of founding MROs can be traced back to a decade ago (in 2005), when the US Copyright Office proposed a ‘21st Century Music Reform Act’, which would have effectively repealed the section 115 statutory license. According to the said Act, MROs
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would be vested with the right to license both performance and mechanical rights on a blanket basis. Later, the Section 115 Reform Act (‘SIRA’)
also aimed to establish a ‘general designated agent’, provided that they represented at least 15% of the music publishing market. While the basic goals of founding MROs were widely agreed upon among the music industry participants, the participants still addressed their concerns on specific issues: for example, the separate licensing of musical composition and sound recording copyright remained unsolved; the Proposal of the US Copyright Office could not effectively deter MROs from exploiting their excessive market power brought about by over-consolidation; also, the Proposal was not functional, credible and relevant enough for the future, being unlikely to prevent future impasse sufficiently.

Although the worries of industry participants deterred the proposals from being reported out, if the following measures can be taken to solve the problems mentioned above, it is likely that that MROs can serve as good starting point for the further modernisation of the US licensing system. On the one hand, each MOR to be established should enjoy an antitrust exemption in order to negotiate performance and mechanical licenses collectively on behalf of its members. Accordingly, because of the allegations of anticompetitive conducts, the US Copyright Office also proposes to create a unified licensing scheme for broadcasters by migrating all ratesettings to a single, specialised agency. As mentioned above, nowadays ASCAP and BMI are operating under an ad hoc system in the federal rate courts, in which only a small fraction of their rates are actually litigated. After the establishment of this new agency, it will be able to outcompete the current rate courts in that it possesses the capacity to assess a broader spectrum of rate-related questions and is expert in copyright law related issues.

On the other hand, MROs should also maintain a searchable electronic database of the musical work represented by those agents, the cost of which would be shared by both the agents and the licensees. In this regard, stakeholders would not suffer from the lack of reliable licensing data anymore, alleviating the inefficiency in the licensing process.

4.3 Alternatives to networks for distribution of content

Besides the possible solutions mentioned above, it should be recognised that, after all, online distribution is not suitable for all forms of contents.

For instance, high-value, high-lived products (e.g., Over the rainbow contained in the The Wizard of Oz), might never be made available on the internet with sufficient protection of copyright, because the possibility of someone capturing the bits are too great, while the technical, legal and social enforcement costs of preventing these illegal exploitations from happening are prohibitive.

In these circumstances, a possible way to resolve this problem is to make use of special-purpose delivery devices [such as digital video disks (DVDs)], which combine both software encryptions and specialised hardware. Although this approach is not as convenient as the online provision of music, users can still enjoy the great convenience brought about by the devices’ digital content (e.g., compactness, low manufacturing cost). Moreover, the traditional distribution media, in which contents are ‘bound to’ the physical objects, make the decrypted digital content very difficult to capture. In sum, is should be bear in mind that, for some of the music, there is no need to risk the consequence and provide it online.
In sum, music is a form of ‘art’ while the ‘licensing of music copyright’ is a way of doing ‘business’. In this regard, the art and profit involved in the licensing process are and will continue to be uneasy partners, the conflicts between which cannot be easily resolved.

5 Conclusions

Copyright legislation seeks to balance the creation of incentives for authors to produce new works with the desire to ensure public access to those works. However, the fragmented music copyrights has greatly distorted the balance of incentives and public access to music. Moreover, the dawn of information age as well as the use of online music platform further complicates this matter.

Although CMOs effectively reduce transaction costs involved in the licensing of music related copyrights, their management approach and market power result in unfavourable effects on both copyright holders and users. In response to this problem, this paper argues that, instead of enforcing antitrust law, the US Congress may reform the music licensing system by

a providing the publishers the right to ‘opt out’ from blanket performance licenses for interactive streaming downloading activities

b establishing consolidated licensing organisations such as MROs.

In a word, adapting CMOs to this new digital era provides a significant start to realising the internet’s promise of increased access of copyrighted music. The US Congress and the US Copyright Office need to apply fresh eyes to music copyright management to ensure that the regulations remain functional, credible and relevant for the future.

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United States Supreme Court (1979) *Broadcast Music, Inc. v. CBS, Inc.*., 441 U.S.


Notes


9 United States Code Title 17, §102, Subject matter of copyright: in general, Circular 92, Chapter 1.

14 The definition of phonorecord: According to 17 U.S.C. § 101, the term ‘phonorecord’ is defined as follows: ‘phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.
15 The United States Code Title 17, §106(a)(1)–(5), Exclusive rights in copyrighted works.
16 Mechanical license grants the rights to reproduce and distribute copyrighted musical compositions (songs) on CDs, records, tapes, ringtones, permanent digital downloads, interactive streams and other digital configurations supporting various business models. See HFA [online] http://www.harryfox.com/license_music/what_is_mechanical_license.html (accessed 1 January 2015) for reference.
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32 Supra note 9, §101, Definition.
37 Work-for-hire provisions: According to the definition provided by the United States Copyright Act of 1976, Definitions (17 U.S.C. § 101), “a ‘work made for hire’ is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”
40 Supra note 13.
43 Id.
45 Supra note 9, §114(d)(1)(A)–(B): Scope of exclusive rights in sound recordings.
46 Supra note 13.
47 Supra note 9, § 114(d)(2–4), Scope of exclusive rights in sound recordings.
48 Supra note 32, pp.237, 242–43.
49 Id., pp. 851. See also 17 U.S.C. §§ 114(d)(3) and 114(h) (1994 and Supp. IV 1998)
50 Id.
51 17 U. S. C §§ 114(d)(2)(A), (C).
52 Supra note 11, pp.163.
55 Supra note 32, pp. 2.
57 Id., pp. 4.

60 Supra note 57.


64 ASCAP and BMI have continued to attempt to derive income from non-music programming, have failed to provide meaningful per-program licenses, and have sought to require royalties from entities engaged in non-compensable public performances. Each of these activities is a substantive violation of the consent decrees. See, Hillman, N. (1998) ‘Intractable consent: a legislative solution to the problem of the aging consent decrees in United States v. ASCAP and United States v. BMI’, Fordham Intellectual Property, Media and Entertainment Law Journal, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J, pp.756–762 for reference.

65 Supra note 31.

66 United States Supreme Court (1979) Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 at p.11.

67 Id. At 12, n. 20.

68 ASCAP Consent Decree §§ IV.B.C, VI, VIII, XI; BMI Consent Decree §§ IV.A, V, VIII.


70 Supra note 66.

71 Supra note 66, at p.6.

72 Rule of reason: The rule of reason is a legal doctrine used to interpret the Sherman Antitrust Act. Conducts analysed under the rule of reason are only considered illegal when their effect is to unreasonably restrain trade. See, Case Adyston Pipe and Steel Co. v. United States (175 U.S. 211) for reference.

73 United States Supreme Court, CBS v. ASCAP, 620 F.2d 930, 938 39 (2d Cir. 1980).


78 Supra note 55.

79 Id.

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of the litigation and was only recently readjusted retroactively to account for inflation and
the network’s own revenue increases during that period. ABC’s ASCAP license has also been
frozen since 1976 and the parties have yet to agree upon proper retroactive adjustments.

judgment of 1950’, Bulletin of the Copyright Society of the U.S.A, 23 BULL. COPYRIGHT
SOC’Y 119, 124, pp.119, 126.

Id. pp.119, 126.

Id. pp.138.

Supra note 55.

Id.

Case Comment (1978) ‘CBS v. ASCAP: who calls the tune? Performing right societies and

Supra note 59.

The United States Department of Justice (2014) Antitrust Consent Decree Review [online]

Supra note 31.

Id. p.1.

Supra note 16.

See generally Copyright Office Views on Music Licensing Reform: Hearing Before the
Subcomm. on Courts, the Internet, and Intel. Prop. of the H. Comm. on the Judiciary, 109th

SIRA, H.R.5553, 109th Cong. (2006). SIRA was later incorporated into the Copyright

section 115: escape from the byzantine world of mechanical licensing’, 24 Cardozo Art and

Supra note 16.

Supra note 31.

Supra note 6.

Id.

The United States Supreme Court (1990) Stewart et al. v. Abend, DBA Authors Research Co.,
495 U.S. 207, 228.

Supra note 30, pp.242–243.