



Issues Related to Performing Rights Organizations

U.S. Copyright Office

Docket No. 2025–1

Re:Create is dedicated to a balanced copyright system that serves the full spectrum of copyright stakeholders including libraries, civil libertarians, online rights advocates, start-ups, consumers, and technology companies of all sizes. Rather than respond to the specific questions in the Copyright Office’s notice of inquiry concerning performing rights organizations (PROs), we write to comment more generally on the need for more assertive regulation of the activities of collective management organizations (CMOs), of which PROs are a subset.

CMOs clearly have an important role to play in the efficient operation of copyright systems, particularly with respect to musical compositions and sound recordings. However, without proper regulation, CMOs around the world engage in practices that are abusive to licensees. Likewise, CMOs often deny rightsholders their fair share of the royalties CMOs collect on the rightsholders’ behalf. In effect, CMOs act as both monopsonists and monopolists, benefiting themselves at the expense of both rightsholders and users.

Antitrust law, by itself, has proven inadequate to deal with CMOs’ market power. It remains to be seen whether statutes such as the Music Modernization Act, regulations mandated by the EU Collective Rights Management Directive, or the good practices advocated by the WIPO Toolkit, will more effectively protect the interests of users and rightsholders. That these interventions were made, however, shows that the status quo ante of CMO regulation is widely understood to be inadequate.

As the Office proceeds with this inquiry, it should consider the long history of abuses by CMOs documented in Jonathan Band and Brandon Butler, *Some Cautionary Tales About Collective Rights Organizations*, 21 *Michigan State Int’l L. Rev.* 687 (2013), <http://doi.org/10.17613/edqy5-ct715>; and Jonathan Band and Brandon Butler, *Cautionary Tales About Collective Rights Organizations*, Part 2, *Infojustice* (May 22, 2018), <http://infojustice.org/archives/39886>.

Briefly, the stories collected and classified in these articles show that CMOs worldwide have engaged in a variety of harmful practices, with negative impacts on rightsholders that include:

- Corruption
- Mismanagement, excessive overhead, and unfair distribution
- Lack of transparency and choice

- Harms to Songwriters
- Harms to Performers, Venues, and Journalists
- Slow adoption of digital technologies that could improve efficiency and accuracy

CMOs have also been shown to harm users and the public in a number of ways, most importantly through monopolistic conduct and aggressive license demands.

For an abbreviated summary of these issues and a longer discussion of one illustrative example, the Office should review Jonathan Band and Brandon Butler, "ASCAP v The Girl Scouts of America: The IP Excesses of Collective Management Organisations" in Bonadio & O'Connell, *IP Excesses: Exploring the Boundaries of IP Protection* (2022).

The extraordinarily high risk of abuse posed by CMOs requires an extraordinarily well-designed and maintained regulatory structure. As the Office explores the specific questions raised in its NPRM, it should keep in mind the fundamental fact that CMOs typically have extremely high levels of market power and yet are subject to extremely low levels of control by their presumed beneficiaries. Under those circumstances, vigilance is needed to prevent CMOs from harming rightsholders and the public alike.

Sincerely,

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¹ Not every member of the Re:Create Coalition necessarily agrees on every issue, but the views we express represent the consensus among the bulk of our membership.