

# 9 Overseas societies

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## Introduction

9.1. Performing rights are administered collectively in most parts of the world although the precise arrangements used differ from one country to another. In some cases only the performing right is administered, as by the PRS in the UK; in others both performing rights and mechanical rights are administered by a single society (eg STIM in Sweden) and in others (eg JASRAC in Japan) performing, mechanical, synchronisation, lending and publication rights are all handled by the one society. The corporate status of the collection societies varies considerably, as does the degree of government involvement and supervision. Generally, in each country there is a *de facto* monopoly, with only one society involved in collecting performing rights, but this is not the case in the USA, where three societies-ASCAP, BMI and SESAC-are involved, nor in Brazil, where there are several competing societies. Most performing right societies are membership societies in that they provide membership to the writers and publishers for whom they are collecting royalties. By contrast, BMI (USA) and SESAC (USA) are privately owned, treating their writers and publishers as affiliates, not members. Some African and Eastern European societies are state-controlled.

9.2. We have collected detailed information from a selection of overseas societies in order to see how the PRS compares with them in a number of important respects and to see whether there are any aspects of overseas arrangements which are not currently deployed here but which could be of relevance. The PRS's relationships with overseas societies are not covered in this chapter; they are dealt with in Chapter 6. However, the efficiency and method of working of overseas societies is of great importance to the PRS given that some one-third of its income-£52 million in 1994-comes from these overseas sources.

9.3. We asked the societies to answer a number of questions, reproduced at Appendix 9.1. Not all of those whom we approached responded; and some sent only a partial reply. The responses are, therefore, necessarily selective. They are summarized in Appendix 9.2, supplemented where necessary by material which we obtained from discussions with the Society or Government Ministry concerned and from published sources. They include material from all the US societies, which operate in a competitive environment; from SOCAN in Canada, where competition was tried and then abandoned; from two European societies (STIM and SACEM); and the Japanese (JASRAC) and Australasian (APRA) societies.

9.4. In looking at the comparisons, in particular the material concerning financial performance and costs, great care needs to be taken. The circumstances in which the societies operate differ greatly; mechanical rights are usually cheaper to collect and distribute than performing rights; the level of tariffs charged varies from country to country; the legal and regulatory systems differ; and differing weights are placed on the cultural value of music. In addition, difficulties with translation and different methods of calculation of the figures and accounting practices in each country mean that it is hard to be certain that comparisons are exact. Societies also have different methods of allocating costs and of dealing with non-licence income. The levels of service provided to members vary greatly.

## **Comparative revenues as a percentage of gross domestic product and per capita**

9.5. Appendices 9.3 and 9.4 show, in diagrammatic form, the gross performing right domestic licensing revenue for 1993 of 17 major collecting societies as a percentage of GDP in the territories concerned and per head of population. In order to make the comparisons as meaningful as possible income from mechanical and other rights and from overseas sources has been omitted, ie the comparison is of royalties generated from broadcasting and public performances in the country in question.

9.6. The charts show that in both cases the PRS lies close to and just below the median. Domestic licensing revenue per head is similar to that pertaining in Germany, Ireland, Sweden and the USA, but only just over half of the French figure and around one-third of the Austrian figure.

9.7. Appendices 9.5 and 9.6 show similar charts in respect of general domestic licensing revenue, ie omitting broadcasting. Here again the UK finds itself just below the median. What is interesting here, though, is the high position of the French and Italian societies, probably reflecting, amongst other things, the scale and cultural importance of music publicly performed in those countries and the tariffs charged, compared with the comparatively lowly position of the USA, where much of the societies' revenues are derived from broadcasting.

## **Costs**

9.8. Appendix 9.7 shows cost:revenue ratios for 17 major collecting societies. Costs are compared both with total revenues, which include overseas remittances, and domestic revenues. As noted in paragraph 9.4, great care needs to be taken in interpreting these figures. Only certain broad conclusions can safely be made. The PRS is seen to be slightly below the median for total revenues, reflecting the comparatively high proportion-around one-third-of revenue derived from overseas sources and slightly above the median for domestic revenues. Those companies which appear to be most 'efficient' (in terms of the lowest ratio of costs to revenues) either collect and distribute mechanical revenues as well as revenues derived from performing rights-JASRAC, GEMA and SGAE-or derive, as does APRA, most of their revenues from broadcasting, which is cheaper to administer than royalties for live performances.

## **Types of society**

9.9. The great majority of overseas societies are membership societies and are non-profit-making. The chief exceptions are BMI and SESAC in the USA. These two societies have what are described as 'affiliates' (who are effectively customers, who have a contractual relationship with the Society) rather than members, and the latter is also profit-making. Of the membership societies, admission is usually to a provisional category on the basis of a certain number of works either being performed or published. There are various systems in place for ensuring that members have an opportunity to express their views and where necessary vote on issues of interest and concern. It is quite common for the number of votes allocated to each member to increase in relation to his earnings, as is the case for the PRS, and for provisional members to have no votes until they have established themselves and been promoted to a higher category of membership. For BMI and SESAC, the affiliates have no formal method, ie through voting, of making their views known, although clearly in the competitive environment in the USA these societies will listen closely to any comments put to them. BMI is open to all if there is a reasonable likelihood of public performance of a potential affiliate's material. SESAC is much smaller than its two US sister societies and composers/writers and publishers are invited to become affiliates and have individually-negotiated contracts.

9.10. Most of the membership societies we studied have a Board comprising various numbers of elected writer and publisher directors. For the PRS, ASCAP and APRA there are equal numbers of writers and publishers, but for SACEM, and many other European societies, authors and composers substantially outweigh publishers. The degree of influence exerted by the Boards varies. For example, BMI and SESAC have the types of Board typical of commercial organizations, whilst SACEM's Board is strictly restricted to supervisory activities.

## **Exclusivity**

9.11. The majority of performing right societies, including the PRS, require, as a condition of membership, the exclusive assignment of all of a member's performing rights, be he writer or publisher. This is not the case in the USA, where there is competition between three performing right societies, ASCAP, BMI and SESAC. In Ireland, although IMRO takes an exclusive assignment, it will grant its members a non-exclusive licence to administer any category of their own works.

9.12. In the USA, ASCAP, which is the longest-established of the three societies, and BMI operate under the terms of Consent Decrees imposed under US anti-trust laws. These are described more fully in paragraph 4.31. They include provisions which prevent exclusivity. SESAC is not regulated in the same way but, nevertheless, allows its affiliates to issue non-exclusive licences to others.

## **Tariffs**

9.13. There is enormous variety and complexity in the tariff structures adopted by the various societies. In part this reflects cultural differences and the importance attached to music, in part it is a reflection of the historical development of particular tariffs since performing rights first began to be licensed early this century. In some countries it is also due to the degree of regulatory intervention. Some tariffs are calculated as flat fees, others as a percentage of the revenue, turnover or admission receipts of the organization concerned. In place of turnover, hotels and restaurants may be charged in relation to their size, type or seating capacity. Different tariffs are also set for different usages. For example, in the UK there are some 41 published tariff categories, as detailed in paragraph 5.42.

## **Appeal mechanisms**

9.14. In some countries there is provision for a user to appeal against a tariff with which he is dissatisfied, in others tariffs must first be approved by the appropriate Government body or by the Courts, and in yet others the performing right society is itself an organ of Government. In view of the concerns expressed by some UK users about the levels of tariffs in the UK and the operation of the UK Copyright Tribunal, which provides the mechanism for appealing against tariffs, we devoted some time to studying different procedures in place elsewhere. In particular, we looked at the USA, where more than one society licenses the same rights, at France where there is a higher degree of state influence than in the UK, and at Germany, where there is an arbitration procedure. We also looked at the appeal mechanisms in place for members of a society who were dissatisfied with its internal decisions which affected their own individual rights.

## ***The US system***

9.15. ASCAP's Consent Decree requires ASCAP to issue licences to those who request them and not to discriminate between the charges applied to similar types of user. If a user has a complaint, he can take the matter to the Federal Court in the Southern District of New York. There, the matter is considered by a particular judge who has built up considerable expertise in the setting of tariffs. The Court also deals with ASCAP's distribution and sampling rules, indeed ASCAP is required to seek the Court's agreement to changes in the rules, and with disputes between ASCAP and its members. Mr John LoFrumento, Chief Executive and Managing Director of ASCAP, agreed, in oral evidence (see paragraph 13.14), that the role of the Judge in the USA went beyond what was traditional and that he was, in some instances, more of an arbitrator than a rule maker. Moreover, the Judge's comments were not always restricted to the core matter of

any particular dispute but could cover more general issues concerning the operation of the society and how it might be improved to the benefit of all. Mr LoFrumento also commented on the effect of the Court's close involvement with ASCAP on the transparency of the Society's proceedings. The ASCAP Board could not make decisions in secret; they always had to be prepared to argue their case rationally in a public forum.

9.16. Members of ASCAP do not necessarily have to take their disputes to Court. ASCAP operates an internal procedure for the resolution of disputes through its Board of Review. The Board of Review comprises a number of members of the Society who neither serve on the main Board nor on any advisory committee and who are elected by the membership for a two-year term. ASCAP members who have a dispute with the Society's management can bring the matter before the Board of Review for decision. After the Board has ruled, either party to the dispute then has the option of taking the matter to Court if they are dissatisfied with the ruling. Mr Greenaway, ASCAP's London representative, and previously a Deputy Chairman of the PRS, told us that the US system offered a form of protection for the ASCAP Board but that it could also be a hindrance because it was difficult to make key decisions about the running of the business without having to go to Court to justify them.

### ***The French system***

9.17. The French society which deals with performing rights, SACEM, is a non-profit-making company with a capital base which comprises the admission fees paid by its members. At 31 December 1994 SACEM's registered capital was 18.3 million FF. SACEM is required to abide by a series of specific rules designed to ensure that the economic interests of its members are adequately protected. These rules require:

- (a) the original and any subsequent changes to the Memorandum and Articles of Association to be sent to the Minister of Culture;
- (b) referral of any changes concerning the rules for collection and distribution of royalties to the Minister of Culture; and
- (c) submission of the annual accounts to the Minister of Culture.

9.18. The French state has traditionally been very supportive of all types of authors' rights and although its formal powers are limited, it has a considerable degree of influence over the way in which collecting societies operate. There are few complaints in France about either the way in which royalties are distributed or the amounts paid. As Appendices 9.3 and 9.4 show, total domestic licensing revenue in France as a percentage of GDP and per head of population is above the average for the sample of collecting societies shown.

9.19. There have not been many instances where users have reverted to the Courts. However, the case of French discothèques, which went to the European Court of Justice in 1989 (see *Tournier v Ministère Publique*, paragraph 4.24), is of some interest. The Court ruled that significant differences in tariffs between European countries could, if not explained by local circumstances, constitute abuse of a dominant position. Determination of the detailed points which were disputed was referred back to the local court, but the position was never fully clarified since SACEM and the discothèques reached an out-of-court settlement, and the European Commission (DGIV) study of comparative tariffs for discothèques in Europe was not published.

### ***The German system***

9.20. Tariffs set by GEMA, the German society which administers performing rights, can be fully reviewed by the civil courts. As a matter of principle, however, any court action must be preceded by proceedings before the arbitration board of the German Patent Office. The board comprises a Chairman and two associates, all of whom must be qualified to hold the office of judge. The members of the board are neutral and independent. They are not bound by instructions from any Government office.

9.21. The arbitration board's role is limited to submitting a non-binding conciliatory proposal. In the absence of a written objection from either party within one month the proposal is deemed to have been accepted. If there is an objection, the matter can then be referred to the civil courts. The Munich Higher Regional Court is the sole court competent to handle disputes concerning general agreements in the first instance.

## **Licensing**

9.22. All the societies we have studied use both blanket and individual licences. Individual licences relate to specific events, but nevertheless usually cover the whole repertoire. Radio, television and cable operators invariably have blanket licences. Concerts may be licensed individually or as part of the overall licence for the venue. There is widespread use of inspectors and local offices to ensure that as many premises as possible are licensed. There is, though, some variation from one country to another in the number of licences issued. France, for example, licenses almost twice as many premises as the UK, which in turn licenses seven times as many sites as Australia.

## **Monitoring performances**

9.23. Almost all the societies we studied conduct a census of programmes on the main television networks and most also conduct a census of programmes on the main radio networks. Smaller radio stations are treated by sampling. Treatment of live performances varies: some societies conduct censuses of all or major concerts, some-including the PRS-have a system of significant venues and aim to analyse all programmes returned to those venues, others work through sampling. For general establishments-hotels, restaurants, etc where there is no, or only limited, sampling-revenues are generally distributed on the basis of radio/television logs, perhaps supplemented by various forms of chart information.

9.24. In the USA, ASCAP's census/sampling methods are specified under the terms of its Consent Decree and BMI uses independent third parties to carry out some of the work for it.

## **Basis for distribution**

9.25. The distribution rules employed by the various societies are complex. Generally, the royalties collected are divided into different pools for distribution. In so far as possible the sources of royalties and distribution pools are made to coincide. Within each pool, revenues are usually distributed according to weighting or points systems. These reflect different values accorded, for example, to different types of music usage, various musical genres, the duration of each performance and the time of day when the performance took place.

## **Commissions and cultural deductions**

9.26. A number of the societies we studied make a deduction for administrative costs, in the form of a commission, on income which they receive from overseas societies. ASCAP, for example, deducts 3.5 per cent, and JASRAC 5 per cent. In the notes which the PRS circulated to its members with the second (July) 1995 distribution, the PRS gave details of the percentage amounts it had deducted from each overseas society's income to cover its administrative costs. These were generally of the order of 5 per cent. But the General Council has decided, however, that no further costs be deducted from revenue from US and EC countries.

9.27. Under the terms of the CISAC model contract of reciprocal representation, a signatory may deduct up to 10 per cent of all its net distributable revenue, including that due to an affiliated society, for social and cultural purposes. The funds may be allocated to its own members' pension schemes, benevolent or provident funds or for the encouragement of the national arts. A great many of the European societies do make significant deductions for social and cultural purposes. For example, the annual report of SACEM states that the deductions are used to support members over 55 years old and to help members who are sick, in difficulty or have suffered accidents. SACEM also has funds to improve the revenues of composers and editors of

symphonic music, jazz and other specified genres and to promote music generally, for example by supporting certain organizations supplying musical information and by supporting a number of major live music festivals.

9.28. The PRS has long sought to introduce new contracts of reciprocal representation which would preclude such social and cultural deductions from revenues due to its members. The Australian and US societies have shown a willingness to negotiate new contracts. SESAC has already signed, SOCAN and APRA are about to sign and negotiations with BMI and ASCAP are well advanced. However, the PRS has made little progress with most of the European societies where cultural deductions are long-established.