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In the Matter of	)	
Music Licensing Study: Notice and Request for Public Comment	)	**Docket No. 2014-03**

COMMENTS OF THE TELEVISION MUSIC LICENSE COMMITTEE, LLC

INTRODUCTION

The Television Music License Committee, LLC ("TMLC") submits these comments in response to the Copyright Office Notice of Inquiry requesting public input on the effectiveness of existing methods of licensing music. *See* 78 Fed. Reg. 14,739 (March 17, 2014) (the "NOI"). Among other topics, the NOI requests comments on the effectiveness of licensing public performance rights in musical works, both through the three United States Performing Rights Organizations ("PROs") and in direct licensing transactions.

The TMLC, an organization funded by voluntary contributions from the broadcasting industry, represents the collective interests of local commercial television stations in the United States in connection with certain music performance rights licensing matters. In that capacity, the TMLC has interacted extensively, over decades, with the two larger U.S. PROs – the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") – assisting local television broadcasters in attempting to secure fair and reasonable licenses through a combination of industry-wide negotiations and, as necessary, funding and managing antitrust and federal "rate court" litigation aimed at minimizing the market power enjoyed by those organizations and maximizing the local stations' opportunities to benefit from

competitive licensing of music performance rights. The TMLC also has interfaced with SESAC, LLC ("SESAC") – the smallest of the three U.S. PROs, but nevertheless an organization that wields significant market power in relation to the licensing of the musical works within its repertory. The TMLC currently is funding a class-action antitrust lawsuit brought by three television broadcasters, challenging certain of SESAC's licensing practices. Collectively, local commercial television stations pay some $140 million annually in musical works public performance license fees to the three U.S. PROs – a significant portion of the total royalties collected by those entities.

This submission is limited to providing the Copyright Office the TMLC's perspective on those issues raised by the NOI that relate to the licensing of musical work public performance rights, both through the PRO intermediaries and in transactions directly with copyright holders.

COMMENTS

I. The Local Television Music Licensing Marketplace

With limited exceptions, local television stations are responsible for obtaining licenses for the public performance of copyrighted musical works in all of the programming and commercial announcements they air.[1] A preponderance of such programming and commercial announcements is not produced by the stations themselves but, rather, by third parties, who select and irreplaceably incorporate the music (along with all other programming elements) into the programming. The producers and syndicators of such programming obtain and license to the

[1] Currently, the ABC, CBS, NBC, Univision and TeleFutura television networks obtain "through-to-the-viewer" licenses from the three U.S. PROs covering public performances of the music embedded in the programming they distribute, including performances made by their local-station affiliates when those stations broadcast the network programming. Accordingly, no separate licenses are needed by the local stations affiliated with these networks to perform the music in network programs. The Fox and CW networks have never obtained public performance licenses covering their network programming for their affiliated stations.

stations with which they contract all of the copyright and other rights necessary to broadcast the programming (including those for artistic outputs such as a script, choreography, acting, and directing), with the sole exception of the non-dramatic public performance rights to the copyrighted music embedded in the programming. Because of this anomalous practice, the local stations are themselves uniquely required to procure the necessary non-dramatic musical works public performance rights as a condition of broadcasting the programming they have licensed. Insofar as this imposition takes place *after* the music has already been irrevocably embedded in the programing (in the case of off-network syndicated programming and motion pictures, years after program creation),[2] there is no meaningful opportunity for the stations to negotiate with the composers or publishers of that music over its value.[3] The stations' stark options are to obtain the necessary licenses or forego use of the programming.

In these circumstances, out of practical necessity, local television stations have for generations entered into blanket license arrangements with ASCAP, BMI and SESAC in order to obtain the needed non-dramatic music performance rights in such third-party programming and commercial announcements. The extraordinary leverage this need provides to the PROs is evident. Historically, each PRO has sought to maximize that leverage by seeking supra-competitive license fees from local television broadcasters while, at the same time, resisting affording the stations forms of license that would inject at least some degree of competition into the local television music licensing marketplace.

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[2] Stations are contractually prohibited from changing the music contained in third-party produced programming and commercial announcements.

[3] Even were their bargaining posture otherwise, the local stations would be further severely handicapped by not knowing, in many cases, the identity of the music or the composers and publishers of that music.

It is important to recognize that there is nothing unique about musical works public performance rights in the context of modern-day local television that should necessitate local stations' reliance on PROs to license in aggregated form the performance rights of many thousands of otherwise competing rightsholders. There is, in principle and as a matter of rational economics, no reason that individual rightsholders could not, and should not, themselves negotiate with program producers and advertisers over the value of such performance rights at the time music is selected or commissioned for use in such programming and commercial announcements. The era of television being a spontaneous music use medium akin to the radio disc jockey's "itchy fingers" is long gone. *BMI v. CBS*, 441 U.S. 1, 22, n.37 (1979). The rightsholders in musical works already negotiate with such producers and advertisers, both to contract for any new music to be created and to convey a separate copyright right – a synchronization or "sync" right – permitting the producer to incorporate the selected music into the audiovisual work. There is absolutely no reason that these same parties, as a part of these same negotiations, could not simultaneously bargain over conveying music performance rights to the producer to enable local television broadcast. Such a transaction would place music performance rights on the same footing as all other rights embedded in the programming, namely, they would be secured by the producer on the local stations' behalf at the only time when meaningful negotiation over their fair market value can take place.

This competitive approach to licensing non-dramatic public performance rights has been in place and has operated seamlessly for more than 60 years in the motion picture industry. Jarred loose by antitrust litigation,[4] producer "source licensing" of music performance rights has

[4] In the 1940s, two separate courts found that the practice of ASCAP and its members of "splitting" the licensing of motion picture synchronization and performance rights between the producers and the theater exhibitors so as to require exhibitors to secure ASCAP blanket licenses

supplanted PRO licensing of motion picture theater exhibitors who, like local television broadcasters, exhibit content licensed from third-party producers who determine the music to be incorporated therein and are uniquely positioned to bargain over the prices to be paid for it (with the ability to select one composer and/or musical work over another). Under this competitive licensing model, motion picture exhibitors avoid being subjected to the very leverage to which the local television stations remain captive – by bearing the legal responsibility themselves to clear non-dramatic music performance rights in music they neither select nor control the ability to exhibit.

Decades of efforts on the part of the local television industry to bring about a similarly competitive licensing marketplace have been met by staunch resistance from the PROs, program producers, advertisers, and music copyright holders who, collectively, strongly prefer the licensing status quo to a more competitive marketplace. Efforts to use antitrust remedies vis-à-vis ASCAP and BMI also have been unsuccessful, in significant part because of the courts' perception that the existing antitrust consent decrees adequately rein in ASCAP's and BMI's (though not SESAC's) market power.[5] This status quo requires, at the very least, maintaining constraints protecting music users such as those provided for in the ASCAP and BMI consent decrees.

II. The ASCAP and BMI Consent Decrees Mitigate the Anticompetitive Effects of Collective Licensing

Collective licensing of the type engaged in by the PROs indisputably implicates the exercise of significant market power that can have anticompetitive consequences, most notably

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was artificial, economically anomalous, and in violation of the antitrust laws. *See Alden-Rochelle Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948).

[5] *See, e.g.*, *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917, 927 (2d Cir. 1984).

by eliminating competition among otherwise competing composers and music publishers for performances of their works.[6] The existing ASCAP and BMI consent decrees, while no panacea for users, serve important functions in reining in that market power.[7] Any ongoing examination of the role of those consent decrees and of U.S. collective licensing organizations more generally must be multi-disciplinary, accounting not only for considerations of copyright law and policy, but in equal measure those of antitrust law and policy. In this regard, it is important to bear in mind the distinction between the limited monopoly power the copyright laws confer upon individual creators to exploit their works and the limits that the antitrust laws place upon the collective exercise of such rights by large aggregations of copyright owners.

However imperfectly, the ASCAP and BMI consent decrees play an important role in attempting to strike a balance between the potential benefits of such aggregations from a copyright perspective and the potential eliminations of price competition from an antitrust perspective. As we discuss, the local television broadcasters' long experience as ASCAP and BMI licensees attests to the significance of the monopoly power constraining functions of these decrees.

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[6] *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) ("[I]n the licensing of music rights, songs do not compete against each other on the basis of price."); *BMI v. CBS*, 441 U.S. 1, 32-33 (Stevens, J., dissenting) ("[T]he blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.")

[7] *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012) ("[T]he rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."); *United States v. BMI (In re Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005) ("[R]ate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights."); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) (rate court not simply a "placebo" intended to rubber stamp the "fees ASCAP has successfully obtained from other users.")

Specifically as they relate to local television broadcasters (although clearly also benefiting other users), key provisions of the ASCAP and BMI consent decrees are those: (i) requiring that ASCAP and BMI issue a license to any user upon request, thereby averting the threat of copyright infringement while negotiations over license fees and terms are ongoing; (ii) providing local stations with the right to turn to a federal court in the Southern District of New York – acting as a so called "rate court" – to determine "reasonable" fees and terms in the event of a negotiating impasse; (iii) barring ASCAP and BMI from obtaining *exclusive* rights to license their affiliated copyright owners' works – thereby preserving the right of local television stations to secure performance rights licenses either directly from composers and music publishers ("direct licenses") or through program suppliers who themselves acquire those rights on the stations' behalf ("source licenses"); (iv) requiring those PROs to issue economically viable alternative licensing forms such as the "per program" license and the recently judicially mandated adjustable-fee blanket license ("AFBL"), both of which enable stations to secure public performance rights to at least portions of their music uses via direct and source licenses, and to do so without paying twice for the same rights; and (v) requiring that ASCAP and BMI license all local stations similarly, thereby preventing those PROs from price discriminating within the local television industry.[8]

A. The Consent Decrees Serve to Mitigate The Monopoly Pricing Power of ASCAP and BMI

The foregoing consent decree provisions, as enforced by the rate courts, have provided local television stations with sorely needed relief from the monopoly pricing power of ASCAP and BMI. Historically, local television stations were required by ASCAP and BMI to accept

[8] As discussed in greater detail below, no similar constraints currently apply to SESAC.

traditional blanket licenses conveying the rights, *en masse*, to their entire repertories of music.[9] The pricing structure of these blanket licenses was not related to either the extent of a station's actual use of a given PRO's music or a licensee's success in obtaining non-dramatic performance rights to a portion of the music it used through other licensing mechanisms. The combined leverage possessed by the PROs in licensing music over which the stations have no control and in refusing to afford the stations pricing structures for those licenses that would make alternative licensing arrangements for at least some portion of the musical works used by the stations economically feasible effectively stifled any competitive licensing of non-dramatic music performance rights to local stations.

Utilizing the judicial "ratemaking" provisions of the ASCAP and BMI consent decrees, the local television industry has succeeded in reining in the pricing of ASCAP and BMI blanket licenses. *See United States v. ASCAP (In re Application of Buffalo Broad. Co.)*, Civ. No. 13-95 (WCC) (MHD), 1993 WL 60687 (S.D.N.Y. Mar. 1, 1993) ("*Buffalo Broadcasting*"). By bringing fees for the mainly incidental music it uses down closer to competitive norms, this branch of the television industry has, over the past twenty years, been able to redirect hundreds of millions of dollars towards other areas of broadcast expenditure, including competitive transactions with music composers and publishers. Coupled with other decree-enabling advances described in the next section, local stations have slowly – although over many years and at great expense – been making competitive inroads into the competition-foreclosing, "one size fits all" licensing practices of ASCAP and BMI.

[9] The license repertories of ASCAP, BMI and SESAC are exclusive to one another; accordingly, there is no competition between and among the PROs to license a given composer's musical compositions.

To be sure, judicial supervision over the rates charged by ASCAP and BMI has also benefited other users. The rate courts have time and again rejected the fee proposals proffered by these PROs in favor of significantly lower fees more reflective of competitive market rates. These outcomes are not, as some have suggested, the by-product of courts or judges running amok; rather, they reflect the results of full trial records following extensive discovery (governed by the Federal Rules of Civil Procedure) and issue joinder between leading law firms and expert economists, typically followed by impartial review by the United States Court of Appeals for the Second Circuit. Some of the more salient examples include:

- *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990) – setting fees for cable television program services at 60% of those sought by ASCAP.
- *ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012) – rejecting ASCAP's $15.8 million fee proposal for content aggregator, and instead setting fees at $405,000 – some 2.5% of the fee sought by ASCAP.
- *BMI v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012) – setting fees based on actual competitive market data at 33% of those sought by ASCAP and 45% of those sought by BMI.
- *In re Petition of Pandora Media, Inc.*, Civ. No. 12-8035 (DLC), 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014) – rejecting ASCAP's proposal of fee increases of more than 60% over a five year license term.
- *In re Application for the Determination of Interim License Fees for Cromwell Group, Inc., and Affiliates, et al.*, Memorandum Opinion and Order, Civ No. 10-0167 (DLC)(MHD) (S.D.N.Y. May 13, 2010) – setting interim fees for the commercial radio broadcast industry at $40 million less than those sought by ASCAP, setting the stage for negotiated resolution.

B. The Alternative License Forms Required by the Consent Decrees Provide Stations with Some, Albeit Limited, Ability to Secure Non-Dramatic Performance Rights in Competitive Transactions

Judicial enforcement of the ASCAP and BMI consent decrees has also provided local television stations with licensing alternatives to the PROs' favored all-or-nothing blanket license that are designed to open up at least some degree of competition in the local stations' licensing of

non-dramatic musical works public performance rights. These license alternatives principally give individual stations an economic incentive to negotiate license transactions in direct dealings with copyright holders to fulfill at least part of their music licensing needs, *e.g.*, in relation to their use of news themes for news programming produced by the stations themselves.

These license alternatives only came about through court intervention and over strenuous objections from ASCAP and BMI. ASCAP and BMI fought at every turn either to deny access to such license alternatives, or to make them illusory as a matter of economic reality. Until the historic 1993 *Buffalo Broadcasting* ruling, the local television industry had virtually uniformly throughout its history been remitted to paying blanket license fees to both ASCAP and BMI under the only viable option offered – a blanket license that provided no incentive for source or direct licensing. Although both of their consent decrees contained provisions requiring that they offer stations an economically viable alternative per program license,[10] neither ASCAP nor BMI did so voluntarily, viewing the per program license as undermining the monopoly pricing power they were able to wield by offering only traditional blanket licenses.

The *Buffalo Broadcasting* decision broke ground in establishing the parameters of a per program license that was designed, for the first time, to offer a "genuine choice" between per program and blanket licenses guaranteed to broadcasters under ASCAP's consent decree.[11]

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[10] A "per program license" has a different fee structure from the traditional blanket license that enables a local station to reduce the overall license fee it pays to a PRO by "clearing" one or more of its programs of music from that PRO. This includes obtaining the non-dramatic public performance rights to that music through a direct or source license or simply eliminating that music from its programs.

[11] In recognition of the competitive significance of this ruling, the Government subsequently incorporated the core structural and pricing formulation of the per program license into a revised ASCAP consent decree, thereby requiring ASCAP to extend its benefits to all manner of broadcast licensees.

BMI, whose own consent decree contemplates similar access to the per program license, thereafter generally conformed its licensing practices to these dictates in its dealings with local television stations. The availability of this competition-inducing alternative to the all-or-nothing pricing structure of the blanket license has enabled many local stations to begin to take advantage of the workings of a competitive marketplace. Currently, more than 450 local stations (out of approximately 1,200) have availed themselves of the per program license from either of ASCAP and BMI (or both), and have at least partially controlled their music expense by, for example, entering into direct licensing transactions for the non-dramatic public performance rights to the musical works used in their locally-produced programming. In a more limited number of instances, viable per program licenses have enabled stations to secure source licenses from third-party program producers. All told, these direct and source license transactions have resulted in stations and program producers paying millions of dollars directly to composers and publishers, all outside of the blanket license process.

In addition to the per program license, local television station broadcasters recently secured the entitlement to an adjustable-fee blanket license[12] – again only through resort to the decree-supervising judiciary in the case of BMI and again only over the staunch objections of ASCAP and BMI to offering this form of license more generally.[13] In a case brought by the background music industry, the Second Circuit authoritatively construed the BMI Consent Decree as requiring BMI to offer an AFBL. *United States v. BMI (In re Application of AEI*

[12] An AFBL provides credits for works the performance rights to which have been separately acquired in direct and source licensing transactions. Unlike with the per program license, there is no need to clear an entire program of the PRO-affiliated works for the station to receive a credit.

[13] *See WPIX, Inc. v. BMI,* Opinion and Order, 09 Civ. 10366 (LLS) (S.D.N.Y. Apr. 27, 2011); *United States v. ASCAP (In re Applications of Muzak, LLC and DMX Music, Inc.),* 309 F.Supp.2d 566 (S.D.N.Y. 2004); *United States v. BMI (In re Application of AEI Music Network, Inc.),* 275 F.3d 168 (2d Cir. 2001); *BMI v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012).

Music Network, Inc.), 275 F.3d 168 (2d Cir. 2001). Despite this determination, BMI refused voluntarily to provide such a license type to the local television industry, forcing the local television industry to litigate over, and prevail on, what should have been a settled issue. *WPIX, Inc. v. BMI*, Opinion and Order, 09 Civ. 10366 (LLS) (S.D.N.Y. Apr. 27, 2011). This latest alternative license structure has not yet been implemented, but offers similar promise to the per program license in loosening ASCAP's and BMI's monopoly grip over the music licensing marketplace. As with the per program license, this opportunity to inject competition into the market would not have come about in the absence of the consent decrees and the judicial enforcement mechanisms they offer for the protection of licensees.[14]

The importance to a competitively functioning music performance rights marketplace of opening up meaningful alternative license avenues to the PROs' preferred all-encompassing and fee-inflexible blanket license has been most plainly demonstrated to date by the experience of DMX, a background music supplier. In the aftermath of the *AEI* decision confirming users' entitlement to an AFBL, DMX, which is in the somewhat unusual position of controlling the music it programs, went into the marketplace and secured hundreds of direct licenses from music publishers whose catalogs collectively accounted for upwards of 30% of the musical works performed by DMX. Both the ASCAP and BMI rate courts, and later the Second Circuit, recognized that these direct licenses not only provided a competitive check on the ability of

[14] There are ample examples of other users resorting to the judiciary to enforce alternative licenses guaranteed them under the ASCAP and BMI decrees. For example, in *Turner Broadcasting*, the court construed ASCAP's consent decree as requiring ASCAP to issue cable program services so requesting them through-to-the-viewer licenses covering the public performances of music in the services' programming made by cable system operators. ASCAP (as well as BMI) had refused voluntarily to issue such licenses in an attempt separately to extract license fees at the cable operator level with respect to the music embedded in such programming. *United States v. ASCAP (In re Application of Turner Broad. Sys.)*, 782 F. Supp. 778 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 21 (2d Cir. 1992).

ASCAP and BMI to exercise their considerable market power, but also provided the best evidence of the value of musical works performing rights licenses.[15] Using these competitive market direct licenses as "benchmarks," and prescribing payment formulae under AFBLs such that DMX would not pay twice for its direct license efforts (once directly to the composers and publishers and then again to the PROs), both rate courts set fees substantially below those sought by ASCAP and BMI – indeed, well below those that ASCAP and BMI had historically been able to secure from the background music industry.[16] This is a classic example of a competitive market at work, and also a demonstration of the degree to which markets that have not been opened up to competitive licensing transactions are subject to significant price overcharges at the hands of the PROs.

As the foregoing plainly demonstrates, and as courts have recognized time and again, the availability of alternative license forms that provide the economic incentive for users such as local television stations to enter into direct and source licenses serves to inject much needed competitive dynamics into an arena otherwise subject to market power and monopoly pricing.[17] As a matter of sound copyright and antitrust policy, it is imperative that such alternative license forms, and the direct and source licensing transactions that they allow for, be protected.

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[15] *BMI v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012); *BMI v. DMX*, 726 F.Supp.2d. 355 (S.D.N.Y. 2010)*; In re Application of THP Capstar Acquisition Corp.*, 756 F.Supp.2d 516 (S.D.N.Y. 2010).

[16] *Id.*

[17] *See, e.g., Buffalo Broadcasting*, 1993 WL 60687 at *54 (noting that the per program license provides "the possibility of a bridge to greater source and direct licensing by the stations" and that "the potential for enhancing the competitiveness of the music licensing market presumably explains why the per program provision was included in the 1941 [ASCAP Consent] Decree."); *BMI v. DMX, Inc.*, 683 F.3d 32, 48 (2d Cir. 2012) (concluding that direct licenses "reflected the competitive market").

III. The Local Television Experience with SESAC Provides Ample Evidence That the Protections Afforded by the Consent Decrees Are Still Needed Today

Were there any doubt as to the need for maintaining the protections afforded to users by the ASCAP and BMI consent decrees, that doubt would be quickly dispelled by examination of the current activities of SESAC, the one unregulated PRO in the United States. Despite the fact that it is far smaller than both ASCAP and BMI, SESAC has been able to amass, through collective licensing, substantial monopoly power. With this monopoly power, as judicial findings in pending antitrust litigation attest, SESAC today is engaging in essentially the same activities in relation to local television broadcasters that led to the government antitrust litigation decades ago that culminated in the ASCAP and BMI decrees. These activities include: (i) extracting supra-competitive rates for its blanket license; (ii) refusing to offer any viable alternatives to its all-or-nothing blanket license; (iii) eliminating any opportunity to secure non-dramatic public performance rights for musical works in the SESAC repertory other than through the SESAC blanket license, including by entering into de facto exclusive licensing arrangements with its key affiliates; (iv) revoking interim licensing authorizations and then threatening copyright infringement lawsuits if stations do not acquiesce to SESAC's license fee demands; and (v) refusing to provide users with complete and up-to-date information on all of the works in its repertory in any usable form, thereby eliminating the user's ability to determine if a particular work is in the SESAC repertory.

As a result of SESAC's refusal to curtail these anticompetitive activities, members of the local television industry were compelled to bring a class-action antitrust lawsuit against SESAC in 2009. SESAC's repeated efforts to have the case dismissed have been denied, most recently in an opinion from the federal district court setting the case down for trial following full fact and expert discovery and observing, among other key findings, that:

- "[t]he evidence would … comfortably sustain a finding that SESAC … engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (PAE), __ F.Supp.2d __, 2014 WL 812795, *10 (S.D.N.Y. Mar. 3, 2014).

- "there is strong evidence that [SESAC's] [per-program license] is, in fact, illusory" such that "a jury could find that a local station cannot avoid SESAC's blanket license, because no alternative to it is realistically available." *Id.* at *30.

- the de facto exclusive licensing arrangements with key affiliates "effectively eliminated direct licensing as a means by which stations could license these affiliates' music" and that the penalties for direct licensing in the de facto exclusive agreements constitute "substantial evidence … [from] which a jury could find that SESAC effectively forced local stations to buy its blanket license." *Id.* at ** 10, 30.

- the effective elimination of licensing alternatives to SESAC's blanket license means that "stations must pay supra-competitive prices for the one license that is available—SESAC's blanket license." *Id.* at *34.

- "the evidence is more than sufficient" for a jury to find that "SESAC's conduct harmed competition, and that this harm outweighed any pro-competitive benefits of that conduct." *Id.*

- "it is undisputed that SESAC possesses monopoly power in [the relevant] market" and that "it also appears undisputed that SESAC has the power to control prices over that market as currently structured." *Id.* at *36.

While the final antitrust verdict is not yet in, the findings of the federal district court emphatically underscore the anticompetitive consequences of allowing significant aggregations of music performance copyrights to be exploited without the forms of oversight contained in the ASCAP and BMI consent decrees. Were those restrictions relaxed, ASCAP or BMI could very well revert to the very sorts of practices that SESAC has dubiously sought to exploit. No public interest – copyright, antitrust or otherwise – would be served by such retrogression.[18]

[18] The radio broadcast industry is also engaged in antitrust litigation with SESAC. While that litigation is not as far along, the judicial rulings to date in that suit are entirely consistent with those made in the local television lawsuit.

IV. The Interests of an Efficiently Operating Music Performing Rights Marketplace Would be Further Served by Providing Universal Access to Relevant Information

Notwithstanding the important protections afforded users by the ASCAP and BMI consent decrees, there is still room for significant improvement. One major stumbling block in creating a more efficient and competitive marketplace is a lack of transparency. Each of the three U.S. PROs maintains databases that identify the PRO affiliations of composers and publishers as well as the music content of thousands of television programs (and even some commercial announcements). In addition, there is an international database that identifies the PRO affiliations of composers and publishers that is compiled by the International Confederation of Societies of Authors and Composers ("CISAC"), with the financial support of the U.S. PROs. ASCAP and BMI, however, have gone to great lengths to ensure that users and composers do not have access to any of these databases. This anticompetitive practice, which further entrenches PRO blanket licenses and discourages competitive licensing transactions between individual copyright owners and users, should be eliminated.

There is no rational reason why access to information revealing just which composers and musical works are affiliated with which PROs, as well as what music of which PRO is contained in users' programming, should not be made publicly available.[19] Nowhere else are television broadcasters asked to pay for intellectual property that is unidentified.

CONCLUSION

As the foregoing demonstrates, the requirement that local television stations themselves obtain music performance rights to enable them to broadcast third-party produced programming (as well as commercial announcements) is economically anomalous, has no sound copyright law

[19] The encouragement, by the Copyright Office or others, of increasing efforts to identify musical works when broadcast, through watermarking or other means, would also serve to mitigate this current lack of transparency.

rationale, and stifles competition over the licensing of such rights. Any recommendations for legislative reform should include remedying that circumstance.

In the absence of fundamental reform in the manner in which non-dramatic music performance rights are delivered to local television broadcasters, any legislative or other reform must, at a minimum, preserve the protections afforded to users such as local television station broadcasters by the ASCAP and BMI consent decrees – including not only those protections that prevent those PROs from charging monopoly rates for their traditional blanket licenses but also, and just as importantly, those protections that serve to foster economically meaningful direct and source licensing opportunities.

We thank the Copyright Office for its consideration of these comments.

Respectfully submitted,

Dated: May 23, 2014

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