**Before the**
**United States Copyright Office**
**Library of Congress**
**Washington, D.C. 20559**

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| In the Matter of | |
| Music Licensing Study: Notice and Request for Public Comment | Docket No. RM 2014-3 |

## REPLY COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge submits these Reply Comments in response to the docket compiled pursuant to the Copyright Office's Notice of Inquiry, released March 17, 2014,[1] and the subsequent Second Request for Comments.[2]

## INTRODUCTION

Public Knowledge previously submitted Comments asking the Copyright Office to support policies that simplify and strengthen music licensing mechanisms and promote the development of new competitive services ensuring reasonable compensation for artists.[3] After reviewing the Copyright Office's request for replies and comments filed by other interested parties, Public Knowledge files these Reply Comments to highlight specific points where the Copyright Office has the opportunity to further the aforementioned goals by taking a technology-neutral policy approach designed that can promote platform parity.

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[1] Music Licensing Study, *Notice and Request for Public Comment*, 78 Fed. Reg. 14,739 (Mar. 17, 2014) [hereinafter *Music Licensing NOI*].

[2] Music Licensing Study, *Second Request for Comments*, 79 Fed. Reg. 42,833 (July 23, 2014) [hereinafter *Second Request for Comments*].

[3] *See* Music Licensing Study*, Notice and Request for Public Comment*, Docket No. RM 2014-3, Comments of Public Knowledge and the Consumer Federation of America (May 23, 2014) [hereinafter *Public Knowledge Comments*].

## I. MARKET CONCENTRATION, WHETHER AMONG PUBLISHERS OR PERFORMING RIGHTS ORGANIZATIONS, CAN THWART A COMPETITIVE MUSIC LICENSING MARKET.

In its Second Request for Comments, the Copyright Office inquired into the logistics and concerns related to publishers leaving the performing rights organizations.[4] Regardless of whether and how any publishers leave ASCAP and BMI, the fact remains that substantial concentration among rightsholders will create serious anticompetitive harms in the licensing market, which will have consequences for consumers and for artists.

In her recent opinion in the license negotiation dispute between ASCAP and Pandora, Judge Denise Cote noted that there is an "antitrust concern" at the "core" of the consent decree.[5] Public Knowledge continues to affirm that the consent decrees that govern ASCAP and BMI remain necessary.[6] Market circumstances have not changed in any material way that negates ASCAP and BMI's market power and anticompetitive incentives, so the consent decrees must continue to ensure reasonable licensing practices.[7]

The potential antitrust harms found by Judge Cote culminated in her finding that "ASCAP, UMPG, and Sony did not act as if they were competitors with each other," and used their market power to "extract supra-competitive prices" and breach terms of confidentiality agreements.[8] It is also particularly concerning that, as Judge Cote explains, the companies

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[4] *Second Request for Comments*, Question 4.

[5] *In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 97 (S.D.N.Y. Mar. 18, 2014) [hereinafter *Pandora*].

[6] *Music Licensing NOI*, 27.

[7] *See* Comments of Public Knowledge, *Antitrust Consent Decree Review* (Aug. 6, 2014), *available at* https://www.publicknowledge.org/assets/uploads/documents/PKConsentDecreeComments.pdf.

[8] *Pandora,* 97.

"coordinated their activities with respect to Pandora," and as a result, "the very considerable market power that each of them holds individually was magnified."[9]

The lesson from the *Pandora* ruling is that the consent decrees are still necessary to prevent anticompetitive behavior. It also shed light on how the largest publishers themselves could run into antitrust problems if they leave the PROs and behave anticompetitively using their own substantial market power. If the facts of *Pandora* were a test run, even that small sample of licensing behavior outside of the consent decrees gives great cause for concern about the future of licensing practices in such a consolidated market, absent protections to preserve competition.

## II. CONGRESS SHOULD PREEMPT STATE LAW AND CREATE A FEDERAL PERFORMANCE RIGHT FOR PRE-1972 SOUND RECORDINGS, INCLUDING ALL OF THE LAW'S LIMITATIONS AND EXCEPTIONS TO COPYRIGHT.

This section addresses the *Music Licensing NOI* comments submitted by the Future of Music Coalition, BYU Copyright Licensing Office, Interested Parties Advancing Copyright, the Library of Congress, and Modern Works Music Publishing on the subject of introducing federal copyright for pre-1972 sound recordings. Public Knowledge urges the Copyright Office to support federal copyright protection for pre-1972 sound recordings that preempts any similar rights currently granted under state law and applies federal limitations and exceptions to rights in pre-1972 recordings. This would streamline licensing by eliminating the current confusion caused by the patchwork of state protections, and would give users the certainty of federally protected limitations and exceptions to copyright.

Public Knowledge proposes preempting state law and granting federal copyright protection over pre-1972 sound recordings, with certain adjustments to accommodate the interests of users who may have been making legal uses of these recordings prior to

[9] *Pandora*, 98-99.

federalization. First, copyright protection for pre-1972 recordings should only last for the life of the author. This will appropriately compensate authors while avoiding over-protection that only makes it more difficult to access pre-1972 recordings. The Copyright Office should also consider proposing a certain span of time in which authors should come forward to receive protection for their sound recordings. This will avoid exacerbating the orphan works problem, but will grant federal protection for the works whose authors want it. Pre-1972 sound recordings should also be included in a robust and sustainable statutory licensing regime, to encourage efficient licensing and competition among distribution services and other users. Finally, infringement of a right in a pre-1972 sound recording should not qualify for exorbitant statutory damages. Statutory damages set too high can lead to serious consequences in any case,[10] but especially for works that have existed for decades and only recently been given federal copyright protection, it would be unjust to let good faith users unknowingly subject themselves to astronomical damages.

The Copyright Office should also recommend exemptions that allow users currently relying on limitations in state laws today to have notice and time to adjust to any new legal regime. Especially for works that are by definition already at least four decades old, ensuring that copyright law allows and encourages preservation of recordings is a significant concern. Many early sound recordings exist in fragile, inaccessible formats like wire recordings, wax cylinders, and lacquer discs. If Congress federalizes pre-1972 recordings in a way that subjects libraries and archivists to large or unpredictable liability, we could risk losing access to valuable parts of U.S. culture.

[10] *See* Testimony of Sherwin Siy, House Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Internet, *Hearing on Copyright Remedies* (July 24, 2014), *available at* https://www.publicknowledge.org/assets/uploads/blog/pk_remedies_testimony.pdf.

Including pre-1972 sound recordings under federal law could streamline licensing and give users more legal certainty, but any changes to the law on this topic should ensure that the newly federal rights provide compensation to the actual artists while protecting users from exorbitant liability.

## III. TECHNOLOGICAL NEUTRALITY COUNSELS APPLYING THE SOUND RECORDING PERFORMANCE RIGHT TO ALL PLATFORMS EQUALLY.

Copyright law cannot continue to treat the same services differently simply based on each company's transmission technology. The law should treat like service alike. Therefore, AM/FM radio broadcasters should pay sound recording performance royalties set under the same standard used by other forms of radio.[11]

There is no logical reason why the law should impose different royalty standards on companies that all provide essentially the same service to consumers. Whether transmitted by cable, satellite, AM/FM broadcasting, or through an Internet connection, radio companies all offer to consumers a non-interactive stream of music or other audio programming. Their actual royalty payments need not be exactly the same, but the Copyright Royalty Board should consider the same factors when setting each of their royalty rates.

To the extent that the outright exemption for AM/FM radio was ever justified, it certainly is not now.[12] AM/FM radio provides listeners with essentially the same service as other radio services, and the disparity in treatment only serves to entrench industry incumbents and discourage innovation in the market. This does not help competition, it does not help artists, and

[11] It is Public Knowledge's position that all of these services should pay rates set under the factors in 17 U.S.C. § 801(b).

[12] Many broadcasters have justified their exemption in the past by saying that the promotional value of playing the recording on their stations outweighs any value they may owe to the recording artist. If they are correct here, the broadcasters can present evidence on the promotional value of their service to artists, which the CRB would duly consider in ratemaking proceedings.

it does not encourage new companies to enter the market. The only solution is to put all radio services under the same ratemaking standard.

## CONCLUSION

Public Knowledge respectfully submits the above Reply Comments and urges the Copyright Office to support policies that will constructively reform the U.S. music licensing system.

Respectfully submitted,

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