Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

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

REPLY COMMENTS OF SIRIUS XM RADIO INC.

Sirius XM Radio Inc. ("Sirius XM") has reviewed the initial comments of the other parties in this Music Licensing Study. The views expressed in many of those comments – in particular the filings of ASCAP, BMI, RIAA, and other copyright owners – only serve to underscore many of the concerns outlined in our own initial submission (dated May 23, 2014). We will not repeat those concerns here, but do wish to bring to the Copyright Office's attention two recent filings made by Sirius XM addressing the current music licensing landscape: (i) Sirius XM CFO David Frear's written testimony before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, which was submitted in connection with the Subcommittee's June 24, 2014 "Hearing on Music Licensing Under Title 17" (Exhibit A hereto); and (ii) Mr. Frear's letter to Representative Tom Marino, dated July 25, 2014, in response to certain questions raised by Rep. Marino at the above-mentioned hearing (Exhibit B hereto). We note below certain specific sections of these attachments that we wish to highlight as particularly relevant here:

- **The continued importance of the ASCAP and BMI consent decrees**: Sirius XM endorses the comments of the Radio Music License Committee, the Television Music License Committee, and CTIA-The Wireless Association, among many others, as to the continued necessity for, and vitality of, the antitrust consent decrees governing ASCAP and BMI. We refer to Section III of Mr. Frear's attached Congressional testimony (see Exhibit A at pp. 6-7) and his letter to Rep. Marino (Exhibit B), which amplify Sirius XM's views on this issue.

- **The superiority of the 801(b)(1) rate-setting standard as compared to the "willing-buyer-willing-seller" standard**: The content-owner commenters decry the 801(b)(1) rate-setting standard and advocate instead a "market" standard for rate-setting. But the chorus of voices in favor of the latter standard should not be mistaken for the strength of the position being forwarded; the 801(b)(1) standard remains the far superior option for at least the following reasons:
  - First, there is no fair or competitive "market" for music licensing from which to draw benchmarks for rate-setting based on the willing-buyer-willing-seller standard. As Mr. Frear explains in the attached letter to Rep. Marino (Exhibit B), the degree of consolidation in the marketplace is so high that competition between rightsholders – the key indicia of a "fair" market, and what should be the goal of any serious willing-buyer-willing-seller analysis – is essentially absent under current market conditions.
  - Second (and not unrelated to the first point), however much the "free" market approach is appealing in theory, the willing-buyer-willing-seller rate-setting standard has been a disaster in practice. Sirius XM outlined this history in its opening submission, and it is reiterated in Section II of Mr. Frear's attached testimony to the House Subcommittee (see pp. 5 of Exhibit A).

- Third, even under the 801(b)(1) standard, proper deference to market rates is allowed and encouraged – and has been the norm among rate-setting tribunals. Section II (pp. 4-5) of Mr. Frear's attached testimony describes how 801(b) has been implemented by the CRB and DC Circuit Court of Appeals to take account of marketplace benchmarks.

- **Statutory licensing of custom/personalized Internet radio**: RIAA argues in its opening submission that personalized/user-influenced radio should not be covered by the statutory license. The RIAA position is contrary to the *Launchcast* case in the Second Circuit, which determined that the user-influenced service fell under the statutory license (that is, it was not "interactive" under Section 114). *See Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009). As we noted in our original submission (pp. 20-21), that decision brought clarity to the market and paved the way for an explosion of services – Pandora, iHeartRadio, and MySXM, among others – that together serve literally hundreds of millions of users.[1] To declare such services as unable to rely on the statutory license would upset settled expectations to services that organized themselves around the *Launchcast* decision, and wreak havoc in the market. To the extent the market recognizes differences in such services (for example, that they have a different promotional or substitutional value, or should pay different rates on account of their differing service features), such differences can be accounted for (if warranted) by the CRB, not by revoking access to the statutory license altogether.

[1] A2IM appears to agree with this conclusion: its response to question 8 argues that only fully on-demand services should be considered "interactive" and unable to take advantage of the Section 114 statutory license.

New York, New York
September 12, 2014

Respectfully submitted,

By: /s/ Patrick Donnelly

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EXHIBIT A

Written Statement of David J. Frear
Chief Financial Officer, Sirius XM Holdings Inc.

Before the

U.S. House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on Music Licensing Under Title 17

June 25, 2014

Chairman Goodlatte, Chairman Coble, Ranking Members Conyers and Nadler, and Members of the Subcommittee:

My name is David J. Frear. I am the Executive Vice President and Chief Financial Officer for Sirius XM Holdings Inc. ("Sirius XM"), a position I have held since 2002. On behalf of Sirius XM, I thank you for the opportunity to offer testimony to the Subcommittee.

Sirius XM, with an estimated 40 million listeners, is one of the largest radio providers in the United States. We employ over 2,100 people at our facilities in New York, Washington, DC, Florida, New Jersey, Texas and California. Since our inception, we have operated pursuant to licenses from ASCAP, BMI, and SESAC for the public performance of musical compositions, and we operate under the Section 112 and 114 statutory licenses with respect to the public performance of sound recordings. We have also fully litigated two rate-setting proceedings before the Copyright Royalty Board.

In 2013 alone, we paid approximately $325 million to record companies, publishers, song writers, and recording artists. We have paid well over $1 billion in sound recording performance royalties since we launched in late 2001.

This experience has provided us with great insight into the issues before the Subcommittee, including what works and what does not work within the music licensing market as currently structured. My testimony, builds on that experience – as well as similar comments Sirius XM recently submitted to the Copyright Office as part of its music licensing inquiry – and centers on four key points:

1. **<u>The Need for Platform Parity</u>**: There is no reason that satellite radio and Internet radio should pay sound recording performance royalties while terrestrial radio continues to enjoy an exemption from that obligation.

2. **<u>The Importance of the 801(b) Rate-Setting Standard</u>**: The 801(b) standard provides the Copyright Royalty Judges with both the ability to examine potentially relevant marketplace transactions and the flexibility to balance the interests of both the copyright owners and licensees. The 801(b) standard has proven far superior to the "willing buyer willing seller" standard championed by the rights-owner community. It should be maintained.

3. **The Continued Necessity of the Consent Decrees Governing ASCAP and BMI**: The antitrust consent decrees are not outdated "relics" that prevent competition or copyright owners achieving fair market value for their works, but a necessary antidote to the extreme concentration that persists in the market and would, absent the decrees, violate the antitrust laws. In short, they help *ensure* that rates are set fairly.

3. **The Significant Problems with the Proposed RESPECT Act for Pre-1972 Sound Recordings**: The proposed act would further exacerbate the irrational disparity between digital services and terrestrial radio (which would remain exempt from paying performance royalties for *any* recordings), create a new payment obligation on a narrow set of licensees, and bestow a one-sided windfall on owners of recordings created 70 or 80 years ago, without advancing in the least the foundational purpose of copyright law: providing an incentive for the creation of new recordings.

As may be evident, a common-theme pervades my comments. In statement after statement, copyright owners suggest that the current regulatory framework – including the statutory licenses, the 801(b) rate-setting standard and the antitrust consent decrees – artificially interferes with the normal working of a free and competitive market. The unmistakable tenor of the conversation is that copyright owners are being unfairly forced to subsidize licensees with below-market rates. But these sorts of comments conveniently overlook the reality on the ground in the music licensing marketplace.

On the publishing side, for example, we confront two collectives (ASCAP and BMI) that each control distinct repertories approaching 50% of the market, and a third (SESAC) that, while smaller, makes outrageous fee demands under threat of statutory infringement claims while refusing to identify the works it is licensing. On the record-label side, we see three major labels that likewise control distinct repertories ranging from 20% to nearly 40% of the market each – and over 85% collectively. These entities control separate catalogs of works that are not substitutes for one another. They do not compete with one another as that term is typically understood. A "free" market in licensing – if by that term one means giving copyright owners free rein to exploit the market power they enjoy by having amassed massive repertories of works – would be neither fair nor competitive, but be plagued by rates approaching monopoly levels.

By contrast, the regulatory framework that has developed over the years, rather than forestalling competition or preventing copyright owners from achieving fair market value, helps to achieve the opposite result: ensuring that rates paid by entities like Sirius XM are at least somewhat insulated from the incredible market concentration that would otherwise push them to monopoly levels.

My comments below provide additional detail on these points.

I. Platform Parity Is Vital

As the Subcommittee no doubt is aware, music services in the U.S. operate under a patchwork of statutes, rules, and regulations that distinguish audio entertainment services based upon the mechanism or medium of delivery. This framework is the product of historical compromises and trade-offs between interested parties that no longer make sense and, as many participants noted in the June 10th hearing before the Subcommittee, it is a framework that no one would readily choose again today.

The current framework exempts traditional "terrestrial" radio from the obligation to pay performance royalties to sound recording owners, while requiring other radio services that offer essentially the same service to make such payments. Further, drawing any distinction based on the claim that some services transmit digitally while others do not is nonsensical: terrestrial radio began broadcasting digital signals over a decade ago and has made use of digital copies of sound recordings to further their broadcasts for 30 years. It is antiquated, inequitable, and simply bad public policy to reward the biggest entities in the radio field with a competitive cost advantage while penalizing innovators whose services increase economic activity and create jobs.

To start, similar services – regardless of the mechanism or medium through which they are delivered – should be treated similarly. Copyright law does not distinguish between AM and FM radio based on technology, and should not distinguish between terrestrial and satellite radio, or terrestrial and Internet radio, either. The playing field – that is to say, the requirement that performance royalties be paid, and the standard under which royalty rates are set – should be leveled for all participants in the radio market. In short, "radio is radio," regardless of whether it is AM/FM radio, HD radio, satellite radio, cable radio or Internet radio. *See, e.g., In re Petition of Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), at 14 (S.D.N.Y. Mar. 18, 2014) (Opinion & Order) (explaining that the "radio experience has remained constant through the years, regardless of whether radio programming is transmitted by broadcasting, through a cable, from a satellite, or over the internet").[1]

Continuing the distinctions between various forms of radio established in 17 U.S.C. § 114 – whereby AM/FM radio is exempted from any sound recording performance right obligation, while satellite, Internet, and other audio services (including simulcasts of those very same AM/FM broadcasts) are not – is bad and unjustified policy. Chiefly, it has the effect of subsidizing the largest entities in the industry – the $15 billion/year AM/FM radio station market – and is exactly the opposite of what the public would expect: accommodations to *new* entrants to encourage growth and entrepreneurship. Such a policy punishes digital pioneers with massive royalty obligations not borne by their established and entrenched competitor. For example, Sirius XM, despite enjoying a subscriber base of nearly 25 million, went 18 years until it achieved profitability in 2010 – and then only after running up cumulative net operating losses of $8 billion, merging the two predecessor companies, and narrowly surviving two brushes with bankruptcy. At the same time, it paid well over $1 billion in royalty payments to the recording industry, while AM/FM radio stations paid precisely *zero*.

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[1] We do not mean to suggest by this that all services should pay the exact same fees, but rather that similar services should have their fees set pursuant to the same rate-setting standard and process. As we discuss below, the 801(b) rate-setting standard provides the Copyright Royalty Judges with the necessary and appropriate latitude to account for variations between particular services or service categories in the rate-setting process.

That sort of inequity hampers innovation and job creation. While Sirius XM survived, and while most AM/FM stations continue to offer some form of simulcast, one need only survey the graveyard of services that have tried and failed to establish viable standalone digital radio businesses (including major companies like Yahoo! and AOL) to see the depth of the problem. Winners and losers in the audio entertainment field should be selected by the market on the basis of innovation and the entertainment and other value they provide to consumers, not historical anomalies or cost-side inequities created by statute.

II. The Importance of the 801(b) Rate-Setting Standard

Copyright owners have stated that 17 U.S.C. § 801(b) provides an artificial subsidy to services and suggested that the "willing buyer-willing seller" (WBWS) standard be applied to all Section 114 licenses, or that the 801(b) standard be altered, for example by removing the "disruption" factor found at 801(b)(1)(D). They are wrong.

To start, it is important to highlight the continuing importance of the statutory licenses for national services using thousands (or tens of thousands) of sound recordings. Negotiating with each and every copyright owner would be extremely difficult and costly for at least two reasons. First, any service would need to be able to identify and then negotiate with the copyright owners of hundreds of thousands (or even millions) of songs. Second, the service would be forced to confront a record industry that has become incredibly concentrated, with three majors (and the smaller independent labels distributed by the majors) accounting for over 85% of the market. This concentration provides those record companies with tremendous negotiating leverage, as each major is a "must have" that many services cannot do without.

For similar reasons, the 801(b) standard should be retained as written. Copyright owners blithely characterize the 801(b) standard as devoid of marketplace considerations. But the 801(b) standard requires the Judges set rates that are "reasonable," and in prior proceedings the Judges have started their rate-setting analyses under that standard by first identifying a "zone of reasonableness" defined by *market* benchmarks, and only then using the 801(b) policy factors to identify a rate *within* the *marketplace* range.[2] Moreover, as the economists who have testified on behalf of the industry have argued repeatedly to the Judges, the 801(b) factors – such as the goals of ensuring a fair return and fair income for the parties, and recognizing their "relative contributions" – are those that parties to a *marketplace* transaction would themselves consider. The 801(b) standard thus allows the Judges to consider *marketplace* benchmarks and considerations as part of their determinations, but also provides the Judges with the latitude and flexibility to consider the enumerated policy factors (for example, in the *Satellite I* proceeding, the disruption that Sirius XM would suffer at the rates proposed by SoundExchange, as well as Sirius XM's need to spend hundreds of millions of dollars in satellite-related expenditures).

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[2] That approach has been blessed by the D.C. Circuit. *See Recording Indus. Ass'n of America, Inc. v. Librarian of Cong.*, 608 F.3d 861, 865 (D.C. Cir. 2010). *See also* 17 U.S.C. § 114(f)(1)(B) (specifying that "the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements").

The WBWS standard, by comparison, has proven to be a failure. In the absence of marketplace benchmarks involving non-interactive services, the Judges have been forced to rely on agreements between record companies and completely different categories of music users (*e.g.*, interactive services) and adjust them for application to non-interactive services – an inexact science at best, and one that causes the Judges to apply all manner of imprecise "interactivity" and other adjustments. In the wake of the *Webcasting II* decision, Congress was compelled to enact two Webcaster Settlement Acts to allow the record industry and various services to negotiate "voluntary" agreements (the so-called "WSA" deals) at rates other than those set by the Judges, which would have bankrupted most services. By the time of the *Webcasting III* proceeding, some 95% of the market was operating under such agreements (*i.e.*, not operating under rates set according to the WBWS standard), and only one commercial service of any size participated in the proceeding. Meanwhile, the three largest providers (Yahoo!, AOL, and Microsoft) all exited the market.[3] In contrast, the decisions pursuant to the 801(b) standard have not resulted in the participants rushing to Congress for legislative relief.

Retention of the 801(b) standard is justified not only because it is fundamentally superior to the WBWS standard, but also as a matter of simple fairness. Congress implemented (and later retained) that standard in recognition that services subject to those standards founded their services at a time when there was no sound recording performance right at all. To change the standard now would fundamentally undercut the reliance interests of those services.

To those who would argue that anything other than a free-market standard amounts to a perversion of their property rights and an unfair subsidy from the recording industry to the digital services, it must be remembered that the statutory license was an integral part of the bargain reflected in the Digital Performance Right Act in 1995. Namely, sound recording record companies were provided with a digital audio transmission right against non-interactive services only on the condition that such services (who were being hit with a new royalty not borne by terrestrial radio) have access to a statutory license[4] -- and, in the case of satellite radio, the 801(b)(1) rate-setting standard. Sound recording owners present their right to public performance royalties as a given, and the statutory license as a burden on that right; but that position fails to recognize that the statutory license was the *price* for receiving the performance

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[3] Similar problems plagued the satellite television market. After Congress shifted the Section 119 compulsory license to a "fair market value" standard in the Satellite Home Viewer Act of 1994, the rate increase implemented by the CARP was so drastic that Congress was compelled, in the Satellite Home Viewer Improvement Act of 1999, to slash rates by 45%. *See* Register of Copyrights, Satellite Home Viewer Extension and Reauthorization Act § 110 Report, at 8-11 (Feb. 2006).

[4] This is compared to the interactive services – the providers of the so-called "celestial jukebox" – which Congress feared would substitute for CD sales and which drove the legislation. Sound recording owners, who had never enjoyed a public performance right in the U.S., received a full digital performance right as against on-demand streamers, but not as against non-interactive services that were not viewed as creating the same threat of substitution. Several CARP and CRB proceedings have lent further support to this distinction, as the record industry has failed to present any credible evidence that non-interactive services substitute for record sales.

right in the first place. *See* H.R. Rep. 104-274, at 14 (describing need for "balance" among interests and resulting "limitations" on the performance right, including the statutory license).

III. The ASCAP and BMI Antitrust Consent Decrees

Sirius XM operates pursuant to blanket licenses from ASCAP, BMI, and SESAC covering the public performance of musical works. In our experience, the ASCAP and BMI consent decrees and the licensing process that they mandate work relatively well. As a result of the mandatory license requirement, Sirius XM is assured that it has license coverage for the full repertories without needing to contact and negotiate with every single songwriter and publisher featured on its service. Each side has the opportunity to pursue rate-court litigation if it feels the other side is being unreasonable. Despite that possibility (or likely because of it), Sirius XM has enjoyed relatively amicable negotiations with each of ASCAP and BMI over the past decade, and has not needed to litigate. The publishing community, for its part, has received hundreds of millions of dollars in royalty payments from Sirius XM.

The recent trends in this area, however, are disturbing. The first such trend is the publishers' increasingly strident suggestions, in the press and on Capitol Hill, that the consent decrees are a relic of the past that should simply be dispensed with. Changing times, however, do not change the facts. As noted in the introduction, ASCAP and BMI collectively represent close to 50% of the market each – and a *distinct* 50%. A music service like Sirius XM must take a license from each of those entities to operate effectively – they are not substitutes for one another. ASCAP and BMI do not compete against one another on price, as one would expect to find in a typical "competitive" market – *i.e.*, Sirius XM can't tell ASCAP that if it doesn't lower its price, we will purchase the rights we need from BMI instead. As is obvious, this gives each organization a tremendous amount of market power over licensees who need a license from each to operate a successful service.

As a result, what was true in the 1940s when the consent decrees were adopted, and reiterated throughout the decades, remains just as true now: the PROs' blanket licensing practices are "inherently anti-competitive," reflecting their exercise of "disproportionate power over the market for music rights." *United States v. Broad. Music, Inc. (In re Application of Music Choice),* 426 F.3d 91, 93, 96 (2d Cir. 2005); *see also United States v. ASCAP (In re Application of RealNetworks, Inc.*), 627 F.3d 64, 76 (2d Cir. 2010) (explaining that "ASCAP, as a monopolist, exercise[s] disproportionate power over the market for music rights") (alteration in original) (citation and internal quotation omitted).

While the efficiencies of the blanket licenses and one-stop shopping may justify the PROs' existence, the consent decrees are crucial to protecting against the inevitably non-competitive rate demands (and the ability to shut a service down that does not accede to those demands) that result when publishers are allowed to negotiate collectively. Put simply: a "free" market in this context – i.e., one where publishers are given free rein to negotiate collectively and wield their market power without constraint – would be neither "fair" nor competitive" as the copyright owners like to suggest. The consent decrees do not interfere with competition; they prevent activities that would otherwise constitute clear violations of the antitrust laws.

The existence of national music services playing tens of thousands of songs in reliance on blanket licenses makes the consent decrees all the *more* necessary. Given the practical impossibility of a service identifying and negotiating privately with every copyright owner featured in its programming – ASCAP alone purports to represent over 500,000 songwriters and publishers, while services such as Spotify (to give just one example) advertise libraries of millions of tracks – a music service could face dramatic exposure to infringement liability (and statutory damages) absent the compulsory licensing mechanism of the consent decrees.

Sirius XM's own experience with SESAC (which, unlike ASCAP and BMI, is not bound by a consent decree) drives home the importance of the consent decrees. In prior negotiations with Sirius XM, SESAC has demanded oversized fees that are totally unsupported by the information available regarding its catalogue, and always with the implicit threat of infringement liability. At the same time, it has refused to identify its catalogue of musical works, meaning that Sirius XM cannot (as it could with a single copyright holder) simply remove the tracks at issue from its service. This combination of concentrated ownership and either an unwillingness or inability to be transparent as to what works are actually in the repertory creates a completely untenable situation.[5]

Such anti-competitive concerns have been exacerbated by recent attempts by publishers to withdraw from ASCAP and BMI. As detailed by Judge Cote from the record of the ASCAP-Pandora litigation, publishers that control hundreds or thousands of smaller catalogues (and millions of songs) under one licensing umbrella – making them effectively private PROs five or ten times the size of SESAC – have (a) insisted on the ability to partially withdraw from ASCAP; (b) made exorbitant fee demands, under the threat of litigation, to force direct licenses on services who no longer have access to those publishers' works via the PROs; and (c) refused to provide catalog data that would allow the targeted service to diminish or stop performing the works of those publishers absent a more reasonable fee demand.

To the extent PRO withdrawals become a regular feature of the music licensing landscape, complete transparency with respect to copyright ownership – *i.e.*, what exactly is in the catalogues of each publisher – is an absolute must. Congress should insist on a comprehensive, up-to-date public database of musical work and sound recording ownership information that is available freely to all potential licensees. Second, licensees should enjoy a safe harbor from statutory infringement exposure for copyright owners in such situations who fail properly to identify their works and allow reasonable and sufficient time to remove them from the service's servers and playlists. It is a travesty that a company can assemble millions of copyrights under a single licensing umbrella, insist on an exorbitant fee, but then not tell the licensee which copyrights it is forcing the service to license or stop playing.

IV. Pre-72 Recordings

Sirius XM has been the target of a spate of recent lawsuits regarding its use of sound recordings fixed before February 5, 1972 ("Pre-72 Recordings"). Three suits involve a putative

[5] Judge Engelmayer recognized this exact problem in his recent summary judgment ruling in the television broadcasters' case against SESAC. *Meredith Corp., et al. v. SESAC, LLC*, No. 09 Civ. 9177 (PAE), 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014).

class of record companies suing Sirius XM in California, Florida, and New York seeking damages and license fees under the law of those three states. A fourth suit involves the major record companies and ABKCO (coordinated by the Recording Industry Association of America) suing Sirius XM in California for damages and license fees pursuant to California law. Those same Plaintiffs have also sued Pandora in state court in New York.

Simultaneous with these state-law cases, SoundExchange – the entity that collects and distributes royalties for copyrighted (*i.e.*, "Post-72") recordings pursuant to the statutory licenses found at Sections 112 and 114 of the Copyright Act -- has sued Sirius XM in the District of Columbia for failure to pay for the same performances of Pre-72 Recordings under the *federal* statutory license. SoundExchange has also lobbied for introduction of the RESPECT Act, which would force statutory licensees like Sirius XM and Pandora to pay for performances of Pre-72 Recordings under the (federal) statutory license.

Respectfully, the RESPECT Act is riddled with problems.

First, and worst, by adding a new royalty obligation solely to digital services that currently pay for performances of Post-72 recordings under the federal statutory license, it only further exacerbates the above-described disparity between other audio services and terrestrial radio stations, which would continue to be exempted from performance royalties, not only for Post-72 recordings, but for Pre-72 Recordings as well.

Second, the bill as drafted does not actually grant federal copyright protection to Pre-72 Recordings: it simply forces statutory licensees paying for Post-72 recordings to pay royalties for Pre-72 Recordings as well, without creating any underlying entitlement to such payments.[6] The bill thus effectively exempts Pre-72 Recordings from the limits that typically apply to works covered by the Copyright Act: for example, the need to register works prior to litigation; a limited term of protection; the "Homestyle" exemption at Section 110 (which shelters small business establishments and religious facilities from public performance liability); and, significantly, the DMCA safe harbors at Section 512 (which protect Internet services from infringement liability if they respond promptly to takedown notices from copyright owners). These limitations are crucial to the purposes of the Copyright Act, which seeks to strike a balance between copyright owners and the interest of the public in gaining access to copyrighted works. Owners of Pre-72 Recording should not gain the benefits of copyright protection (royalty payments under Section 114) without being subject to these important limits.[7]

[6] To the extent the Act is predicated on a purported state-law performance right in sound recordings, no such right exists. After months of litigation in three different states, the record companies have failed to demonstrate that such a right exists in those states, much less in the 47 states in which no such litigation is taking place.

[7] The music industry has fought tooth and nail to deny the Section 512 safe harbor to services that offer Pre-72 Recordings – and succeeded – on the ground that a federal statute cannot shelter infringements of non-federally-copyrighted works. (See, for example, the *UMG Recordings v. Escape Media* case in New York). And the RIAA came out strongly *against* the federalization of Pre-72 Recordings in response to a recent Copyright Office inquiry on the subject, no doubt hoping to avoid the limitations in the Act. They cannot have it both ways.

More generally, the RESPECT Act does not serve the fundamental purpose of the Copyright Act: to serve the public interest by providing only the protection necessary to incentivize the creation of works in the first instance before allowing them pass into the public domain.[8] Demanding a new and retroactive royalty obligation for recordings created 45 or more years ago will not, and by definition cannot, serve that purpose. Clearly, the protections that existed prior to 1972, which did not include the prospect of performance-related income, were more than sufficient to prompt the creation of such recordings. And no doubt the same was true of the period between 1972 and 1995, where there continued to be no public performance right – and millions of sound recordings created nonetheless.[9] Absent any public performance right, recording artists continued to make recordings, expected that radio stations would play them, and in fact encouraged radio to do so because they knew it would help them sell even more records.

In short, demanding payment now for what radio has never, in 100 years, had to pay for will merely create a windfall that the artists did not expect when they created the works. Sirius XM, by contrast, will be confronted with tens of millions of dollars in a new, unforeseen, and significant payment obligation that was *not* part of the rights framework in place when it started its business – money that will no longer be available for improving our products and services, innovating, or hiring new employees.

* * *

In conclusion, I would like to thank the members of the Subcommittee once again for the opportunity to submit this testimony. Sirius XM stands ready to provide any additional information or testimony that the Subcommittee would find helpful as it continues its consideration of these important issues. It is crucial that all participants in the music industry

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[8] The Court of Appeals for the Second Circuit reiterated these basic principles just this week: "As the Supreme Court has explained, the overriding purpose of copyright is to promote the Progress of Science and useful Arts. . . . In short, our law recognizes that copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of the creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public." *Authors Guild, Inc., et al. v. HathiTrust, et al.*, No. 12-4547-cv, at 10-11 (2d Cir. June 10, 2014) (internal quotations and citations removed).

[9] The Sound Recording Act of 1971 was passed by Congress specifically to remedy the specific problem of record piracy, which was forbidden by laws in certain state laws but not in others. Congress thus intentionally withheld a public performance right, which it recognized had never existed at the state level (clearly radio stations were not paying performance royalties, and never had). Notably, the 1971 Act also bestowed federal reproduction and distribution rights solely to those recordings created *after* enactment on February 15, 1972. The effect of this was that once the Act was passed, recordings created *even a few months earlier* were left completely unprotected as to public performance rights, and unprotected with respect to unauthorized reproduction and distribution in states that had no record piracy laws. In light of this long history, the current complaints that Sirius XM and Pandora are acting unfairly or even "shamefully" by not paying performance royalties for pre-72 recordings ring hollow.

ecosystem – digital services as well as content creators – have a seat at the table as reforms are considered and debated.

EXHIBIT B

Sirius XM Radio Inc.
1221 Avenue of the Americas
New York, NY 10020

July 25, 2014

Representative Tom Marino
Vice Chairman, Subcommittee on Intellectual Property
410 Cannon House Office Building
Washington, DC 20515

Dear Representative Marino:

I write to respond to your invitation to the witnesses attending the June 25, 2014 Hearing on Music Licensing Under Title 17 to submit for the record any comments they might offer concerning the difference between the concepts of "free" and "fair" market value.

I understand that Willard Hoyt of the Television Music License Committee has submitted an analysis of the issue from Dr. Adam Jaffe, a highly respected economist with years of experience in the music licensing arena. Sirius XM fully endorses Dr. Jaffe's conclusions, which we attach again here, and which square with my comments on this topic in my initial written submission to the Subcommittee. My conclusion there was simple: that due to incredible concentration among copyright owners on both the music publishing and sound recording side, "free" market negotiations (in the sense of negotiations where neither side is compelled to enter into a deal) are not necessarily "fair" – and indeed may lead to rates closer to monopoly levels rather than to the competitive rates one would expect in a truly fair-market transaction.

Dr. Jaffe's analysis focuses on the market concentration evidenced among the performing rights organizations (the "PROs") ASCAP, BMI, and SESAC – and rightly concludes that the consent decrees remain vital and necessary to curb the market power that comes with such entities collectively representing and licensing thousands of music publishers, and millions of songs, in a single blanket license transaction. But the Subcommittee should not be under the illusion that marketplace agreements involving individual rightsholders, as opposed to PROs, are necessarily more indicative of fair-market value just because they do not involve a PRO and may be freely negotiated outside the constraints of a consent decree.

The publishing market is dominated by three major companies, two of whom (Universal and Sony/EMI) represent between 20 and 30% of the market each, and a third (Warner Chappell) which represents approximately 15%. Those companies have assembled together thousands of smaller publishing catalogues which they license on a repertory-wide basis for a single price. Given the size of their amassed repertories, a company like Sirius XM could not realistically operate its service without a license from each of these majors. And because each of these major publishing companies' repertories are unique (and thus not substitutes for one another), we cannot get them to compete against one another on price to win our business; we need a license from each of them.[1] Given these market realities, it simply is not the case that agreements negotiated outside the constraints of the ASCAP and BMI consent decrees and rate courts are (or would be) somehow more representative of fair market value, even if they might be characterized as "freely" negotiated in a narrow sense.

The sound recording market is likewise dominated by three companies each representing between 20% and 40% of the market. And the implications are essentially identical: any large scale music service (especially on-demand services that must make available whatever music a consumer wishes to hear at that moment) must obtain a license with each of the majors, lest it lose access to major swaths of recorded music. For such services, saying "no" to Universal or Sony is simply not a realistic option – hardly the basis for a fair negotiation.

Moreover, it must be remembered that saying "no" would require a music service to remove the repertory of the given publisher or record company from its offerings. Even if it were inclined to take that step, the contents of the majors' repertories are so convoluted, and so shrouded in secrecy, that the service would not know which songs to remove. That would expose the service not only to the commercial damage of a diminished repertory, but to potential copyright infringement penalties of $150,000 per work for songs it failed to remove. This only furthers the bargaining leverage enjoyed by the majors and their ability to drive rights far above competitive levels.[2]

In sum, given the highly concentrated nature of the music licensing marketplace, free-market deals may be "free" in name only; more often than not, they will reflect the tremendous market power that results from concentrating copyright ownership in a handful of companies. Even if one can construe agreements reached under such circumstances as being freely entered, they may be far from fair.

Before concluding, I note as well that these conclusions necessarily impact the choice of rate-setting standard utilized by the Copyright Royalty Board. To the extent the "willing buyer willing seller" standard is utilized, and to the extent it requires the Judges to look to marketplace agreements as benchmarks for statutory license rates, the unfair, non-

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[1] Indeed, the situation is even more complicated. Publishing shares are commonly split across different co-writers affiliated with different publishing companies. Thus, a license from, say, Universal might convey rights to only portions of given songs, and condition those rights on our obtaining licenses from co-publishers affiliated with Sony or Warner Chappell – meaning we could not perform the songs without taking licenses from those majors as well.

[2] To be clear, this power is different from the monopoly creators are granted in a single work. It is a power that comes from combining hundreds of thousands of copyrights together in a single repertory licensed on a blanket basis.

competitive rates the major publishers and record labels are able to extract in unregulated markets will tend to drive up rates under the statutory licenses as well (in the case of the statutory webcasting license, to rates so high that the intervention of Congress was required). The 801(b) standard, by comparison, allows the Judges to consider marketplace benchmarks – and experience shows that the Judges do in fact set rates within the range suggested by marketplace benchmarks – while also allowing the Judges the latitude and flexibility to consider the enumerated policy factors as well.

Thank you again for the opportunity to provide testimony to the Subcommittee. I would be pleased to respond to any additional questions that you might have for Sirius XM.

David J. Frear
Executive Vice President and Chief Financial Officer, Sirius XM Holdings Inc.

CC: Members of Subcommittee on Courts, Intellectual Property, and the Internet

Enclosure (1)

United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Statement of Adam B. Jaffe
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On Behalf of the Television Music License Committee, LLC

Hearing on:
Music Licensing Under Title 17

July 8, 2014

I. Introduction and Overview

As an economist who has studied and prepared expert reports on musical works performance rights for more than a decade, I have been asked by Mr. Hoyt of the Television Music License Committee to comment on Congressman Marino's question on the difference between fair market value and the free market. I have done so in the context of the ASCAP and BMI Consent Decrees and the recent actions of SESAC, all of which I have studied in order to prepare expert reports as part of litigation involving these organizations.

II. The ASCAP and BMI Consent Decrees foster desirable markets outcomes and are not an artificial constraint on "free markets"

Going back to Adam Smith, economists have understood that under certain circumstances *competitive* markets yield desirable outcomes in terms of maximizing the satisfaction of society's wants and needs at lowest cost, as if guided by an "invisible hand." The idea of "free markets"— markets where prices and market choices are determined by market participants without direct government oversight—is closely related to the invisible hand and the desirability of *competitive* market outcomes.

But there are market conditions—generally described as "market failures"—under which the invisible hand fails. Such market failures include, for example, monopoly and imperfect information. In these circumstances, unregulated free markets will not produce desirable outcomes.

What this means in practice is that we need a more subtle concept of "free markets." To be useful, "free markets" should be taken to mean markets with appropriate legal rules so that they perform efficiently rather than some notion of markets with no government involvement of any kind.

As an example, we generally think of the stock market as a "free market," but in fact this does not mean that government plays no role. We prohibit insider trading, because such trading would actually distort the market outcomes away from the desirable competitive norm. You could in some sense argue that it would be more of a "free market" if we eliminated restrictions on insider trading, but doing so would degrade rather than improve its performance.

Similarly, we might think of the wheat market as a "free market," but we have regulations designed to prevent traders from "cornering the market" in a given commodity, because accumulating a monopoly position would interfere with the desired competitive outcome. You could in some sense argue that it would be more of a "free market" if we eliminated restrictions on cornering the market, but doing so would degrade rather than improve its performance.

In the market for public performances of musical works, as described below, the widespread dependence on "blanket licenses" creates a market failure. In effect, ASCAP, BMI and SESAC are able to corner the market on the licensing of the performances of their affiliates' musical works. In the absence of some kind of government constraint, local television broadcasters have no choice but to accept whatever price they demand for the needed performance rights. The Consent Decrees limit this monopoly power, and hence make the markets behave more like the desired competitive norm.

III. The Consent Decrees represent appropriate application of antitrust principles to the music licensing market

The ASCAP and BMI Consent Decrees are not the result of copyright law; they exist because performance rights are licensed in a way that would otherwise be illegal under the antitrust laws.

Copyright gives creators a monopoly over their own works; rightsholders licensing their works individually have the right to charge whatever they choose, and would not be subject to any restriction on their licensing practices or prices. There is no legal or regulatory restriction on the right of any individual composer to operate in this manner today.

Composers and music publishers have chosen, however, to organize themselves into Performing Rights Organizations or "PROs." The PROs (ASCAP, BMI and SESAC) offer local television broadcasters (and other licensees) "blanket" licenses that convey to local television broadcasters the right of public performance to the works of thousands of individual composers at a single price. We would not allow wheat farmers or law firms to band together and offer access to their products only on a package basis at a fixed price, because we expect that if they did so they would insist on higher prices than each could get on their own.

It might seem that this logic does not apply to music performance rights, because music creators "already have" a monopoly granted by copyright. But the copyright monopoly covers only a creator's own works; it does not convey the right to monopolize the combined works of many creators. In some contexts, program producers might feel that they have to have a specific work or a specific composer, in which case competition from other composers would be irrelevant. But in many cases, such as the choice of background or theme music for a television series, there might be many different works and many different composers that would do. We would expect in those circumstances that composers would compete with each other to have their music used and performed. This competition would determine the royalty rates for use of the music. Bundling thousands of composers and thousands of works together in a blanket license eliminates that potential competition.

The ASCAP and BMI Consent Decrees came about because the Antitrust Division of the Department of Justice ("DOJ") challenged this collusive behavior. The logic of the decrees is that appropriate restrictions on the behavior of the PROs can allow them to engage in collusive pricing while mitigating the anticompetitive consequences that would otherwise flow from such behavior.

The nature of the restrictions imposed by the Consent Decrees is directly tied to this function, that is, the restrictions control or mitigate the ability that the PROs would otherwise have, by virtue of collusive pricing, to elevate licensing royalties above the level that would result from competition among different music rightsholders. Specifically:

1. ASCAP and BMI must grant a license to anyone who requests one—because restricting access to the collective product is the mechanism by which a cartel elevates the price.

2. If ASCAP or BMI cannot reach agreement with a licensee on the royalty rate, that royalty is determined by a neutral party (the "Rate Court")—because otherwise the PROs' control of the repertory of thousands of composers would allow them to insist on royalty rates far in excess of what those composers could individually negotiate.

3. ASCAP and BMI are prohibited from restricting their affiliated rightsholders' ability to negotiate individually to license their works—in order to mitigate their collusive market power by allowing for the possibility of competition along side the collective licensing.

4. ASCAP and BMI are required to offer licensees "genuine alternatives" to the blanket license, and to allow licensees to adjust to some limited extent their blanket license fees to reflect works for which they have secured performance rights directly from the rightsholders—again in order to mitigate the collusive market power of blanket licensing by allowing competing mechanisms to operate in parallel with the collective blanket license.

Not surprisingly, ASCAP and BMI would prefer to operate without these restrictions. But from a public policy perspective, the predicate for a performance-royalty-licensing regime without these restrictions should be independent licensing by distinct copyright owners, subject to action under the antitrust laws if they attempt jointly to set the price for portfolios of works from multiple distinct rightsholders. If, on the other hand, the rightsholders wish to continue to price performance rights jointly through blanket licenses, then the above restrictions are entirely appropriate to mitigate the market distortions of unrestricted collusion.

IV. Reasonable royalties for licensing of music performance rights

As noted above, part of the compromise inherent in the Consent Decrees is that ASCAP and BMI are permitted to engage in collusion, but given the likely effect of such collusion on royalty levels, royalties are set by the Rate Courts if the parties cannot agree. To fulfil this role, the Rate Court is charged with setting "reasonable" royalties, and has tied "reasonable" in this context to the rate that would prevail in a competitive market. *United States v. ASCAP (In Re Applications of RealNetworks, Inc. and Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) ("fundamental to the concept of 'reasonableness' is a determination of what an applicant would pay in a competitive market."); *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, No. 13-95 (WCC), 1993 WL 60687, *16 (S.D.N.Y. Mar. 1, 1993) ("[T]he rate court must concern itself principally with defining a rate … that approximates the rates that would be set in a competitive market.").

Written and oral testimony before the subcommittee has introduced other conceptions of the level at which royalties should be set, including "free market," "fair market," and the "willing buyer/willing seller" test. It is useful to consider what these words might mean and how they relate to each other.

Obviously, sellers like high prices and buyers like low prices. From a public policy perspective, there is no reason to seek either higher or lower prices, *per se*. What we can say is that prices approximating those that would occur under competition are economically efficient, meaning that they allow society's overall wants and needs to be satisfied at the lowest possible cost. Thus, in the absence of some other market-specific argument in favor of high or low prices, public policy should seek to approximate competitive prices.

"Free market" prices: As discussed above, the "free market" price level can be interpreted as the level that would obtain in a competitive market free of market failures. In this sense, it means essentially the same thing as the competitive market price level, which is the level that the Rate Court seeks. If, on the contrary, "free market" price level is taken to mean the level that would prevail if PROs were not subject to the antitrust laws, then this means prices elevated over the competitive level by monopoly power. There is no reason why public policy should seek this outcome.

The "willing buyer/willing seller" test: The problem with this test is that, without further elaboration, it does not actually provide much guidance for price setting. In particular, it does not preclude undesirable monopoly pricing, because monopolists are willing sellers, and buyers who have no choice but to pay the monopoly price if they want the monopolized good are, in a sense, willing buyers.

Consider, for example, when OPEC started to operate as an effective cartel in 1972 and raised the price of oil from $2-$3/barrel to $12/barrel. Lots of people continued to buy the oil. They didn't like the new price, but they were still "willing" buyers, given their lack of alternatives, and OPEC was certainly quite willing to sell. Thus the $12 price seems clearly to meet the willing buyer/willing seller test. But it seems equally clear that it was not the competitive price. Should a Court or other fact finder wishing to determine a reasonable price for oil at that time have accepted $12 as "reasonable" because it met the "willing buyer/willing seller" test? If so, then "reasonable" ends up placing no restriction on the exercise of monopoly power.

Thus, if the purpose of the Rate Court is to try to ensure approximation of competitive prices for collective licenses, the willing buyer/willing seller test is not adequate. What we want are prices that approximate the competitive level. The willing buyer/willing seller test does not ensure this outcome because it also allows for monopoly prices.

"Fair market" value: In some contexts, prices subject to negotiation or arbitration are set according to a standard of "fair market" value. It is not clear that this concept is helpful in the current context. Typically, when someone argues that a given price is below (or above) "fair market" value, what they mean is that they can identify some situation that they believe is analogous in which the analogous price is below (or above) the given price. Now, if the allegedly analogous situation is indeed analogous, and if the observed situation is reasonably competitive, then this would be useful evidence regarding the competitive price. But if the analogous situation is not one in which the price is determined competitively, it should not be the basis for determination of the reasonable royalty level. Hence, like the willing buyer/willing seller test, there may be situations in which "fair market" royalties and "competitive market" royalties are the same, but in those situations where they are not, the "fair market" standard is not a valid basis for determining the reasonable rate.

V. Actual experience with music royalties confirms that collective licensing elevates prices above the competitive level

We have two kinds of evidence that confirm the elevating effect of collective licensing on music royalties. The first is that in circumstances where licensees have been able to utilize direct (non-collective) licensing on a significant scale in a reasonably competitive marketplace in which individual rightsholders were competing against each other on the basis of price to have their works performed, the resulting prices have been well below the rates of collective licenses. The second is that the third PRO, SESAC, which is not subject to a Consent Decree, has demonstrated its ability and willingness to rapidly and significantly increase its royalty rates in the absence of any corresponding increase in value to licensees.

DMX provides packages of recorded music that retail stores and other businesses play in the "background" in their establishments. As such, DMX is in the somewhat unusual position of controlling which music is "performed" by its service and which is not. While historically the rights to these public performances were conveyed by a blanket license, in 2006 DMX embarked on a campaign to secure public performance rights directly from individual music publishers ("direct licenses"), with the explicit intention of using these directly acquired rights in place of blanket license rates. Over a period of 5 years, DMX was able to secure hundreds of direct licenses from music publishers – both small and large – whose catalogs collectively accounted for upwards of 30% of the musical works performed by DMX. These transactions occurred in a marketplace in which the rightsholders themselves, and not a licensing collective, decided whether or not the compensation offered by DMX for the right to publicly perform their music was reasonable. One consideration on the part of these rightsholders in evaluating DMX's request for a direct license was the likelihood that DMX would favor directly-licensed titles in constructing its playlists, meaning that rightsholders who agreed to a lower royalty rate would likely see a larger share of DMX plays and hence receive a larger share of royalty payments. This ability of individual rightsholders to compete with each other on the basis of price to have their works performed on the DMX service is the essence of competition.

With the injection of actual competition into the marketplace for performance rights, the license fees paid by DMX declined dramatically. The license fees that DMX secured in direct negotiations were well below those that ASCAP and BMI had historically secured from the background music industry, and were well below those that ASCAP and BMI were asking of DMX. This licensing experience of DMX provides an example of a competitive market for music performance royalties at work, and demonstrates that in this context such competition produces royalty rates much lower than those produced by collective licensing. There is no way to know precisely how this experience would translate to other performance royalty licensing contexts, but it is at least suggestive that the economic prediction that collective licensing elevates royalties is correct and is quantitatively significant.

At the opposite end of the spectrum is the recent experience of local television stations (and others) in their dealings with SESAC, the one United States PRO that is not subject to a consent decree. 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, SESAC, beginning in late 2007, demanded from local stations across-the-board fee increases that were entirely divorced from normal market forces. The data showed SESAC music use by local television stations declining, and the industry (and the economy generally) was in the throes of the "Great Recession." Nevertheless, the stations felt that they had no alternative but to take a SESAC blanket license; indeed some stations were informed by SESAC that it was withdrawing interim authorization for performance of its music and therefore the station would be subject to copyright infringement claims if it did not agree to the license terms demanded. Eventually, all stations gave in to SESAC's demands. This ability to dramatically raise one's price without suffering any loss in business is a hallmark of monopoly power.

VI. The ASCAP and BMI Rate Courts are reasonably flexible and appropriate mechanisms for the task of ensuring reasonable music performance royalties

The foregoing discussion shows that the problem the Consent Decrees are designed to solve is a real one. It is nonetheless fair to ask whether or not the decrees constitute a reasonable solution to this problem. Some testimony before the subcommittee has portrayed the Consent Decrees and the Rate Courts as obsolete and/or heavy-handed regulatory mechanisms. These are misleading characterizations.

While it is true that the Consent Decrees themselves have been around for a while, they have been continuously adapted to changing circumstances. There is no evidence that the Decrees or the Rate Courts have been resistant to implementing change as needed. In particular:

1. The Consent Decrees themselves have been amended on numerous occasions, most recently in 1994 for BMI and 2001 for ASCAP. *Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32, 36 (2d Cir. 2012).

2. The Rate Courts have continuously adapted the rules and implementation for music licensing, including significant modifications to the per-program

license, and more recently the development of the Adjustable-Fee Blanket License

3. The Department of Justice has announced its own inquiry into the question of whether any modifications are necessary, and public comment on that inquiry is currently open. *See* Antitrust Division Opens Review of *ASCAP* and *BMI* Consent Decrees, at http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.

While the advent of digital technologies and the growth of the Internet change the nature of music performances requiring licensing, they do not change the underlying reality that collective pricing for thousands of compositions creates monopoly power that is not present in the individual composers' copyrights. Hence while updating of the Consent Decrees may be appropriate, there is no analytically valid basis to suggest that these new technologies undermine the need for the oversight the Consent Decrees provide.

Another issue raised by some commenters is that the DOJ has a general presumption that antitrust consent decrees should "sunset" after some period of time. There are, however, good reasons why the general presumption that antitrust consent decrees should "sunset" after some time does not apply here.

First, most antitrust enforcement actions emerge out of a particular set of market conditions at a point in time. In most markets, companies that manage to establish some kind of monopoly position can be expected to be unable to sustain any such dominance if prohibited from engaging in anticompetitive behavior for some period of time. But the market power associated with the collective pricing by the PROs is fundamentally different. It is not the result of a narrow or temporary set of circumstances—it is inherent in the licensing structure they have chosen to establish.

Second, the general presumption that consent decrees should be of finite duration in no way implies that when a consent decree ends the firms involved are subsequently somehow exempt from the antitrust laws. But BMI and ASCAP do not seem to be proposing ending their practice of collective licensing. What they apparently seek is weakening or removal of the Consent Decree restrictions, while they would continue to be permitted to license collectively. The analogy to such a proposal is not "sunsetting" of a narrow consent decree, it is broad exemption from the antitrust laws that apply to everyone else.

Finally, some commenters have emphasized that the Rate Courts are expensive and time-consuming, and implied that they are therefore an outmoded example of heavy-handed regulation. While it is true that Rate Court is time-consuming and expensive when it is invoked, it is only a very small number of cases in which it is needed. Year in and year out, ASCAP and BMI have thousands of licensees and license agreements. Only a handful of these agreements are handled by Rate Court in any given year. For the rest, Rate Court provides a "backstop" that mitigates the monopoly pricing that collective licensing would otherwise generate, but it does so without actually being used. Thus, the time and expense of the small number of Rate Court cases that are actually needed is more than balanced by the benefit created in all licensing negotiations by its mere existence in the background. Rate Court therefore represents a reasonable solution to the problem of permitting collective licensing without generating monopoly royalty rates.

VII. A more competitive framework for music licensing royalties could be developed

At least in principle, one could imagine a different overall approach to the licensing of music performance rights for local television broadcasting. Instead of being paid after the fact for local television performances, music creators could negotiate with the producers of television programs to provide the subsequent right of public performance ("source licenses"). Within this framework, creators would receive additional compensation when programs are created to compensate them for the subsequent public performance of their works. The cost of this compensation would then be priced into the programs.

This approach has the advantage that the compensation for the right of public performance is determined at the time that the producer is deciding what music to use, so that the competitive market can operate freely to determine the compensation levels. This approach does have different risk-sharing and transactions cost properties than the more widespread after-the-fact licensing. How those risks and costs would be borne would be determined by market forces.

In a world in which all local television broadcasters have blanket licenses, and all composers share in royalties set collectively, there is tremendous inertia that operates against such source licensing developing. Nonetheless, the BMI and ASCAP Rate Courts have been working with the PROs and the licensees to develop the per-program license, and to develop the Adjustable-Fee Blanket License, so as to permit maximum development of alternative licensing pathways in conjunction with the blanket license. The evolution of these competitive market mechanisms offers the best hope for eventually reducing the need for Rate Court oversight to ensure that the PROs are not able to exercise monopoly power in the pricing of blanket licenses.