Before the
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Washington, D.C.

In the Matter of	)	
Music Licensing Study: Second Request for Comments	)	**Docket No. 2014-03**

ADDITIONAL COMMENTS OF THE TELEVISION MUSIC LICENSE COMMITTEE, LLC

The Television Music License Committee, LLC ("TMLC") submits these comments in response to the Copyright Office's request for additional comments on whether and how existing music licensing methods serve the music marketplace, including new and emerging digital distribution platforms. *See* 79 Fed. Reg. 42833 (July 23, 2014) (the "Second Request"). We respectfully refer the Copyright Office to the comments submitted by the TMLC on May 23, 2014, in response to the March 17, 2014 Notice of Inquiry in this matter (the "TMLC NOI Comments") for a description of the TMLC and the local television music licensing marketplace.

I. DATA AND TRANSPARENCY

The TMLC welcomes the Copyright Office's consideration of possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data. As explained in the TMLC NOI Comments, local television stations predominantly broadcast programming produced by third parties. Stations do not control the selection of music used in this third party-produced programming and often do not know what music has been irrevocably embedded after

the program has been broadcast, let alone before. To promote a competitive market for music performance rights, and to ensure that license payments made by local stations and other entities that transmit audio-visual programming are distributed equitably to the owners of works actually performed, the music marketplace would benefit greatly from an authoritative source of public data concerning not only the identity and ownership of musical works generally, but also specifically in relation to the audio-visual works with which such works have been synchronized.

There is a ready model for a publicly available source of such data. Producers of television programming typically prepare music "cue sheets" that list each musical work synchronized with the visual images of the program and include, for each cue, detailed ownership information, the affiliated performing rights organization, and the duration of the performance. ASCAP and BMI, the two largest performance rights organizations, have developed and utilize a data management system known as RapidCue that enables production companies to provide cue sheet information in electronic form to these two collectives. This system provides a web interface and standard format for the submission of cue sheet information. We understand that RapidCue assigns unique ID numbers to each program, episode, performance, composer(s), and copyright owner(s). The data are logged, validated, and dispersed electronically to ASCAP and BMI. *See generally* http://www.rapidcue.com/Module_1_How_RapidCue_Works.htm. ASCAP and BMI maintain databases of this cue sheet information, which they use, at least in part, to determine royalty distributions.

These databases are not completely comprehensive, but they do contain music content information for most of the programming broadcast on television. While ASCAP and BMI have access to this information, they do not make it available to composers, publishers, licensees, or

other licensing collectives, let alone the general public. Even though the cue sheet data are prepared by third parties, and even though ASCAP and BMI share cue sheet information with each other, each has asserted that the databases they maintain are proprietary.

RapidCue could form the basis, or at least a model, for an international standard cue sheet reporting system and publicly available database that would have tremendous benefits for the marketplace for music performance rights. An authoritative, public source of information could be used by copyright owners and licensees alike to understand better the basis for payments to and distributions from performing rights organizations, creating more transparency for all interested parties, more opportunities for direct license transactions, and a more competitive marketplace for music rights. Access to such data would provide an incentive to other private organizations to share their own data about the music used on television, which would make the database more robust, and it would allow interested parties to verify cue sheet data, which would make the database even more accurate and more reliable.

II. OTHER PERTINENT ISSUES THAT THE COPYRIGHT OFFICE MAY WISH TO CONSIDER

During the June 10, 2014 Hearing on Music Licensing before the Subcommittee on Intellectual Property of the Committee on the Judiciary of the U.S. House of Representatives, the Honorable Tom Marino, Vice-Chairman of the Subcommittee, invited witnesses attending the hearing to submit comments for the record concerning the differences between "free markets" and "fair market value." The TMLC asked a leading economic expert well-versed in music licensing issues, Dr. Adam Jaffe, to prepare a white paper to dispel the apparent confusion arising out of the disparate ways the witnesses who testified at the hearing were using those terms. Dr. Jaffe's white paper, which was submitted to Congress on July 8, 2014, includes an explanation of what the term "free market" means and when and whether government regulation

is appropriate to respond to "free market failures." His paper also includes discussions of the terms "fair market" and "willing buyer/willing seller" as used generally in the music licensing context and the relationship of copyright law to the current music licensing system. His paper concludes with a brief analysis of the experience with the current ASCAP and BMI Consent Decrees and a short description of what might facilitate a more competitive environment for licensing music performance rights to local television stations. The TMLC respectfully submits that these issues are pertinent to the Copyright Office's consideration of the music licensing landscape and annexes hereto a copy of Dr. Jaffe's July 8, 2014 white paper.

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

Respectfully submitted,

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/s/ Willard Hoyt
Willard Hoyt
Executive Director
TELEVISION MUSIC LICENSE COMMITTEE, LLC
4941 Scenic Creek Drive
Powell, Ohio 43065
(917) 414-5893
will@televisionmusic.com

R. Bruce Rich
Benjamin E. Marks
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8000
bruce.rich@weil.com
benjamin.marks@weil.com

Counsel for Television Music License Committee, LLC

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

Statement of Adam B. Jaffe
Fred C. Hecht Professor Emeritus in Economics,
Brandeis University

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.