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Roundtable on Antitrust Consent Decrees
Written statement of Public Knowledge
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Consent decrees are imperfect, but necessary tools to address systemic problems of misaligned incentives in certain marketplaces. To illustrate, I would like to briefly summarize the tensions of three standing consent decrees: ASCAP/BMI, and Comcast-NBCUniversal.

The structure of copyright law makes the music industry unique, even among media markets. First, of course, is the dual structure of musical copyright, with separate copyrights inhering in songwriters and recording artists. Second, the relatively short duration of most music means that many consumers will interact with a high volume of copyright interests on a daily basis. Third, these two factors together mean that many large commercial users and delivery services will, for efficiency's sake, obtain "blanket" licenses that cover as many works as possible. Fourth, to ensure they can fully participate in the market, most songwriters find it advantageous to make sure their works are included in such licenses.

These dynamics make collective action in the musical context appealing. Music users such as radio stations benefit from getting a small number of licenses that grant them access to a large repertoire, and songwriters benefit from being included in these licenses, which ensures they get paid for the use of their music. Thus, the creation of performing rights organizations, such as ASCAP and BMI, is in many ways a natural outgrowth of the legal and economic structure of music as a product.

This same collective bargaining, however, raises potential competitive issues. Music delivery is a multi-layered system that relies on non-fungible goods. While songwriters "compete" with each other at the composition stage, and PROs compete with each other to attract songwriters to their businesses, competition disappears when the end consumer appears. The individual consumer's access preferences are not determined the PRO affiliation of a given work; PROs are structurally invisible to an individual consumer. To accommodate consumer preferences, intermediaries must generally obtain licenses from *all* PROs. This creates natural incentives for collusion among PROs, who enjoy relatively captive buyers.

This situation eventually led to the imposition of consent decrees on the two major PROs. These decrees allowed them to continue to provide their valuable service while limiting some of the

anticompetitive threats. Admittedly, this system has showed signs of strain in recent years; the kinds of uses music is put to have changed, and some artists have pulled out of the two major PROs, leading to a disparity in the legal treatment of different PROs which may be difficult to justify. However, the same basic tensions remain. Thus, whatever their flaws, the consent decrees should remain in place.

The consent decree regarding the Comcast/NBC-Universal transaction is another example of an imperfect set of rules that is nonetheless responsive to a real, and continuing problem—namely, increasing vertical and horizontal concentration in the video marketplace that could limit the development of new and lower-cost alternatives for consumers. Obviously, the efficacy of this particular consent decree has been hotly debated. Critics said that it did little to protect video competition, and supporters said that it worked as intended to curb the worst potential anticompetitive excesses Comcast/NBC might otherwise have engaged in.

Looking back, Public Knowledge believes that the consent decree did prevent Comcast from fully using NBC-Universal assets to harm rival distributors, or from fully using its distribution platform to harm rival programmers. Much of this seems to have been as much a result of the structural side-effects of the consent decree's very existence, providing major counterparties with ready legal recourse in the event of bad behavior. That said, the decree likely failed to protect potential new competition delivered by independent and smaller providers, as the dispute over the peer programming condition demonstrated.¹

In fact, though the online video marketplace has continued to grow since the time of the merger, its development has not entirely been what was expected. Major online video services like Netflix and Amazon Prime Video have not evolved to become full-fledged cable replacements; rather, they remain complementary services that often create original programming. They are more like cable channels than cable systems. More recently, a number of cable-like services have been launched, including AT&T's DirecTV Now and DISH's Sling TV. But this market is dominated by video incumbents, with the notable exception of Google's YouTube TV—which serves only to underscore how expensive it is to enter the video marketplace.

¹ As Public Knowledge wrote with respect to this issue,

[T]he “peer programming” condition ... was intended to ensure that Comcast-NBCU offered its video programming to online video providers on terms comparable to those of its non-vertically-integrated programming peers. Comcast was able to undermine that condition by arguing that in order to comply with it, it would have to review its competitors' confidential programming contracts. Its competitors naturally balked at this, and the peer programming condition did not successfully ensure that third-party online video providers had full access to NBC programming.

Petition to Deny of Public Knowledge and Open Technology Institute, in Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign and Transfer Control of FCC Licenses and Other Authorizations, MB Docket No. 14-57, at 56-57 (filed August 25, 2014).

On balance, the consent decree was predicated on the idea that Comcast could benefit from merger efficiencies without resorting to anticompetitive behavior. It is difficult to see why, if behavior was considered anticompetitive and disallowed in 2015 or 2016, it should be allowed in 2018 or 2019. Thus, late last year, Public Knowledge asked the DOJ to extend this consent decree. We recognize that the problems the decree addresses are not limited to Comcast and we share many of the concerns about the use of consent decrees in place of regulation. However, until there is a better alternative the DOJ should seek to keep its competitive protections in place.