Before the
U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION
Washington, D.C.

In re Antitrust Consent Decree Review: American Society of Composers, Authors and Publishers/Broadcast Music, Inc.

COMMENTS OF NATIONAL ASSOCIATION OF BROADCASTERS

Introduction and Summary

The National Association of Broadcasters ("NAB") hereby submits its comments in connection with the review ("Consent Decree Review") undertaken by the U.S. Department of Justice ("DOJ") Antitrust Division with respect to the operation and effectiveness of the Final Judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) (collectively, "Consent Decrees"). NAB members are both creators and users of copyrighted works and, as such, recognize the important need to balance the rights of copyright owners against the public interest. In particular, the public's interest in products and services that increase the availability of copyrighted works is one that has been repeatedly recognized by the Supreme Court as an essential policy objective of the copyright law, and should be a key consideration in this review.

NAB supports the joint comment submitted by the Television Music License Committee ("TMLC") and the Radio Music License Committee ("RMLC"), which are the entities most directly engaged with the Consent Decrees on behalf of broadcasters. In addition to the points raised by TMLC and RMLC, NAB offers the enclosed analysis of economist Steven Peterson, Ph.D., as summarized in and supplemented by the discussion below. The major points addressed in Dr. Peterson's analysis are that: (1) the Consent Decrees provide important protections against the inherently anti-competitive features of Performance Rights Organization ("PRO") licensing, which remain essential and should not be diminished; (2) the unique history, context, and necessities animating the Consent Decrees render the DOJ's general policy favoring sunset provisions inapplicable; (3) ASCAP and BMI should not be permitted to discriminate against certain types of licensees by allowing music publishers to selectively withdraw their catalogs for only some licensees but not others; (4) improving the availability and reliability of information concerning the PROs' repertories can facilitate alternative licensing of performance rights and otherwise introduce a degree of competition to the licensing process; and (5) the due process, efficiency, and expertise afforded by the rate courts should not be sacrificed in favor of truncated, private arbitration.

The Consent Decrees remain essential to the functioning of the market for musical composition performance rights

The Consent Decrees serve an essential purpose in today's music licensing marketplace by providing necessary protection against anti-competitive conduct and effects inherent in the collective licensing of musical composition performance rights. As a preliminary matter, the collective and blanket licensing of performance rights remains essential to the functioning of the music licensing market, both for copyright owners and licensees. PROs aggregate the musical works of many songwriters. This aggregation creates numerous efficiencies, including those relating to licensing, enforcement, and administration of rights. Without collective licensing, the transaction costs associated with all of these functions would be prohibitive for all involved.

At the same time, the blanket licensing of performance rights is inherently anti-competitive because the very nature of the PROs' blanket license involves the fixing of a single price for all music, irrespective of which songs are actually used. Moreover, the aggregation of rights gives the PROs tremendous market power, which in the absence of the Consent Decrees would allow the PROs to extract supra-competitive pricing for their licenses. Radio and television broadcasters lack control, in certain instances, over the particular songs that are broadcast. Even with respect to programming created by broadcasters, each of the PROs has aggregated such a large repertory that there is often no practical way to avoid playing music licensed by each of the PROs.[1]

Notably, there is no competition between ASCAP and BMI with respect to these licenses because neither license provides a substitute for the other. Thus, in order to avoid potentially devastating penalties for infringement, broadcasters must license performance rights from each of the PROs. In the absence of the Consent Decrees, the resulting market power would allow ASCAP and BMI to engage in the "hold up" of licensees, and otherwise allow the PROs to supra-competitive rates, terms, and conditions from licensees. [2]

The inherent anti-competitive effects of collective, blanket licensing are clearly demonstrated by the conduct of the one (as of yet) unregulated PRO, SESAC. In particular, recent rulings in two antitrust cases brought against SESAC by the TMLC and RMLC, respectively, illustrate how such an unregulated PRO has abused the market power inherent in the blanket license. In the TMLC case, the court found that the "evidence would … comfortably sustain a finding that SESAC . . . engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." *Meredith Corp. v. SESAC LLC*, 09 CIV. 9177 PAE, 2014 WL 812795, *10 (S.D.N.Y. Mar. 3, 2014). The court further determined that the evidence was "more than sufficient" to support findings that "SESAC's conduct harmed competition, and that this harm outweighed any pro-competitive benefits of that conduct." *Id.* at *34.

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[1] This problem is further aggravated by the PROs' refusal to provide sufficient information about their repertories, as discussed further below.

[2] As the Copyright Office has previously acknowledged, the collective licensing of large catalogs of music copyrights inherently raises antitrust issues and therefore typically requires regulation and oversight. U.S. Copyright Office, *STELA §302 Report* 95-96 ("there is a significant risk that the collective may exploit its market power by charging supra-competitive rates or discriminating against potential licensees").

Similarly, in the RMLC case, after the presentation of extensive evidence in a preliminary injunction hearing, the magistrate judge concluded in her Report and Recommendation (which the District Court subsequently adopted) that "the challenged conduct has produced anticompetitive effects in the relevant market," *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5087, Report and Recommendation, *30 (E.D. Pa. Dec. 20, 2013), and that "SESAC has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no alternatives but to purchase their licenses," *id.* at 33.

The PROs and music publishers have alleged that the Consent Decrees somehow unfairly suppress the compensation that songwriters and composers receive for the public performances of their music and are causing songwriters' incomes to drastically decrease. According to their own press releases, however, ASCAP's and BMI's revenues have recently experienced "record setting" revenue growth, and resulting increases in distributions to songwriters.[3] If songwriters' incomes are truly decreasing on an industry-wide basis, it is certainly not due to a decrease in performance royalties.

Among the most important protections afforded by Consent Decrees are (1) the mandatory license upon request; (2) the protection of rate court if the PROs and licensees cannot agree on reasonable rates; and (3) the guaranteed availability of real alternatives to the blanket license.

Sunset provisions should not be added to the Consent Decrees

NAB appreciates that DOJ's current policy generally favors the inclusion of sunset provisions in new consent decrees. It would be inappropriate, however, to apply that general policy to the PRO Consent Decrees, which are unique in several important ways. First, the Consent Decrees have been in place for almost the entire history of the market for blanket public performance licenses. During those many decades, the various stakeholders involved have grown and adapted to the regulatory regime of the Consent Decrees.

Second, the rationale behind sunset provisions is that in the more typical situation a consent decree is fashioned in reaction to a particular set of market conditions, which may reasonably be expected to change after a certain period of time. In those cases, the terms of the consent decree may be expected to improve those market conditions such that the restrictions eventually become unnecessary. The ASCAP and BMI Consent Decrees are fundamentally different. The need for the Consent Decrees arose from the very nature of the blanket licenses, which are fundamentally anti-competitive, but also necessary to enable wide scale music licensing. The blanket license, itself, creates the market power necessitating its regulation. Even decades later, the market power of the PROs is no less today than it was in 1941. If anything, that market power has increased, and there is no evidence or other reason to believe that such market power (and its abuse in the absence of the Consent Decrees) will decrease at any time in the foreseeable future.

[3] *See* http://www.bmi.com/press/entry/563077; *see also* http://www.ascap.com/press/2014/0213-2013-financials.aspx.

The Consent Decrees should not be amended to allow the PROs to discriminate against certain licensees by allowing music publishers to selectively withdraw their catalogs with respect to some licensees but not others

In an attempt to circumvent the Consent Decrees, ASCAP and BMI music publishers have sought to selectively withdraw their catalogs from the ASCAP and BMI repertories for only certain licensees but not for others. Both rate courts interpreted the Consent Decrees to prohibit such withdrawals, and the Consent Decrees should not be amended to allow them to do so.

One of the hallmarks of the Consent Decrees is nondiscrimination. Allowing the PROs to facilitate discrimination against licensees would undermine not only the nondiscrimination principle, but also the very purpose of the Consent Decrees: to prevent anti-competitive conduct. The major music publishers with substantial catalogs have essentially the same market power as the PROs because their catalogs do not compete with one another, and each has aggregated a large enough number of songs from individual songwriters as to make the licensing of their catalogs indispensible for broadcasters. Moreover, the recent *Pandora* decision provides ample evidence that, if allowed to circumvent the Consent Decrees, those publishers will abuse their market power to extract supra-competitive rates, terms, and conditions from the blanket licensees they choose to target. Indeed, when Sony and UMPG attempted to withdraw certain rights from the scope of the Consent Decrees, the court in *Pandora* found that:

> the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying AFJ2 . . . Because their [ASCAP, Sony, and UMPG's] interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified.

In re Pandora Media, Inc., 12 CIV. 8035 DLC, 2014 WL 1088101, *35 (S.D.N.Y. Mar. 18, 2014).

If the Consent Decrees are amended at all, they should require greater transparency with respect to the PROs' repertories

The Consent Decrees could be improved by requiring ASCAP and BMI to provide more accurate and comprehensive information to licensees about their repertories. Lack of meaningful access to such information has increased transaction costs and hindered licensing activities – both direct and collective. Repertory transparency would allow licensors, licensees, and the rate courts to better understand the rights that are being licensed and their value. Such information is also crucial for the development of real alternatives to the blanket licenses, which in turn may help lessen some of the anti-competitive effects of the blanket licenses.

The due process, efficiency, and expertise afforded by the rate courts should not be sacrificed in favor of truncated, private mediation

One of the most fundamental protections afforded licensees by the Consent Decrees is rate court supervision of license negotiations. For decades, the rate courts have been successful in setting

rates that have been largely uncontroversial. Even in the vast majority of instances, where the parties are able to agree on rates without rate court litigation, the availability of rate court helps moderate the PROs' ability to abuse their market power in negotiations.

In recent years, however, ASCAP and BMI have lost a string of rate cases against digital music licensees, in which the rate courts found that the PROs failed to justify their requested rate increases. Of course, the very fact that ASCAP and BMI have lost so many recent cases proves that the courts are working and why they are so essential. The various changes to the Consent Decrees requested by the music publishers and their PROs, discussed above, are all motivated by their desire to eliminate or circumvent rate court supervision. Eliminating the rate courts in favor of truncated private arbitration risks weakening this protection, and should be rejected.

The proposal to move to arbitration assumes, in the first instance, that the rate courts are inadequate. This assumption is false. The rate courts are presided over by inherently neutral, sophisticated federal judges, who routinely adjudicate copyright and antitrust issues and who regularly hear complex expert testimony. The same judge hears disputes for each PRO, which allows each judge to develop significant industry expertise, and decisions are subject to appellate review before changing panels of the Second Circuit Court of Appeals. There has been no legitimate argument that these federal judges have been unable to understand the music industry or relevant legal issues in any way that negatively impacts ratemaking. Each of the judges has also developed streamlined procedures, which are nonetheless consistent with the due process afforded by federal court, to ensure that rate cases are decided quickly and efficiently. The rate courts are also governed by precedent, with increased resulting predictability.

By contrast, a private arbitrator will have far less experience with the relevant copyright and antitrust law than a federal judge. To the extent an arbitrator has music industry experience, the arbitrator would necessarily have represented either copyright owners or licensees, creating lingering concerns over fairness and perceived conflicts of interest. Discovery in arbitration is typically minimal, or eliminated entirely. Such lack of discovery would disproportionately prejudice licensees, because the PROs have access to potential benchmarks and other relevant information while licensees typically do not.

Given the financial stakes in rate disputes, parties will aggressively litigate royalty rates regardless of whether the venue is in federal court or arbitration. There is no reason to believe that, without drastic elimination of discovery and appellate review, private arbitration will be any more efficient, speedy, or cost-effective than the rate courts. To the contrary, arbitration will introduce a destabilizing uncertainty into the licensing process. The due process guaranteed by the rate courts should not be sacrificed for the dubious expedience of private arbitration.

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NAB appreciates this opportunity to provide a meaningful contribution to the Consent Decree Review, and looks forward to continued dialog on these important matters.

Respectfully submitted,

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Comments of Steven R. Peterson, Ph.D., on Behalf of the National Association of Broadcasters

I. Introduction

I respectfully submit the following comments regarding the U.S. Department of Justice's review of the Consent Decrees governing the conduct of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") on behalf of the National Association of Broadcasters ("NAB"). ASCAP and BMI are performing rights organizations ("PROs"), which have been granted the right to license the public performances of copyright holders' compositions. NAB is a trade association representing the interests of radio and television broadcasters in the United States.

ASCAP and BMI each license the performance rights of the musical works created by hundreds of thousands of composers and music publishers.[1] It is not possible for broadcasters to avoid playing the works contained in ASCAP's and BMI's repertories. In fact, broadcasters often cannot control the particular works they play. Therefore, they must obtain licenses from each PRO. As a result, ASCAP and BMI have substantial market power in the markets for the rights to perform musical works in television and radio broadcasts. ASCAP and BMI are subject to Consent Decrees, which limit their ability to exercise their market power. Under these Consent Decrees, the rates, terms, and conditions of ASCAP's and BMI's licenses are subject to court oversight. In addition, ASCAP and BMI cannot refuse to provide a license to any party seeking one, even if the parties cannot agree on a license fee, and are required to offer licensees viable alternatives to a standard blanket license covering all of the works in their repertories.[2]

Often consent decrees are put in place to put an end to conduct that prevents a market from operating competitively. In those cases, once that anticompetitive conduct is eliminated,

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1 See, http://www.ascap.com/about/ and http://www.bmi.com/about.

2 See United States of America v. American Society of Composers Authors and Publishers, Second Amended Final Judgment, June 11, 2001 (hereinafter "ASCAP Consent Decree") and United States of America v. Broadcast Music, Inc., Final Judgment, November 1994 (hereinafter "BMI Consent Decree").

the market can develop the capacity to operate competitively, and the consent decree may no longer be needed.

This has not been the case for the ASCAP and BMI consent decrees. Importantly, the market power created by ASCAP's and BMI's aggregated performance rights has not diminished since the Consent Decrees were enacted. It has merely been constrained by the consent decrees, on whose protection participants in the markets for performance rights have come to rely. Nothing about the inherently anticompetitive nature of the PROs has changed since the consent decrees were put in place, and they continue to provide important competitive protections, which should not be diminished.

Unleashing the market power of ASCAP and BMI would be economically inefficient and harmful to broadcasters' audiences. ASCAP and BMI could charge license fees that effectively extract the value of the investments that broadcasters made in the expectation of continued protection from ASCAP's and BMI's market power. In addition, ASCAP's and BMI's unrestrained market power would threaten ongoing investment in broadcasting, particularly in the digital arena where web simulcasting and digital services are expanding the listening options available to broadcasters' audiences.

Some music publishers have publicly raised the prospect that they would provide ASCAP and BMI with only limited grants to license their performance rights by carving out the rights for certain kinds of performances.[3] Allowing copyright owners to selectively withdraw from ASCAP and BMI would substantially undermine the competitive protections of the Consent Decrees by giving copyright holders the freedom to exercise their market power. Ultimately, rights holders would withdraw from ASCAP and BMI with respect to all licensees for which the exercise of market power would be beneficial to the rights holders.

It is appropriate for the DOJ to periodically review the Consent Decrees. However, at this time, it is clear that the protections the Consent Decrees afford should not be diminished.

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[3] See, *e.g.*, http://www.ascap.com/members/governingdocuments/rights-withdrawal.aspx (accessed August 5, 2014); Anne L. Kim, "Songwriter Groups Have a Little Advice About Consent Decrees," *Roll Call*, June 9, 2014; and Nate Rau, "ASCAP: Future at stake in Pandora case," *The Tennessean*, August 4, 2014, available at http://www.tennessean.com/story/money/industries/music/2014/08/04/ascap-pandora-music-streaming-battle/13591685/ (accessed August 5, 2014).

Any material reduction in the protections afforded by the Consent Decrees or eventual termination of the Consent Decrees must be contingent on increased competition in the markets for performance rights. Until competition becomes strong enough to provide licensees protection from the market power of the PROs and large rights holders, the regulatory framework should continue to be administered through federal Rate Courts.

II. Background on Music Licensing

A. U.S. Performing Rights Organizations

U.S. copyright law grants composers the exclusive right to publicly perform their musical compositions. If a person other than the copyright owner of the musical work wishes to perform the work publicly, the person must obtain the permission of the copyright owner. Copyright owners are free to license their works directly. However, copyright owners more typically grant the right to license public performances of their works to a PRO by becoming the PRO's member or affiliate. In this manner, PROs aggregate the performance rights of many copyright owners. The PRO acts as a joint selling agent on behalf of its affiliates by licensing the bundle of their performance rights to radio stations, television stations, and other businesses and venues that publicly perform music (*e.g.*, bars, restaurants, sports arenas, and so forth). PRO licenses frequently take the form of a blanket license that grants to the licensee the right to perform any work in the PRO's repertory during the term of the license for the agreed license fee. PROs distribute the net revenue from these fees to their affiliates.

PROs have the potential to reduce transaction costs because they provide a large bundle of rights in a single license. This may lower the cost of obtaining the rights a broadcaster needs to publicly perform musical works legally compared to other methods. Many countries have a single PRO. The United States has three major PROs: ASCAP, BMI, and SESAC. ASCAP and BMI each aggregate the rights to works created by hundreds of thousands of composers. The ASCAP repertory contains over 9 million works[4] and the BMI repertory contains over 8.5 million works.[5] In September 2013, BMI reported licensing

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4 ASCAP Press Release, February 12, 2014, "ASCAP Reports Strong Revenues in 2013."

5 www.bmi.com/about (accessed August 4, 2014).

revenues grew by $45 million and exceeded $944 million for the year ending June 30, 2013.[6] In February 2014, ASCAP reported its domestic licensing revenue for the year ending December 31, 2013 grew by $13.2 million, bringing its revenue to $944 million.[7] SESAC has a smaller repertory than either ASCAP or BMI. It is not subject to a consent decree or to rate regulation, but the Radio Music License Committee and a class of television stations have sued SESAC for antitrust violations.[8]

B. Radio Stations' Use of Music

Many radio stations play music as their primary programming. In addition, radio stations broadcast music as bridges between different programs and as part of commercials. Stations also broadcast ambient music in their coverage of live events, such as a local football or baseball game or a parade.

Radio stations control some of the music that they broadcast, such as the music content of their primary programming. They also have control over the music content of locally produced commercials. However, radio stations cannot readily control the music content of the commercials they do not produce, including those placed by national advertising agencies. Similarly, radio stations cannot control the music played at the live events that they cover. The radio broadcaster must obtain the rights to publicly perform the music that it programs and that is embedded in programming that is created by others.

C. Television Stations' Use of Music

Television stations play music as part of their audio-visual programming. The musical performance may be part of a feature presentation, such as a concert. Music is also played in the background of movies, television dramas and sitcoms. Television commercials and infomercials also contain music. In addition, music may be broadcast as part of the transition

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6 BMI Press Release, September 23, 2013, "Broadcast Music Inc. Reports Record-Breaking Revenues of $944 million."

7 ASCAP Press Release, February 12, 2014, "ASCAP Reports Strong Revenues in 2013."

8 See, *e.g.*, Radio Music License Committee, Inc. v. SESAC, Inc. *et al.*, No. 2: 12-cv-05807-CDJ, Complaint, October 11, 2012; Meredith Corporation, *et al.* individually and on behalf of all others similarly situated, v. SESAC, LLC, *et al.*, Case No 09 Civ. 9177 (NRB), First Amended Class Action Complaint, March 18, 2010.

between programs, as the theme music for television shows and newscasts, and as part of the broadcast of live events.

Like radio stations, television stations control only some of the music that they broadcast. Music in commercials, infomercials, syndicated programming, and live events is not under a station's control. Moreover, it is often not possible to know what music is contained in a particular television program. Information on the music in television programs is contained in cue sheets. Cue sheets, however, are not always complete and frequently do not exist for certain types of programming, such as infomercials. Regardless, the television broadcaster must obtain the rights to publicly perform the music that is included in its programs and the programs created by others.[9]

III. PROs Have Substantial Market Power as the Result of Their Aggregating the Rights to Many Individual Composers' Works

A. Broadcasters Must Obtain Licenses from Each of the PROs

As described above, television and radio stations do not control all of the music in the programming they broadcast. The music in their programming may be in the repertory of any of the three PROs. There is no realistic prospect that a broadcaster could, even at great cost, assemble an attractive programming schedule and a slate of commercials that did not include music from each of the three PROs' repertories. Thus, to avoid infringing the copyrights of the musical works contained in its programming, the broadcaster must obtain a license from each of the PROs.

B. PROs Do Not Compete with One Another

In the licensing marketplace as it currently exists, copyright owners grant the right to license public performances of their works to a PRO that bundles and prices the performance rights in common. Allowing the PRO to price many composers' works jointly eliminates competition among individual composers to determine the fees for performance licenses. In a competitive market for performance rights, each composer would control the rights to his or her own musical works and would establish the fees for performing those works through

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[9] In the case of network television, some television networks obtain the rights to broadcast the music contained in the network programming they provide to their network affiliates, and others do not.

competition with other copyright owners. Broadcasters and others who create programming and commercials would have sufficient information to choose what music to include in their programming and commercials based on the prices of individual copyright owners' performance licenses.[10]

It may appear that the three PROs compete with one another. This is not the case, however, because there is no prospect for a broadcaster to avoid all of the works of one PRO in favor of the works controlled by another PRO. This means that a license from ASCAP, for example, is not a substitute for a license from BMI.[11] All stations need licenses from each of the PROs. If all radio and television broadcasters need a license from each PRO, a PRO cannot materially increase its number of licensees by lowering its prices. Similarly, the PRO does not lose business by raising its prices, at least until it reaches the point of driving some broadcasters out of business or to a non-music programming format, such as sports or talk. Thus, each PRO is a monopolist of the performance rights for the works in its repertory.[12]

Unregulated markets for the performance rights licensed through three PROs may be less economically efficient than they would be with a single PRO. The performance rights licensed from the PROs are complements, meaning that they need to be used together to achieve the desired result – broadcasting performances without infringing upon any musical works. Each PRO, however, will price its bundle of rights without regard for the effect of its high price on the prices that other PROs can charge. Thus, each PRO charges a price that is too high from the perspective of the other PROs selling complementary rights. A single monopolist would potentially charge a price below the combined prices of the three PROs. In

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10 Clearly, the tremendous amount of information required and the large number of transactions associated with such markets for performance rights make it impractical as a real-world means of establishing the rates for broadcasting music.

11 This is particularly the case when the only economically viable license option is a blanket license.

12 In fact, application of the hypothetical monopolist test shows that the relevant product market for a PRO's license contains only the rights to the works in that PRO's repertory. U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, at section 4.

addition, having three PROs triples the number of licenses that must be administered, raising the administrative costs relative to the costs a single efficient PRO would incur.[13]

The recent experience of broadcasters with SESAC, a PRO that is not subject to a consent decree, demonstrates the market power of unregulated PROs. Traditionally, SESAC licensed European composers and gospel music. Broadcasters did not necessarily believe they needed a SESAC license to avoid infringing copyrights, and SESAC's fees were low. More recently however, SESAC has obtained rights to some key musical works and some popular artists and has aggressively raised its licensing rates. Broadcasters have found that SESAC's increases in license fees exceed the increases in the size and value of its repertory, however. Despite the rapid increases in SESAC's rates, broadcasters are not able to avoid taking a SESAC license. The ability to aggressively raise rates without losing licensees is direct evidence of SESAC's market power. As noted above, radio and television broadcasters have sued SESAC over these very issues.

Unregulated markets work well when customers are well informed and have choices and when sellers compete with each other. In this circumstance, customers can choose what to purchase based on the value the product offers relative to its price. If customers do not like the price of one seller's product, they can turn to the product of a competing seller. There is no prospect for such competition in the markets for the performance rights for musical works. Here, competition among composers producing competing musical works has been replaced by the licensing of performance rights by PROs that are monopolists over the rights to the works in their respective repertories. There should be no expectation that unregulated markets for performance rights would achieve anything approximating competitive results.

C. Competition Is Not Possible When Decisions Regarding Music Use Are Made Before Performance Rights Are Obtained

There are additional aspects of the processes for both selecting musical works for programming and obtaining the associated performance rights that make achieving competitive results in an unregulated market impossible. Most notably, many decisions

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[13] The three PROs must duplicate much of the administrative burden of managing licenses with music users and tracking music use. At a minimum, the number of licenses that must be managed is three times larger than would be necessary with a single PRO.

regarding the music that is broadcast by radio and television stations are made *before* the performance rights have been obtained. For example, when the producer of a television show chooses music to include in the programming, it must obtain a synch right to include the music in the television program.[14] The producer does not, however, obtain the right to perform the music it chooses to include in the program. It is left to the television network or to the local television station that will broadcast the program to obtain the public performance rights.

Thus, when a television producer inserts a musical work into its television program, it is inserting property that it does not have the right to publicly perform into its own valuable property, the completed television program. (The same would be true for a television or radio commercial.) Absent regulation of performance rights, the owner of the copyright to the musical work would be free to hold up the radio or television station by raising the price of performance rights up to the point where it is just worth broadcasting the program.[15]

This system where decisions about the musical works to embed in television programs and radio and television commercials are made prior to arranging the rights to perform the music is only workable where the Consent Decrees effectively restrict the ability of rights holders to refuse performance licenses. The existing process for obtaining performance rights for musical works has allowed the creation of a large body of programming that contains music that the programs' owners do not have the right to perform. Without the protections of the Consent Decrees, ASCAP and BMI would be able to exercise substantial market power in establishing the fees to perform this programming.

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[14] A synchronization or "synch" right is needed to use the recording of a musical work in an audio-visual format, such as a television program or commercial. http://www.ascap.com/licensing/termsdefined.aspx.

[15] This, of course, lowers the value of the program to its producer because broadcasters will place a lower value on programs that impose high costs to obtain performance rights.

IV. The Competitive Protections the Consent Decrees Afford Should Not Be Diminished

A. The Consent Decrees Provide Important Competitive Protections

The Consent Decrees provide a number of important protections against the exercise of market power by ASCAP and BMI. As discussed above, broadcasters cannot realistically operate without exposure to copyright infringement liability unless they obtain licenses from ASCAP and BMI. Therefore, in an unregulated market, ASCAP and BMI could impose large costs on broadcasters by refusing to provide licenses to broadcasters during negotiations or unless the broadcasters agree to the license fees the PROs demand. The Consent Decrees directly address this competitive problem. The Consent Decrees require ASCAP and BMI to provide licenses even if the parties have not yet agreed on a fee for the license.[16] This requirement limits the ability of ASCAP and BMI to hold up broadcasters by refusing to provide them with licenses.

Moreover, the PROs are free to negotiate terms and conditions with licensees. If those terms and conditions are not reasonable, however, licensees can petition the Court to determine reasonable terms. Thus, the negotiations between the PROs and licensees are conducted in an environment where the refusal to agree will result in the Court's establishing competitive license terms.

The Consent Decrees also provide that the PROs will offer alternatives to the blanket license, such as per-program and per-segment licenses. Blanket licenses allow the licensee unlimited use of a PRO's repertory in exchange for the license fee. In contrast, per-program and per-segment licenses allow licensees to pay fees that are more closely tied to the amount of the PRO's music that they actually use. Use of alternative licenses increase the cost of license administration, but can lower a station's license fees so that they more accurately reflect the station's actual use of music.

The ability to choose license structures that establish license fees that are more closely related to the amount of music actually used introduces a small degree of competition into the ratemaking process. If license fees are high, broadcasters can determine whether they can pay

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[16] ASCAP Consent Decree at 8 and 12 and BMI Consent Decree at 2 and 8.

a lower fee by adopting an alternative license that rewards using less of a PRO's music. For example, television stations can adopt a per-program license under which they pay a base fee and an additional license fee to a PRO for a program only if the program contains the PRO's music. Radio stations can adopt a per-program license under which they pay a base fee and additional fees that vary with the number 15-minute intervals that have otherwise unlicensed feature music of the licensing PRO. Thus, alternative license structures give broadcasters some ability to demonstrate the value of the music the PROs license. If many radio stations, for example, were to adopt a talk format in response to an increase in license fees, this shift may indicate that fees are inefficiently high.

B. There Are No Reasonably Expected Changes to Competition that Justify Establishing a Termination Date for the Consent Decrees

Consent decrees are not generally intended to be permanent. In the present case, however, there have been no developments in the markets for performance rights that have limited the market power of the PROs. Broadcasters simply do not have competitive options available to them that would allow them to avoid the market power of the PROs absent the protections of the Consent Decrees. Moreover, nothing indicates that the market power of the PROs will be diminished in the future.

The structure of the music licensing marketplace has developed in such a way that the marketplace cannot function competitively. As noted, the choice of music to use in a television show or radio or television commercial is made without the producer of the programming arranging for performance rights at the time the choice is made. This need not be a problem if a license to the musical work cannot be denied and the rate for the license is subject to Court oversight. Outside of the regulatory framework created by the Consent Decrees, however, the existing process of licensing performance rights is economically untenable because it is rich with opportunities for rights holders to demand high license fees *after* investments in broadcasting and programming have been made. Absent regulation, this is a recipe for hold up. Allowing for the termination of the Consent Decrees without addressing the dysfunctional licensing process that has been sustainable only because of the protections the Consent Decrees provide would subject broadcasters to market power and

would lead to broadcasters using less music, which would harm the viewing and listening public.

Adding a termination date to the Consent Decrees when there is no realistic prospect of the reduction in the PROs' market power will lead to reduced investment in broadcasting as the termination date of the Consent Decrees approaches. The preferred course is to review the Consent Decrees periodically. Any termination of the Consent Decrees or material reduction of the protections they afford must be contingent on a demonstration that the markets for the licensing of performance rights have become sufficiently competitive to warrant such a change.

V. ASCAP's and BMI's Members Should Not Be Permitted to Selectively Limit Their Grants of Rights to ASCAP and BMI

A. Allowing Rights Holders to Selectively Grant Licensing Rights to ASCAP and BMI Would Allow Them to Exercise Their Substantial Market Power

The major music publishers each control a significant share of musical works. As illustrated by broadcasters' experience with SESAC, it is not necessary that a licensing entity be particularly large to have market power. A repertory of performance rights confers market power when the repertory grows sufficiently large and its contents sufficiently opaque to licensees that it is not economically feasible to avoid infringement with the expenditure of reasonable effort and expense. The major music publishers control works that broadcasters cannot realistically avoid. Therefore, if music publishers were to pull out of ASCAP and BMI, control over their own repertories would provide them with market power because broadcasters would need to obtain licenses from each publisher to avoid infringement.

Clearly, music publishers want to selectively grant rights to ASCAP and BMI because they want to charge higher rates to some licensees than ASCAP and BMI are able to charge. In other words, the rights holders want to withdraw from ASCAP and BMI so that they can exercise their market power with regard to those licensees where they believe they have the upper hand. Of course, they will withdraw their grants of licensing rights from ASCAP and BMI for the licensees that are most susceptible to the exercise of market power. The first

targets of the publishers appear to be the major digital music streaming services.[17] Thus, the first targets of the publishers are those services that are investing most heavily in developing new ways for music listeners to access music.

There is no reason, however, to expect the publishers to limit their withdrawal from ASCAP and BMI to a small, fixed group of licensees. The first licensees targeted will be those that the publishers expect to be able to pay higher rates and that are the least expensive to administer. Once the publishers succeed with one group, however, they will have every incentive to repeat their success by withdrawing other rights from ASCAP and BMI and targeting another group of licensees. Eventually, all of the large licensees that can pay more and are not too administratively complex to license directly would be subject to the music publishers' market power.

The music publishers may choose to withdraw entirely from ASCAP and BMI if they are not allowed to withdraw on a limited basis. Thus, there is some risk associated with enforcing an "all or nothing" rule with regard to participation in ASCAP and BMI. However, while the likelihood of that outcome is certainly higher if limited withdrawal is not permitted, it is by no means certain. Regardless, it is not appropriate to modify the Consent Decrees to incentivize what would become the staged withdrawal of rights from ASCAP and BMI as the publishers increasingly extend their market power over a greater number of music users. Whether the publishers pull out of the PROs all at once or gradually, the Consent Decrees will fail to provide the protection they were designed to afford, and in either case, some alternative means of restraining the market power of music publishers will have to be developed.

B. ASCAP and BMI Should Not Be Allowed to Become "Administrators" for Rights Holders That Are Exercising Market Power

Administering thousands of licensing agreements with licensees is costly. To avoid this cost, the publishers that withdraw their rights from ASCAP and BMI (in whole or in part) might seek to have ASCAP or BMI administer their contracts with licensees. In effect, the publishers would set the prices for licenses and ASCAP and/or BMI would administer the licenses on behalf of the publishers.

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[17] In Re Petition of Pandora Media, Inc., 12 Civ. 8035 (DLC), Opinion and Order, September 17, 2013.

Allowing ASCAP and BMI to perform this function would undermine the purpose of the Consent Decrees because it would facilitate the music publishers' withdrawal from ASCAP and BMI and would encourage them to exercise their unilateral market power. The Consent Decrees should not permit ASCAP and BMI to administer rights that are not subject to the competitive protections of the Consent Decrees. Allowing them to do so would facilitate the exercise of market power and threaten to increase the economic inefficiencies of the markets for music performance licenses.

VI. Improving the Availability and Reliability of Information on the Contents of ASCAP's and BMI's Repertories Would Facilitate Ratemaking

As described above, alternatives to the blanket license allow some licensees to pay license fees that more closely track the amount of music that they actually use. These alternatives also make it possible for licensees to respond to the prices that the PROs charge. This brings some aspects of competition into the ratemaking process because PROs bear some cost when rates are set too high and licensees find it in their interests to use less of a PRO's music. The use of the alternatives to the blanket license also provides information on whether rates are inefficiently high. If many stations are spending money to administer alternatives to the blanket license, it is possible that blanket license rates are above the competitive level.

For the above reasons, the use of alternative license structures should be encouraged. Of course, using alternative license structures effectively and administering them efficiently requires ready access to current and accurate information on the works contained in the PROs' repertories. Thus, improved information on the works in ASCAP's and BMI's repertories that could be reliably and inexpensively searched would enhance the ability of licensees to use alternative licenses to their benefit. As the information costs associated with using alternative licenses fall, it may also be possible to develop alternative licenses that introduce even more of the benefits of competition into the ratemaking process.

VII. The Ratemaking Function Should Remain with the Rate Court

Setting license fees through regulation is necessarily an adversarial process, but is unavoidable here if market power is to be controlled. If an adversarial process must be used to establish rates, however, it is important to choose the process that is most likely to generate results that track the outcome of a competitive market. If a regulatory process is to produce

results that track competitive outcomes, it is important that the parties have full access to information on potentially comparable transactions and the circumstances surrounding those transactions. The details surrounding comparable transactions and the relative economic positions of the parties to them are important for determining whether the transactions can, in fact, serve as competitive benchmarks.

The full access to information that is necessary to the complete analysis of competitive rates does not come about naturally. Licensees generally have less information about licensing rates and the circumstances under which rates were struck than licensors. Thus, there is a natural imbalance in the amount of relevant information held by licensors and licensees as they enter the ratemaking process. The Rate Court is able to provide informational parity in this circumstance through the discovery process.

Arbitration may be able to replace some of the functions of the Rate Courts, but may not provide licensees the same access to discovery as the Rate Court. Without access to complete discovery, the regulatory process becomes subject to the selective introduction of information that is favorable to the producing party. This will systematically lead to skewed results that cannot be expected to reflect competitive outcomes that benefit the listening and viewing public.

The Rate Courts offer other benefits that arbitration cannot. Federal judges develop extensive experience with copyright and antitrust law. Moreover, Rate Court judges develop experience with music licensing and with the unique market power issues that arise in music licensing. Federal judges also develop extensive experience dealing with complex issues and the testimony of experts. This experience should be expected to lead to better decision-making over time than a process of private arbitration in which arbitrators have shorter tenure and operate in an environment with less (or selective) information.

VIII. Conclusion

The Consent Decrees continue to provide important competitive protections to music users. In fact, the markets for performance rights to musical works have developed in ways that depend on the protections of the Consent Decrees. There is no basis to find that absent the Consent Decrees the markets for performance rights to musical works will operate

competitively. Thus, the protections of the Consent Decrees should be maintained and no termination date should be established for the Consent Decrees.

The protections the Consent Decrees afford would be systematically undermined by modifications that permitted rights holders to selectively withdraw their rights for certain types of broadcasters. Allowing partial withdrawal from the PROs would ultimately lead to the rights holders withdrawing from the PROs with respect to all music users for whom the rights holders' exercise of market power would be profitable. Thus, a modification of the Consent Decrees to permit partial withdrawals of rights would undermine the very purpose of the Consent Decrees.

The existing regulated marketplace could potentially work more efficiently if licensees had more reliable and more timely information on the works included in each PRO's repertory. Greater access to information at lower cost may allow for the development of alternative licenses that permit broadcasters to pay license fees that more closely track their music use.

If regulated rates are to track those that competition would establish, the regulatory process must be balanced, particularly with regard to information on transactions for performance rights. The selective introduction of information into a ratemaking process will skew the results in favor of the producing party. The Rate Courts are able to provide equal access to information in ways that private arbitration may not, which promises a more efficient and more equitable ratemaking process. Thus, the Rate Courts should not be replaced by private arbitration.

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