Before the
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Washington, D.C.

In the Matter of	)	
Music Licensing Study: Notice and Request for Public Comment	)	**Docket No. 2014-03**

COMMENTS OF THE RADIO MUSIC LICENSE COMMITTEE, INC.

INTRODUCTION

The Radio Music License Committee, Inc. ("RMLC") hereby submits comments in response to the March 17, 2014 Copyright Office Notice of Inquiry requesting public input on the effectiveness of existing methods of licensing music. *See* 78 Fed. Reg. 14,739 (Mar. 17, 2014) (the "NOI"). Among other topics, the NOI requests comments on the effectiveness of licensing musical works public performance rights through the three United States Performing Rights Organizations ("PROs").

The RMLC, an organization funded by the radio broadcasting industry, represents the collective interests of the vast majority of commercial radio stations in the United States in connection with certain music licensing matters. The RMLC has been negotiating license terms with the two larger U.S. PROs – the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") – for decades in an effort to secure license fees for the public performance of copyrighted musical works that resemble as closely as possible those that would emerge in a workably competitive marketplace. Periodically, when such negotiations have reached impasse, the RMLC has coordinated and funded so-called "rate court" litigation under the auspices of the ASCAP and BMI government consent decrees, seeking the

assistance of the federal judiciary in securing fair and reasonable license fees for the broadcast radio industry. Currently, radio stations pay license fees to each of ASCAP and BMI in the approximate aggregate amount of $150 million annually. These license fees represent a significant portion of the total royalties collected by those PROs.

The RMLC to date has not had any success in negotiating with the third of the U.S. PROs – SESAC, Inc. ("SESAC"). In fact, due to the licensing posture and practices of SESAC, the RMLC was compelled to bring an antitrust lawsuit in the Eastern District of Pennsylvania seeking relief from what the lawsuit contends to be anticompetitive practices by SESAC that have resulted in significant overcharges to radio stations for their uses of SESAC music. As described in greater detail below, that lawsuit is ongoing.

The RMLC is generally not directly involved in other aspects of music licensing. Accordingly, this submission is limited to the RMLC's perspective on those issues raised by the NOI that relate to the licensing of musical works public performance rights. It is our understanding that the licensing of sound recording performance rights by radio broadcasters will be discussed in a separate submission from the National Association of Broadcasters.

COMMENTS

I. The Protections Afforded Radio Broadcasters by the ASCAP and BMI Consent Decrees Limit the Ability of those PROs To Fully Exert Their Monopoly Power

Collective licensing of the type engaged in by the PROs is inherently anticompetitive, as it serves to eliminate competition among otherwise competing composers and music publishers to have their works performed by users such as radio station broadcasters.[1] By suppressing such

[1] *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) ("in the licensing of music rights, songs do not compete against each other on the basis of price."); *BMI v. CBS*, 441 U.S. 1, 32-33 (Stevens, J., dissenting) ("[T]he blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at

competition, the PROs are able to secure for themselves substantial market power. While the existing ASCAP and BMI consent decrees do not eliminate this market power entirely, they do serve to limit it in important ways for, among others, radio broadcasters.[2] Accordingly, so long as aggregate licensing organizations such as ASCAP and BMI are permitted to exist, it is appropriate that they continue to be subject to constraints in their dealings with users of the type contained in their existing antitrust consent decrees.

In any public policy debate over the continuing role to be performed by PROs, considerations of *both* copyright and antitrust law must inform the discussion. While individual copyright owners enjoy wide latitude in exploiting the rights conferred upon them, long experience on the part of the radio industry demonstrates the anticompetitive potential of arrangements whereby countless thousands of copyrighted works are pooled and licensed collectively, as has been the historic practice of the U.S. PROs. However imperfectly, the ASCAP and BMI consent decrees attempt to preserve the potential benefits of such aggregation while recognizing this anticompetitive potential.

The ASCAP and BMI consent decrees, which are the result of earlier antitrust challenges by the Antitrust Division of the U.S. Department of Justice, impose a number of constraints upon

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an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.")

[2] *ASCAP v. MobiTV, Inc*., 681 F.3d 76, 82 (2d Cir. 2012) ("the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music."); *United States v. BMI (In re Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005) ("[R]ate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights."); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) (rate court not simply a "placebo" intended to rubber stamp the "fees ASCAP has successfully obtained from other users.")

those organizations' activities to rein in their monopoly pricing power. Specifically as they relate to radio broadcasters, those restrictions include:

- barring "gun to the head" licensing tactics by requiring ASCAP and BMI to issue licenses to radio stations on request, averting threats of copyright infringement for the stations' failure to accede to these PROs' license fee demands;

- empowering the federal court in the Southern District of New York, which supervises the decrees, to act as a "rate court" in setting "reasonable" license fees in the event of negotiating impasse;

- barring ASCAP and BMI from obtaining *exclusive* rights to license their affiliated copyright owners' works – thereby preserving the right of users such as radio station broadcasters to secure performance rights licenses directly from composers and music publishers;

- mandating that ASCAP and BMI offer radio stations economically viable alternative forms of license beyond a fixed-fee blanket license, thereby enabling stations to secure public performance rights to at least portions of their music uses in transactions directly with rightsholders, and to do so without double paying for the same rights;

- requiring that ASCAP and BMI license similar users similarly, thereby preventing ASCAP and BMI from price discriminating within a group of users.

The aforementioned decretal provisions, as enforced by the courts, have played a pivotal role in affording radio broadcasters with some sorely needed relief from the monopoly pricing power otherwise possessed by those PROs. This was most recently demonstrated in the negotiations between the PROs and the RMLC that culminated in the current license agreements – negotiations that took place in the wake of the recent financial crisis during which the radio industry saw its revenues fall by billions of dollars. Despite this dramatic change in the economic circumstances of the radio industry, ASCAP and BMI both sought to perpetuate the supra-competitive license fees they had been receiving from the radio industry. It was only by utilizing the judicial "ratemaking" provisions of the ASCAP and BMI consent decrees that the radio broadcasting industry was able to rein in, to some degree, the monopoly pricing power of

ASCAP and BMI and thereby avert economic impositions that risked impeding the radio industry's ability to continue to serve its vital role in educating, informing and entertaining the American public. *See In re Application for the Determination of Interim License Fees for Cromwell Group, Inc., and Affiliates, et al.*, Memorandum Opinion and Order, Civ No. 10-0167 (DLC)(MHD) (S.D.N.Y. May 13, 2010) (setting interim fees for the commercial radio broadcast industry at $40 million less than those sought by ASCAP).

The radio broadcasters are not the only users that have felt compelled to avail themselves of the protections of the ASCAP and BMI consent decrees in an effort to mitigate the monopoly pricing power of those PROs. The ASCAP and BMI rate courts have repeatedly been called upon to place in check the PROs' pricing demands; time and again, the judiciary has responded by setting significantly lower fees closer to the rates that would emerge in a more competitive marketplace.[3] The suggestions that such rate court supervision is no longer necessary or that the impartial federal district court and appellate judges who oversee this process have deprived owners of musical works of fair compensation is unfounded. Quite instead, the pattern of price corrections and other decree enforcement measures implemented by the federal judiciary following vigorously contested trials and appeals is testimony to the continuing need for judicial supervision of ASCAP and BMI.

II. Evidence That The Protections Afforded by the Consent Decrees are Still Needed Today Is Readily Found in the Radio Industry Experience with SESAC

Confirmation of the salutary purposes served by the ASCAP and BMI consent decrees is found in the radio industry's comparative experience with SESAC, the one unregulated U.S.

[3] *See, e.g., ASCAP v. MobiTV Inc.*, 681 F.3d 76 (2d Cir. 2012); *BMI v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990); *In re Petition of Pandora Media Inc.*, Civ. No. 12-8035 (DLC), 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014).

PRO. 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 today is engaging in virtually the same activities that prompted the government to sue ASCAP and BMI decades ago, culminating in the ASCAP and BMI decrees. These SESAC activities include, among others:

- Extracting supra-competitive rates for its blanket license;
- Refusing to offer any alternatives to its all-or-nothing blanket license;
- Eliminating all avenues for securing the public performance rights for musical works in the SESAC repertory other than through the SESAC blanket license, including by entering into de facto exclusive licensing arrangements with its key affiliates;
- Revoking interim licensing authorizations and threatening crippling copyright infringement lawsuits if stations do not acquiesce to SESAC's license fee demands;
- Refusing to provide users with complete and up-to-date information on all of the works in its repertory in any usable form, thereby eliminating the user's ability to determine if a particular work is in the SESAC-repertory.

SESAC's persistence in engaging in this course of conduct compelled the RMLC to bring an antitrust lawsuit against SESAC in 2012. While the case is still in its relatively early stages, in late 2013, Magistrate Judge Lynne Sitarski conducted an evidentiary hearing on the radio industry's preliminary injunction motion, with both fact and expert economic witnesses testifying for both sides. With the benefit of this testimony, the Magistrate Judge concluded that the RMLC had a likelihood of success on the merits of its antitrust claims. This ruling was later adopted by District Judge C. Darnell Jones, II. Among the key findings of the Court were that:

- "there is no evidence to support the conclusion that SESAC's blanket license has been the customer's preferred choice in the face of available alternatives. To the contrary, SESAC's blanket license is the user's only choice." (emphasis in original). *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5087, Report and Recommendation, 29 (E.D. Pa. Dec. 20, 2013)

- "the only representative broadcaster who attempted to forego SESAC's blanket license was threatened with an infringement suit by SESAC before eventually agreeing to the license." *Id.* at 30.

- "the current record suggests there is no restriction on SESAC's ability to raise its prices. This ability, coupled with SESAC's 100% market share of the unique product – the collection of songs in its repertory – further supports a finding that the challenged conduct has produced anticompetitive effects in the relevant market." (emphasis in original). *Id.*

- "Because users have no choice but to buy a blanket license from SESAC, and SESAC can set its prices without restriction, I find that Plaintiff has made a prima facie case of a rule of reason violation of section 1 [of the Sherman Act]." *Id.* at 31.

- "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.

- "A station cannot bypass a SESAC license by obtaining bundle of direct licenses for all of the works in SESAC's repertory because they cannot accurately and reliably determine the content of SESAC's repertory." *Id.* at 15.

These findings of the court confirm the dangers of allowing a music collective of any scale to operate free of the forms of oversight contained in the ASCAP and BMI consent decrees. Were the existing restrictions in the ASCAP and BMI consent decrees relaxed, who is to say that one or both of ASCAP or BMI would not revert to the very sorts of anticompetitive practices in which SESAC has been engaged. No sound public policy interest would be served by such an outcome.[4]

III. The Interests of an Efficiently Operating Music Performing Rights Marketplace Would be Further Served by Providing Universal Access to Relevant Information

To be sure, the existing consent decrees are no panacea for the competitive shortcomings of the existing music performance rights marketplace. One major stumbling block in creating a more efficient and more competitive marketplace is a lack of transparency. All three of the U.S.

[4] The local television broadcast industry is also engaged in antitrust litigation with SESAC, which is separately discussed in the submission being made by the Television Music License Committee and will not be repeated here. The judicial rulings to date in that litigation are consistent with those made in the radio broadcaster lawsuit.

PROs maintain databases that identify the PRO affiliations of composers and publishers and the works written by those composers and publishers. In addition, there is an international database that identifies the PRO affiliations and works of millions of composers and publishers that is compiled by the International Confederation of Societies of Authors and Composers ("CISAC"), with the financial support of the U.S. PROs (among others). This database not only identifies the composers and publishers of the works, but also the percentage shares owned by each composer and publisher. The PROs, however, have gone to great lengths to ensure that users, including radio broadcasters, cannot get access to any of these databases – databases that would serve the interest of facilitating licensing transactions. This anticompetitive practice should be eliminated.

Access to such information will further serve to increase the efficiency of the music performing rights marketplace in at least two ways. First, this information would allow users, such as radio broadcasters, to gain a better and more complete understanding as to their relative usage of the repertories represented by the PROs. Currently, each of the three U.S. PROs maintains its own databases and uses this information to calculate, each in a different way, its own market share of total performances by radio broadcasters. Not surprisingly, each PRO employs a distinct methodology designed to maximize its own market share – leading to the absurd result, when the self-reported market shares of the three PROs are added up, of a combined market share well over 100%. Providing radio stations (or even a neutral third party) with all relevant information will promote a single, and consistent, calculation of the relative market shares of the three PROs – to the benefit of users and PRO members entitled to receive their fair share of total license fees alike.

Second, and as important, by being afforded access to such information, radio stations will finally be able to definitively identify all of the rightsholders to the music that they perform.

Having access to this information can only serve to help foster direct licensing transactions, thereby creating a more competitive marketplace.

IV. The Emergence, and Rapidly-Developing Pace, of New Technologies Underscores the Continued Need for the ASCAP and BMI Consent Decrees

Over the course of the last decade, radio stations have increasingly invested in so-called "new media" platforms and distribution technology and channels for transmitting content to their listeners. These include, among others, radio station websites, mobile streaming platforms, and HD radio. While the radio industry is hopeful that these innovations will one day increase audience size and generate substantial additional revenues, that is not the case today. Benefits to the radio industry from these newer platforms have yet to materialize in any significant way. Despite these economic realities, the PROs have attempted to place unrealistically high valuations on public performances of music via these still developing areas of content distribution.

In the case of both HD radio programming and that streamed on radio station websites, the PROs have proposed license fees that are far in excess of those they have been able to secure for the broadcast of programming via traditional means.[5] This is so despite the fact that the programming transmitted, and the contribution of the composers and publishers, is largely identical. In addition, the PROs have attempted to secure for themselves a percentage of the

[5] The recent experience of digital audio entertainment service Pandora Media, Inc. demonstrates the lengths to which ASCAP and some of its publisher members have been willing to go in an effort to secure supra-competitive license fees for new media performances. As the district court recently determined in the litigation pursuant to ASCAP's consent decree, ASCAP, in concert with two major publishers, engaged in "troubling coordination…which implicates a core antitrust concern underlying [the ASCAP consent decree]," the result of which was that "the very considerable market power that each of them h[eld] individually was magnified." Using this magnified market power, the publishers were able to "extract supra-competitive prices." *In Re Petition of Pandora Media, Inc.*, __ F.Supp.2d __, 2014 WL 1088101 (S.D.N.Y. Mar. 14, 2014), at *35.

revenues generated by radio station websites that are entirely unrelated to the public performance of music.

It is only because of the protections afforded to radio broadcasters by the ASCAP and BMI consent decrees (including guaranteed licenses and the right to invoke judicial rate-making to set reasonable fees) that broadcasters engaged in such innovation have had any leverage to push back. Were these protections diminished or eliminated, there is every reason to believe that any number of radio broadcasters would reduce, if not forego altogether, expenditures designed to keep up technologically with the American public's evolving patterns of music listening.

V. There is No Sound Basis for Allowing Sound Recording Public Performance License Fees to be Considered by the ASCAP and BMI Rate Courts

In yet another effort to increase public performance rights license fees, the publishing industry, in concert with ASCAP and BMI, is now pressing to have 17 U.S.C. § 114(i) amended to allow for the consent decree rate courts to take account of the license fees paid for the right to publicly perform sound recordings when determining reasonable fees for the licensing of musical works public performance rights. These efforts should be rejected.

First, it should be noted that this request is tinged with irony. The current language in Section 114(i) was included at the insistence of the PROs and publishers as a protectionist measure designed to forestall the prospect that the introduction of sound recording performance rights into U.S. copyright law would diminish license fees available for and payable on account of public performances of musical works. *See* H.R. Rep. 104-274, at 24 (1995) (describing provision as dispelling "the fear that license fees for sound recording performance may adversely affect music performance royalties"). It is only following Copyright Royalty Board (and predecessor) (herein collectively "CRB") rulings, based on developed records featuring corporate affiliates to the very music publishers that are at the forefront of the current legislative

effort testifying as to the assertedly significantly greater value that sound recording performance rights convey in comparison to musical works performance rights[6] that the PROs and music publishers have changed their tune. The recent desire on the publishers' part to be able to import into musical works ratemaking cases evidence as to the much higher valuations that the CRB has ascribed to sound recording performances (which was itself based on evidence of the asserted fair market value of musical works performance rights) invites a classic bootstrapping, with one copyright interest group playing off of the other in distinct ratemaking fora in an endless effort to spiral up the value of their respective copyright interests. This transparently self-interested effort forms no legitimate basis for amending Section 114(i).

We thank the Copyright Office for considering these comments.

Respectfully submitted,

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[6] *See, e.g.*, Rebuttal Testimony of Charles Ciongoli, Universal Music Group North America, Docket No. 2006-1 CRB DSTRA (July 2007); Rebuttal Testimony of Mark Eisenberg, Sony BMG Music Entertainment, Docket No. 2006-1 CRB DSTRA (July 2007).