Hearing: Music Licensing Under Title 17 Part One
United States House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet
Testimony of Willard Hoyt, June 10, 2014

1. Introduction

Chairman Coble, Ranking Member Nadler, and members of the Subcommittee, my name is Will Hoyt, and I am the Executive Director of the Television Music License Committee, LLC ("TMLC"). The TMLC, an organization funded by voluntary contributions from local television stations and made up of volunteers from a wide variety of local stations, represents the collective interests of the local commercial television stations in the United States and its territories in connection with certain music performance rights licensing matters. In that capacity, the TMLC has interacted extensively, over decades, with the two larger U.S. Performing Rights Organizations ("PROs") – the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") – assisting local television broadcasters in attempting to secure fair and reasonable licenses through a combination of industry-wide negotiations and, as necessary, funding and managing antitrust and federal "rate court" litigation in order to address the systemic lack of competition in the licensing of music performance rights to the local broadcast television industry. The TMLC also has had license dealings in the past with SESAC, LLC ("SESAC") – the smallest of the three U.S. PROs, but nevertheless an organization that wields significant market power in relation to the licensing of the musical works within its repertory. The TMLC is providing financial support to an antitrust action brought by several television broadcasters on behalf of the local television industry to address SESAC's anticompetitive licensing practices.

My testimony today will address the following topics:

- how local television stations acquire the right to publicly perform the music embedded in the programs they broadcast;
- the fact that stations do not choose and do not have control over the musical works embedded in much of the programming they broadcast;
- as a result of the way the marketplace for licenses to perform the music in television is structured, stations need to take licenses from each of ASCAP, BMI, and SESAC;
- the importance and necessity of the protections for local television stations (and other music users) provided by the ASCAP and BMI antitrust consent decrees (the "Consent Decrees");

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- the continuing need for the ASCAP and BMI Consent Decrees and the need for equivalent oversight of SESAC or other aggregators of performance rights;

- the lack of transparency of information about the music embedded in television programming and how that lack of transparency hinders the development of a more competitive market for music performing rights.

2. The Goal of the TMLC

The goal of the TMLC has not changed since I last testified before this Subcommittee in 2005. As I stated then, "the ultimate goal of the TMLC is to provide a competitive marketplace for music performance rights in which local television stations (and other music users) pay a fair price for performance rights and composers and publishers receive equitable payments for the rights used by local television stations." If there were a functioning free market with competition between and among music copyright owners to license performance rights, we expect the give-and-take of the marketplace would yield reasonable fees, but as described below, such a market has never existed and does not exist now for the rights for local television stations to perform the music in syndicated programming and commercials.

3. The Local Television Music Licensing Marketplace

As discussed in greater detail in the May 23, 2014 Comments of the Television Music License Committee submitted in response to the Copyright Office Notice of Inquiry requesting public input on the effectiveness of existing methods of licensing music, *see* 78 Fed. Reg. 14,739 (March 17, 2014), ("TMLC Comments") (attached), local television stations, with limited exceptions, are responsible for obtaining licenses for the public performance of copyrighted musical works in the programming and commercial announcements they air.[1]

For the programs that local stations produce themselves, such as local news, the acquisition of music performing rights is straightforward. In these programs, the station determines what music is used and how it will be used. Because the station can obtain the music performing rights at the time it selects the music and acquires all of the other rights needed to use it, the station can ensure that the performing rights are available at a reasonable price. It is within the station's control to ensure that it does not broadcast music performances for which it does not

[1] The ABC, CBS, NBC, Univision, and Telefutura television networks clear the performances of music contained in their network programming on behalf of their local station affiliates. Accordingly, stations affiliated with one of those networks are only responsible for licensing the rights to perform the music in the "non-network" portion of their programming day. Other television networks, such as FOX, do not clear the music in their network programming, and stations must separately obtain licenses to cover their performances of that music.

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have a performance right or for which the cost is too high. The ability to select what music is used in local programming allows stations to deal directly with the creators of the music in a competitive market environment. The prices paid by stations in these competitive market circumstances have typically been significantly lower than the prices charged by ASCAP, BMI and SESAC for similar music performances. Due to the opaque systems used by PROs to distribute royalties, these lower direct payments sometimes result in higher payments to creators. This suggests that money that would otherwise flow to creators of television music in a free market is being diverted by PROs to other rightsholders or that these collectives are inefficient.

Most of the programs and commercial announcements that stations broadcast, however, are produced by third parties who select the music for the program but do not pay for the right for stations to broadcast those musical performances. For example, syndicated programming, which includes reruns of shows that were originally broadcast on the networks ("off-net") and shows that are produced and recorded specifically for broadcast on local television stations ("first run syndication") are produced by a third-party programmer and then licensed or "syndicated" to stations for broadcast in markets across the country. Examples of these "off-net" shows include *Seinfeld* and *Friends*, both of which are being broadcast years after the initial production was completed and the music embedded. *Judge Judy* and *Entertainment Tonight* are examples of "first run" syndicated shows. Stations do not control what music is in these programs, nor do they necessarily even know which music has been embedded, but the contract between the station and the syndicator typically requires the station to broadcast the program as produced without alteration. Currently, these syndication contracts convey to the station all of the rights required to broadcast the program (including those for the other creative elements, such as the script, choreography, acting and direction) except for the right to publicly perform the musical works that are irrevocably embedded in the program. These same principles apply to the network programs provided by networks such as FOX that do not clear performances by their affiliated stations and to television commercials produced by advertisers, which are often distributed as part of syndicated or network programs.

Because these third-party producers do not acquire the performing rights for the music, stations have little choice but to rely on repertory-wide coverage (typically, through so-called "blanket licenses") from each of the three U.S PROs to ensure that they do not infringe copyrights. Even for stations that have tried to deal directly with each of the composers or publishers whose music is embedded in the program, the station either has not had access to accurate, timely, and complete music use information or a significant percentage of the rightsholders have declined to deal with the station individually, preferring to license their works collectively through a performing rights organization. This reality confers significant market power on each of the PROs.

In these circumstances, a station is left essentially with two hypothetical choices: either pay the fee demanded by the PRO or do not broadcast a program in which the station has made an economic investment that far outweighs the value of the music performance rights in the program. This assumes, contrary to fact, that a station knows what music has been used in a program before it airs and which PRO controls the respective performing rights. The

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extraordinary leverage this provides the PROs forces most stations to purchase blanket license coverage as insurance against the risk of copyright infringement liability.

Individual rightsholders could instead negotiate directly with program producers and advertisers over the value of performance rights at the time music is selected or commissioned for use in third-party produced programming and commercial announcements. Those rightsholders already negotiate with such producers and advertisers, both to contract for any new music to be created and to convey a separate copyright right – a synchronization or "sync" right – a variant of the reproduction right that permits the producer to reproduce the musical work in timed relation to the audiovisual images of the program. Rightsholders and program producers can bargain over music performance rights as part of the transaction for the sync rights. Such a transaction would place music performance rights on the same footing as all other rights embedded in the programming, namely, they would be secured by the producer on the local stations' behalf at a time when meaningful negotiation over their fair market value can take place.

These competitively negotiated rights would then be included in the price of the contract between the syndicator and the local station that permits the station to broadcast the program. The cost of this broadcast syndication license is, in turn, determined in a competitive market that includes other local stations, cable networks and other new media delivery systems.

This approach to licensing non-dramatic public performance rights has been in place and has operated seamlessly for more than 60 years in the motion picture industry.[2] Motion picture exhibitors have thereby avoided being subject to the very predicament that local television stations find themselves in – bearing the legal responsibility themselves to clear performance rights in music they neither select nor control the ability to exhibit. To be sure, there are challenges in shifting the television industry to a system where program producers clear all downstream music performance rights. Producers and creators will need to develop new compensatory systems that recognize the greater value of performances that are more frequently transmitted or broadcast to a greater audience. At least until that system is in place, PROs will

[2] This competitive market for the music performance rights in the movie industry was brought about in large measure by a private antitrust lawsuit. In *Alden-Rochelle Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), operators of motion picture theatres challenged certain provisions of ASCAP's by-laws which prevented ASCAP members from conveying directly to movie producers music performance rights, notwithstanding that they were already engaging in negotiations with such producers over synchronization rights in the same musical works. This artificial "splitting" of the licensing of copyright rights forced theater exhibitors to obtain blanket licenses from ASCAP in order to lawfully exhibit the motion pictures. A federal court concluded that ASCAP violated the antitrust laws and issued an injunction stopping ASCAP's members from licensing music performance rights to the music embedded in movies to anyone but the movie producers. 80 F. Supp at 900 & n. 2; (*See also M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948)).

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continue to play a prominent role in licensing performances of music on television, and ongoing government oversight will be needed to prevent abuses of the market power conveyed by collective licensing.

4. Licensing Activities of ASCAP, BMI AND SESAC

ASCAP, BMI and SESAC license the non-dramatic public performance right for musical works. Historically, local television stations were required by these PROs to accept traditional blanket licenses conveying the rights, *en masse*, to their entire repertories of music.[3] The pricing structure of these blanket licenses was not related to either the extent of a station's actual use of a given PRO's music or to a licensee's success in obtaining performance rights to a portion of the music it used through direct license arrangements with the copyright owners ("direct licenses") or the limited instances in which program producers have obtained such rights on the station's behalf ("source licenses"). This aggregation of individual copyrights gives the PROs significant market power and eliminates competition among otherwise competing individual composers and music publishers for performances of their works.[4] When combined with the fact that local stations have no control over much of the music that they publicly perform and may not know the music content of a program at the time it is broadcast, the ability of the PROs to exploit this market power is magnified.

Recognizing the inherent market power that blanket licensing affords PROs and their affiliated composers and publishers, the Antitrust Division of the U.S. Department of Justice brought antitrust challenges against both ASCAP and BMI. These lawsuits resulted in the ASCAP and BMI Consent Decrees, which impose a number of constraints upon those organizations' licensing activities designed to rein in their monopoly pricing power.

Specifically as they relate to local television broadcasters (although clearly also benefiting other music users), key provisions of the ASCAP and BMI Consent Decrees include those that:

- Require ASCAP and BMI to issue licenses on request, thereby averting threats of copyright infringement by those PROs or their affiliated publishers and composers while negotiations over fees and terms are ongoing;

[3] The license repertories of ASCAP, BMI and SESAC are exclusive to one another; accordingly, there is no competition between and among the PROs to license a given composer's musical compositions.

[4] *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) ("[I]n the licensing of music rights, songs do not compete against each other on the basis of price."); *see also* 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 an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.").

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- Empower the federal court that supervises the decree to act as a "rate court" in setting "reasonable" license fees in the event of negotiating impasse;

- Bar ASCAP and BMI from obtaining *exclusive* rights to license their affiliated copyright owners' works – thereby preserving the right of users to secure performance rights licenses either directly from composers and music publishers or through program suppliers who themselves acquire those rights on the stations' behalf;

- Mandate that ASCAP and BMI offer music users economically viable alternative forms of license beyond an all-or-nothing blanket license, thereby enabling stations to secure public performance rights to at least portions of their music uses via direct and source licenses without paying twice for the same rights; and

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

As discussed in greater detail in the TMLC Comments, these constraints, as enforced by the courts, have been the primary catalyst in affording local television stations and other music users critical, albeit limited, relief from the monopoly pricing power otherwise possessed by these collectives.[5] For instance, using the rate court process provided under the Consent Decrees, local television stations have been able to establish alternative license fee formulas under the blanket license umbrella to obtain limited fee credits for music licensed directly or at the source, injecting at least some competition into the music licensing marketplace.[6] As long as the alternative license structures do not provide full credit in PRO fees for direct and sourced licensed works, direct and source licenses result in double payments to creators and PROs, thereby discouraging the development of a more competitive market for local television music performance rights. Any reforms that weaken the current consent decree and rate court systems would be a step backward toward greater inefficiency and PRO market abuse.

[5] Del Bryant, the former CEO of BMI, agreed. In his 2005 testimony he noted that "[t]he BMI Consent Decree is doing the job it is supposed to do . . . that is, afford a BMI license to those music users that want a BMI license, and afford a relief valve in the event the music user and BMI cannot agree to license fees/term."

[6] The Per Program formula requires that every music performance within a program be "otherwise licensed," so that even a one second performance of a PRO affiliate's music not otherwise licensed requires full payment for that entire program. The most recent alternative provides for a pro rata credit for each performance by a particular PRO's affiliate, but it does not provide any credit for a directly-licensed performance by a creator who is not a member of that PRO or substitution of music owned by a non-member. Neither of these alternatives provide for a reduction in the transactional fees associated with the performances that are direct or source licensed.

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Unlike ASCAP and BMI, SESAC is not yet subject to any judicial constraints on its licensing activities. Despite the fact that it is far smaller than either ASCAP or BMI, SESAC has been able to amass, through collective licensing, substantial monopoly power. With this monopoly power, SESAC today is engaging in essentially the same activities in relation to local television broadcasters that led to the government antitrust litigation decades ago that culminated in the ASCAP and BMI decrees.

These activities include: (i) extracting supra-competitive rates for its blanket license; (ii) refusing to offer any viable alternatives to its all-or-nothing blanket license; (iii) eliminating any opportunity to secure non-dramatic public performance rights for certain 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; (iv) revoking interim licensing authorizations and then threatening copyright infringement lawsuits if stations do not acquiesce to SESAC's license fee demands; and (v) 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.

As a result of SESAC's refusal to curtail these anticompetitive practices, broadcasters were compelled to bring an antitrust class-action lawsuit on behalf of the local television industry against SESAC in 2009. A trial date has not yet been set, but SESAC's motions to dismiss the case at the pleading stage and for summary judgment after the close of fact and expert discovery were denied.[7] In denying SESAC's motion for summary judgment, the court observed that the effective elimination of licensing alternatives to SESAC's blanket license means that "stations must pay supra-competitive prices for the one license that is available—SESAC's blanket license." *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (PAE), __ F. Supp.2d __, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014). The Court stated that "it is undisputed that SESAC possesses monopoly power in (the relevant) market" and that "(i)t also appears undisputed that SESAC has the power to control prices over that market as currently structured. *Id*. at *36. The court also noted that de facto exclusive licensing arrangements with key affiliates "effectively eliminated direct licensing as a means by which stations could license these affiliates' music," *id* at *10 and that the penalties for direct licensing in the de facto exclusive agreements constitute "substantial evidence … [from] which a jury could find that SESAC effectively forced local stations to buy its blanket license." *Id.* *30.[8]

In the absence of fundamental marketplace reform in the manner in which local television broadcasters acquire the rights to perform the music embedded by others in the programming

[7] For a more detailed discussion of this antitrust action, please see Section III of the TMLC Comments, p 14.

[8] The very existence of these exclusive licensing arrangements was denied in testimony given by former SESAC CEO Stephen Swid in testimony before this Subcommittee in 2005. *See* May 11, 2005, Serial No. 109-25 (p 26) ("As Stephen Swid…stated in his oral testimony SESAC has not entered into any exclusive arrangements with composers and publishers…").

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that they broadcast, any legislative or other reform should preserve the critical protections of the Consent Decrees afforded users such as local television station broadcasters. Similar oversight should be extended to SESAC and any other entity that seeks to aggregate and collectively license performing rights on behalf of composers and publishers that would otherwise be competing.

6. The Importance of Transparency in Music Licensing

Future regulation of collective licensing of music performance rights should recognize the importance of transparency in music licensing. A modern system of data concerning the use of music in television, combined with transparent and accurate information about music rights ownership and PRO affiliation, would go a long way toward promoting competitive-market alternatives to the traditional blanket license. PROs, to varying degrees, have sought to preserve and exploit the lack of robust, accurate, and timely information available to their local broadcast station licensees to stifle competitive alternatives for the licensing of music performance rights. While it would not solve all of the problems of a music rights marketplace that has been marked by the absence of competition, transparent and standardized information would facilitate individual license negotiations between stations and rightsholders and increase the prevalence of performance rights payments that reflect fair market value.

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