PUBLIC PERFORMANCE RIGHTS ORGANIZATIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

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PUBLIC PERFORMANCE RIGHTS ORGANIZATIONS

WEDNESDAY, MAY 11, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 4:07 p.m., in Room 2142, Rayburn House Office Building, the Honorable Lamar Smith (Chair of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order. Without objection, the Chairman and the Ranking Member will make their entire opening statements a part of the record. If the witnesses will stand, I will swear them in, and we will get to your testimony.

[Witnesses sworn.]

Mr. SMITH. Thank you, please be seated. Would you all object if I dispense with your introductions? That will save another few minutes.

I will simply say that our witnesses today are Del Bryant, President and Chief Executive Officer, Broadcast Music Inc. (BMI); Stephen Swid, Chairman and Chief Executive Officer, SESAC, Inc.; Jonathan M. Rich, Partner, Morgan Lewis & Bockius, on behalf of ASCAP; and Will Hoyt, Executive Director, Television Music License Committee (TLMC).

Mr. SMITH. We welcome you all, and Mr. Bryant—by the way, I don't see any name tags. Oh, they are the other way. Okay. Well, you all know who you are.

But, Mr. Bryant, we will begin with you. Please limit your testimony to 5 minutes or less so that we will have time for questions.

TESTIMONY OF DEL R. BRYANT, PRESIDENT AND CHIEF EXECUTIVE OFFICER, BROADCAST MUSIC INC. (BMI)

Mr. BRYANT. Thank you. I push the button.

Mr. SMITH. Yes.

Mr. BRYANT. Mr. Chairman and Ranking Member, thank you for the opportunity to testify today. My name, as the Chairman mentioned, is Del Bryant and I am President and Chief Executive Officer of BMI.

America's copyright laws have provided a firm foundation to support the vibrant, creative community whose works fuel a robust and growing entertainment industry. BMI is proud to represent the

public performing rights of over 300,000 songwriters, composers and publishers.

The BMI family includes icons in American music and today's most successful creators from Hank Williams, Senior to Toby Keith; Billie Holliday to Norah Jones; Patsy Cline to Shania Twain; Santana to Gloria Estefan; the Eagles to 3 Doors Down; John Williams to Danny Elfman, Ray Charles to Jamie Foxx, and Miles, Mingus and Monk to Herbie Hancock. And that just simply scratches the surface.

My background gives me a special insight on the issues that we are here to discuss today. My parents, Boudleaux and Felice Bryant were the first full-time songwriters in Nashville, Tennessee. Like most songwriters, you wouldn't necessarily know their names, but you would know some of their works, "Bye-Bye Love," "Wake up, Little Susie," "All I Have to Do is Dream," and the State song of Tennessee, "Rocky Top." As the son of songwriters, I know firsthand what it means to rely on the income that comes through BMI for public performances. I know how precious these royalties are to the creators and especially to their families.

And in my more than three decades at BMI, I have certainly learned how precious licensing fees are to broadcasters and other music users.

Because we were founded by leaders of the broadcast industry, BMI has always had a special appreciation for their business models and their programming needs. There are hundreds of thousands of enterprises who bring our creators' music to the public. Our operations are efficient and fair, and our distributions are timely, accurate, and they are competitive.

The competition among American performing rights organizations provides benefits to the creators and to the music users alike. It's a win-win for the American free enterprise system. In addition to a solid platform provided by the copyright laws, BMI's consent decree insures our licensees that we are fair and evenhanded. BMI's rate court has proven to be a valuable asset to the creators and the music users. Simply put, it works.

BMI also plays a critical role in identifying new talent and fostering the musical careers of the future creators. BMI is the first professional relationship that most songwriters have; most of our songwriters, certainly. We guide young creators through the career start-up phase, educating them about the industry and about copyright, and then we bring their music to the attention of seasoned professionals.

Mr. Chairman, for example, BMI was the cofounder in Austin, Texas of the South by Southwest Music Festival, which annually draws 10,000 decisionmakers, music makers and some fans, primarily the industry, though. Each year our educational efforts include hundreds of career seminars and lectures.

Speaking on BMI support for classical music, Pulitzer Prize winner John Adams stated, "The support of BMI has been absolutely essential to my career. American classical music is high art, presenting what is best about our culture. BMI, as a champion of the American composers, understands this."

As we mark our 61st—excuse me 65th anniversary, BMI has become one of the most respected brands and business models in

music here and, indeed, around the world. We are grateful to Congress for the effectiveness of the Copyright Act, which has permitted BMI to develop a successful business, allowing songwriters, composers, and publishers to be fairly compensated.

Thank you for allowing me to speak to you about BMI.

Mr. SMITH. Thank you, Mr. Bryant.

[The prepared statement of Mr. Bryant follows:]

PREPARED STATEMENT OF DEL R. BRYANT

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee on the occasion of congressional oversight of the three U.S. music performing right licensing organizations. I would also like to thank the Ranking Minority Member and the other members of the Subcommittee.[1]

My name is Del Bryant. I am President and Chief Executive Officer of BMI, one of the world's leading performing right organizations. Mr. Chairman, America's copyright laws have provided a firm foundation to support a vibrant creative community of songwriters and composers whose works fuel a robust and growing entertainment industry. BMI is proud to represent the public performing rights of over 300,000 songwriters, composers and music publishers, more than any other performing right licensing organization. BMI also represents the works of thousands of foreign composers and songwriters when those works are publicly performed in the United States. Our core competency is as a trusted third party in licensing the public performing right of these musical creators and copyright owners. To be successful in this mission, we have developed an understanding of and appreciation for the business models and programming needs of the hundreds of thousands of businesses across our nation who bring our creators' music to the public.

We must be, if you will, a trusted bridge between the musical creator and copyright owner on the one hand and the businesses using music on the other. Our operations are efficient, fair and transparent, and our royalty distributions are accurate and timely. The competition among American performing right organizations provides benefits to creators and music users alike . . . a win-win success story for the American enterprise system. We maintain a sensitivity to the creative process, identifying and supporting musical creation in all its varieties. At the same time, we assist our licensees by offering customized licensing solutions that permit them to focus on their businesses.

BMI oversees a repertoire of more than 6.5 million musical works. BMI's repertoire includes outstanding creators in every style of musical composition: from pop songwriters to film and television composers; from country music to gospel; from classical composers to commercial jingle writers; from library music to musical theatre composers; from jazz to hip hop; from metal to meringue; classical to soul; rock to reggae; and all categories in between.

As you know, BMI, ASCAP and SESAC enjoy statutory recognition in the Copyright Act. A "performing rights society" is defined as "an association, corporation, or other entity that licenses the public performance of non-dramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc." 17 U.S.C. § 101. For more than six decades, BMI has worked with the House and Senate Judiciary Committees to promote the efficacy and fairness of this Nation's copyright law. BMI recognizes the importance of oversight in ensuring the effectiveness of our laws and their administration.

Specifically, BMI's role is to license one of the six exclusive copyright rights, the right to perform publicly musical works on radio, television, cable, satellite and the Internet as well as at concerts, sports venues, restaurants, hotels, retail stores and universities, to name a few of the many categories of BMI licensees. BMI licenses its music literally wherever music is heard or communicated to the public.

Although BMI, ASCAP and SESAC share certain similarities, there are important differences. Moreover, while the organizations are allies on legislation which protects copyright, we are also competitors in the marketplace. It is widely acknowledged that competition between performing right organizations provides an important incentive for efficiency and innovation in this sector delivering benefits to

[1] Neither I nor BMI have received any funds, grants, contracts (or subcontracts) from any federal agency or proceeding of any kind during this fiscal year or the preceding two fiscal years that would have any relevancy to this hearing or my testimony.

music creators and users alike. My testimony will describe BMI's history and mission, and briefly highlight some recent successes.

BMI'S HISTORY

BMI's history gives it a unique and well-rounded perspective on the role of a performing right organization as a bridge between creators of music and the businesses that use and transmit that music to the American public. Created by the broadcasting industry in 1939 to provide a competitive source of music licensing, BMI threw its doors open wide to representation of genres of American music that were not, at the time, generally available for licensing. BMI's "open door" policy opened a floodgate of music from folk and country to rhythm and blues, to gospel, to bluegrass, to jazz . . . the true roots of music of America. This explosion of musical creativity benefited the burgeoning entertainment business of the 1940s, bringing vast new audiences to broadcasters, record companies and live music performances.

Here's how legendary Atlantic Records producer Jerry Wexler tells the story:

> "The lid was kept on Rhythm-and-Blues music, Country music, ethnic music, folk. Once the lid was lifted—which happened when BMI entered the picture—the vacuum was filled by all these archetypal musics. BMI turned out to be the mechanism that released all those primal American forms of music that fused and became Rock-and-Roll."

BMI protected the rights of minority songwriters and publishers in many cases providing funds essential for their survival. In the words of legendary Motown composer Lamont Dozier:

> ". . . all of my life I have worked at being a songwriter, and ever since I was able to get my family and myself out of the Jeffrey Projects in Detroit, Michigan, at the age of 16 years old, I have been writing songs and making a living writing songs. Performance income is now the only living that I do earn.. . . . If it weren't for BMI and performance income, my family would be destitute. We are not receiving any income from mechanicals or sales, as one would call it, only air play." Letter from Lamont Dozier to Hon. John Conyers, Jr. (Sept. 28, 2001).

Thanks to that "Open Door" policy, it is not surprising that many of these seminal songwriter/artists have chosen BMI to represent their works. The list includes 69% of the inductees into the Rock 'n Roll Hall of Fame, 87% of the Country Music Hall of Fame, 76% of the Bluegrass Hall of Fame, 87% of the Rhythm & Blues Foundation Pioneers and 94% of the Blues Hall of Fame. The BMI family includes true icons of American music and today's most successful songwriters and composers: from Hank Williams to Toby Keith; Billie Holliday to Norah Jones; Elvis to Kid Rock; Patsy Cline to Shania Twain; Santana to Gloria Estefan; the Beach Boys and the Eagles to Maroon 5 and 3 Doors Down; Bill Monroe to Alison Krauss; Ray Charles to Jamie Foxx; Miles, Mingus and Monk to Herbie Hancock; John Williams to Danny Elfman; and from classical music legend Charles Ives to the Pulitzer-winning John Adams—and that just scratches the surface.

When you think of BMI's affiliates, we ask that you not think only of these superstars, however. The typical songwriter does not receive income from recording his or her own songs, nor does he or she receive income from performing at concerts, television appearances, appearing in commercials, the sale of souvenirs, T-shirts, and so forth. The typical songwriter is a small businessperson, working out of a home studio, often borrowing money when necessary, sometimes working two jobs. The typical songwriter receives a modest income stream for his or her creative efforts of writing music that is publicly performed by others. You may not know their names; but you see them in the supermarket pushing a grocery cart or on the soccer field with their kids. They may be your neighbors. When you consider BMI and the music industry, please think of these songwriters and composers.

BMI'S MISSION

To successfully perform our role as a trusted bridge between the music creators and music users, BMI's mission includes: (1) to distribute performing right royalties to songwriters, composers and music publishers on an accurate and timely basis; (2) to provide the business and broadcast communities with legal access to publicly perform a music catalog of unique and lasting value which includes all genres of music; (3) to educate the public about the importance of copyright to culture and to protect the copyright rights of BMI's affiliates; and (4) identification of the next generation of musical talent and fostering of songwriting careers.

BMI operates on a non-profit making basis. BMI collects license fees from businesses that perform music. After deducting its overhead, it distributes the license fees collected to its affiliated songwriters and music publishers. BMI strives for ever greater efficiency, and last year distributed more than 85 cents in royalties from every dollar collected while assuring that we continue to support the important work of developing new careers and protecting copyright.

Since its inception, BMI has played an active role in the evolution of U.S. Copyright Law. Domestically, BMI has always worked closely with the leadership of this Subcommittee, and with the Copyright Office. Internationally, BMI contributed to the process of joining the Berne Convention in 1988, as well as the negotiation and ratification of the recent WIPO Copyright Treaties. In the digital era, copyright enforcement not only depends on the law, but also relies on an informed citizenry to respect property rights of owners and authors, increasingly the intangible property of copyright. In this regard, BMI works with a wide variety of organizations representing the creative community and music licensees to help create a greater understanding of the public performing right in copyright and to help foster an environment of copyright protection. For example, we collaborate with organizations representing the creative community, including: the Recording Academy; the Television Academy; Motion Picture Association of America; Recording Industry Association of America; Songwriters Guild of America; Nashville Songwriters Association International; Songwriters Hall of Fame; National Music Publishers' Association; and the official associations representing Country, Gospel, Blues and Bluegrass Music. We also work with a host of organizations representing those who bring the music to the public, including: National Association of Broadcasters; Radio Advertising Bureau; National Association of Black Owned Broadcasters; American Hotel and Lodging Association; North American Concert Promoters Association; Broadcast Cable Financial Management Association; and National Restaurant Association. In addition, we work with educators through organizations such as the American Council on Education and the National Association for Music Education.

Mr. Chairman, America's music is one of its most important exports, annually bringing in almost $400 million in performing right royalties to U.S. songwriters, composers and copyright owners from overseas. BMI's repertoire has enjoyed explosive growth overseas during the last 15 years with international royalties increasing well over 300% since 1990.

BMI is now one of the largest copyright organizations in the world as measured by performing right revenue. BMI plays an extremely active role in the international copyright arena, serving on many committees and in leadership capacities in CISAC, the international confederation of societies of authors and composers.

The BMI Foundation, Inc., a not-for-profit corporation founded by BMI in 1985, is devoted to encouraging the creation, performance and study of music through awards, scholarships, internships and grants. In the spirit of "giving back," support for the Foundation comes primarily from BMI-affiliated songwriters, composers and publishers, BMI employees and members of the public with a special interest in music.

CAREER BUILDING

To support its mission, BMI plays a prominent role in the discovery of new musical talent and the fostering of careers for the next generation of songwriters in all genres of music. We produce over 100 new talent showcases in more than two dozen cities across the nation to introduce promising new songwriter/artists to the industry and to new audiences. For example, we were a co-founder of the South By Southwest Music Festival in Austin, Texas in 1987, and continue to be an anchor sponsor of this event, which now draws more than 10,000 music professionals each year. Likewise, BMI sponsors dozens of showcases at regional music industry events nationwide.

Career development is a top priority at BMI which annually sponsors competitions for the best new musical compositions in the field of classical music—eleven winners of this contest have gone on to win the Pulitzer Prize; popular music with the John Lennon Scholarship Contest; jazz with the Charlie Parker Prize; and other coveted prizes for jazz composers and musical theater composers and lyricists. BMI also provides some of the industry's most sought after professional workshops for composers in film and television music, jazz, and musical theater.

Legendary songwriter/composer Isaac Hayes said this of the unique role that BMI plays in the creative community: "It is very important to have someone who is strong and has good ethics. BMI exemplifies all of that. They've been fighting my battles for years and years." Speaking of BMI's support for classical music, Pulitzer Prize winner John Adams said, "The support of BMI has been absolutely essential

for me. American classical music is . . . a great tradition. It is high art, representing what is best about our culture. BMI, as a champion of American composers, understands this and continues to do the right thing to make the tradition persevere."

BMI also engages in many educational activities, both within the field of music as well as the copyright law itself, and each year BMI executives make many appearances at schools and universities, on industry panels and legal seminars in an effort to educate the public about the music industry and the importance of copyright.

TECHNOLOGY LEADERSHIP BY BMI

BMI is a worldwide leader in technology and innovation. BMI was the first entertainment industry organization to launch a website in September 1994, at a time when there were only a handful of websites, mostly run by governmental entities or institutions of higher education. BMI.com(r) now serves more than 10,000,000 visitors each year on a network of 20 different sites, encompassing over 10,000 web pages.

BMI has entered into global agreements and initiatives that have streamlined the collective administration of the performing right. For example, BMI was one of five original founding members of FastTrack(, an international technical alliance, which delivers unprecedented efficiency as BMI processes millions of international copyright transactions each year on behalf of its songwriters, composers and publishers. On other fronts, through technology partnerships with MediaBase, Nielsen BDS, Shazam, and many others, BMI is breaking new ground in identifying performances of music in a fast and efficient manner.

BMI'S CONSENT DECREE

While BMI and ASCAP now have consent decrees that have similar licensing provisions, BMI's history is different from ASCAP's. Shortly after BMI was formed in 1939, the Justice Department started a proceeding against ASCAP. To terminate that case, ASCAP agreed to enter into a consent decree in 1941. But the DOJ desired to have a "level playing field" between BMI and ASCAP. And so, even though BMI was only a fledgling organization at the time, BMI also agreed to enter into a consent decree with the Department of Justice in 1941. Like ASCAP, BMI has agreed to license rights on a non-exclusive basis and to avoid discrimination in licensing, and these provisions are reflected in BMI's current decree, which was entered in 1966. Further, BMI is required to offer broadcasters per-program licenses that allow broadcasters to pay fees only for programs containing BMI music. BMI's consent decree prohibits discrimination between users who are "similarly situated."

BMI's consent decree also contains two provisions aimed at resolving license fee disputes. The first is an automatic license provision, which permits any user of BMI music to apply for a license by sending BMI a request for a license in writing and become immediately licensed. The second is a provision designating a specific federal district court to serve as a "rate court" to resolve license fee disputes. Unlike ASCAP, until 1994 BMI did not have an automatic license provision in its consent decree or a provision allowing parties to adjudicate license fee disputes. This situation changed when an amendment establishing BMI's own separate rate court was agreed to with the Department of Justice and approved by the court in that year.

While BMI historically attempted to negotiate fair and reasonable rates in the marketplace with users, certain large music-using industries urged that BMI seek its own rate court to provide a neutral forum for them to bring any potential rate disputes and to eliminate the threat of infringement liability. For its part, BMI often felt disadvantaged in the marketplace compared to ASCAP by the fact that BMI did not have a legal mechanism to resolve rate disputes. The existence of the ASCAP rate court had ensured that ASCAP would continue to be paid license fee payments through court-set interim fees pending the outcome of negotiations over final fees and terms, while BMI did not have an interim fee mechanism.

In over ten years since the 1994 amendment of BMI's consent decree, only a handful of rate proceedings have been commenced, and only one of them has gone to trial. BMI continues to meet the needs of the market and BMI is striving to negotiate, rather than litigate, fee disputes. However, in those instances where the parties have been unable to negotiate license fees, the rate court proved to be a valuable asset to BMI and its customers.

BMI'S LICENSING PRACTICES

BMI has always attempted to work closely with users of music to create licensing models that work for both the users of music and songwriters, composers and music

publishers. In recent years BMI redoubled its efforts to address concerns of the restaurant industry in the Fairness in Music Licensing Act of 1998 by entering into negotiations with numerous state restaurant, tavern, and licensed beverage associations so that mutually acceptable license structures and license fees could be developed. These negotiations proved to be well received by licensees. The BMI/Association agreements include 41 state restaurant associations and 10 licensed beverage associations. It should be noted that just last year BMI received the "Restaurant Supplier of the Year" award from the Alabama Restaurant Association.

BMI's licensing program has been a success for both BMI and the associations since its inception, giving each side the opportunity to work with the other on issues affecting both sides. BMI has worked diligently to maintain a cooperative business relationship with these associations. The program has resulted in a better understanding of each other's contributions to the U.S. economy as well as a lessening of misunderstandings between those businesses using music and BMI.

BMI has made several other initiatives aimed at improving its service to licensees, including:

- In response to requests from various groups, BMI placed a comprehensive list of the songwriters, composers and publishers of BMI's repertoire of songs, including film and television themes scores, on the Internet in order to give users of music immediate knowledge of and access to information about the BMI repertoire. BMI was also the first to offer data on its repertoire on CD-ROM.
- Early on BMI entered into Internet licensing agreements with users of music on the Internet. BMI was the first to offer on-line licensing for Internet users of music via BMI's *Digital Licensing Center*. This "Klik-Thru" license is aimed at smaller Internet users and is structured to afford the music user the opportunity to obtain a license quickly and easily in an on-line environment.
- BMI offers *Radio Select and TV Select* to the broadcast radio and broadcast television industries. *Radio Select* was developed in concert with the National Religious Broadcasters Music License Committee. The free software offered by BMI enables those radio and television stations on per program licenses to save money and time in reporting their music use.

COMPARISON TO SESAC

BMI operates as a non-profit making organization, and ASCAP is a non-profit making association, while SESAC operates for the profit of its private owners. As previously mentioned, BMI and ASCAP also have consent decrees which regulate their relations with licensees and require non-discriminatory treatment. SESAC does not have any similar licensing requirements. Additionally the BMI and ASCAP consent decrees govern their relationships with their respective songwriters, composers and publishers. No comparable regulations apply to SESAC.

CONCLUSION

Mr. Chairman, thank you for the opportunity to tell the BMI story. In a challenging period for the music industry, BMI remains a bulwark of support for songwriters, composers and publishers, and an ever more valuable supplier of essential rights to music users. Our thousands of affiliates are being accurately and quickly compensated for the public performance of their musical works. We offer our licensees non-exclusive collective licenses for millions of copyrighted works. BMI serves both creators and music users by finding solutions that facilitate the use of copyrights, at reasonable and competitive prices, while growing the world's most vibrant and diverse musical catalog for our licensees and their audiences. Increasingly, our licensing model is being copied and touted by rights-clearance and royalty-payment systems beyond the public performing right in musical works. We continue to be a leader in the use of technology to identify performances of music and collect and distribute royalties.

We have a huge job with huge responsibilities. BMI does its job in an exemplary fashion. The 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/terms. In fact, as stated above, in those few instances where rate proceedings were commenced only one has proceeded to trial.

Mr. Chairman, we are grateful to you and the Subcommittee Members for the effectiveness of the Copyright Act, which permits BMI to function, and songwriters, composers and publishers to be compensated. Thank you for your leadership on these issues which affect the livelihoods of those we represent.

Mr. SMITH. Mr. Swid.

TESTIMONY OF STEPHEN SWID, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, SESAC INC.

Mr. SWID. Thank you, Mr. Chairman and distinguished Ranking Member, Mr. Berman. My name is Stephen Swid. I am the Chairman, Chief Executive Officer, and a shareholder of SESAC, Inc. I have already provided a detailed statement for distribution in advance of the hearing today.

I would like to share with you three important aspects of SESAC's role and function in the U.S. performing rights marketplace. These are: one, SESAC's size and influence in the market; two, that SESAC forces competition, innovation to the market; and, three, the size and market power of the competitors and licensees.

I believe that after considering these factors, you will reach the just conclusion that SESAC should not and need not be subject to regulation. SESAC is one of the three performing rights organizations. SESAC is relatively small compared to its competitors, ASCAP and BMI, who share annual revenues of approximately 1.3 billion, which constitutes approximately 95 percent of all performing rights revenues.

SESAC nevertheless manages to effectively compete, because one critical lesson learned by all experienced entrepreneurs: We listen to the market. We respond to songwriters and composers as importantly as we respond to the concerns of our licensees. As a result, in the past 10 years, SESAC has grown its market share of revenues from less than 1 percent to approximately 5 percent. SESAC is very proud of the innovations it has produced in our marketplace.

One case example is SESAC's creation of unique customized license for Spanish-language broadcasters. These broadcasters have testified before Congress that they objected to the forms of license offered by ASCAP and BMI that require them to pay for access to unwanted English language repertory.

SESAC allied with Broadcast Data Systems, a company that had developed a digital fingerprint technology for identification of copyrighted music, to adapt this technology for the Spanish-language music market license that charged Spanish language broadcasters for the actual SESAC music they were using.

SESAC created a new division to serve this market and provide the Spanish-language music creators broadcast using their public forum music in bilingual royalty-earning statements. This technology was subsequently adopted by ASCAP and BMI for their writers and publishers.

SESAC must survive in the marketplace, uncomfortably sandwiched between ASCAP and BMI, each of which controls 45 to 50 percent of American copyrights and the numerous alliances of music license users whose combined revenues and market power far exceed those of SESAC.

Despite operating under consent decrees with the Government, both ASCAP and BMI individually—through owners' retention policies that inhibit right of publishers from changing PROs to collectively excluding SESAC from joint ventures, as more fully detailed in my written testimony—engage in activities and conduct that

serve to reduce competition and restrain SESAC's ability to compete with ASCAP and BMI.

SESAC also must negotiate with music licensees, almost all of whom retain greater market and bargaining power than to SESAC. For example, SESAC is currently engaged in the negotiation with the Television Music Licensing Committee. This committee represents 1,200 local broadcasters with combined advertising revenues approximately of $30 billion.

In response to their request, their request for a license that would charge only for the music that was actually played, SESAC created novel music—a novel license model that was based on actual music use by each local station.

It's hard to fathom the TLMC complaints and reaction to this license form that equitably balances license fees with actual repertory use. Moreover, these multibillion users—or any music user, for that matter—could avail them themselves to licensing SESAC's modest share of the market, including licensed directly with SESAC composers or simply choosing not to use any SESAC music.

SESAC is the quintessential model of an innovative American small business competing in the challenging marketplace. SESAC has served to enhance competition in the marketplace. SESAC believes that its innovative practices, its modest market share, and its de minimis market power, when viewed in the perspective of the overall performing rights marketplace, creates competition and does not require regulation.

It is antithetical to a free market economy and to the intent, spirit, and letter of the Sherman Act, for Congress to impose burdensome and unnecessary regulation on SESAC when the Department of Justice has declined to do so.

I thank you for the time you have provided me to help you better understand SESAC and to share our several themes with you, and the just conclusion that SESAC does not require and should not and need be subject to any regulation.

I look forward to responding to any questions you may have. Also, because of the voluminous submissions of the other witnesses, we would like the opportunity later to add any needed ideas and answers.

Mr. SMITH. Okay. The record will be open, and you will be able to do that without objection.

[The prepared statement of Mr. Swid follows:]

PREPARED STATEMENT OF STEPHEN SWID

Mr. Chairman and distinguished members of the Subcommittee. My name is Stephen Swid. I am the Chief Executive Officer and one of the shareholders in SESAC, Inc. Thank you for inviting me to testify today on behalf of SESAC about the operation of music performing rights organizations in the United States. I greatly appreciate the opportunity to speak to you about who SESAC is, what SESAC does in this highly competitive and sometimes misunderstood aspect of the American music industry, and how SESAC fundamentally differs from its two much larger competitors ASCAP and BMI. I hope to shed light on issues that may concern you, enabling you to reach the just conclusion that there is no need at this time for Congressional oversight or governmental regulation concerning SESAC.

WHO IS SESAC?

SESAC is essentially a small business competing successfully in a challenging marketplace. It has done so by constantly embracing innovative and efficient busi-

ness practices that benefit and improve the marketplace. SESAC is the type of American enterprise that we all value.

SESAC is one of three domestic performing rights organizations. It was organized under the laws of New York in 1930, and was originally formed to represent the interests of European composers for performances of their works in the United States In its early years, SESAC also represented American composers and music publishers of Christian and Gospel music when no one else would represent them. SESAC is this country's second oldest performing rights organization. SESAC literally started as a mom and pop operation, and was family owned for its first sixty-two years. Nearly 13 years ago, the present ownership, including myself, acquired SESAC.

WHAT DOES A PERFORMING RIGHTS ORGANIZATION DO?

SESAC, like other performing rights organizations, represents songwriters and music publishers and grants licenses to music users authorizing the public performance of musical compositions, for which SESAC functions as a non-exclusive licensing agent. Of course, any music user may, at its election, choose to license directly with the SESAC's songwriters or music publishers. Under the current Copyright Act, and its predecessors all the way back to 1897, the owner of a musical composition has the exclusive right to perform the composition in public. A song may be publicly performed in any number of ways—be it a disc jockey playing the song on the radio, a pianist playing the song in a nightclub, a television station broadcasting music in its programming, or more recently, a webcaster streaming the song over the internet. In every instance, the Copyright Act entitles the copyright owner to be paid for the use of his or her intellectual property.

WHY PERFORMING RIGHTS ORGANIZATIONS ARE NEEDED?

The public performance of music is so widespread and pervasive in our culture that it would be difficult for individual owners of songs to license and enforce their rights on a nationwide scale. Such an enormous task would result in exponentially higher license fees for music users than otherwise are available through licenses offered by performing rights organizations. This is precisely why songwriters and music publishers engage the services of performing rights organizations, such as SESAC, to collectively license and monitor these rights. Section 101 of the Copyright Act expressly recognizes SESAC as one of the three musical performing rights organizations in the United States.

SESAC COMPETES EFFECTIVELY IN A MARKET WITH TWO DOMINANT COMPETITORS

SESAC is a member of the National Federation of Independent Businesses (the "NFIB"). SESAC is a for-profit company, as are 99% of its music user licensees. SESAC, with annual revenues of approximately 5% of the performing rights industry revenues, has been able to survive for 75 years despite market power of its competitors, who collectively have revenues in excess of $1.3 billion. It has done so by being a more efficient company, an early user of technology, a creator of innovative music licensing practices, and accelerated and transparent payments to its songwriter and music publisher affiliates. These pro-competitive, efficient business methods combined with historical judicial oversight of the Department of Justice have contributed to SESAC's survival in an environment where it competes with two larger economic powers.

As a for profit company, SESAC is not tethered to the past or the continuity of the status quo; SESAC seeks efficient and effective methods of conducting performing rights business tasks, and is responsive to customer insight, feedback, and needs. As far back as the 1930s, SESAC was the only performing rights organization to provide to radio stations, free of charge, transcription recordings of its gospel and appropriate church music to help those stations comply with the FCC requirement that broadcasters devote a portion of their programming to public service.

SESAC seeks to introduce new technologies, cooperation, and efficiencies into its performing rights business model. SESAC is a small business that successfully thrives in a marketplace through its ability to be innovative, creative, transparent, and responsive to developing market needs.

Shortly after purchasing the company, SESAC's new management met with Spanish language broadcasters at the National Association of Broadcasters convention in Las Vegas. The radio broadcasters were chagrined that blanket licenses offered by ASCAP and BMI required them to pay for access to unwanted Anglo repertories. Their complaints fell on deaf ears. Moreover, the performances of Spanish language songwriters were not adequately recognized by ASCAP and BMI radio surveys to determine royalty distributions.

SESAC undertook the innovative role to address these gaps by working with Broadcast Data Systems (BDS), a company that had developed a digital fingerprint technology for identification of copyrighted music. (It is interesting to note that it was SESAC who encouraged BDS, a company also affiliated with Billboard Magazine, to properly attend to a Latin chart which had been missing from the array of charts provided for monitoring and recognizing hit-driven music). SESAC spent considerable time and resources to help manage the massive first-time encoding process of Spanish language copyrights into the BDS system and to recommend market deployment locations for monitoring the bulwark of licensed Spanish language stations.

Recognizing the needs of Spanish language composers and publishers, SESAC successfully launched a first-time bilingual presentation of royalty statements. This not only benefited the Spanish language writers but also provided these writers the recognition and respect they deserved.

In order to satisfy the Spanish broadcasters, SESAC undertook a novel licensing model that measured SESAC's daily "detection share" of all PRO copyrights and developed a mini-blanket license that charged the stations for the actual use of SESAC's Latina repertory, a total departure from the blanket license structure imposed upon these broadcasters by other performing rights organizations. Taking this new concept one logical step further, the SESAC Latina affiliates would also get paid for all public performances of their works with accompanying intelligent data that specified when and where a station used their songs.

The net result was a championing of Spanish language music, a facilitation of a more appropriate performance license, and a customized approach to an underserved segment of the music community. ASCAP and BMI passed on this opportunity. SESAC, a small market innovator, rescued this format.

Having successfully introduced BDS technology to the Spanish language format, SESAC initiated the expansion of the BDS fingerprint technology to all mainstream radio formats. This meant that for the first time, broadcasters, songwriters and music publishers knew when music was actually being broadcast and by what broadcaster, a process that was simpler, cost efficient, and more accurate for both the creator of music and the music user. Years later, ASCAP and BMI adopted the same technology.

More recently, when another technology firm attempted to bring a new "watermarking" technology to the performing rights marketplace, it was SESAC who invested financial and human resources and allied with that company to bring greater accuracy to the identification of music cues (short musical interludes) contained in television programming, to the benefit of copyright owners and the television broadcast industry.

Moreover, SESAC is an active member of the nation's larger copyright community. It has actively participated in the recent public policy discussions regarding copyright-related issues, including the recent legislative efforts surrounding passage of the Satellite Home Viewer Extension and Reauthorization Act of 2004 and the Copyright Royalty and Distribution Reform Act of 2004; several amicus briefs in appellate court proceedings concerning important new issues of music use on the Internet; and several pending proceedings before the Copyright Office regarding rate-setting and distribution of compulsory license royalties.

Ultimately, SESAC must survive in the marketplace competing, on the one hand, against ASCAP and BMI, each of which claim to represent 45% to 50% of American music copyrights while, on the other hand, often negotiating with organized combinations of music users whose combined revenues and market power far exceed those of SESAC. The songwriters and music publishers have the option of affiliating with a different performing rights organization. The music users have the option of choosing not to use SESAC's small 5% share of the American musical performing rights market. Alternatively, music users are free to bypass SESAC and instead obtain licenses for SESAC-represented compositions directly from the copyright owners.

SESAC believes that it has been able to grow, in part, because it has been able to recognize and react positively to inefficiencies in the marketplace. For example, SESAC has been approached by songwriters who believe that they are underpaid and undervalued by their performing rights organization. In certain instances, several of these songwriters have become affiliates of SESAC, which has helped fuel SESAC's music growth and enhance the value of a SESAC license. We have heard it said by certain licensees, and SESAC's two competitors, that SESAC has grown its repertory and market share by overpaying royalties to songwriters. In fact, the list of songwriters who have engaged SESAC in affiliation discussions but who have nonetheless chosen not to join SESAC, is far lengthier than the short list of those who have joined SESAC. This fact alone would dispel the unfounded "overpayment"

argument. Typically, the writers who chose not to affiliate with SESAC did so because they eventually were offered far more money from either ASCAP or BMI than SESAC thought prudent. Moreover, negotiations with songwriters and publishers who either choose to join SESAC or remain with their existing performing rights organizations serves to foster competition and is the anthethis of anti-competitive conduct.

To stay in business, SESAC must offer value to its customers or it will price itself out of the market. Although SESAC has a duty to maximize the value of its affiliates' intellectual property, if it pursued a business strategy of refusing to enter license agreements for failure to come to terms, SESAC would not survive for long.

SESAC IS NOT A SERIAL LITIGATOR

SESAC is proud that over the past 50 years, it has been pressed to initiate only three copyright infringement lawsuits, two of which were expeditiously settled. The third case, concluded in December 2003, resulted in a federal jury award in SESAC's favor. SESAC has consistently, vigorously and efficiently protected its affiliates' copyrights without resorting to serial litigation. Instead, SESAC's innovative, transparent, and informational licensing methods, such as the use of digital fingerprinting and other technology to electronically track and identify music use, has led to greater compliance with the Copyright Act by its music users.

SESAC NEGOTIATES WITH INDUSTRY GROUPS SOME OF WHICH ARE VERY LARGE, WELL-ORGANIZED, AND WELL-FUNDED

SESAC presently is in negotiations with an organization called the Television Music License Committee (the "TMLC"), the organization that represents all of the full-power, commercial television stations in the United States and its territories. The TMLC collectively negotiates music performing rights license fees with performing rights organizations for authorization to perform copyrighted compositions in the programming that its member stations broadcast. The TMLC represents such entities as ABC Television, CBS Television, Cox Broadcasting, Gannett Broadcasting, NBC Television, Scripps Howard Broadcasting, The Tribune Company, and other large companies. The TMLC member stations had combined 2004 advertising revenues of approximately $30 billion. The broadcasters retain the ultimate bargaining power to either: (i) reject the benefits of a SESAC license and only use ASCAP and BMI music, which constitutes approximately 90% of all local television music; (ii) choose not to air programming that contains SESAC music; or (iii) license the music directly from the copyright owner, thus avoiding the need for a SESAC license. The TMLC cannot use such power against either ASCAP or BMI, because of their respective significant market share and music impregnation of local television programming. SESAC's lack of market power is reflected in the fact that, in the TMLC's lengthy website references regarding performing rights, SESAC is given only cursory mention.

Many of the broadcasters represented by the TMLC are, in fact, subsidiaries of large diversified companies whose other subsidiaries both produce the programming that the broadcasters air and own the compositions contained in that programming. Surely, if those broadcasters chose to, they could simply obtain direct licenses from their sister publishing companies for the music that they both own and use, cutting SESAC out of the process. Ironically, some of these producers / broadcasters / publishers have direct representation on the boards of ASCAP and BMI. The integrated operations of those broadcasters again point out the superior market power that the TMLC, as well as ASCAP and BMI, exercise over SESAC.

SESAC SHOULD NOT BE SUBJECT TO GOVERNMENTAL REGULATION

SESAC's competitors control a combined market share of approximately 95% of the American copyrights. The conduct of SESAC's competitors has been repeatedly challenged by the Department of Justice under the antitrust laws. Based on these actions, ASCAP and BMI have been subject to Consent Decrees overseen by a federal district court since 1941. Additional regulations under the decrees were imposed in 1950 and 1966, and there were further modifications in 1994 and 2001. Both ASCAP and BMI still claim a market share of approximately 45% to 50% of performing rights revenues.

In contrast, with a small 5% share of performing rights revenues, SESAC promotes competition, has been innovative and responsive to both music creators and music users alike and does not require judicial or legislative regulation. In fact, despite several requests by local television interests, the Department of Justice has determined that action to regulate SESAC was not necessary.

SESAC DOES NOT VIOLATE ANTITRUST LAWS

The antitrust laws were intended to remove obstacles to free competition, such as predatory pricing through misuse of market power by single firms or price fixing by powerful organized, well-funded groups. They are based on the belief that the best way to protect the interests of consumers, so that they can benefit from low prices, high quality, and innovation, is to permit the unfettered interaction of competitive forces in the marketplace.

The antitrust laws are not intended to be a system of regulation that allows government lawyers to dictate in advance which business activities are legitimate and which are unlawful. Instead, these laws are applied to business conduct when that conduct causes or seriously threatens to cause injury to competition. This is done through the judicial process in which a company is found to have violated the law, not just because a company has reached a certain size or uses a certain business model.

Under the section of the antitrust laws that prohibit agreements that unreasonably restrain trade, the Department of Justice investigated and brought actions against the improper use of so called "blanket" licenses by ASCAP that prevented music users from licensing rights directly from the copyright owners. The Department of Justice also challenged ASCAP's membership policies that favored some members to the disadvantage of others.

SESAC is an excellent example of the best workings of the competitive process. SESAC has none of the characteristics, and engages in none of the conduct, that might subject a company to the antitrust laws and justify regulation in the form of a decree or otherwise. It is not uncommon for SESAC's affiliated songwriters and music publishers to negotiate independent direct licenses with music users. SESAC's non-exclusive representation of multiple copyright owners under a blanket license is not the type of agreement among competitors with which the courts are concerned. In fact, the courts have consistently recognized that blanket licenses are lawful, efficient, and pro competitive methods of connecting music users with music owners. There has never been any suggestion that SESAC has treated any of its songwriter and music publisher affiliates in a discriminatory way. In fact, SESAC has enhanced its blanket licensing with innovations and technology that make it possible to pay affiliates faster than its competitors, and to maintain a high rate of compliance with the copyright laws by music users.

Another section of the antitrust laws prohibits individual companies with very significant market shares from engaging in actions such as predatory pricing or requiring customers to deal exclusively with them, which effectively drive other competitors out of the market. This anti-monopoly provision does not prohibit a firm with a significant market share from charging its customers whatever price "the market will bear" as long as the firm does not also act to prevent competition. SESAC's market share, especially in the face of the far larger individual and collective shares of the two dominant performing rights organizations, is simply too small to suggest that SESAC has any ability to dominate the market. Of course, every copyright confers upon its owner some amount of market power, because there will be some music users for whom that copyrighted work has no substitute for immediate use. However, this is not monopoly power. In this country, private parties, and I believe regulators as well, share the belief that regulation tends to stifle innovation and efficient competition.

Despite being subject to several consent decrees, ASCAP and BMI continue to engage in conduct, which is or appears to be anticompetitive. Examples of such conduct are:

- "Licenses in effect" which restrain the free movement of writers between performing rights organizations.
- Failure to pay earned royalties to departing members.
- Predatory pricing including the authorization of free use of copyrights within digital broadcasts.
- The use of other affiliates' / members' earnings as loans or royalty advances to discourage movement to other performing rights organizations.
- Allowing incorrect information to be maintained in databases available to music users and other performing rights organizations, thus impeding the accurate distribution of license fees.
- The exclusion of SESAC by ASCAP and BMI in their collaboration to establish and control an electronic database of television cue sheets essential to the accurate collection and payment of television royalties.

As the members of the Subcommittee of Courts and Intellectual Property are aware, in recent discussions concerning the possibility of revamping the music licensing scheme for certain subscription music services on the Internet under Section 115 of the Copyright Act, ASCAP and BMI proposed that the licensing be administered by a newly created super agency. Not surprisingly, ASCAP and BMI (along with the National Music Publishers Association) proposed that they alone run this new agency to the exclusion of SESAC (and any other representatives of songwriters or music publishers). Without explanation, ASCAP and BMI would exclude the one remaining independent organization in the United States that collects royalties on behalf of songwriters and publishers from participating in the operation of this new super agency. As ASCAP and BMI would have it, SESAC's deserved share of royalties, on behalf of its songwriter and music publisher affiliates, would effectively be controlled by and dispersed at the whim of SESAC's two direct market competitors in a medium that some believe will be the future of music delivery.

SESAC does not engage in anti-competitive practices including "copyright misuse." In fact, this defense and other antitrust claims were defeated in SESAC's successful 2003 copyright infringement lawsuit in federal court. As I said earlier, a business model based upon the refusal to license music would be, at best, counterproductive to SESAC's goals, and has never been a part of SESAC's business practices. Certainly, from time to time SESAC is required to engage in difficult and protracted negotiations, as is currently the case with the TMLC. But these are simply commercial disputes, which the marketplace should be allowed to resolve.

SESAC's demonstrated pragmatic, informational, and transparent approach in dealing with its customers and potential customers has been embraced by the music user community. For example, a radio station that is not licensed by SESAC, contacted SESAC with a problem. The radio station had received a request from local concert promoter to broadcast advertisements of an upcoming concert by a SESAC songwriter/artist affiliate. The advertisements contained some of the affiliate's music copyrights. Because the radio station was not a SESAC licensee, and apparently did not otherwise perform SESAC music, it asked SESAC to grant it a limited license permitting the radio station to perform the music contained in the commercial advertisements. Although SESAC had the right to seek substantial license fees, given the fact that radio station would receive between $4,000 and $6,000 in advertising revenues from airing the advertisement, SESAC granted the license for this limited use of music and for a limited period of time. SESAC's transparent, pragmatic approach in this instance is demonstrative of its licensing philosophy and the antithesis of predatory practices. SESAC's innovation and efficiency is further demonstrated by its unique negotiations with individual broadcasters wherein SESAC has entered into barter agreements with radio stations. SESAC effectively trades a percentage of license fees in exchange for commercial advertising spots populated solely with advertising encouraging music users to respect copyright laws, avoid unlawful peer-to-peer distribution of copyrighted music and obtain appropriate music licenses.

CONCLUSION

SESAC is the quintessential model of an innovative American small business competing successfully in a challenging marketplace. SESAC's business methods enhance competition and should be fostered and promoted. SESAC believes that it would be against the small business philosophy of this body to impose a regulatory scheme on SESAC similar in any fashion whatsoever to the regulation that has been required of its dominant competitors given SESAC's small market share, limited economic power and resources. Unnecessary regulation would drain SESAC's limited economic resources and could threaten its investment in people and benefits, if not its very existence.

SESAC's business practices should be nurtured, encouraged, and protected. The Copyright Act was enacted to protect the Constitutional rights of creators, including songwriters who themselves are small businessmen and women and is intended to encourage the production of literary and artistic works for the benefit of the public. The policy of the Untied States since at least the passage of the antitrust laws in 1890 has been to eliminate cartels and to prevent the misuse of market power by dominant firms. To regulate SESAC would be anticompetitive and could destroy a feisty, exciting, and innovative company that successfully protects the intellectual property of its songwriter and music publisher affiliates by competing for market share with two dominant competitors, on one hand, while negotiating licenses with government sanctioned oligopolies. It would be contrary to the free market economy to impose upon SESAC any type of regulation, especially when the Department of Justice has declined to do so. SESAC believes that its innovative practices, minimal

market share, and de minimus market power, when viewed in the perspective of the performing rights marketplace, creates competition and does not require any government regulation. The Department of Justice, which is responsible for the enforcement of the antitrust laws and prohibiting monopolistic practices, has found no justifiable reason or purpose to proceed against SESAC

Again, thank all of you for this opportunity to come here today and explain to you what SESAC is, what it does, and how it competes in the marketplace.

Mr. SMITH. Mr. Rich.

TESTIMONY OF JONATHAN M. RICH, PARTNER, MORGAN LEWIS & BOCKIUS, ON BEHALF OF ASCAP

Mr. RICH. Thank you, Mr. Chairman, Mr. Berman,

Ms. Sánchez. I am Jonathan Rich, and I am here and thank you very much for the opportunity to be here on behalf of ASCAP. I am not going to talk about ASCAP as an organization today, because I think that the Members of the Subcommittee are quite familiar with ASCAP. But I will talk a little bit about the consent decree, which I know is one of the subjects in which you are interested.

The ASCAP decree, the current ASCAP decree, dates back to 2001, but it's actually the third decree that's in effect in the *United States v. ASCAP,* going back to 1941. In the mid-1990's, the Department of Justice and ASCAP both sort of reached a mutual conclusion that after 50 years the degree needed some updating. And we spent quite a bit of time over a number of years working out a new decree.

I would like to just hit on a few of the important provisions that are in the current decree. One is that the grant of rights that ASCAP received from its writer and publisher members are nonexclusive; which is to say that users can always obtain a license directly from a copyright owner and cannot deal with ASCAP.

Number two, the ASCAP licenses cover all of the works, and there's millions of works, in the ASCAP repertory.

Number three, the decree says that ASCAP has to treat like users alike.

Fourth, whenever a user requests a license in writing, from that moment on, that user is licensed and doesn't have to worry about infringement. The only issue that is left is how much that user is going to pay for that license.

Which brings me to one of the most important parts of the decree, which is it actually has rate-setting machinery in it, the so-called rate court, which is an institution that actually sets the rates.

And finally, the decree has transparency provision that requires ASCAP's repertory to be well known to the public both in electronic and other forms.

One of the biggest changes that we made when we negotiated that new agreement was with respect to the rate court, which had become a very slow and cumbersome process at that point. And the new decree dramatically streamlined the rate court provisions so they are much faster than they used to be; it put in place special rules that made a proceeding go quite quickly.

In the 4 years since the decree has been in effect, rate proceedings have all been decided fairly quickly and without going to trial. There actually has not yet been a rate case that has gone to trial under the new decree.

For all of those reasons, ASCAP is viewed by many, not just by us, as the model for music licensing. In fact, Judge Connor, who is the judge who administers the decree in the Southern District of New York, at one point said that if ASCAP didn't exist, it would have to be invented.

So that's the decree, and I would be delighted to answer any questions you may have about it further.

Turning for a moment to SESAC and to our friends there, ASCAP believes very strongly in free and unfettered competition and just notes that at this point in time, we have two societies that are governed by fairly detailed consent decrees and one that is not, and that is a difference can which could very well be affecting the marketplace.

Thank you very much.

Mr. SMITH. Thank you, Mr. Rich.

[The prepared statement of Mr. Rich follows:]

PREPARED STATEMENT OF JONATHAN M. RICH

Mr. Chairman, Mr. Berman, members of the Subcommittee, good afternoon. I am Jonathan M. Rich, a partner in the firm of Morgan, Lewis and Bockius, and I advise ASCAP on antitrust matters. I thank you for the opportunity to testify at this oversight hearing on America's performing rights organizations. ASCAP is usually represented at Congressional hearings by one of its songwriter members. Given that the focus of this hearing is of a legal nature, we thought it best to have an attorney as a witness to answer your questions.

The Subcommittee is, I believe, so familiar with ASCAP that I need not spend time describing the Society; we have attached to our written statement a brief description of ASCAP, which I would ask be made part of the record.

We understand that the Subcommittee wishes us to address two points today: first, the ASCAP consent decree as it currently functions, and second, the activities of another performing rights organization, SESAC.

The ASCAP Consent Decree. The ASCAP model of licensing the nondramatic performing rights in copyrighted musical works on a collective basis has on occasion raised antitrust issues. Accordingly, starting in 1941, ASCAP entered into a series of consent decrees with the Department of Justice that eliminated any possible antitrust concern. The 1941 consent decree was completely reshaped in 1950, in what was called the Amended Final Judgment, or "AFJ." After almost 50 years, both ASCAP and the Department of Justice thought it was time to update and modernize AFJ, and take account of 50 years of experience under it. After long and careful discussions and negotiations, a revamped Second Amended Final Judgment, or "AFJ2," was entered by the court on June 11, 2001 to replace the old AFJ. (The full text of AFJ2, by the way, is posted on ASCAP's website.)

AFJ2 contains certain provisions concerning the licensing of music users:

- The rights ASCAP gets from its writer and publisher members are nonexclusive, so that users may always obtain licenses directly from the copyright owners and need not deal with ASCAP at all.
- ASCAP's licenses cover all the millions and millions of works in its repertory, on a collective, bulk basis.
- ASCAP may not discriminate in license fees, terms, or conditions among similarly situated users.
- If a user requests an ASCAP license in writing, ASCAP must grant the request—the user will, thus, not infringe the copyrights of ASCAP members. The only question, then, is the amount of a reasonable license fee.
- If the user and ASCAP cannot agree on a license fee, the court with jurisdiction over AFJ2 will determine a reasonable license fee, and the burden is on ASCAP to prove the reasonableness of its fee proposal.
- AFJ2 also guarantees that users can have full information—both in traditional and electronic, on-line form—about the works in the ASCAP repertory.

One of the significant improvements of AFJ2 was that it radically streamlined the rate determination process. For example, during the pendency of rate determination proceedings, users pay an interim fee, subject to retroactive adjustment when a final

fee is agreed upon or determined; AFJ2 eliminated lengthy battles over the amount of the interim fee. Or, as another example, rate proceedings are much shorter: Under AFJ, rate proceedings sometimes lasted over a decade. Today, AFJ2 requires that the proceedings be ready for trial within one year after they start. And AFJ2 guaranteed certain types of users—including broadcasters, and, for the first time, background/foreground music services and on-line services—a genuine choice among different types of licenses to meet their needs.

On the membership side of the equation, ASCAP admits to membership anyone who meets the minimal requirement of being a professional writer or a legitimate music publisher. Further, under ASCAP's rules and regulations, members may resign from membership and affiliate with a different performing rights organization annually. ASCAP's distribution rules are fully transparent and available for all to see—ASCAP has posted on its website all the "Distribution Resource Documents" that govern the royalty distribution system. The basic principle of royalty distribution is simple—the more your works are performed, the more you earn in royalties.

In fact, ASCAP performing rights royalties constitute the largest single source of income for its member songwriters and composers. It is worth noting that, other than for very limited and rare exceptions (such as a writer's assignment of royalties to a charity), ASCAP will not pay writer royalties to anyone but the writer.

For all these reasons, ASCAP is held up as the model for others in the music industry to emulate. Both creators and users of music agree that the ASCAP model works well. That is why, when performing artists testify before Congress about their relationship with their record labels, they point to their relationship as songwriters with ASCAP as the ideal paradigm. It is also why, when DiMA's representatives testify about their licensing needs, they cite ASCAP as the model for others to follow. It is no wonder that Judge William C. Conner, who administers AFJ2, has said on more than one occasion that, if ASCAP did not exist, it would have to be invented.

We should also note that consent decree rate proceedings very frequently provide the framework for negotiations and settlements. In the four years under AFJ2, ASCAP has reached voluntary licenses with major users of music including cable television networks, the local television industry, the local radio industry, and background/foreground music services, all without need of a trial. This track record demonstrates the efficiency of the ASCAP licensing model.

SESAC: ASCAP believes in vigorous competition as the lifeblood of the American economy, and has no objection to fair competition with other performing rights organizations, and with SESAC in particular. But if there is to be fair competition, there must be a level playing field. Because ASCAP is subject to governmental regulation (through a consent decree) and SESAC is not, the playing field is not level. Thus, we must grant a license to any user who requests it, but they need not. We may only obtain nonexclusive rights, but they may get exclusive rights. We are subject to third-party rate determination, but they are not. We must offer alternative forms of licenses to broadcasters and other users, but they need not. If performing rights organizations are to compete fairly, we should all be subject to the same rules.

Thank you for the opportunity to testify on behalf of ASCAP, and I look forward to your questions.

ABOUT ASCAP

The American Society of Composers, Authors and Publishers is the United States' oldest and largest performing rights licensing organization. ASCAP was founded in 1914 by songwriters including Victor Herbert and John Phillip Sousa, for the purpose of licensing the right of nondramatic public performance in the copyrighted musical works they created.

ASCAP is the only true American performing rights society—it is an unincorporated membership association, whose members (now numbering over 210,000 active writers and publishers) are exclusively composers, lyricists and music publishers. ASCAP is run by a 24-person Board of Directors consisting of 12 writers and 12 publishers; the writer Directors are elected by the writer members of ASCAP and the publisher Directors by the publisher members. The current Chairman of the Board is the noted, multiple award-winning lyricist Marilyn Bergman.

The ASCAP repertory consists of millions upon millions of musical works in all genres and types—pop, rock, alternative, country, R&B, rap, hip-hop, Latin, film and television music, folk, roots, blues, jazz, reggae, gospel, contemporary Christian, new age, theater, cabaret, dance, electronic, symphonic, chamber, choral, band, concert, educational and children's music—the entire musical spectrum.

ASCAP is home to the greatest names in American music, past and present, as well as thousands of writers in the early stages of their careers. ASCAP members include Cole Porter, Aaron Copland, Stevie Wonder, Bruce Springsteen, Leonard Bernstein, Madonna, Wynton Marsalis, Stephen Sondheim, Dr. Dre, Mary J. Blige, Duke Ellington, Rogers and Hammerstein, Garth Brooks, Tito Puente, Dave Mat-

thews, Destiny's Child, and Henry Mancini, just to name a few. In addition, through affiliation agreements with foreign performing rights societies, ASCAP licenses the music of hundreds of thousands of their members in the USA.

ASCAP's licenses allow music users to perform any and every work in the ASCAP repertory, upon payment of one license fee. ASCAP's hundreds of thousands of licensees include Internet sites and wireless services, restaurants, nightclubs, hotels and motels, cable and television networks, radio and television stations, conventions and expositions, background/foreground music services, shopping malls, dance schools, concert promoters, and retail businesses. Those who perform music find ASCAP's licensing model highly efficient, for, with one transaction, they are able to perform whatever they want in the enormous ASCAP repertory.

ASCAP deducts only its operating expenses from the licensing fees it receives (in 2004, operating expenses were 13.5%—lower than any other American performing rights organization, and among the lowest in the world). The remainder is split 50–50 between writers and publishers. Each member's royalty distribution is based on a survey of what is actually performed in the various licensed media. ASCAP royalty distributions make up the largest single source of income for songwriters, enabling them to make a living, pay their rent and feed their families. ASCAP thus fulfills the Constitutional purpose of copyright, allowing songwriters—who are the smallest of small businessmen and women—to earn a fair return on the use of their property and so use their creativity to enrich America's culture.

Mr. SMITH. Mr. Hoyt.

STATEMENT OF WILL HOYT, EXECUTIVE DIRECTOR, TELEVISION MUSIC LICENSE COMMITTEE (TMLC)

Mr. HOYT. Mr. Chairman, Ranking Member Berman, and Members of the Subcommittee. Good afternoon. My name is Will Hoyt and I am the Executive Director of the Television Music License Committee, a nonprofit association that represents approximately 1,200 full power commercial television stations in the United States and its territories.

Thank you for inviting me to testify today. My written testimony lists a broad array of music user groups who have urged me to express our joint concern. There is a void in current copyright law that allows PROs without consent decrees to undermine the functioning of the Nation's music licensing system. Simply put, in contrast to the situation as to ASCAP and BMI, no dispute mechanism exists under current law for music users to resolve license fee disputes with SESAC and future PROs.

Currently the implied threat of copyright infringement with the accompanying risk of willful damages is skillfully exploited by SESAC to suppress free competition and force arbitrary licensing rates on users. There are three fundamental principles that guide the relationship among ASCAP, BMI, and all major music performance rights consumers.

First and most important is the third-party dispute resolution process that can be invoked by either party and averts the prospect of copyright infringement liability for the users while that takes place.

Second, users are free to negotiate directly with composers, rather than having to deal only with the PROs.

And third is the availability of a license in which the user pays fees only for programs or segments for which its music is actually used. These do not apply to SESAC.

SESAC wants you to believe that a television station may walk away from a SESAC license. That is simply not the case. No television station can operate without syndicated programming. Since television stations contractually cannot eliminate or change the

music in these programs, they are forced to pay whatever SESAC unilaterally determines is a fair price for a blanket license fee. SESAC uses a similar strategy in other industries.

The problem is compounded by SESAC's licensing arrangements with key television composers. These arrangements legally or economically take away those composers' ability to license performing rights directly to television broadcasters. Despite Mr. Swid's assertion of transparency, the fact is that SESAC speaks in generalities about how prevalent SESAC music is within a given user's industry while withholding the actual information to back it up.

If you are a broadcast user faced with potentially massive copyright infringement penalties for guessing wrong about whether you are or are not using SESAC music, chances are that you will opt for taking a SESAC license at their price.

SESAC argues that it is simply a small competitor trying to survive in a world dominated by ASCAP and BMI. But at the bargaining table, SESAC sings a very different tune to its market share. Our industry is currently paying SESAC some 9 percent of total television music station license fees. And in the most recent round of negotiations, SESAC insisted on still more.

Our Nation's copyright laws exist to encourage, protect and reward intellectual creativity. SESAC's music licensing practices do not promote that goal. SESAC does not create a music licensing market, does not increase output, does not offer composers competitive license fees to which they otherwise would be deprived or offer any other meaningful efficiencies for consumers.

They, instead, cynically misuse the collective power of the copyrights of SESAC licenses to wring as much money out of trapped users as SESAC can. Left unchecked, such practices will continue to undermine and erode copyright policy and might serve to encourage development of new PROs similarly unconstrained by existing copyright law.

We believe that there is a compelling case for Congress to act on this issue. Only Congress can address this issue in a manner that uniformly applies to SESAC as well as future PROs. We are seeking legislation that applies only to PROs not operating under a consent decree, establishes a third-party dispute resolution process that can be initiated by either party to determine reasonable fees, and averts the prospect of copyright infringement liability during the pendency of such proceedings.

The challenge we have brought before the Committee is not just a SESAC issue. SESAC's practices have simply exposed what any PRO not under consent decree can do to manipulate the current law. It requires a legislative solution to fix the broad challenge and allow the integrity of the copyright system to prevail.

We look forward to working with individual composers, the PROs, and the Subcommittee to meet this challenge and hopefully to craft legislation that will address it in a fair and reasonable way.

[The prepared statement of Mr. Hoyt follows:]

PREPARED STATEMENT OF WILL HOYT

Mr. Chairman, Ranking Member Berman, and members of the Subcommittee, good afternoon. My name is Will Hoyt and I am the Executive Director of the Television Music License Committee (TMLC), representing the vast majority of local commercial television broadcast stations in the United States and its territories.

The Television Music License Committee is a non-profit association that negotiates and administers industry music performance licenses and fees with the performing rights organizations (PROs), ASCAP, BMI and SESAC, on behalf of approximately 1,200 full-power, commercial television stations in the United States and its territories. The Committee is made up of volunteers from local television stations and group broadcasters throughout the country (representatives of large and small market stations and affiliates and independents).

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.

Thank you for inviting me to testify today. I will address the broader issues regarding all PROs in my testimony. However, first and foremost my testimony will expose a serious flaw in current copyright law that allows select PROs to undermine the music licensing system. With the exception of ASCAP and BMI, any other future PRO could—and SESAC actually does—thrive and prosper by exploiting this loophole in the system.

The issue I speak of impacts not just television stations, but every music user across the nation seeking to pay for the use of music in broadcast or cable programming as well as in business establishments. While I am the only music user witness invited to testify today, I have been urged by a broad array of music user groups to express their grave concern regarding the current manipulative practices and abuse of copyright privileges engaged in by SESAC.

Radio Music License Committee (RMLC)—Keith Meehan, the Executive Director of RMLC states, "The Radio Music License Committee joins in the concerns expressed here by the other user communities. SESAC blanket license fees for radio stations are projected to increase tenfold from 1995 to 2008 even though much of SESAC's music on radio is background music or music in commercials,—not feature performances. But stations have to keep paying SESAC's price or risk infringement suits."

National Religious Broadcasters Music License Committee (NRBMLC)—Russell Hauth, the Executive Director of NRBLC, which represents religious, classical and other radio stations that perform limited amounts of copyrighted music during their broadcasts, has described SESAC as one of the Committee's major concerns, and called SESAC a monopolist with extraordinary, unconstrained, market power with whom all radio stations must deal. SESAC flatly refused that constituency's request to hold negotiations over its effective doubling of fees from 2004–2008 (the second consecutive doubling of fees over a five-year period), and also refused its request for arbitration.' He has informed me that the NRBMLC will be submitting a written statement for the record.

National Cable Television Association (NCTA)—Dan Brenner of NCTA reports "Our experience in previous negotiations with BMI and in negotiations with SESAC indicate that SESAC and future music performance organizations that aggregate music performance copyrights should be subject to the same negotiating restrictions that are applied to BMI and ASCAP, including a third party dispute resolution process that can be invoked by either party and averts the prospect of copyright infringement liability while that process takes place."

It is highly likely that these concerns are also shared by small, medium, and large business establishments using music such as restaurants, taverns, casinos, and health clubs.

When any music user seeks to pay licensing fees to SESAC (a situation that would pertain in dealings with any future PRO other than ASCAP or BMI), no dispute resolution mechanism exists under current law, except a lawsuit brought against the prospective licensee for copyright infringement if that user fails to agree to the license terms requested by SESAC. I will elaborate on how this unbridled power, with the accompanying risk to the user of an assessment of willful copyright damages, is skillfully manipulated by SESAC to suppress free competition and extort supracompetitive licensing rates.

Under sections 504(c) and 505 of the Copyright Act, successful plaintiffs who prove willful copyright infringement may be awarded damages of up to $150,000 per work infringed, as well as costs and reasonable attorney's fees. Thus, if each of the 1200 stations represented by the TMLC Committee were found liable for the infringement of just one song, the total damages at $150,000 per song would be $180 million! These damages would far exceed any reasonable costs of a license to perform music on local television.[1]

[1] To underscore the risks for users associated with refusing to take a SESAC license, in August 1998, SESAC commenced a copyright infringement action against a radio broadcaster in

MUSIC LICENSING—FUNDAMENTAL PRINCIPLES THAT GOVERN ASCAP AND BMI

Currently, there are three music performance organizations operating in the U.S.—ASCAP, BMI, and SESAC. ASCAP, the oldest performing rights organization, is a non-profit association and represents the greatest number of composers and publishers. While BMI was formed and is still nominally owned by broadcasters, it is operated as a not-for-profit corporation representing the interests of composers and publishers in head-to-head competition with ASCAP and SESAC. Today BMI is roughly comparable in size to ASCAP. Until recently, the music performing rights market was dominated by these two large PROs. Between them, ASCAP and BMI controlled the public performance rights in virtually all of the copyrighted musical works broadcast by local radio and television stations or shown on cable television in the United States. Because no individual composer can simultaneously license his or her works through more than one performing rights organization, the net effect was that both ASCAP and BMI enjoyed monopoly power over the licensing of the millions of works they represent on behalf of the respective composers who affiliate with them. In sum, stations must have licenses from both PROs.

The local television industry, typifying in most ways the experience of the other major broadcast and cable media, has engaged in a multi-decade effort to instill some degree of competition in the music performing rights market. The TMLC has been a leader in achieving significant reforms in the marketplace dominated by ASCAP and BMI.

Today, there are three fundamental principles that guide the relationship among ASCAP, BMI and all music performance rights consumers. The first and most important is the third-party dispute resolution process that can be invoked by either party and averts the prospect of copyright infringement liability while that process takes place. The second is a provision that allows composers to negotiate individually with users in lieu of accepting royalty payments as determined by their PRO's royalty distribution formula (non-exclusive composer affiliation contracts); and the third is a requirement that the PRO offer a license in which the user pays fees only for programs in which its music is actually used (the "per program" license) instead of a fee for access to the entire repertoire of the PRO (the "blanket license").

BACKGROUND ON ASCAP AND BMI DEVELOPMENTS AND OBSERVATIONS

In large part the principles described above were derived through the dispute resolution process that exists with regard to ASCAP and BMI. Through invocation of the third-party dispute resolution procedures provided as part of the ASCAP consent decree, our industry was able to make major strides in the direction of a freely-competitive market for music performing rights.

First, in 1990 the federal district court determined that it is inappropriate to tie the license fees paid by television broadcasters to their advertising revenues. Second, the court gave teeth to the per-program provisions of the ASCAP decree. The court structured a per-program license that gave many local stations a realistic opportunity to pay directly for the services of a composer in their community to write the theme for their local news programming and not have to pay ASCAP again for those same rights.

More recently, a group of background music service industry licensees of ASCAP and BMI attained court rulings that should similarly stimulate access to competitive license alternatives for a wide group of music users. The Second Circuit Court of Appeals as to BMI and the Federal District Court for the Southern District of New York as to ASCAP have affirmed users' rights to a blanket license, the fee for which must reflect "credits" for direct licensing initiatives by the licensee.

Last November, ASCAP and the TMLC reached agreement on a license for local television stations that will end in 2009. The agreement was made after months of preparing for a similar rate court proceeding under the consent decree guidelines. The facts and theories that greatly influenced the decision by both parties to reach agreement were included in discovery and position papers filed as part of this dispute resolution process. The mere availability of a dispute resolution process forces the parties to clarify and document their positions, which, in turn, often leads to a negotiated settlement based on the information shared between the parties.

Many of these advances have been adopted by the Justice Department and incorporated into the recently-amended ASCAP consent decree for the benefit of all users.

Pittsburgh in which SESAC sought, and was ultimately awarded, willful infringement damages *dozens* of times higher than the blanket license fees SESAC had requested from the station. *See SESAC, Inc. v. WPNT, Inc.,* 327 F. Supp.2d 531 (W.D. Pa. 2003) (denying defendants' motion for a new trial).

I would be less than honest if I sat before you today and reported that the progress music users have been making with ASCAP and BMI has resulted in the kind of market-based music licensing to which music consumers are entitled. It remains difficult to convince many composers, music publishers and program producers to break with the ways of the past and agree to engage in alternative license discussions.

I would like to make two specific observations about TMLC's current positions concerning license provisions that we believe will strengthen the competitive market for music performance rights. First, a license similar to the license advocated by the background music industry and sustained by the courts relative to ASCAP and BMI will benefit both copyright owners and users. Such a license provides licensees an economic incentive to direct license individual music performances within an individual broadcast program, thus providing copyright owners a competitive choice when they decide to license their performance rights. The current BMI and ASCAP per program licenses entitle these organizations to deny this competitive choice unless all of the composers within a program agree to direct license their music. Second, access to electronic cue sheets (the documents that record information about each performance within a television program) will create a more efficient system for determining music use and equitable royalty distributions to copyright owners. Although the TMLC advocates a cooperative effort to establish such an electronic data base, ASCAP and BMI currently have denied the TMLC and all other parties with an interest in music performance licensing the right to invest in, participate in, purchase or license the rights to RapidCue, a system jointly developed and operated by these two large PROs.

Indeed, it is still a chore to obtain in any form from the PROs complete and accurate information as to the music which they license that appears in our programming, even though much of that information is readily available to those organizations in the form of music cue sheets prepared by third parties and supplied regularly to them. By artificially branding such cue sheets as "proprietary," when in fact all they contain is a listing of musical works that are publicly performed on broadcast television, the PROs have needlessly made the process of accountability for what they license and its marketplace value a game of cat-and-mouse.

Nevertheless, over the last several decades, thanks in large part to the dispute-resolution mechanisms described, a good deal of progress has been made among ASCAP, BMI and music users moving toward meaningful competition in the performing rights marketplace.

SESAC'S ABUSE OF THE MUSIC LICENSING PROCESS

Today we would like to focus on an overriding obstacle that has emerged in recent years that threatens to severely limit all of the competitive gains that the TMLC and others have made, and to revert the music performing rights marketplace to one which freezes out any meaningful competition. That is the emergence of a third, wholly-unregulated licensing organization whose practices are a throwback to the early days of ASCAP and BMI. That organization is SESAC, which is not new to the marketplace, but which has grown sufficiently in licensing repertory so as to develop an avaricious licensing-fee appetite and market power that commands supracompetitive prices.

SESAC is distinct from ASCAP and BMI in several key respects. It is the only organization that operates with a profit motive. It is substantially smaller than ASCAP and BMI in terms of composers, publishers, and its repertoire of music. Most importantly, it operates without the legal constraints imposed on BMI and ASCAP.

Every major media industry has a long line of SESAC "horror stories" to recount. Written testimony to be submitted by other groups will, no doubt, elaborate. Common to these stories is an exorbitant demand for license fees, unsupported by any evidence of actual usage of SESAC-repertory works and a refusal to extend licenses to permit negotiations. The threat of an infringement suit permeates every communication, meeting, discussion, and negotiation. Accordingly, the music user has two alternatives: either pay the ransom or face the implied or real threat of an infringement suit since there is no third party dispute resolution process.

The impact of SESAC practices is especially evident in local television station licensing due to the nature of television programming. Local stations license syndicated programming months and often years in advance. It is often the most popular programming they broadcast. Stations' costs to acquire and promote highly coveted programs like "Seinfeld," "Oprah" and "Everybody Loves Raymond" are huge and unprecedented. Ironically, the only creative right not included in a syndicated program license is the music performance right. The music is embedded in these

programs by the producers and, under syndicated license agreements, the station cannot eliminate or change the music in these programs. This fact allows a PRO like SESAC to control the licensing of performance rights within designated television programs and then insist that the program cannot be aired unless the television station pays whatever SESAC unilaterally determines is a fair price. Thus, if SESAC signs a composer formerly associated with BMI or ASCAP whose music is part of one of the more popular shows, a station is forced to sign a license agreement with SESAC in order to protect a significant investment in its syndicated program. The resulting license fee with SESAC can be significantly more than the previous BMI or ASCAP fee for the same exact music in the same program.

Since SESAC was purchased by the current investment group in 1992, the owners have pursued an aggressive "take it or be sued for infringement" approach to music licensing that has abused the privileges conferred on the individual composers and music publishers SESAC claims to represent. In 1995, although SESAC was unable to demonstrate any meaningful increase in the use of its repertory, SESAC announced to local television stations a **DOUBLING** of industry-wide blanket license fees effective almost immediately. At the same time, SESAC required ABC, CBS and NBC to sign separate performance rights agreements covering music in their network programming, which previously had been included in the local station license.

Since most, if not all, of the SESAC affiliates were previously ASCAP or BMI members and most of their music has already been written and pre-recorded in television programming, SESAC licenses do not create a music licensing market, increase output, afford composers competitive license fees of which they otherwise would be deprived, or offer any other meaningful efficiencies for consumers. SESAC licenses instead impose a new and unjustifiable cost for music that otherwise would be included within licenses already paid for by local stations. And when SESAC lures a composer from ASCAP or BMI, the ASCAP and BMI rates do not fall commensurately to account for the change.

The coercive effect of SESAC's licensing practices is further exacerbated by its inability and/or unwillingness to disclose the identities of all its affiliated composers and publishers and works under license in a comprehensive and timely manner. In contrast, ASCAP is required under its consent decree to make available a public list containing the title, date of copyright, writer, and publisher of all works in its repertory, and is barred from bringing an infringement action as to works not listed.

While SESAC has provided the TMLC with a list of affiliated composers whose works appear on a recurring basis in local broadcast television programming, SESAC has not undertaken comprehensively to identify all of the works that may appear on local television, and without question enjoys the leverage that such lack of full knowledge on the stations' part provides. *Thus, even if local stations were scrupulously to avoid programming reflected in SESAC's lists, they would still face significant risk of copyright infringement if they unknowingly broadcast SESAC music in commercials or unknowingly make incidental or occasional uses of SESAC music in other programming.* In direct contrast to ASCAP there is no restriction on SESAC's ability to sue for infringing uses of music in the SESAC repertory not identified on lists provided to stations.

Local television stations thus, have no alternative to taking a SESAC blanket license. This lack of information contributes to the impossibility of eliminating SESAC music from programming and works in combination with the other elements of SESAC's licensing practices to force reliance on the blanket license at the risk of being sued for copyright infringement for failing to obtain one.

SESAC's ability to demand supracompetitive rates from consumers is based on its ability to aggregate the licensing authority of strategic composers and use the hammer of copyright infringement damages to force a fee resolution to SESAC's satisfaction.

This method of operation has enabled SESAC to gain an ever-increasing market advantage over ASCAP and BMI, which cannot operate in so unconstrained a manner, and threatens to undermine decades of progress in the music performing rights marketplace and freeze out meaningful competition.

What makes SESAC so difficult to contend with, and affords it such anticompetitive potential, is not simply its disdain for settled marketplace fee-level expectations, shaped in many instances by decades of rate court decisions on ASCAP fees. It is, rather, the fact that SESAC brazenly exploits the aggregated power of the copyright rights held by its composer-affiliates free of any third-party arbiter, such as a rate court or arbitration forum, to place a check on its license rates. Accordingly, SESAC does, and any other future PRO without a consent decree could, engage in the following practices:

- Refuse to afford alternative dispute resolution mechanisms that can be invoked by **either party** in the event of a negotiating impasse, so as to allow the more balanced approach present as to ASCAP and BMI of continuous access to the organization's musical repertory in return for a fair and dispassionate fee-determination mechanism.
- Refuse to provide interim copyright protection during negotiations when the user is actively seeking a license
- Resort to "gun-to-the-head" licensing tactics with users or user groups unwilling to agree to SESAC's blanket license fee demands, creating deadlines by which an agreement must be reached, failing which authority to use SESAC music on an ongoing basis will be revoked
- Obtain exclusive license authority from key radio and television composers, creating enormous hold-up potential in its license negotiations with major users who are effectively unable to maintain their day-to-day programming intact unless they acquire a performance license with SESAC or a newly created organization.
- Refuse to bargain over alternative forms to the single-price blanket license, whether in the form of a meaningful per-program license, a blanket carve-out license, or the like.

In stark contrast to the legal framework and fundamental principles that apply to ASCAP and BMI, armed with the power to trigger infringement suits, SESAC freely engages in practices that undermine the music licensing system and provide no meaningful choice to music users seeking to pay copyright fees. We believe that there is a compelling case for Congress to act on this issue.

CONGRESS SHOULD CREATE A DISPUTE RESOLUTION MECHANISM

Our nation's copyright laws exist to encourage, protect and reward intellectual creativity. SESAC's music licensing practices do not foster that result but, instead, cynically misuse the power that SESAC has aggregated to attempt to wring as much money out of trapped users as it can. Left unchecked, such practices will continue to undermine and erode copyright policy and might serve to encourage development of new PROs similarly unconstrained by existing copyright law.

Only Congress can address this issue in a manner that uniformly applies to SESAC as well as future PROs. We are seeking legislation that:

- applies only to PROs not operating under a consent decree
- establishes a third-party dispute resolution process that can be initiated by either party to determine reasonable fees, and
- averts the prospect of copyright infringement liability during the pendency of such proceedings.

The legislative solution we are seeking is in line with already-established procedures as to ASCAP and BMI for resolving music licensing fee disputes. Music users and ASCAP and BMI have had access to the rate court for decades. In addition, under Chairman Sensenbrenner's leadership, in 1997 Congress acknowledged and enacted music fairness legislation creating a dispute resolution mechanism available to small and medium business establishments through the federal courts.

SESAC has also provided evidence that arbitration is a viable dispute resolution mechanism. They included the option, with the choice to initiate *only at their sole discretion*, in their 1997 agreement with the TMLC. The fact that SESAC just recently exercised their unilateral option to trigger arbitration proceedings with the TMLC is further evidence that they should not object to such a process in and of itself.

One might surmise that their unilateral option to initiate arbitration combined with their proclivity to threaten infringement action simply allows the abuse of their copyright privileges to persist. If SESAC suggests that they have or are willing to offer bilateral arbitration within negotiations with TMLC, it would only support our contention that the concept itself is viable and should apply to all music users and all future PROs not subject to consent decrees.

The challenge we have brought before the subcommittee is not just a SESAC issue. SESAC's practices have simply exposed what any new PRO not under a consent decree can do to manipulate the current law. It requires a legislative solution to fix the broad challenge and allow the integrity of the copyright system to prevail.

We look forward to working with the subcommittee to meet this challenge and hope to craft legislation that will address it in a fair and reasonable way. I am con-

fident that that other music user groups who were not able to be heard today will join in this request fully communicating their views in written testimony.

Mr. SMITH. Thank you, Mr. Hoyt. Let me address my first question to you.

You have been pretty rough on SESAC, both in your oral and in your written testimony. Now, my question is this. Why should any business, and particularly SESAC, be required to offer arbitration? I think that's one of the main issues of the day when someone doesn't like their fees; but why should anybody, Congress or anyone else, mandate arbitration?

Mr. HOYT. Well, I think in our view, the problem is that the PROs can aggregate copyrights, which in themselves are monopolies, as you know. And it's the aggregation that gives us a problem in terms of the policy. We aren't really interested in what the rate is. What we are interested in is setting up a system that allows us to have a competitive pricing for music performance rights. Whether that's higher than it is now or lower than it is now is not important to us.

Mr. SMITH. Okay.

Mr. Rich, do you think that SESAC has been abusing its position in the marketplace. And, if so, why?

Mr. RICH. Well, they have been able to take advantage of the fact that there are some differences between the two societies that are under decrees and themselves. The ASCAP decree has some fairly clear membership rules. There are fewer than there used to be, but there are still some in there. And ASCAP governs itself in a way that allows ready exit by members from the Society.

SESAC doesn't have that same arrangement. Similarly on the licensing side, ASCAP and BMI are obligated to offer users certain types of licenses, and SESAC doesn't have that same requirement.

Mr. SMITH. Mr. Swid, very quickly, why would it be unfair for you to operate under the same conditions as BMI and ASCAP? Why not offer arbitration yourself?

Mr. SWID. Well, I can answer that in two parts. The first is, we are a 5 percent market-share player. Secondly, we are subject to all the U.S. laws, including the Sherman Act and all antitrust legislation. We are not otherwise under the consent decree like ASCAP and BMI, because we have not violated, do not violate, and don't plan to violate.

Mr. SMITH. I know you are not required, because you are not under consent decrees, and the other two PROs are. Why not, out of fairness, opt for arbitration?

Mr. SWID. Well, we have a contract with the local television industry. And in our arbitration proceeding last time, we reached a contract at the end of it. They asked us for one thing other than the monetary agreement that we made; that is, that they make the allocation. This time, they are asking us for mutual arbitration. We agreed to that already. They know it. We said we will give you mutual arbitration. We never planned to sue them. We plan to go to arbitration.

Mr. SMITH. If arbitration was good enough for you and them in that case, why wouldn't it be good for all other individuals who do business with you?

Mr. SWID. Because I don't—arbitration is very, very costly. We paid approximately $3 million to go to arbitration last year. That's us. They had 1,200 stations. If they are about $3 million, they are paying $2,500 a station. We had to pay $3 million. If that happened all year long, in 1 year, we would be out of business.

Mr. SMITH. So cost is a consideration.

Mr. SWID. Extraordinary.

Mr. SMITH. Thank you, Mr. Swid.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. I am a little confused. Seems like there are people who have said opposite things about the same situation, and I want to make sure I have this right.

Mr. Hoyt, you describe the fundamentals which describe your relationship with ASCAP and BMI, but not SESAC. And you say, "The second fundamental principle is a provision that allows composers to negotiate individually with users in lieu of accepting royalty payments as determined by their PROs."

But SESAC in its testimony says, "SESAC functions as a nonexclusive licensing agent." if they are right, then it seemed like you might be wrong. Can you go to a composer—can you go to a SESAC composer directly and get a license?

Mr. HOYT. We can with some and not with others. The ones that we think—and we don't—we would want to—the last time around in the last arbitration, apparently there is some evidence that—and even since then, there is some evidence there are exclusive contracts between SESAC and some of their critical composers.

Mr. BERMAN. Are there?

Mr. SWID. Not that I know of.

Mr. HOYT. Exclusivity can be done in economic terms as well as in legal terms.

Mr. BERMAN. Is this like the Mafia or something, or what?

Mr. HOYT. No, no. If the composer signs an agreement with SESAC that says, for instance, if you want to do direct licensing, you have to come to me and come to SESAC and others. If I want a direct license with a composer, that contract might say, for instance, that we have to go to that—to SESAC in order to negotiate that, and that the composer has to accept what SESAC has agreed to.

Mr. BERMAN. That sounds legal to me.

Mr. HOYT. Well, I guess—I think the term is de facto, economic, it's an economic exclusivity, not a legal—you cannot——

Mr. BERMAN. Is a composer legally constrained from negotiatingwith you?

Mr. HOYT. We believe they are.

Mr. BERMAN. Mr. Swid says not that he knows of; right?

Mr. SWID. Correct. And in fact, we gave a list of our composers to Mr. Hoyt, because he requested it, and he ran down to some of our composers in Texas and other places and asked to direct license. He offered them basically nothing, and they said no.

Mr. HOYT. I think we may have a difference in factual—view of what happened.

Mr. BERMAN. You can take it to arbitration.

Mr. HOYT. Yes, and probably will. I can only tell you that the composer that we talked to, at Mr. Swid's suggestion, told us that he could not disclose what was in his contract.

Mr. BERMAN. Something else, something else confused me about what you said. You said, you represent a bunch of different television stations. They depend on syndication. But from earlier conversations I had, the syndication rights come separately from the rights to the music; is that right?

Mr. HOYT. That is correct.

Mr. BERMAN. Is there something in your contract with the people who syndicate the programming that force you to use the same music?

Mr. HOYT. Yes. We cannot—in a syndicated contract, if you have a program, that allows you to put a syndicated program on the air, there's a contract with that syndicator that says you may not change or remove any of the music in that program.

Mr. BERMAN. So even though the person you are contracting with can't give you the music rights, they make you use the music that went with your original show?

Mr. HOYT. That is correct.

Mr. BERMAN. Thank you.

I know you probably want to finish this hearing?

Mr. SMITH. If at all possible.

Mr. BERMAN. In that spirit, I will yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Berman, but I want to check to see if either Mr. Wexler or Ms. Sánchez have a quick question to ask.

Mr. WEXLER. Can I ask a very quick question following on Howard?

Mr. SMITH. Sure. The gentleman is recognized.

Mr. WEXLER. I just always get concerned when possibly Congress may be in the position of rewriting a contract, in effect. The original contract that you refer to in response to Mr. Berman's question, in terms of when you agreed to buy the syndicated program, you then agree to use the music, even though the person giving you the power for the syndication can't give you the power for the music.

Could you originally, or as you do new syndications, negotiate that differently?

Mr. HOYT. I will answer it this way. I would like the opportunity to actually give a little bit further answer—since this seems to be of some concern—in writing later. But I think the quick answer to that question is historically the producers get paid—the publishing companies that are owned by the producers get paid money through the performance rights system. And so the answer is, no, we can't.

Mr. BERMAN. That doesn't make sense.

Mr. SMITH. Thank you. Mr. Wexler.

Ms. Sánchez, do you have a question?

Ms. SÁNCHEZ. Very quickly. Being the most junior Member on this Subcommittee I am still sort of sorting through what is going on.

Mr. Rich, can you tell me why BMI and ASCAP are currently under a concept decree, when it is like 50 years later after the fact?

Mr. RICH. It goes back quite a ways. The first antitrust case actually was, I believe, in 1934. And the first decree dates back to 1941. Back then, the grant of rights that ASCAP got from their members was exclusive. And there were a number of disputes overall, a number of issues between ASCAP and their users that resulted in one and then successive consent decrees to resolve antitrust disputes.

Ms. SÁNCHEZ. Okay, thank you.

Mr. Swid, I am interested in knowing why is it that you think SESAC should not be subject to a rate court like ASCAP and BMI?

Mr. SWID. Well, a rate court was set up as a penalty for the violations of the antitrust laws that ASCAP and BMI incurred. And the rate court is not for a nonviolation. It's a penalty. We have an arbitration clause in the contract, like most businesses have—or some businesses have.

Ms. SÁNCHEZ. Okay. And a follow-up question. The allegation from TLMC is that because of your unique position in the market, that you have doubled and tripled your fees to the television industry; is that correct?

Mr. SWID. In the last arbitration, our fees tripled, and that was an agreement—as you well know, the arbitration did not go to termination, to decision; we agreed in a negotiation while arbitration was on—of the fees. As a matter of fact, two things were said, one today and one in 2003.

In 2003, ASCAP—excuse me, TLMC said in their court—in their submission to the rate court, that applicants believe that SESAC's agreement is probative of a reasonable ASCAP blanket license fee. So our music grew at least three times. So we went up at least three times in rate.

And today Mr. Hoyt said we are asking for 9 percent—they are paying 9 percent of the fees.

They have told us that they have done a study, a music study by an organization called MRI. And in 2002, which is the last year they did this study, they told us we had 9.4 percent of the music on television without ambient or incidental music. That means they didn't count the advertisements and other types of one-off songs.

Mr. SMITH. Ms. Sánchez, we are going to need to go vote. Members, I am sure, are welcome to give written questions to the witnesses, and they would be happy to respond.

Mr. BERMAN. Mr. Chairman, I don't think the 10-minute bell has gone off yet.

Mr. SMITH. We are on go.

I want to thank the Members for their interest and thank the witnesses for their expert testimony. This has been very helpful. Obviously, this is an issue we care about as well. Thank you very much.

[Whereupon, at 4:47 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman,

Thank you for holding this oversight hearing on the Performing Rights Organizations. It has been a number of years since this Subcommittee has examined the differences in the ways the PROs operate, and specifically how their licensing practices impact their members or affiliates and the music users.

Section 106 of the Copyright Act affords copyright owners the exclusive right to publicly perform their works. With respect to music, the right to authorize public performances is the most crucial right to songwriters because it provides them with their largest source of income. This right provides incentives for the creator to continually produce new musical compositions and helps foster the growth of music offerings.

Acknowledging the integral role PROs have in the licensing system, The Fairness in Music Licensing Act of 1998 added the definition of Performing Rights Societies into the Copyright Act. ASCAP, BMI and SESAC, all specifically named in the Act, perform one of the most essential services for the copyright owner. PROs act as the composer's agent to those who publicly perform music. They negotiate licenses with the many restaurants, taverns, hotels, radio, tv and other establishments that perform musical compositions and then collect and distribute the rightful compensation to the copyright owner. Imagine a world without the PROs, where Alan and Marilyn Bergman had to pound the pavement to discover which wedding halls performed "The Way We Were" or where the unknown songwriter who waits tables for a living has to go knocking on doors across the country in an attempt to find the radio stations playing his music.

The PROs have also developed new technologies such as digital fingerprinting which help track where and when music is performed. But the question that pervades the licensing mechanisms of the PROs is the ability to compete in both offering reasonable rates to benefit the music user and better returns for the member. An ASCAP economist summarized the dilemma perfectly when saying " I never met an ASCAP member who thought he was being paid too much and I never met a music user who thought he was paying too little."

Currently, two of the PROS operate under a consent decree. One does not. Two of each of the PROs has at least 45 % of the market, one does not. Do these differences impact the ability of the members to get the best value for their music and for users to perform the music?

What clearly doesn't benefit the composer or the public interest is a boycott of music. If the choice is between infringement or a blackout of music, nobody benefits. In the 1940s, when radio broadcasters objected to facets of the music licensing scheme, only music in the public domain was played over the airwaves. It became known as the era of "I Dream of Genie with the Light Brown Hair." This should not be repeated.

Healthy competition among the PROs should serve to benefit music users—but most importantly, songwriters.

I look forward to hearing from the witnesses.

PREPARED STATEMENT OF THE HONORABLE ELTON GALLEGLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you for holding this hearing, Mr. Chairman.

I am concerned, and I have constituents who are concerned, about the operation of two of the Performance Rights Organizations under consent decrees that promote fairness in the market and the operation of the third, SESAC, under no such constraints.

Constituents have come to me with concerns about behavior that SESAC engages in that ASCAP and BMI are not permitted to engage in. For example, small content users, even some talk radio stations that use only a bar or two of content at a time, are forced to purchase a very expensive blanket license instead of purchasing a smaller unit commensurate with the amount of content that they use.

Though SESAC only represents less than 10% of the performance rights market, they are able to engage in what is arguably anti-competitive behavior due to the nature of the market. Courts have recognized that when a number of artists band together to license their unique musical performances, there is a potential to engage in anti-competitive conduct. I look forward to hearing from the witnesses about whether that is happening in this case.

I am thankful that the subcommittee is holding this hearing and I am interested in hearing more about the Performance Rights Organizations, how they function, and the appropriate role of the Department of Justice in regulating anti-competitive conduct.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(WHITE PLAINS)

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civ. Action No. 41-1395 (WCC)
v.	)	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,	)	SECOND AMENDED FINAL JUDGMENT
Defendants.	)	

Plaintiff having filed its complaint herein on February 26, 1941, the original defendants having appeared and filed their answer to the complaint denying the substantive allegations thereof, all parties having consented, without trial or adjudication of any issue of fact or law therein, to the entry of a Civil Decree and Judgment, filed March 4, 1941, to the entry of an Amended Final Judgment on March 14, 1950, as subsequently amended and modified and to the entry of an Order thereunder issued on January 7, 1960, as subsequently amended and modified;

The parties having moved the Court to amend the Amended Final Judgment,

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, without admission by the defendant American Society of Composers, Authors and Publishers with respect to any such issue, and upon consent of all remaining parties hereto, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Amended Final Judgment be amended as follows:

I. **Jurisdiction.** This Court has jurisdiction of the subject matter hereof and of all parties hereto. The complaint states a claim upon which relief may be granted against ASCAP under Section 1 of the Sherman Act, 15 U.S.C. § 1.

II. **Definitions.** As used in this Second Amended Final Judgment:

(A) "ASCAP" means the American Society of Composers, Authors and Publishers;

(B) "ASCAP music" means any work in the ASCAP repertory;

(C) "ASCAP repertory" means those works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time;

(D) "Background/foreground music service" means a person that transmits performances of music to subscribers and that furnishes to those subscribers equipment not otherwise available to the general public that enables subscribers to make the transmitted performances on their premises. A background/foreground music service does not include radio or television stations or networks, cable television networks or systems, persons that transmit renditions of music to private homes, apartments, or hotel or motel guest rooms, or persons that transmit renditions of music to subscribers that charge admission;

(E) "Blanket License" means a non-exclusive license that authorizes a music user to perform ASCAP music, the fee for which does not vary depending on the extent to which the music user in fact performs ASCAP music;

(F) "Broadcaster" means any person who transmits audio or audio-visual content substantially similar to content that is transmitted by over-the-air or cable radio or television stations or networks as they existed on the date of entry of this Second Amended Final Judgment or that transmits the signal of another broadcaster: (1) over the air, (2) via cable television or direct broadcast satellite, or (3) via other existing or yet-to-be-developed transmission technologies, to audiences using radios, television sets, computers, or other receiving or playing devices;

(G) "Music user" means any person that (1) owns or operates an establishment or enterprise where copyrighted musical compositions are performed publicly, or (2) is otherwise directly engaged in giving public performances of copyrighted musical compositions;

(H) "On-line music user" means a person that publicly performs works in the ASCAP repertory via the Internet or similar transmission facility including any succeeding transmission technologies developed after entry of this Second Amended Final Judgment;

(I) "Performing rights organization" means an association or corporation, such as ASCAP, Broadcast Music, Inc., or SESAC, Inc., that collectively licenses rights of public performance on behalf of numerous copyright owners;

(J) "Per-program license" means a non-exclusive license that authorizes a broadcaster to perform ASCAP music in all of the broadcaster's programs, the fee for which varies depending upon which programs contain ASCAP music not otherwise licensed for public performance;

(K) "Per-segment license" means a non-exclusive license that authorizes a music user to perform any or all works in the ASCAP repertory in all segments of the music user's activities in a single industry, the fee for which varies depending upon which segments contain ASCAP music not otherwise licensed for public performance;

(L) "Person" means an individual, partnership, firm, association, corporation or other business or legal entity;

(M) "Program" means either a discrete program exhibited by a broadcaster or on-line music user or, if such broadcaster or on-line music user does not exhibit discrete programs, such other portion of the transmissions made by the broadcaster or on-line music user as shall be agreed to by ASCAP and the broadcaster or on-line music user or as shall be determined by the Court in a proceeding conducted under Section IX of this Second Amended Final Judgment;

(N) "Public list" means such records that indicate the title, date of U.S. copyright registration, if any, writer and current publisher or other copyright owner of all works in the ASCAP repertory, including, but not limited to, the public electronic list;

(O) "Public electronic list" means separate databases of: (1) works in the ASCAP repertory that have been registered with ASCAP since January 1, 1991, or identified in ASCAP's surveys of performed works since January 1, 1978, identifying the title, writer, and current publisher or other copyright owner of each work; and (2) current ASCAP members;

(P) "Representative music user" means a music user whose frequency, intensity and type of music usage is typical of a group of similarly situated music users;

(Q) "Right of public performance" means, and "perform" refers to, the right to perform a work publicly in a nondramatic manner, sometimes referred to as the "small performing right," and any equivalent rights under foreign copyright law, including, but not limited to, rights known as the rights of transmission, retransmission, communication, diffusion and rediffusion;

(R) "Similarly situated" means music users or licensees in the same industry that perform ASCAP music and that operate similar businesses and use music in similar ways and with similar frequency; factors relevant to determining whether music users or licensees are similarly situated include, but are not limited to, the nature and frequency of musical performances, ASCAP's cost of administering licenses, whether the music users or licensees compete with one another, and the amount and source of the music users' revenue;

(S) "Through-to-the-Audience License" means a license that authorizes the simultaneous or so-called "delayed" performances of ASCAP music that are contained in content transmitted or delivered by a music user to another music user with whom the licensee has an economic relationship relating to that content;

(T) "Total license fee" means the sum of all fees paid by the music user in connection with the license, including any fee for ambient or incidental uses but excluding the administrative charges authorized by Section VII(B) of this Second Amended Final Judgment;

(U) "Work" means any copyrighted musical composition; and

(V) "Writer" means a person who has written the music or lyrics of a work.

III. **Applicability.** The provisions of this Second Amended Final Judgment shall apply to ASCAP, its successors and assigns, and to each of its officers, directors, agents, employees, and to all other persons in active concert or participation with any of them who shall have received actual notice of this Second Amended Final Judgment by personal service or otherwise. Except as provided in Sections IV(A) and (B) of this Second Amended Final Judgment, none of the injunctions or requirements herein imposed upon ASCAP shall apply to the acquisition or licensing of the right to perform musical compositions publicly solely outside the United States of America, its territories or possessions.

IV. **Prohibited Conduct.** ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any foreign or domestic rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis; provided, however, that ASCAP may collect and distribute royalties for home recording devices and media to the extent such royalty collection is required or authorized by statute;

(B) Limiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a performing rights organization, non-exclusive licenses to music users for rights of public performance;

(C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated;

(D) Granting any license to any music user for rights of public performance in excess of five years' duration;

(E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theater exhibitor concerning the right of public performance for music synchronized with motion pictures;

(F) Asserting or exercising any right or power to restrict from public performance by any licensee of ASCAP any work in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such work; nothing in this Section IV(F) shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a work, from restricting performances of a work in order reasonably to protect the work against indiscriminate performances, or the value of the public performance rights therein, or the dramatic or "grand" performing rights therein, or to prevent ASCAP from restricting performances of a work so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such work;

(G) Instituting, threatening to institute, maintaining, continuing, sponsoring, funding or providing any legal services for any suit or proceeding against any motion picture theater exhibitor for copyright infringement relating to the nondramatic

public performance of any work contained in a motion picture, provided, however, that nothing in this Section IV(G) shall preclude ASCAP from pursuing its own *bona fide* independent interest in any such suit or proceeding; and

(H) Issuing to any broadcaster any license the fee for which is based upon a percentage of the income received by the licensee from programs that include no ASCAP music unless the broadcaster to whom such license shall be issued shall desire a license on such a basis; provided, however, that this Section IV(H) shall not limit the discretion of the Court in a proceeding conducted under Section IX of this Second Amended Final Judgment to determine a license fee on any appropriate basis.

V. **Through-to-the-Audience Licenses.** ASCAP is hereby ordered and directed to issue, upon request, a through-to-the-audience license to a broadcaster, an on-line user, a background/foreground music service, and an operator of any yet-to-be-developed technology that transmits content to other music users with whom it has an economic relationship relating to that content; provided, however, that, in accordance with Section III of this Second Amended Final Judgment, ASCAP shall not be required to issue a through-to-the-audience license to perform ASCAP music outside the United States. The fee for a through-to-the-audience license shall take into account the value of all performances made pursuant to the license.

VI. **Licensing.** ASCAP is hereby ordered and directed to grant to any music user making a written request therefor a non-exclusive license to perform all of the works in the ASCAP

repertory; provided, however, that ASCAP shall not be required to issue a license to any music user that is in material breach or default of any license agreement by failing to pay to ASCAP any license fee that is indisputably owed to ASCAP. ASCAP shall not grant to any music user a license to perform one or more specified works in the ASCAP repertory, unless both the music user and member or members in interest shall have requested ASCAP in writing to do so, or unless ASCAP, at the written request of the prospective music user shall have sent a written notice of the prospective music user's request for a license to each such member at the member's last known address, and such member shall have failed to reply within thirty (30) days thereafter.

VII. **Per-Program and Per-Segment Licenses.**

(A) ASCAP is ordered and directed to offer, upon written request:

(1) To a broadcaster, a per-program license that shall, in addition, cover ambient and incidental uses and shall not require any record-keeping or monitoring of ambient and incidental uses; and

(2) To a background/foreground music service or to an on-line music user, a per-segment license if (a) the music user's performances of music can be tracked and monitored to determine with reasonable accuracy which segments of the music user's activity are subject to an ASCAP license fee; (b) the music user's performances of music can be attributed to segments commonly recognized within the music user's industry for which a license fee can be assessed; and (c) administration of the license will not impose an unreasonable burden on ASCAP; the per-segment license shall, in

addition, cover ambient and incidental uses without any record-keeping or monitoring of those uses if that is reasonably necessary to afford a genuine choice among the various types of licenses offered, or of the benefits of any of those types of licenses; if a portion of any on-line music user's transmissions consists of programs substantially similar to those transmitted by over-the-air or cable radio or television stations or networks as they existed on the date of entry of this Second Amended Final Judgment, or is a retransmission of any broadcaster's programs, it shall be presumed that each individual program shall constitute a segment and for those segments the on-line music user need not meet the requirements of subsections (a), (b) and (c) of this section.

(B) ASCAP may charge any music user that selects a per-program license or a per-segment license a fee to recover its reasonable cost of administering the license.

(C) Nothing in this Second Amended Final Judgment shall prevent ASCAP and any music user from agreeing on any other form of license.

(D) The fee for a per-program license and for any per-segment license issued to an on-line user shall be at the option of ASCAP either:

(1) Expressed in terms of dollars, requiring the payment of a specified amount for each program or segment that contains works in the ASCAP repertory not otherwise licensed for public performance, or

(2) Expressed as a percentage of the music users' revenue attributable to each program or segment that contains works in the ASCAP repertory not otherwise licensed for public performance.

VIII. **Genuine Choice.**

(A) ASCAP shall use its best efforts to avoid any discrimination among the various types of licenses offered to any group of similarly situated music users that would deprive those music users of a genuine choice among the various types of licenses offered, or of the benefits of any of those types of licenses.

(B) For a representative music user, the total license fee for a per-program or per-segment license shall, at the time the license fee is established, approximate the fee for a blanket license; for the purpose of making that approximation, it shall be assumed for the purposes of this Section VIII(B) that all of the music user's programs or segments that contain performances of ASCAP music are subject to an ASCAP fee.

(C) ASCAP shall maintain an up-to-date system for tracking music use by per-program and per-segment licensees; ASCAP shall not be required to incur any unreasonable costs in maintaining such system; ASCAP may require its members and such licensees to provide ASCAP with all information reasonably necessary to administer the per-program or per-segment license including, but not limited to:

(1) cue sheets or music logs;

(2) the date of performance of a work and identification of the program or other segment of the music user's activities that contained the performance;

(3) the title of the work performed; and

(4) the writer, publisher or performing artist;

such requirements shall be designed to avoid unreasonable burdens on ASCAP, ASCAP members and licensees.

(D) The terms and requirements of any license shall be designed to avoid imposing any unreasonable burdens or costs on licensees or ASCAP.

IX. **Determination of Reasonable Fees.**

(A) ASCAP shall, upon receipt of a written request for a license for the right of public performance of any, some or all of the works in the ASCAP repertory, advise the music user in writing of the fee that it deems reasonable for the license requested or the information that it reasonably requires in order to quote a reasonable fee. In the event ASCAP requires such additional information, it shall so advise the music user in writing, and shall advise the music user in writing of the fee that it deems reasonable within sixty (60) days of receiving such information. If the parties are unable to reach agreement within sixty (60) days from the date when the request for a license is received by ASCAP, or within sixty (60) days of ASCAP's request for information, whichever is later, the music user may apply to the Court for a determination of a reasonable fee retroactive to the date of the

written request for a license, and ASCAP shall, upon receipt of notice of the filing of such request, promptly give notice of the filing to the Assistant Attorney General in charge of the Antitrust Division. If the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when ASCAP advises the music user of the fee that it deems reasonable or requests additional information from the music user, and if the music user has not applied to the Court for a determination of a reasonable fee, ASCAP may apply to the Court for the determination of a reasonable fee retroactive to the date of a written request for a license and ASCAP shall upon filing such application promptly give notice of the filing to the Assistant Attorney General in charge of the Antitrust Division.

(B) In any such proceeding, the burden of proof shall be on ASCAP to establish the reasonableness of the fee it seeks except that, where a music user seeks a per-segment license, the music user shall have the burden of demonstrating that its performances of music can be tracked and monitored to determine with reasonable accuracy which segments of the music user's activity are subject to an ASCAP fee and of demonstrating that the music user's performances of music can be attributed to segments commonly recognized within the music user's industry for which a license fee can be assessed.

(C) The fees negotiated by ASCAP and any music user during the first five years that ASCAP licenses music users in that industry shall not be evidence of the reasonableness of any fees (other than an interim fee as provided in Section IX(F)

of this Second Amended Final Judgment) for any license in any proceeding under this Section IX.

(D) Should ASCAP not establish that the fee it requested is reasonable, then the Court shall determine a reasonable fee based upon all the evidence.

(E) The parties shall have the matter ready for trial by the Court within one year of the filing of the application unless ASCAP and at least one music user request that the Court delay the trial for an additional period not to exceed one year. No other delay shall be granted unless good cause is shown for extending such schedule. Pending the completion of any such negotiations or proceedings, the music user shall have the right to perform any, some or all of the works in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Section IX(F) of this Second Amended Final Judgment, and to the final order or judgment entered by the Court in such proceeding.

(F) When a music user has the right to perform works in the ASCAP repertory pending the completion of any negotiations or pending proceedings provided for in Section IX(A) of this Second Amended Final Judgment, either the music user or ASCAP may apply to the Court to fix an interim fee pending final determination or negotiation of a reasonable fee. The Court shall then fix an interim fee within ninety (90) days of such application for an interim fee retroactive to the date of the written request for a license, allowing only such limited discovery, if any, that the Court deems necessary to the fixing of such

interim fee. In fixing such interim fee, there shall be a presumption that the last existing license (if any) between the music user and ASCAP, or between licensees similarly situated to the music user and ASCAP, sets forth the appropriate interim fee. If the Court fixes such interim fee, ASCAP shall then issue and the music user shall accept a license providing for the payment of a fee at such interim rate from the date of the request by such music user for a license pursuant to Section IX(A) of this Second Amended Final Judgment. If the music user fails to accept such a license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of its application for a reasonable fee, if any.

(G) When a reasonable fee has been determined by the Court, ASCAP shall be required to offer a license at a comparable fee to all other similarly situated music users who shall thereafter request a license of ASCAP; provided, however, that any license agreement that has been executed between ASCAP and another similarly situated music user prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement.

(H) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory, nor shall this Second Amended Final Judgment be construed as importing any validity or value to any of said copyrights.

(I) Pursuant to its responsibility to monitor and ensure compliance with this Second Amended Final Judgment, the United States may participate fully in any proceeding brought under this Section IX. Any order or agreement governing the confidentiality of documents or other products of discovery in any such proceeding shall contain the following provisions:

(1) The Department of Justice (the "Department") may make a written request for copies of any documents, deposition transcripts or other products of discovery ("products of discovery") produced in the proceeding. If the Department makes such a request to a party other than the party who produced the materials in the proceeding or to a deponent ("the producing party"), the Department and the party to whom it directed the request shall provide a copy of the request to the producing party. The producing party must file any objection to the request with the Court within thirty days of receiving the request; if the producing party does not file such an objection, the person to whom the Department directed its request shall provide the materials to the Department promptly;

(2) Any party to the proceeding may provide the Department with copies of any products of discovery produced in the proceeding. Any party who provides the Department with copies of any product of discovery shall inform the other parties to the proceeding within fifteen days of providing such materials to the Department. The producing party must file any objection to the production within fifteen days of receiving such notice; and

(3) The Department shall not disclose any products of discovery that it obtains under this order that have been designated as "confidential" in good faith or as otherwise protectable under Fed. R. Civ. P. 26(c)(7) to any third party without the consent of the producing party, except as provided in the Antitrust Civil Process Act, 15 U.S.C. § 1313(c)-(d), or as otherwise required by law.

X. **Public Lists.**

(A) Within 90 days of entry of this Second Amended Final Judgment, ASCAP shall, upon written request from any music user or prospective music user:

(1) Inform that person whether any work identified by title and writer is in the ASCAP repertory; or

(2) Make a good faith effort to do so if identifying information other than title and writer is provided.

(B) Within 90 days of entry of this Second Amended Final Judgment, ASCAP shall:

(1) Make the public list available for inspection at ASCAP's offices during regular business hours, maintain it thereafter, and update it annually; and

(2) Make the public electronic list available through on-line computer access (*e.g.*, the Internet), update it weekly, make copies of it available in a machine-readable format (*e.g.*, CD-ROM) for the cost of reproduction, and update the machine-readable copies semi-annually.

(C) Beginning 90 days after entry of this Second Amended Final Judgment, the first written offer of a license that ASCAP makes to a music user or prospective music user shall describe how to gain access to the public list and public electronic list and describe the variety of works in the ASCAP repertory, including, but not limited to, a list of writers, genres of music and works that illustrates that variety.

(D) After the date on which ASCAP makes the public electronic list available pursuant to Section X(B)(2) of this Second Amended Final Judgment, ASCAP

shall not institute or threaten to institute, maintain, continue, sponsor, fund (wholly or partially, directly or indirectly) or provide any legal services for, any suit or proceeding against any music user for copyright infringement relating to the right of nondramatic public performance of any work in the ASCAP repertory that is not, at the time of the alleged infringement, identified on the public electronic list; provided, however, that nothing in this Section X shall preclude ASCAP from pursuing its own *bona fide* independent interest in any such suit or proceeding. This Section X(D) shall not apply to any such suit or proceeding pending on the date of entry of this Second Amended Final Judgment.

XI. **Membership.**

A. ASCAP is hereby ordered and directed to admit to membership, non-participating or otherwise:

(1) Any writer who shall have had at least one work regularly published, whether or not performance of the work has been recorded in an ASCAP survey; or

(2) Any person actively engaged in the music publishing business, whose musical publications have been used or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

B. (1) ASCAP shall distribute to its members the monies received by licensing rights of public performance, less its costs, primarily on the basis of

performances of its members' works (excluding those works licensed by the member directly) as indicated by objective surveys of performances periodically made by or for ASCAP, provided, however, that ASCAP may make special awards of its distributable revenues to writers and publishers whose works have a unique prestige value, or which make a significant contribution to the ASCAP repertory. Distribution of ASCAP's distributable revenue based on such objective surveys shall reflect the value to ASCAP of performances in the various media, and the method or formula for such distribution shall be fully and clearly disclosed to all members. Upon written request of any member, ASCAP shall disclose information sufficient for that member to determine exactly how that member's payment was calculated by ASCAP.

(2) Where feasible, ASCAP shall conduct, or cause to have conducted, a census or a scientific, randomly selected sample of the performances of the works of its members. Such census or sample shall be designed to reflect accurately the number and identification of performances and the revenue attributable to those performances, made in accordance with a design made and periodically reviewed by an independent and qualified person.

(3) ASCAP shall not restrict the right of any member to withdraw from membership in ASCAP at the end of any calendar year upon giving three months' advance written notice to ASCAP; provided, however, that any writer or publisher member who resigns from ASCAP and whose works

continue to be licensed by ASCAP by reason of the continued membership of a co-writer, writer or publisher of any such works, may elect to continue receiving distribution for such works on the same basis and with the same elections as a member would have, so long as the resigning member does not license the works to any other performing rights licensing organization for performance in the United States. ASCAP may require a written acknowledgment from such resigning member that the works have not been so licensed.

(a) A resigning member shall receive distribution from ASCAP for performances occurring through the last day of the member's membership in ASCAP, regardless of the date the revenues are received.

(b) ASCAP shall not, in connection with any member's resignation, change the valuation of that member's works or the basis on which distribution is made to that member, unless such changes are part of similar changes applicable to all members in the resigning member's classification.

(c) Notwithstanding the foregoing, for any member who resigns from ASCAP, ASCAP is enjoined and restrained from requiring that member to agree that the withdrawal of such works be subject to any rights or obligations existing between ASCAP and its licensees, provided, however, that ASCAP may make withdrawal

of any works from the ASCAP repertory subject to any license agreement between ASCAP and any licensee that is in effect on the date that this provision becomes effective.

C. Each provision of Section XI(B) of this Second Amended Final Judgment shall only be effective upon entry of an order in United States v. Broadcast Music, Inc., No. 64 Civ. 3787 (S.D.N.Y.), that contains a substantially identical provision. Until the provisions of Section XI(B)(3) of this Second Amended Final Judgment become effective, ASCAP shall not enter into any contract with a writer or publisher requiring such writer or publisher to grant to ASCAP performing rights for a period in excess of five years.

D. Notwithstanding the provisions of Section XI (B)(3) and (C) of this Second Amended Final Judgment, a member who requests and receives an advance from ASCAP shall remain a member of ASCAP and shall not be entitled to exercise any right to resign until the advance has been fully recouped or repaid.

XII. **Plaintiff's Access.**

(A) For the purposes of determining or securing compliance with this Second Amended Final Judgment or determining whether this Second Amended Final Judgment should be modified or terminated, and subject to any legally recognized privilege, authorized representatives of the Antitrust Division of the United States Department of Justice, shall upon written request of the Assistant Attorney

General in charge of the Antitrust Division and on reasonable notice to ASCAP, be permitted:

(1) Access during regular business hours to inspect and copy all records and documents in the possession, custody, or under the control of ASCAP, which may have counsel present, relating to any matters contained in this Second Amended Final Judgment;

(2) To interview ASCAP's members, officers, directors, employees, agents, and representatives, who may have counsel present, concerning such matters; and

(3) To obtain written reports from ASCAP, under oath if requested, relating to any matters contained in this Second Amended Final Judgment.

(B) ASCAP shall have the right to be represented by counsel in any process under this Section.

(C) No information or documents obtained by the means provided in this Section shall be divulged by the plaintiff to any person other than duly authorized representatives of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Second Amended Final Judgment, or as otherwise required by law.

(D) If, at the time information or documents are furnished by defendant to plaintiff, ASCAP represents and identifies, in writing, the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7)

of the Federal Rules of Civil Procedure, and ASCAP marks each pertinent page of such material, "subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10-days notice shall be given by plaintiff to ASCAP prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which ASCAP is not a party.

XIII. **Dismissal of Individual Defendants.** This action is dismissed with respect to Gene Buck, George Meyer and Gustave Schirmer and their estates.

XIV. **Retention of Jurisdiction.** Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Second Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Second Amended Final Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof. It is expressly understood, in addition to the foregoing, that:

(A) The plaintiff may at any time after entry of this Second Amended Final Judgment, upon reasonable notice, apply to the Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP; and

(B) If, at any time after the entry of this Second Amended Final Judgment, a stipulated amended final judgment is entered in United States v. Broadcast Music, Inc., No. 64 Civ. 3787 (S.D.N.Y.), ASCAP may move the Court, and the Court shall grant

such motion, to substitute the relevant terms of that stipulated amended final judgment for those of this Second Amended Final Judgment.

XV. **Effective Date.** This Second Amended Final Judgment shall become effective three months from the date of entry hereof whereupon the Amended Final Judgment entered on March 14, 1950, all modifications or amendments thereto, the Order entered thereunder on January 7, 1960, and all modifications and amendments thereto (collectively the "Amended Final Judgment") and the Final Judgment in United States v. The American Society of Composers, Authors and Publishers, (formerly Civ. No. 42-245 (S.D.N.Y.)) entered on March 14, 1950 and all modifications and amendments thereto (the "Foreign Decree") shall be vacated. This Second Amended Final Judgment shall not be construed to make proper or lawful or sanction any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited by the Amended Final Judgment or the Foreign Decree.

Dated:

_____
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. BROADCAST MUSIC, INC. and RKO GENERAL, INC., Defendants.	Civil No. 64-Civ-3787

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on December 10, 1964, and defendant having filed its answer denying the substantive allegations of such complaint, and the parties by their respective attorneys having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission by either party with respect to any such issue:

Now, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states claims for relief against the defendant under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "Defendant" means the defendant Broadcast Music, Inc., a New York Corporation;

(B) "Programming period" means a fifteen minute period of broadcasting commencing on the hour and at fifteen, thirty and

forty-five minutes past the hour without regard to whether such period contains one or more programs or announcements.

(C) "Defendant's repertory" means those compositions, the right of public performance of which defendant has or hereafter shall have the right to license or sublicense.

III.

The provisions of this Final Judgment shall apply to defendant and to each of its subsidiaries, successors, assigns, officers, directors, servants, employees and agents, and to all persons in active concert or participation with defendant who receive actual notice of this Final Judgment by personal service or otherwise. None of the provisions of this Final Judgment shall apply outside the United States of America, its territories, and possessions.

IV.

Defendant is enjoined and restrained from:

(A) Failing to grant permission, on the written request of all writers and publishers of a musical composition including the copyright proprietor thereof, allowing such persons to issue to a music user making direct performances to the public a non-exclusive license permitting the making of specified performances of such musical composition by such music user directly to the public, provided that the defendant shall not be required to make payment with respect to performances so licensed.

(B) Engaging in the commercial publication or recording of music or in the commercial distribution of sheet music or recordings.

V.

(A) Defendant shall not refuse to enter into a contract providing for the licensing by defendant of performance rights with any writer who shall have had at least one copyrighted musical composition of his writing commercially published or recorded, or with any publisher of music actively engaged in the music publishing business whose musical publications have been commercially published or recorded and publicly promoted and distributed for at least one year, and who assumes the financial risk involved in the normal publication of musical works; provided, however, that defendant shall have the right to refuse to enter into any such contract with any writer or publisher who does not satisfy reasonable standards of literacy and integrity if the defendant is willing to submit to arbitration in the County, City

and State of New York the reasonableness and applicability of such standards, under the rules then prevailing of the American Arbitration Association, with any writer or publisher with whom defendant has refused so to contract.

(B) Defendant shall not enter into any contract with a writer or publisher requiring such writer or publisher to grant to defendant performing rights for a period in excess of five years, provided, however, that defendant may continue to license, as if under the contract, all musical compositions in which the defendant has performing rights at the date of termination of any such contract until all advances made by defendant to such writers and publishers shall have been earned or repaid.

(C) Upon the termination, at any time hereafter, of any contract with a writer or publisher relating to the licensing of the right publicly to perform any musical composition, defendant shall continue to pay for performances of the musical compositions of such writer or publisher licensed by defendant upon the basis of the current performance rates generally paid by defendant to writers and publishers for similar performances of similar compositions for so long as such performing rights are not otherwise licensed.

VI.

(A) Defendant shall not acquire rights of public performance in any musical compositions from any publisher under a contract which requires the officers, directors, owners or employees of such publisher to refrain from publishing or promoting musical works licensed through another performing rights organization, provided that nothing contained in this paragraph shall prevent defendant from entering into a contract with a publishing entity which requires such entity not to license any performance rights through any other performing rights organization during the term of the contract, and requiring that any works licensed by such officers, directors, owners or employees through another performing rights organization be licensed by a separate publishing entity which does not have a name identical with or similar to the name of any publishing entity with which defendant has contracted.

(B) Defendant shall not enter into any agreement for the acquisition or the licensing of performing rights which requires the recording or public performance of any stated amount or percentage of music, the performing rights in which are licensed or are to be licensed by defendant.

VII.

(A) Defendant shall make available at reasonable intervals, to all writers and publishers who have granted performance rights to it, a complete statement of the performance payment rates (to writers, those applicable to writers, and to publishers, those applicable to publishers), currently utilized by it for all classifications of performances and musical compositions.

(B) Defendant will not offer or agree to make payments in advance for a stated period for future performing rights which are not either repayable or to be earned by means of future performance to any writer or publisher who, at the time of such offer or agreement, is a member of or under direct contract for the licensing of such performing rights with any other United States performing rights licensing organization, provided that this restriction shall not apply (1) in the case of any such writer or publisher who at any time prior to said offer or agreement had licensed performing rights through defendant or (2) in the case of any such writer or publisher who is a member of or directly affiliated with any other United States performing rights licensing organization which makes offers or makes payments similar to those forbidden in this subparagraph to writers or publishers then under contract to defendant.

(C) Defendant shall include in all contracts which it tenders to writers, publishers and music users relating to the licensing of performance rights a clause requiring the parties to submit to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association, all disputes of any kind, nature or description in connection with the terms and conditions of such contracts or arising out of the performance thereof or based upon an alleged breach thereof, except that in all contracts tendered by defendant to music users, the clause requiring the parties to submit to arbitration will exclude disputes that are cognizable by the Court pursuant to Article XIV hereof.

VIII.

(A) Defendant shall not enter into, recognize as valid or perform any performing rights license agreement which shall result in discriminating in rates or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different rates or terms shall not be considered discrimination within the meaning of this section; and provided further that nothing contained in this section shall prevent changes in rates or terms from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

(B) Defendant shall, upon the request of any unlicensed broadcaster, license the rights publicly to perform its repertory by broadcasting on either a per program or per programming period basis, at defendant's option. The fee for this license shall relate only to programs (including announcements), or to programming periods, during which a licensed composition is performed. The fee shall be expressed, at defendant's option, either (1) in dollars, (2) as a percentage of the revenue which the broadcaster received for the use of its broadcasting facilities or (3) in the case of sustaining programs or programming periods, as a percentage of the applicable card rate had the program or programming period been commercially sponsored. In the event defendant offers to license broadcasters on bases in addition to a per program or per programming period basis, defendant shall act in good faith so that there shall be a relationship between such per program or such per programming period basis and such other bases, justifiable by applicable business factors including availability, so that there will be no frustration of the purpose of this section to afford broadcasters alternative bases of license compensation.

IX.

(A) Defendant shall not license the public performance of any musical composition or compositions except on a basis whereby, insofar as network broadcasting by a regularly constituted network so requesting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

(B) With respect to any musical composition in defendant's catalogue of musical compositions licensed for broadcasting and which is or shall be lawfully recorded for performance on specified commercially sponsored programs on an electrical transcription or on other specially prepared recordation intended for broadcasting purposes, defendant shall not refuse to offer to license the public performance by designated broadcasting stations of such compositions by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all stations enumerated by the licensee, on terms and conditions fixed by defendant, without requiring separate licenses for such enumerated stations.

(C) Defendant shall not, in connection with any offer to license by it the public performance of musical compositions by

music users other than broadcasters, refuse to offer a license at a price or prices to be fixed by defendant with the consent of the copyright proprietor for the performance of such specific (i.e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

X.

(A) Defendant shall not assert or exercise any right or power to restrict from public performance by any licensee of defendant any copyrighted musical composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this paragraph shall prevent defendant from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance rights therein or to protect the dramatic performing rights therein, or, as may be reasonably necessary in connection with any claim or litigation involving the performance rights in any such composition.

(B) Defendant, during the term of any license agreements with any class of licensees, shall not make any voluntary reductions in the fees payable under any such agreements, provided, however, that nothing herein shall prevent defendant from lowering any fees or rates to any or all classes of licensees in response to changing conditions affecting the value or marketability of its catalogue to such class or classes, or where necessary to meet competition.

XI.

For the purpose of securing or determining compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division. and on reasonable notice to defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendant relating to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of defendant and without restraint or interference from it, to interview officers or employees of defendant, who may have counsel present regarding any such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section XI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the Plaintiff, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XII.

All of the provisions of this Final Judgment shall become effective on the entry thereof, except as to paragraph C of Article VII, which shall not become effective until 90 days after the date of entry of this Final Judgment.

XIII.

Jurisdiction is retained by this Court for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

To best preserve the independent conduct of defendant's music licensing activities, the jurisdiction retained by this Court over this Final Judgment shall be exercised by a Judge of this Court other than one to whom has been assigned any action in which a judgment has been entered retaining jurisdiction over any music performing rights licensing organization (e.g. ASCAP) other than defendant. No reference or assignment of any issue or matter under this Final Judgment shall be made to a Magistrate Judge or Master to whom has been referred or assigned any pending issue or matter in which any music performing rights licensing organization other than defendant as to which this Court has entered judgment retaining jurisdiction, (e.g. ASCAP) is a party.

XIV.

(A) Subject to all provisions of this Final Judgment, defendant shall, within ninety (90) days of its receipt of a written application from an applicant for a license for the right

of public performance of any, some or all of the compositions in defendant's repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when defendant advises the applicant of the fee which it deems reasonable, the applicant may forthwith apply to this Court for the determination of a reasonable fee and defendant shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Assistant Attorney General in charge of the Antitrust Division. If the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when defendant advises the applicant of the fee which it deems reasonable and no such filing by applicant for the determination of a reasonable fee for the license requested is pending, then defendant may forthwith apply to this Court for the determination of a reasonable fee and defendant shall promptly give notice of its filing of such application to the Assistant Attorney General in charge of the Antitrust Division. In any such proceeding, defendant shall have the burden of proof to establish the reasonableness of the fee requested by it. Should defendant not establish that the fee requested by it is a reasonable one, then the Court shall determine a reasonable fee based upon all the evidence. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in defendant's repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in defendant's repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or defendant may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. It is the purpose of this provision that an interim fee be determined promptly, and without prejudice as to the final determination of what constitutes a reasonable fee. It is further intended that interim fee proceedings be completed within 120 days of the date when application is made to fix an interim fee, subject to extension at the request of defendant or the applicant only in the interest of justice for good cause shown. If the Court fixes such interim fee, defendant shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date the applicant requested a license. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of its application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant requested a license;

(C) When a reasonable fee has been finally determined by this Court, defendant shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of defendant, but any license agreement which has been executed without any Court determination between defendant and another applicant similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Article XIV shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in defendant's repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED that with respect to any music user heretofore licensed by defendant the license agreement of which expressly provides for determination by this Court of reasonable license fees or other terms for any period covered by such license, either defendant or such music user may apply to this Court for such determination provided that such license agreement provision has not otherwise expired.

Dated: New York, N. Y.
December 29, 1966

EDWARD C. MCLEAN
United States District Judge

JUDGMENT ENTERED DECEMBER 29, 1966

JOHN J. OLEAR, JR.
Clerk

Dated: New York, New York
November 18, 1994

Robert P. Patterson, Jr.
U.S.D.J.

SUPPLEMENTAL STATEMENT OF STEPHEN SWID, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, SESAC INC.

Mr. Chairman and distinguished members of the Subcommittee. On behalf of SESAC, Inc., I appreciate the opportunity to supplement my previous written statement in light of the written and oral testimony presented by ASCAP, BMI, and the TMLC at the May 11, 2005 hearing. I will demonstrate that SESAC is able to provide value and service to its customers and potential customers through licensing practices that are not only fair, but innovative and responsive to their needs, while at the same time ensuring that SESAC's affiliated songwriters and music publishers are fairly compensated for their intellectual property.

Meeting the needs of one's customers and constituents is fundamental to a competitive economy. The TMLC and ASCAP, which have an entrenched way of doing business that has barely changed in decades, do not like the fact that SESAC is bringing energy to the marketplace, attracting a growing base of talented music writers, compensating those creative talents more fairly than ASCAP and BMI (whose ranks they left to join SESAC), and seeking to price its repertory in innovative ways that it believes are responsive to the needs of the music and television community. They therefore seek Congressional intervention in the hope that they can stymie SESAC's innovations rather than having to meet those competitive pressures by changing their own behavior.

Before addressing the specific misstatements made by the other parties testifying before the Subcommittee, I feel compelled to note the obvious: The TMLC (along with ASCAP), in seeking to impose upon SESAC a rate court mechanism similar to those imposed by the Department of Justice upon ASCAP and BMI, evidences a fundamental business philosophy that stands the American economic system on its head. As a matter of first principles, SESAC operates by virtue of a free market economy. ASCAP and BMI are subject to Consent Decrees and rate courts because the Department of Justice has determined that their behavior in exercising their admittedly vast market share and leverage to extract terms from both its members and its licensees that they would not otherwise have obtained through free negotiation. Rate courts were imposed on ASCAP and BMI as a remedial measure because they used their disproportionate market power unfairly to extract terms to which they were not entitled.

By contrast, SESAC does not have such market power. SESAC's annual revenues amount to only approximately 5% of the American performing rights industry's revenues. A dozen years ago, when the present owners bought SESAC, it was a moribund society with only about a 1% market share. SESAC is growing, and attracting talent from the membership ranks of ASCAP and BMI, because it is prepared to be creative and to pay and be paid for value delivered. If SESAC overprices its repertory, the television industry will stop hiring SESAC members; SESAC will then either need to cut its prices, or its members will resign and move back to ASCAP or BMI. That is how competitive markets work.

But the TMLC prefers regulation to competition. That is how it has done business with ASCAP and BMI, which have been regulated for generations, so that is all that it knows. As the TMLC would have it, heavy marketplace regulation would be the norm, the default, and a free market business model would be reduced to a "loophole" that has to be closed as soon as any upstart finds new ways of meeting marketplace demand. This is a curious suggestion from a negotiating body representing virtually the entire local television industry, whose members' combined revenues are approximately $30 billion, and who thrive on charging their own advertiser customers escalating fees for the programming aired on their stations. The TMLC brings to bear the economic power of 1,200 television stations to collectively exercise leverage over SESAC, a small service provider that is a fraction of their size. In fact, the parent companies of many of these stations are multimedia giants that control the majority of television production in this country, and which have aggregate revenues of at least hundreds of billions of dollars.

As I stated earlier, SESAC is the quintessential model of an innovative American small business operating successfully in a challenging industry. It competes, on the one hand, against two large PROs that dominate the marketplace while, on the other hand, often negotiating with large all-industry negotiating committees, like the TMLC, whose membership has combined revenues that dwarf those of the entire performing rights industry by roughly 20 times. The TMLC acts for multimedia powerhouses. Simply stated, these are not small organizations in need of Congressional protection and compulsory and ongoing judicial oversight to ensure that they do not get overcharged for music rights; these are the "big boys" of the industry who, in other contexts, have demonstrated themselves to be quite capable of making savvy business deals and looking out for their own economic interests.

SESAC's innovative business methods enhance competition and should be fostered and promoted, not regulated to the benefit of industry giants. Presumable, TMLC members would have a different view about rate courts if negotiators representing automotive or pharmaceutical companies or any other large-dollar advertisers came to Congress complaining that local stations were asking for a higher advertising rate than they wanted to pay.

ASCAP MISSTATEMENTS

General Response

ASCAP's request that Congress impose regulation on SESAC should be rejected. In its testimony, ASCAP states that "the playing field is not level" and "fair unfettered competition is not possible" because ASCAP "is subject to governmental regulation" by consent decree "while SESAC is not." This suggestion is disingenuous for at least two reasons. First, it begs the question: "Why, after five decades, is ASCAP still subject to a Consent Decree?" It is no wonder that, when asked this very question at the May 11 hearing, ASCAP was unable to articulate a clear and direct answer for the Subcommittee. The simple answer is that ASCAP (as well as BMI) is still subject to a Consent Decree because the Department of Justice continues to believe that such an extraordinary remedy is necessary, given ASCAP's vast market share and historical anticompetitive business practices.

Indeed, just three years ago, ASCAP renegotiated and obtained court approval to change certain terms of its Consent Decree, but did not ask the court to terminate that decree as no longer necessary. (By contract, IBM did seek and obtain the termination of its decades-old antitrust consent decree some years ago when it was found no longer to be necessary because of new and significant competition from other computer makers.) Contrary to the tone of ASCAP's discussion on this topic, a Consent Decree is not the equivalent of a good citizenship award. Rather, it is more like plea bargaining for probation. It is an extraordinary remedy imposed to correct violations of antitrust laws to and prevent such behavior from reoccurring. The very purpose of this governmental regulation is to "level the playing field" that had been tilted by ASCAP, and to restore the "fair unfettered competition" that ASCAP had sought to negate.

Second, ASCAP's complaints of being disadvantaged by SESAC are belied by ASCAP's (and BMI's) continued domination of the performing rights marketplace. Combined, ASCAP and BMI claim approximately 95% of the market, each claiming between 45% and 50%; SESAC, by contrast, claims only 5%. Strikingly, ASCAP, which has been operating under Consent Decrees since Glen Miller was at the top of the charts and Joe DiMaggio was hitting home runs for the Yankees, does not suggest that SESAC be subject to regulation because of any perceived illegal business practices on SESAC's part. Rather, ASCAP seeks SESAC's regulation simply so that ASCAP, BMI and SESAC "all be subject to the same rules." This simplistic analysis disregards the lessons of history as perceived by the Department of Justice, which has always declined to seek similar regulation of SESAC. SESAC is left to wonder exactly how much of its 5% market share ASCAP—which already controls nearly half the market—seeks to capture through the impositions of consent decree obligations on SESAC. (It should be noted that, in its testimony, BMI does not seek such regulation of SESAC. Rather, BMI acknowledges that the competition existing among the PROs benefits both copyright owners and music users.)

One wonders about the real motives underlying ASCAP's comments; could this simply amount to a woeful response to the fact that SESAC's market share is escalating while ASCAP's share of television music is declining? If SESAC's present market share were reduced by half, would that "level the playing field" sufficiently for ASCAP? Forcing regulation upon a small but savvy competitor would be tantamount to penalizing SESAC because of the true market forces that are pulling down ASCAP, and rewarding an unsuccessful competitor that could neither retain nor attract significant composers to avoid market share decline.

Specific Statements by ASCAP

The following are specific responses and corrections to factual assertions and false premises presented by ASCAP in its testimony:

• *Statement:* ASCAP states that, "under ASCAP's rules and regulations, members may resign from membership and affiliate with a different performing rights organization annually."

Fact: ASCAP conveniently ignores any mention of its onerous membership rules which serve to discourage such resignation. For example, under its "licenses in effect" policy, ASCAP—while technically permitting a member's resignation—purports to prohibit the movement of that member's existing catalog of compositions so long

as any ASCAP license granting rights in those compositions remains in effect. Because, on any given day, there are vast numbers of ASCAP licenses covering its entire repertory in place for periods up to five years, the practical effect of this policy is to hold compositions hostage indefinitely and discourage members from leaving ASCAP, or to force them to leave without their work product. Under another ASCAP policy, because ASCAP pays its members from their earnings six months in arrears, if a songwriter resigns, he or she *will not be paid* for the two quarter-years of earnings that accrued as of the resignation date. In short, when ASCAP members leave, they must "leave money on the table"; broadcasters are paying ASCAP for music it represents, but that money does not go to the music owners. This half-year earnings gap serves as a strong disincentive for an ASCAP member to resign, despite the purported benevolent membership policy. By contrast, BMI and SESAC pay their composer and publisher affiliates all of the royalties earned while they are affiliates.

Effective January 1, 2005, ASCAP changed its policies with regard to resigning members. Previously, members could terminate their association with ASCAP at the end of each calendar year by giving not less than 90 days notice. This provided a convenient date for members to evaluate their status with ASCAP and plan accordingly. The decision to resign from ASCAP had to be made prior to September 30 of each year, a convenient and straightforward process.

The new policy removes the common resignation dates and states that resignations are effective on the first day following the calendar quarter in which the anniversary date of the resigning member's "election" to ASCAP's membership falls. Notice must be given not less than six months and not more than nine months prior to the resigning member's election date. Thus, if a member's election date is February 15, the effective date of the member's resignation is April 1, and notice of resignation must be given between July 1 and September 30 of the previous year; a rather more complicated calculation. By the same token, another member will have an entirely different set of dates to comply with. ASCAP has established an obstacle course of notices and calendar hurdles—and requires a one year delay (and a new notice) if any of those technical obstacles is missed by even a day.

Because ASCAP is a membership society, the member's "election date" is the date that the member was formally elected into ASCAP's membership. This date is not readily available to ASCAP's members. It does not appear on the membership application; it does not appear on ASCAP royalty statements; and it does not appear on the membership card. This now-critical date was not previously a date that would hold any importance to a member. What was once a simple, understandable process has been turned into a confusing maze that serves to prevent ASCAP members from defecting to SESAC or BMI. ASCAP members must first ascertain what their election date is, then must calculate the effective date of the resignation, and finally must evaluate their status within a short three-month window. (Of course, in any event, an ASCAP member who successfully resigns will have to "leave money on the table.")

• *Statement:* ASCAP states that it "must grant a license to any user who requests it, but [SESAC] need not."

Fact: This requirement was imposed by the Department of Justice because of ASCAP's misuse of its large market share. In any event, SESAC is in the licensing business; to refuse to grant licenses as a matter of policy would be contrary to its interests and business model. If the Subcommittee would find it helpful, SESAC is willing to share additional information on a confidential basis concerning examples of its innovative licensing practices.

• *Statement:* ASCAP states that it "may only obtain nonexclusive rights, but [SESAC] may get exclusive rights."

Fact: This is another restriction imposed because of ASCAP's improper exercise of market share and leverage. In any event, it is SESAC's policy to obtain only nonexclusive rights, giving its songwriter music publisher affiliates the ability to license their music directly themselves. To the best of its knowledge, SESAC has only one affiliate agreement that prohibits direct licensing, and that agreement is currently being restructured to permit it.

• *Statement:* ASCAP states that it is "subject to third-party rate determination, but [SESAC] is not."

Fact: Again, this restriction was and continues to be a penalty imposed on ASCAP by the Department of Justice in response to ASCAP's demonstrated market share, leverage, and conduct. SESAC has granted arbitration rights to licensees on occasion. However, this has been the result of marketplace negotiations, not governmental regulation. The marketplace works in SESAC's case to establish contractual rights and a fair market value for its music. Fair market value is the value to which a willing buyer and a willing seller agree. It is not the regulated, restricted or artifi-

cially manipulated "lowest price" that an independent third party might see as appropriate or "fair."

• *Statement:* ASCAP states that it "must offer alternative forms of licenses to broadcasters and other users, but [SESAC] need not."

Fact: Again, this is a result of ASCAP's demonstrated market share, leverage, and conduct. In any event, SESAC routinely uses alternative forms of licenses for broadcasters and other users, which acknowledge the amount of their use of SESAC music. SESAC is willing to provide additional information about these alternative license forms on a confidential basis.

The true reason why ASCAP was compelled to offer alternatives to its blanket license is that ASCAP's refusal to do so was deemed as harmful to a competitive marketplace. SESAC, as a for-profit company, seeks to listen to and innovate for its licensees. It has led the way to new forms of licenses, such as a per-use license for Spanish-language radio stations, because it made sense for all parties and fostered good relations with those licensees. SESAC formulates new licenses without the attendant regulatory compulsion because, to remain competitive in this challenging industry, SESAC must be market-sensitive. (Unlike ASCAP and BMI, SESAC also licenses separate "mechanical" rights to compositions in its repertory on a minimal basis from time to time. There is no legal prohibition against doing so and, historically, this has been done to accommodate a handful of SESAC affiliates. SESAC does not consider this a part of its core business; the new ownership "inherited" this undertaking from the previous owners, and they have not invested resources in it. First and foremost, SESAC is in business of licensing music performing rights.)

TMLC MISSTATEMENTS

General Response

The TMLC's self-serving request that Congress impose a rate court mechanism upon SESAC should be rejected. The ASCAP and BMI rate courts are extraordinary and expensive remedies put in place because of those entities' dominant market share, leverage, and conduct, as the TMLC readily acknowledges. Rate courts are not intended as a general industry substitute for marketplace negotiations and the normal give-and-take that buyers and sellers exercise in commercial transactions.

The TMLC's request is extreme and antithetical to the American economic system. Dispute resolution processes should be voluntary and not imposed by Congress to resolve commercial transactions. The TMLC, which represents members whose combined revenues are approximately $30 billion, pleads for Congress' aid because it seeks to enhance its members' profits outside of contractually agreed procedures. The TMLC granted SESAC the unilateral right to seek arbitration in negotiating a new license. SESAC opted for such arbitration, as it had done under the previous license negotiated by the parties. SESAC notified the TMLC that it would arbitrate rather than take the easier route of avoiding negotiations with the TMLC altogether and, instead, establish its own rate structure for individual local television stations.

The TMLC simply is displeased with the contract it negotiated with SESAC. In fact, it has let the Subcommittee know in no uncertain terms that little, if anything, about SESAC pleases the TMLC. But the TMLC sings a different tune when that suits its members: In a different forum—the ASCAP rate court—the TMLC has stated that the SESAC/TMLC license has probative value in determining what the ASCAP/TMLC license fee should be. For all of the TMLC's over-the-top hyperbole and vitriol, if the TMLC points to its SESAC agreement as the measure of fair market pricing that results from arm's length negotiations, that agreement surely could not have been the result of "gun-to-the-head" negotiating, monopolistic practices, anticompetitive behavior, or any other untoward activities in the TMLC's long list of perceived sins. To the contrary, the TMLC entered into negotiations with SESAC immediately after SESAC had presented its case in an arbitration proceeding; the TMLC chose to negotiate a settlement rather than challenge SESAC's case. If the TMLC wants ASCAP to accept the SESAC agreement as the basis for apportioning license valuations in light of the PROs' relative market shares, it would appear that SESAC received, at best, fair market value in its negotiations with the TMLC.

Ultimately, the goal of the TMLC before the Subcommittee is the same goal that all for-profit companies aspire to achieve: lower operating costs. In fact, lowering music licensing costs for its 1,200 local television members is the sole justification for the existence of the TMLC. Its station members spend hundreds of millions of dollars on programming acquisitions in a competitive market, vying against fellow TMLC station members. To offset program costs and earn large profits, TMLC members seek billions of dollars in advertising revenues. The TMLC members do not seek Congressional assistance in purchasing programming, and they certainly do not seek Congressional oversight of their own advertising sales practices. (For exam-

ple, as every football fan knows, advertisers are made to—and willingly do—pay "what the market will bear" for commercials during the Super Bowl and other compelling programming.)

It is not a coincidence that the TMLC comes before this Subcommittee in the middle of spirited negotiations and on the eve of arbitration with SESAC; it is a commercial dispute. The TMLC would have the Subcommittee believe that SESAC, with its minimal market share and leverage, has cast some type of magic spell rendering the TMLC enfeebled and no longer empowered by its members' multiple billions of dollars in revenues and profits. The TMLC is not confident that it will obtain from SESAC its sought-after music cost reductions through the commercial negotiation process, the arbitration process, or the Department of Justice. Therefore, the TMLC now seeks the aid and assistance of Congress to reform its members' SESAC contracts, to give the TMLC the leverage and obeisance that it demands from SESAC. Given the TMLC members' willingness to litigate against ASCAP and BMI, often successfully, it would appear that the TMLC acknowledges SESAC's market power and conduct do not require antitrust oversight. The TMLC cannot prove otherwise; its problem is that SESAC will not cower to its tactics. The Department of Justice has received similar diatribes from the TMLC regarding SESAC and, after review, has declined to take any action. The TMLC and its members are vigorous advocates and worthy litigants. Despite the TMLC's relentless complaints, however, it has never undertaken, much less succeeded in, any legal action concerning SESAC's licensing practices. This Subcommittee and Congress similarly should decline to take any action against SESAC at the TMLC's request.

The general rule is that, except for a small number of statutory compulsory license requirements, a copyright owner has no obligation to license works to anyone, or to license on any particular terms. Nevertheless, it is SESAC's business to license the public performance of music; that is how SESAC and its songwriter and its music publisher affiliates make money. SESAC is perfectly willing to negotiate individually with television station owners and to offer favorable terms to those stations that do not use a great deal of SESAC music. It is the individual station owners, however, controlling tens of billions of dollars in media holdings and acting in concert through the TMLC on behalf of virtually the entire United States television broadcast industry, who exercise their market power by refusing to negotiate individually. Instead, they insist on acting only as a collusive bloc.

These television station owners are not persons in need of Congressional protection. TMLC members buy and sell companies far larger than SESAC on a regular basis. Indeed, each of the leading TMLC station owner members has annual revenues between 200% and 2,000% of the total license fee that the 1,200 TMLC stations collectively pay to SESAC each year. To assist the Subcommittee, I have attached to this statement a three-page exhibit, based upon company reports and independent industry reports, demonstrating that (i) television music rights costs have not kept pace with other broadcast syndication expenses; (ii) television licensees, including TMLC members, are enjoying robust financial health; and (iii) broadcasting operating margins increased significantly in recent years.

In fact, the licensing "problem" that the station owners complain about is one of their own creation. When the television networks and production companies, which often are sister companies to the television stations, hire a composer to write for a television program, they do so under a "work for hire" agreement. Under a common scenario, the production company, a corporate relative of the local station, owns (through a music publisher alter ego) all of the rights to the music. The producer chooses to allow the composer (and itself, through its publishing entity) to collect performing rights from its PRO. The producer could just as easily increase the work for hire payment to the composer at the outset and "buy out" virtually all of the rights (and thus be able to direct licenses to their related broadcasters). The producers chose instead to participate in "back end" distribution of royalties paid by the PROs, which enhance their bottom line. They make their election because the network and production companies create pilot programming "on spec," and they do not want to add to their initial costs by paying for music in television pilot programs that might not become successful. Instead, they would rather pay later, only if and when the television program is a hit and goes to syndication. They elect this as the best economic practice for their companies. When successful programs go into syndication years after production, the station owners again do not want to pay a fair price for the music, even though they purchase syndication rights—in highly competitive marketplace bidding for huge and ever-growing prices—always knowing that there will be an additional fee for the public performance of the music pursuant to the Copyright Act. The performing rights fees are an insignificant fraction of the price paid purchasing the right to air the programs. Hit syndicated television pro-

grams like "Friends" are so very profitable for these sophisticated businesses that they are loath to allow music licensing to eat into their already high profit margins.

This system was not created by SESAC—the media companies created and continue to preserve it for their economic self-interest. When the profits of the production companies and the profits of the local television stations are consolidated on the top-level financial statements of such media companies, they have concluded that it is a net benefit: their production companies save the money by not buying the music rights on the "front end," choosing instead to have a sister company, which owns television stations, incur an offsetting performing rights expense later.

For all of the TMLC's discussion—which is heavy on hyperbole and light on hard facts—SESAC has crafted for television music a licensing model that is innovative and equitable to all interests. The SESAC model attempts to join all music copyright interests into one valuation pool, from which all licensor participants are allocated proportionate shares, including the equitable proportion of music use based on credible, third party information. In essence, it would charge each station only for the SESAC music that it actually performs, based upon the programs that it chooses to broadcast and further valued by the actual number of viewers who watch the program. Given its proclamations about seeking fairness in television music licensing, one would assume that the TMLC's approval of this model. However, because television stations who use relatively little SESAC music would receive a very economical deal, while those who use a substantial amount of SESAC music would pay more, the TMLC apparently wants to avoid such fair apportionment of fees for fear that it would cause dissention among certain substantial members. In the meantime, SESAC has received complaints from television station licensees about the perceived inequity in the TMLC's allocation of license fees. (During the 2002 arbitration settlement, the TMLC negotiated for and obtained the right to determine how to allocate the industry-wide license fee among its members.) Instead, the TMLC has come to Congress complaining that SESAC is taking advantage of its sophisticated members, who collectively earn tens of billions of dollars in revenues, and asking this Subcommittee to assist it in continuing to reap even greater profits on the backs of the songwriters and music publishers that SESAC represents.

Specific Misstatements by the TMLC

The following are specific responses and corrections to factual assertions and false premises presented by the TMLC in its testimony:

• *Statement:* The Radio Music License Committee ("RMLC"), speaking through the TMLC, purportedly states that "SESAC blanket license fees for radio stations are projected to increase tenfold from 1995 to 2008 even though much of SESAC's music on radio is background music or music in commercials—not feature performances."

Fact: SESAC's blanket license fees for radio stations are projected to increase approximately by a multiple of *3.7*, not 10, for the 13-year period from 1995 through 2008, to reflect the increased market share and value of SESAC music in that medium. (By contrast, ASCAP's radio license fees for the period 2001 through 2009 will have increased 52.3%; BMI's radio license fees for the period 2001 through 2006 will have increased 40%.) The vast majority of SESAC's music on radio is not background music or music in commercials. Rather, SESAC represents featured music in virtually all genres of today's most popular music, including R&B/Hip-Hop, Dance, Rock, Country Latina, Contemporary Christian, and Jazz. Over the years, innumerable recording artists who have performed SESAC-affiliated songs. A handful of names includes Usher, Bob Dylan, Garth Brooks, Destiny's Child, Mercy Me, Ludacris, Jim Brickman, Kenny Chesney, Eric Clapton, Neil Diamond, U2, Luciano Pavarotti, LeAnn Rimes, Mariah Carey, Alan Jackson, Cassandra Wilson, Jagged Edge, Jimi Hendrix, Christina Aguilera, and UB40. In fact, just two weeks ago, SESAC recently had the Number One country song on the Billboard Chart, "Anything But Mine," as sung by Kenny Chesney. As verified by industry trade resources, during the past 17 months SESAC has represented songwriters of 180 Top Ten record releases in various genres, including 63 Number One hits.

• *Statement:* The National Religious Broadcasters Music License Committee ("NRBMLC"), speaking through the TMLC, purportedly states that SESAC is "a monopolist with extraordinary, unconstrained, market power"; that "SESAC flatly refused the NRBMLC's request to hold negotiations over its effective doubling of fees from 2004–2008 (the second consecutive doubling of fees over a five-year period), and also refused its request for arbitration."

Fact: As an initial matter, the NRBMLC's name is misleading. While some of its constituents include religious broadcasters, the NRBMLC also represents broadcasters in many other non-religious music-intensive formats such as Contemporary Hit Radio, Adult Contemporary, Country, Jazz, and Urban Contemporary. After in-

troducing a new license fee schedule effective January 1995, SESAC entered into what was effectively a stand-still letter agreement with the NRBMLC in April 1995, agreeing to allow its constituents to pay pre-1995 fees while discussions ensued concerning final fee rates. At the time, the NRBMLC was in a license fee dispute with ASCAP and it asked for SESAC's forbearance. SESAC agreed to postpone any fee negotiations with the NRBMLC until the ASCAP matter was resolved. Another letter agreement between SESAC and the NRBMLC occurred in November 1997, extending the pre-1995 license fee arrangement. (During discussions in 1999, SESAC discovered that the NRBMLC represents stations outside the traditional religious formats.)

After nearly five years of forbearance and on-again, off-again negotiations during which NRBMLC stations continued to pay pre-1995 fees while enjoying interim authorization to perform all the copyrights represented by SESAC in all radio formats, a final five-year agreement was reached effective December 1999. The agreement benefits not only stations represented by the NRBMLC during negotiations, but all stations that subsequently become members or that are acquired by members, regardless of radio format. That agreement, renewed by SESAC in 2004, provided benefits for all NRBMLC members. Retroactive to January 1, 1995 and on a going-forward basis, any station operating under ASCAP and BMI per-program licenses would receive a SESAC license fee *discounted* by 45%. SESAC's amendment for "talk radio," providing a 75% *discount* in license fees continues to be available to NRBMLC members. SESAC also gave a one-time financial credit to all other stations not qualifying for the per-program or "talk radio" discounts, in the amount of $250 for classical stations and $100 for all others. Additionally, SESAC's radio group license and corresponding discount are available to all radio groups *retroactive to January 1997.* Although the SESAC/NRBMLC agreement expired in December 2003, SESAC extended to NRBMLC members through 2008 the same benefits that were negotiated in 1999. SESAC has proposed an "across the board" rate adjustment for the entire radio industry. Finally, contrary to the NRBMLC's assertion, SESAC's license fees for its members did not double from 2004 through 2008. In fact, the increase was less than 50%.

• *Statement:* The National Cable Television Association ("NCTA"), speaking through the TMLC, purportedly states that its experience in negotiations with SESAC indicates that SESAC should be "subject to the same negotiating restrictions that are applied to BMI and ASCAP, including a third party dispute resolution process that can be invoked by either party and averts the prospect of copyright infringement liability while that process takes place."

Fact: SESAC proposed a license agreement for cable operators in May 1995. Later that year, SESAC was contacted by the NCTA advising that it wanted to negotiate collectively, and asking for SESAC's forbearance until it finalized negotiations with ASCAP and BMI. Again SESAC agreed to the NCTA's request. In 1998, the parties reached a "standstill" agreement providing for a modest down payment of license fees from the entire cable industry, with negotiations for a final agreement to commence after the NCTA's rate court proceeding against ASCAP concluded. In 1999, the standstill agreement was extended with an additional modest down payment. A final license agreement was approved in 2001, retroactive to 1994 and extending through December 2004. SESAC attempted to negotiate with the NCTA in mid-2004 for an extension of the agreement. The NCTA, however, unbeknownst to SESAC, previously had concluded negotiations with ASCAP and BMI through 2006 (two years beyond the SESAC/NCTA agreement), expressed dissatisfaction that SESAC was seeking increased license fees for the period beginning in January 2005, because the NCTA had not sought or obtained any license fee reductions from ASCAP or BMI in the event that SESAC's market share increased. Accordingly, SESAC sought to enter into individual extension agreements for a three year period directly with cable operators at license fee levels that it had sought from the NCTA. Eventually, the NCTA came to SESAC to renew discussions in early 2005. A final agreement resulted in a two-year extension through 2006, which eliminated authorization for certain types of music performances in exchange for a license fee that was *less* than that proposed by SESAC. Again, in this instance, the marketplace worked.

• *Statement:* The TMLC states that, "[w]hen any music user seeks to pay a licensing fees to SESAC . . . , no dispute resolution mechanism exists under current law, except a lawsuit brought against the prospective licensee for copyright infringement if that user fails to agree to license terms requested by SESAC," thereby permitting SESAC "to suppress free competition and extort supracompetitive licensing rates."

Fact: There is no basis in law for singling out a small business for a "third party dispute resolution process" to second guess arm's-length marketplace negotiations among sophisticated parties. ASCAP and BMI are subject to rate courts because the

Department of Justice determined that their market share, leverage, and conduct required it. In practice, being subject to a possible rate court proceeding by any licensee who wants a second bite at the negotiating apple would be intolerably cost-prohibitive for SESAC and for many licenses.

To put this suggestion in perspective, the average SESAC license fee per day for AM radio stations is $3.37; for FM radio stations, $6.29; for commercial television stations, $31.69; for hotels, $1,.97; for restaurants, $0.83, and for health clubs, $0.240. It would be crippling for SESAC to be subjected to arbitration concerning all of these types of licenses given its small share of the marketplace. In fact, Congress in its wisdom discerned the distinction between ASCAP and BMI, on the one hand, and SESAC, on the other hand, when setting up the "mini" rate court provisions of the Fairness In Music Licensing Act of 1998. The TMLC notes that, under Chairman Sensenbrenner's leadership, Congress enacted this law "creating a dispute resolution mechanism available to small and medium business establishments through the federal courts." What the TMLC fails to acknowledge is that, even in this recent legislation, SESAC was exempted from the rate court system required by the market share, leverage, and conduct of ASCAP and BMI.

In any event, the TMLC's dire prediction of infringement lawsuits flies in the face of SESAC's demonstrated non-litigation strategy, as compared to the litigation strategy of ASCAP and BMI. Recent archival research indicates that over the last 50 years, SESAC has filed six copyright infringement lawsuits. (This is a correction to information contained in the SESAC Fact Sheet distributed earlier, in which SESAC indicated that it had filed three lawsuits over the past 50 years. We apologize for the misstatement.) Four of those lawsuits were settled quickly; one resulted in a default judgment against a group of radio stations that remains unlicensed to this day; and the other resulted in a jury verdict in SESAC's favor against a group of radio stations that, tellingly, still remains unlicensed by SESAC.

The lawsuit that resulted in a jury verdict for SESAC is illustrative. The music user was a company that operated two radio stations (having sold a third station for approximately $11 million). SESAC was forced to cancel its performance license in the early 1990s due to non-payment of fees by the licensee. Over the course of years, SESAC repeatedly offered to reinstate performance licenses, but all attempts were rebuffed even though the stations continued to play SESAC music. In July 1998, SESAC filed suit in Federal Court in Pennsylvania for copyright infringement. Initially, SESAC was granted a restraining order prohibiting the stations from playing SESAC music, but they nevertheless continued to do so. The company asserted several counterclaims and affirmative defenses including copyright misuse and antitrust violations, all of which it withdrew after conducting extensive discovery. Ultimately, after all attempts to settle the lawsuit failed, in November 2002 the case went to trial, during which the company admitted copyright infringement. SESAC does not use litigation as a first resort but understands that, on rare occasions, unfortunately it is the only remaining remedy.

• *Statement:* The TMLC states that SESAC has "an avaricious licensing-fee appetite and market power that commands supracompetitive prices."

Fact: The TMLC's hyperbolic words do not square with its actions. In recent rate court proceedings against ASCAP, the TMLC touted its agreement with SESAC as being *probative* evidence of the market value of music. SESAC's minimal market power is evidenced by its minimal share of the American music performing rights market. "Supracompetitive rates," in plain English, means that this well-funded and sophisticated all-industry negotiating group does not want to pay fair market value for use of SESAC music. As a specific example, the total fees paid from 2002 to 2004 for blanket licenses by the local television industry was $198 million annually. The TMLC acknowledged that its own studies revealed SESAC's share of the music use in this industry was 9.4% in 2002, and SESAC has strong evidence that its share of such music use is approximately 11% today. Simple mathematics shows that the TMLC understood that they should have been paying SESAC $18.6 million for 2002 and $21.78 million for 2004. Instead, the TMLC paid SESAC only $11.5 million for 2002, a full 42% less than fair market value by the TMLC's own calculations, and only $13.5 million for 2004, a 38% reduction from fair market value. This raises the question: "Which party here, in fact, has been "unfair" and "avaricious" in its dealings with the other?" It would appear that the TMLC's definition of "fair" means *less* royalties for composers and *more* profits for broadcasters; the TMLC's complaint that SESAC has "disdain for settled marketplace fee-level expectations" translates to: "SESAC is an upstart unwilling to permit the TMLC to devalue the music of its songwriters and music publishers." The TMLC cries crocodile tears about SESAC's "anticompetitve" behavior after it has negotiated at least a $18 million decrease in license fees payable to ASCAP, based in part upon SESAC's probative licensing val-

ues. Far from being anticompetitive, SESAC's licensing practices appear to set marketplace standards while protecting the rights of American songwriters.

• *Statement:* The TMLC complains that SESAC is "wholly-unregulated" and "operates with a profit motive."

Fact: The wrong-minded premise of this statement is troubling. SESAC is indeed regulated to the same extent that all other businesses must comply with the rules, regulations, and statutes enacted by governmental bodies having jurisdiction over it. The fact that SESAC's marketplace negotiations with customers are not otherwise regulated, and the fact that SESAC is a for-profit company, are attributes of the American economic system, not faults. The TMLC's complaints in this regard read like an indictment of the entire American free enterprise system. I will not apologize for SESAC being a for-profit company. Regulation is not the norm; a free market is the norm. For example, the TMLC would have SESAC subjected to a rate court which, among other things, could adjust downward SESAC's negotiated or arbitrated blanket license fee rates to account for "carve-out" credits to the TMLC for any direct licenses that its members obtain from SESAC affiliates. In essence, the TMLC would have the opportunity to have a "second bite" before some governmental body with the power to reform SESAC's contracts after the fact. Not only would this be contrary to the fundamentals of American enterprise, it also would be wholly unnecessary. The existence of direct licenses, along with numerous other factors, is a subject that can be presented and weighted in negotiations *leading up to* an agreement. Direct licensing is a factor that sophisticated and powerful groups like the TMLC can "put on the table" in negotiating fair market fees. ASCAP and BMI are subject to consent decrees and rate court mechanisms because the Department of Justice has concluded that their market share, leverage and conduct require it. By contrast, after reviewing SESAC's market share and licensing practices, the Department of Justice has concluded that governmental regulation is not appropriate. As the TMLC concedes, SESAC "is substantially smaller than ASCAP and BMI in terms of composers, publishers, and its repertoire of music."

• *Statement:* The TMLC alleges that SESAC "refus[es] to extend the licenses to permit negotiations."

Fact: SESAC has negotiated, with more than a dozen cable network groups, license agreements that contain provisions for interim authorization while the parties negotiate renewal contracts. In fact, three such entities presently have chosen that option and are currently operating under their interim authorization based upon contracts that expired in December 2004. Over the last several years, SESAC has provided interim authorization during negotiations with a vast number of music users, including television stations, cable networks, radio station groups, local cable operators, and the NRBMLC. Moreover, SESAC is aware of the unlicensed status of hundreds of AM and FM radio stations, and several dozen commercial television stations. SESAC has not one copyright infringement lawsuit pending against any of these unlicensed stations.

• *Statement:* The TMLC states that, "[i]n 1995, although SESAC was unable to demonstrate any meaningful increase in the use of its repertory, SESAC announced to local television stations a **DOUBLING** of industry-wide blanket license fees effective almost immediately."

Fact: Prior to 1995, SESAC licensed television stations based upon factors such as market size and advertising spot rates. SESAC had developed an adjusted fee schedule effective January 1983. However, pending final resolution of the *Buffalo Broadcasting* rate court lawsuit, SESAC—at the TMLC's urging—chose not to apply its revised fee schedule, and rolled back fees to 1980 levels. The 1983 fee schedule was not implemented until 1985.

In 1994, after nine years of stagnant license fee rates, during which SESAC continued to add to its television repertory, SESAC began to develop a new television fee schedule and a new methodology that was audience- and ratings-driven. SESAC again requested that the TMLC negotiate with it, but the TMLC requested that SESAC forbear until the TMLC's rate court proceeding against ASCAP was concluded. Over a two-year period, SESAC principals and management met with the TMLC requesting that negotiations commence; again, the TMLC requested SESAC's forbearance until negotiations with the other PRO were concluded.

Finally, upon the conclusion of the TMLC's disputes with the other PROs, SESAC informed the TMLC that it wished to negotiate license fees; the TMLC declined. SESAC then informed the TMLC that, unless good faith negotiations were commenced within a reasonable time, SESAC would implement its new fee schedule effective October 1995. On that date, the new fees were introduced to the local television industry which, on an industry-wide basis, effectively doubled the stagnant license fees that SESAC had been receiving without incremental increases since

1985. This represented SESAC's first rate increase in a decade, designed to more accurately reflect the value of its songwriter and music publisher affiliates' music.

In early 1996, the TMLC approached SESAC with a request to enter into industry-wide negotiations; SESAC agreed. SESAC did not bring a single copyright infringement lawsuit against a local television during the period 1985 through the present. In January 1997, negotiations between the parties were finalized, providing for slightly *lower* licensing fees than those implemented by SESAC in October 1995. In short, it was only after SESAC raised its license fee rates that the TMLC commenced negotiations with SESAC.

• *Statement:* The TMLC states that, in 1995, "SESAC required ABC, CBS and NBC to sign separate performance rights agreements covering music in their network programming, which previously had been included in the local station license."

Fact: While SESAC had licensed the three major television networks for many years prior to October 1995, the TMLC did not negotiate on behalf of the networks, only the local television stations. Network programming was explicitly excluded from the final TMLC/SESAC negotiated license agreement, leaving SESAC no alternative but to turn to the networks directly. In 1996, SESAC commenced negotiations with all three networks. All three networks are presently licensed by SESAC. Licenses granted to networks are for the programming they supply to local affiliates and do not cover local or syndicated programming created or bought by those stations, as the TMLC well knows.

• *Statement:* The TMLC states that "most, if not all, of the SESAC affiliates were previously ASCAP or BMI members."

Fact: Less than *10%* of SESAC affiliates were previously affiliated with ASCAP or BMI. The overwhelming majority of SESAC songwriters have never written music that was previously represented by ASCAP or BMI.

• *Statement:* The TMLC states that "SESAC licenses do not . . . offer any . . . meaningful efficiency for consumers"; that "SESAC licenses instead impose a new and unjustifiable cost for music that otherwise would be included within licenses already paid for by local stations [to ASCAP and BMI]"; and that "when SESAC lures a composer from ASCAP or BMI, the ASCAP and BMI rates do not fall commensurately to account for the change."

Fact: Efficiency is in the eye of the beholder. The TMLC has informed SESAC that it has "taken down" ASCAP license fees by as much as $18 million from 2004 to 2005, and that it likewise intends to "take down" BMI license fees, in light of the fact that SESAC is the only PRO whose (admittedly minimal) market share is growing. SESAC, in turn, based upon the growth that the TMLC acknowledges, is seeking a $5 million increase in music use fees. The math indicates that the net result would be lower prices for the TMLC's members; the fee increase sought by SESAC because of its market share growth is far outweighed by the fee reduction already obtained by the TMLC based on the market share contraction of ASCAP. This is yet another example of how an innovative small business, permitted to function efficiently in a market populated by giants, can nevertheless effect benefits for both its songwriter and music publisher affiliates *and* its music customers. If the TMLC is complaining that its members have paid ASCAP and BMI for music licensing rights that belong to SESAC, it should address that matter with ASCAP and SESAC, not Congress. By the same token, if the TMLC believes that the license fees its members pay to ASCAP and BMI are too high in light their shrinking market share, again that would be a matter to discuss with ASCAP and BMI in negotiations or before their respective rate courts. SESAC merely seeks to be paid its fair share, without regard to the TMLC's possible "overpayment" to ASCAP and BMI. In any event, SESAC's gains in affiliate representation have actually benefited some local stations whose programming, purged of any ASCAP or BMI music, can now take advantage of the ASCAP and BMI per-program license fees and thereby obtain considerable savings. The TMLC's members, whose combined revenues are in the tens of billions of dollars, are sophisticated music users who well understand the licensing and affiliation practices of the PROs when they agree to fees in negotiations or rate court proceedings. They should not be heard to complain to Congress after the fact.

• *Statement:* The TMLC states that "[t]he corrosive effect of SESAC's licensing practices is further exacerbated by its inability and/or unwillingness to disclose the identities of all its affiliated composers and publishers and works under license in a comprehensive and timely manner;" and that SESAC has not undertaken comprehensively to identify all of the works that may appear on local television, and without question enjoys the leverage that such lack of full knowledge on the station's part provides" because the stations might "unknowingly broadcast SESAC's music in commercials or unknowingly make incidental or occasional uses of SESAC music in other programming."

Fact: SESAC provides continually updated lists of songwriters, composers, music publishers, and song titles to the public via its website *(www.sesac.com)* and by providing printed lists upon request. In fact, upon the TMLC's request, SESAC provided such a list to permit the TMLC to attempt to obtain direct licenses from copyright owners. (the TMLC was unsuccessful in seeking such direct licenses because its offer was deficient. Indeed, one SESAC composer of music for local news programming, who was approached by the TMLC, later told a TMLC member that the member's stations paid more for paper cups than had been offered for his music.)

As a practical matter, it is impossible for SESAC—or ASCAP and BMI, for that matter—to give an instantaneous list of all of the music titles that it represents, much less a list of television programming in which such music will appear. Music, be it hit songs or television and movie cues, is being created and added to the SESAC repertory continuously. For example, there is no practical method for a PRO to learn in advance that a popular musical artist has been chosen to perform a song in SESAC's repertory on a live late night television talk show or a live morning news/information program. Moreover, SESAC—like ASCAP and BMI—also represents musical compositions in "music libraries," large catalogs of incidental music which are pre-licensed in their entirety for use by various music users, including television program producers, without further need for authorization. Again, SESAC has no method to monitor in advance all of the proposed uses of such music.

It is a fundamental precept of copyright law that the burden to obtain permission to perform a copyrighted composition rests on the music user, not upon the copyright owner in the first instance to announce his or her rights under jeopardy of not being paid. If, for example, a television station accepts advertising money to air a commercial containing SESAC music, it behooves that station to obtain a license in advance to use the music for its profit. As the parties and the courts acknowledge, this is the raison d'etre for blanket licensing. The TMLC's implicit suggestion to the contrary would rewrite decades of clear legal precedent and negate exclusive rights granted under the Copyright Act.

• *Statement:* The TMLC states that "[l]ocal television stations . . . have no alternative to taking a SESAC blanket license."

Fact: If local television stations do not choose the convenient and efficient alternative of entering into a SESAC blanket license, they can either license the music that they use directly from the copyright owner or screen their programming for any music that they conclude is not in the ASCAP or BMI repertory. In many instances, the local television station presumably could contact its related corporate music publisher to obtain such rights directly. In any event, the TMLC's suggestion that the sky is falling is unfounded; *SESAC has never sued a single local television station for copyright infringement.* It is in the business of music licensing, not music litigation.

• *Statement:* The TMLC states that SESAC can "demand supracompetitive rates" because of its ability to "use the hammer of copyright infringement damages to force a fee resolution to SESAC's satisfaction."

Fact: Again, for all of the TMLC's hyperbole, SESAC has never sued a single local television station for copyright infringement, although it is aware of at least dozens of television stations that are not licensed by SESAC. Litigation, which is an extremely expensive and inefficient method of conducting business, is not the general policy of SESAC, which believes in the efficiency of marketplace negotiations with its potential customers. The TMLC's constant drum beat concerning SESAC's purported "supracompetitive license fees" is baffling in light of the fact that the current fees were negotiated at arms' length by this sophisticated group of highly profitable companies in the midst of arbitration with SESAC, without any threat of a lawsuit. SESAC has every right to seek on behalf of its songwriters and music publishers whatever fees the marketplace will bear, and the TMLC's members presumably would not pay such fees to use SESAC music if it was not profitable for them.

• *Statement:* The TMLC states: "What makes SESAC so difficult to contend with" is that it "brazenly exploits the aggregated power of the copyright rights held by its composer—affiliates free of any third-party arbiter, such as a rate court or arbitration forum, to place a check on its license rates."

Fact: Again, the TMLC's shrill complaint sounds like an indictment of the American free enterprise system. SESAC readily acknowledges that it desires fair compensation for the copyrights of its affiliated songwriters and music publishers; SESAC is in the business of maximizing the value of their copyrights, and has an obligation to its affiliates to do so. SESAC is proud that it has vigorously and for 75 years honorably represented its composers and music publishers without the need for sanctions or regulation. In America's vibrant economy, the presence of a third-part arbiter such as a rate court to "place a check" on marketplace pricing is the exception, not the rule. The TMLC appears to be advocating some sort of regu-

lated economy for all musical rights (but presumably not for its own members' tens of billions of dollars in unregulated advertising revenues) under which the absence of governmental price regulation is considered a "loophole." This viewpoint has been discredited worldwide in recent decades.

• *Statement:* The TMLC states that SESAC "[r]efuse[s] to afford alternative dispute resolution mechanisms that can be invoked by either party in the event of a negotiating impasse."

Fact: SESAC has already agreed to include such a provision prospectively in the new TMLC license currently being negotiated. Previously, SESAC did not refuse to afford such a provision; the TMLC, with all of its negotiating acumen, did not request it for its members. The unilateral right to arbitrate was a hold-over provision from the 1996 TMLC/SESAC negotiation, to which the TMLC agreed. When the TMLC ultimately sought mutual arbitration rights in 2005, SESAC immediately agreed. Significantly, however, the provision of mutual arbitration rights was one that was agreed to by SESAC during arms' length, marketplace negotiations between the parties and not, as the TMLC would have it, imposed upon SESAC by the government. This again provides clear evidence that, as to SESAC, the marketplace is working properly.

• *Statement:* The TMLC states that SESAC "[o]btain[ed] exclusive license authority from key radio and television composers, creating enormous hold-up potential in its licensing negotiations."

Fact: When asked directly at the March 11 hearing whether SESAC affiliates have the legal right to license directly, the TMLC appeared unable, despite its written testimony, to provide a clear response. In fact, as a matter of course, SESAC obtains non-exclusive rights from its affiliated composers and music publishers and permits direct licensing by them. Several of SESAC's most noted songwriter and music publisher affiliates have issued and continue to have the ability to do so.

• *Statement:* The TMLC states that SESAC "[r]efuse[s] to bargain over alternative forms to the single-price blanket license, whether in the form of a meaningful per-program license, a blanket carve-out license or the like."

Fact: SESAC routinely issues many forms of negotiated custom licenses to meet the unique needs of its customers. It has done so in the restaurant industry, the airline industry, the health club industry, the retail industry, the hotel industry, the background/foreground music industry, the jukebox industry, the theme park industry, the racing industry, the sports industry, the health care industry, and others. Moreover, all of SESAC's major Internet accounts have custom licenses negotiated between the music user and SESAC without governmental intervention, to deliver only the particular rights needed by the music user at a price arrived at through negotiation.

Finally, it is curious that throughout the TMLC's diatribe, it continually suggests that its proposed regulations apply not only to SESAC, but to any other PROs not operating under a consent decree. As the Copyright Act acknowledges, there are only three such entities in the United States: ASCAP, BMI, and SESAC. There has not been a new PRO formed in the United States in over 65 years and, given the significant barriers to entry and the difficult environment of the music performing rights marketplace, there is no indication that any new PRO will be formed in the foreseeable future in the United States. This begs the question: "Why does the TMLC go to such lengths to suggest that it is not attempting to single out SESAC here, but instead is seeking legislation that will govern any future PROs?" Perhaps the TMLC is somewhat shy about asking Congress to enact what could be viewed as an unconstitutional bill of attainder, seeking legislation that singles out SESAC and imposes punishment for legal activity without benefit of trial. The TMLC's target here is not all theoretical PROs that may someday exist; it is SESAC, with whom it concurrently happens to be engaged in spirited negotiations in which SESAC has already voluntarily chosen the independent third-party dispute resolution that the TMLC claims is not available. Congress should not accede to such requests from a group whose combined revenues are in the tens of billions of dollars and who aggregate the bargaining power of 1,200 local television stations against one small American business contending with giants on all sides. The TMLC's sole objective is to reduce the cost of music licensing so that its members can increase their already prodigious profit margins at the expense of American songwriters and music publishers.

SESAC is proud of its role in the American music industry, proud of the innovations and efficiencies that it has brought to the performing rights marketplace, and proud of the service that it provides to both its songwriter and music publisher affiliates as well as its music customers. SESAC epitomizes a success small American business that competes in a marketplace dominated by giants, and its business model should be fostered.

I have been working since the age of 16. Whether delivering groceries, working as a waiter throughout my college years, or running a PRO, I have always been in the business of buying or selling goods or services. I know one thing for certain: in the marketplace, the seller usually wishes he had gotten more for his wares and the buyer usually wishes he had paid less. That is the marketplace. Absent undue market share, leverage, and improper conduct (as has been the case with ASCAP and BMI), there is no need for a judicial or quasi-judicial apparatus to second guess arms' length agreements made by sophisticated parties.

Again, SESAC appreciates having been given the opportunity to explain to this Subcommittee what SESAC is, what it does, how it competes in the marketplace and why it should not be subjected to governmental regulation at the behest of one of its giant competitors and giant all-industry negotiating committees. Thank you.

Television Licensees Are Enjoying Robust Financial Health

Summary of Financials for Major Broadcast Station Owners

	FY '01	FY '02	FY '03	FY '01 to '03 Growth
Broadcasting Revenues				
Tribune	$1,130	$1,222	$1,323	17.1%
Gannett	$663	$771	$720	8.6%
Washington Post	$314	$344	$315	0.4%
Sinclair	$624	$671	$662	6.1%
Hearst Argyle	$642	$721	$687	7.0%
Meredith Corp.	$270	$255	$272	0.7%
Aggregate	$3,643	$3,983	$3,979	9.2%
Broadcasting Operating Expenses				
Tribune	$818	$769	$816	-0.2%
Gannett	$413	$400	$390	-5.6%
Washington Post	$182	$175	$175	-3.7%
Sinclair	$529	$425	$415	-21.5%
Hearst Argyle	$526	$456	$468	-11.1%
Meredith Corp.	$236	$234	$208	-11.6%
Aggregate	$2,704	$2,459	$2,472	-8.6%
Broadcasting Operating Profit				
Tribune	$312	$453	$507	62.5%
Gannett	$250	$371	$330	32.1%
Washington Post	$132	$169	$140	6.0%
Sinclair	$95	$245	$247	159.6%
Hearst Argyle	$115	$266	$219	89.5%
Meredith Corp.	$35	$20	$64	84.1%
Aggregate	$939	$1,524	$1,506	60.4%

Note: All figures are in $ millions. Data for Tribune is before restructuring charges. Fiscal years end Dec, except Meredith Corp fiscal year ends June.

Source: Company financial reports

ATTACHMENT

Broadcasting Operating Margins Increased Significantly From 2001 Through 2003

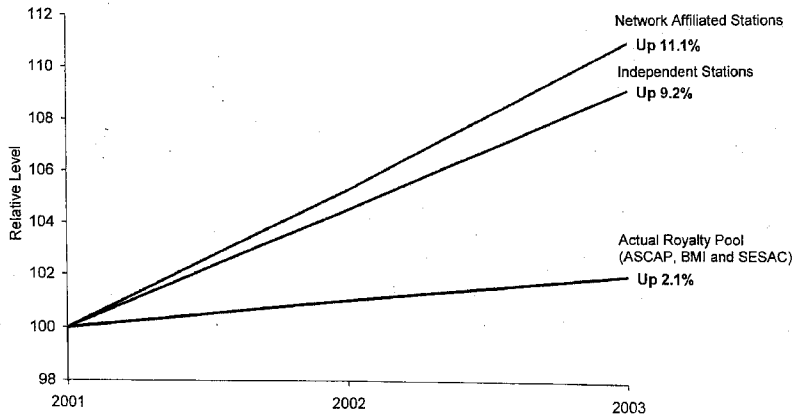
	FY '01	FY '02	FY '03
Tribune	28%	37%	38%
Gannett	38%	48%	46%
Washington Post	42%	49%	44%
Sinclair	15%	37%	37%
Hearst Argyle	18%	37%	32%
Meredith Corp.	13%	8%	23%
Aggregate	26%	38%	38%

Note: Data for Tribune is before restructuring charges. Margins are on operating basis for broadcasting segments only. Fiscal years end Dec, except Meredith Corp fiscal year ends June.

Source: Company financial reports

Music Rights Costs Have Not Kept Pace With Other Broadcast Syndication Expenses

Program Rights Costs Versus Royalties Paid to PRO's, Growth 2001 - 2003



Source: Kagan, Economics of TV Programming & Syndication 2004

SUPPLEMENTAL STATEMENT OF JONATHAN RICH ON BEHALF OF ASCAP (MAY 12, 2005)

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May 12, 2005

Hon. Lamar S. Smith
Chairman
Subcommittee on Courts, the Internet, and Intellectual Property
B-352 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

On behalf of ASCAP, thank you for giving us the opportunity to address the Subcommittee at yesterday's hearing.

Had time permitted, I would have asked for an opportunity to respond briefly to an incorrect statement Mr. Swid made shortly before adjournment and to address the dispute regarding whether SESAC obtains exclusive rights from its members.

With respect to the first point, Mr. Swid said that the ASCAP rate court provisions in the consent decrees are "penalties." That is simply not true.

The rate court provision dates back to the 1950 Amended Final Judgment in *United States v. ASCAP*. The Department of Justice, ASCAP, and music users all have been satisfied that the rate court is a necessary adjunct to the requirement in the 1950 Decree that ASCAP must grant a license to users upon request (so that they would not otherwise be infringers). The Decree could not have functioned without a mechanism to set the price of that mandatory license in those cases where ASCAP and the users were unable to reach an agreement on an appropriate license fee. The drafters of the Decree followed an existing model that was prevalent in other decrees relating to intellectual property, namely, third party patent royalty rate determination. Because it had generally worked well, this provision was carried forward in the 2001 Second Amended Final Judgment with the support of both ASCAP and the Department.

The ASCAP consent decree explicitly states that it was entered "without trial or adjudication of any issue of law or fact" and "without admission by [ASCAP] with respect to any

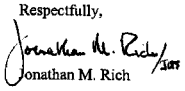
such issue." Recognizing that such decrees are the product of compromise and not evidence of wrongdoing, the Clayton Act exempts consent decrees from the usual rule that a final judgment in a government antitrust case is prima facie evidence against the defendant in any later private action. 15 U.S.C. § 16(a). And the U.S. Supreme Court has recognized that consent decree provisions "normally embod[y] a compromise" and therefore "cannot be said to have a purpose." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

On a separate point, several questions yesterday addressed the issue of SESAC's exclusivity. This discussion highlighted SESAC's lack of transparency. There is no room for debate that the rights ASCAP obtains from its writer and publisher members and grants to its licensees are non-exclusive. ASCAP's uniform membership agreement, as well as the full text of the consent decree, ASCAP's distribution rules, and other governing documents, are on the ASCAP website for all to see, and are explicit on the point. SESAC has no comparable transparency, and it keeps the terms of its agreements with its writer and publisher affiliates secret.

We understand that the record of the hearing will remain open for a short period so that interested parties may respond more fully to the written testimony of all of the witnesses, and we expect to do so.

Thank you again for all of your kind attention.

Respectfully,



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SUPPLEMENTAL STATEMENT OF JONATHAN RICH ON BEHALF OF ASCAP (MAY 17, 2005)

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May 17, 2005

Hon. Lamar S. Smith
Chairman
Subcommittee on Courts, the Internet, and Intellectual Property
B-352 Rayburn House Office Building
Washington, DC 20515

Hon. Howard L. Berman
Ranking Member
Subcommittee on Courts, the Internet, and Intellectual Property
B-352 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman and Mr. Berman:

ASCAP appreciates the opportunity to testify before the Subcommittee with respect to oversight of Performing Rights Organizations. ASCAP's formal written testimony outlines our position on the current functioning of the ASCAP consent decree ("AFJ2") and SESAC's unregulated position in the marketplace. ASCAP would like to take this opportunity to submit these corrections for the hearing record with respect to certain misstatements made in the written and oral testimony of the other witnesses.

As noted in our written testimony, ASCAP's over 210,000 songwriter, composer, and publisher members represent the entire range of American musical creativity, in every genre and type. The ASCAP model has proven to be an efficient, workable model for all involved in the music licensing industry. Music users and others in the industry have repeatedly praised the ASCAP system. Marybeth Peters, the Register of Copyrights, testified before this Subcommittee that ASCAP provides a "very successful model" for the collective administration of public performance rights.[1] Similarly, DiMA testified that ASCAP provides "comprehensive blanket-

[1] Statement of Marybeth Peters, Subcommittee on Courts, the Internet, and Intellectual Property, March 11, 2004.

license solutions to songwriters, music publishers and licensees" that "work well for clearing large volumes of rights and royalties."[2] Both creators and users of music agree that the ASCAP model works well.

The ASCAP model is built on a number of core principles. The foremost of these is transparency. Any songwriter or publisher can view ASCAP's uniform membership agreement and distribution rules on the ASCAP website. And anyone can search the extensive ASCAP database to determine whether a work that they are planning to use is in the ASCAP repertory and to identify the writer and publisher members-in-interest.

Unfortunately, many of the statements in SESAC's written testimony about ASCAP are untrue.

- Latin Music: ASCAP, not SESAC, is the champion of Latin music. In 2004, of the 10 hottest Latin tracks according to *Billboard*, 7 were licensed by ASCAP, 3 by BMI, and none by SESAC. From our Latin Music Awards to our music education efforts, ASCAP has been at the forefront of recognizing and encouraging the contributions and talent of Latin music songwriters.

- Licenses in Effect: Unlike SESAC, which ties up its affiliates for a number of years, ASCAP writers and publishers are free to resign from ASCAP membership annually. If they do resign, their works remain in the ASCAP repertory for each user until the license in effect for that particular user expires. That rule protects ASCAP's licensees' rights. When each licensee enters into an ASCAP license, it bargains for at least a specific repertory, which would be enlarged (through new works written by members) but not diminished over the course of the license term. Thus, the licensee is entitled to have the repertory it bargained for, until its license expires.

- Payments to Departing Members: ASCAP pays all members, including resigned members, on the same cash basis. Every ASCAP member, including resigned members, gets his or her share of the license fees received by ASCAP during the period of membership. Resigned members whose works remain in the ASCAP repertory continue to receive the same payments they would have received if they had remained members, on the same basis and under the same distribution rules as continuing members.

- "Free" Licenses for Digital Broadcasts: ASCAP's most recent agreements with the television and radio broadcasters included specified license fees covering specified uses.

[2] Testimony of Jonathan Potter, Executive Director, Digital Media Association, Subcommittee on Courts, the Internet, and Intellectual Property, March 8, 2005.

Within those specified uses were certain digital broadcasts. Those uses are therefore not "free" and the license fees are certainly not "predatory."

- Enticements to New Members: ASCAP competes fiercely to retain its members and to attract new members in order to keep its repertory strong. Fundamentally, SESAC's complaints about ASCAP are complaints that it does not want its competitors to compete on the same terms. As the Department of Justice noted when SESAC raised this point at the time the court entered AFJ2:

  > SESAC's complaint that ASCAP will be able to "lock up the writers who are currently in the highest demand" (SESAC Comments at 2) is in fact a request that ASCAP not be permitted to bid to keep those high-demand writers. Matching or even beating competitive offers is not "locking up" anything, nor is it "[e]recting . . . barriers;" it is *competition*. The AFJ2 is intended to foster such competition between rival PROs.[2]

  Ironically, unlike ASCAP, which opens membership to all and which has fully transparent distribution rules, SESAC (according to its own website) "utilizes a selective process when affiliating songwriters and publishers" and, we understand, resorts to payments from its capital to attract new affiliates.

- Database Information: ASCAP is required by AFJ2 to maintain a huge and comprehensive public database of information on its membership and repertory. If a few mistakes creep in – an inevitability when the database contains information on millions and millions of musical works – ASCAP corrects those mistakes when they are found. Moreover, AFJ2 prohibits ASCAP from threatening or filing an infringement suit against a user for any work that is not listed in the database, which provides a powerful incentive for ASCAP to maintain its repertory database as complete, accurate, and up-to-date as possible.

- Cue Sheet Database: SESAC claims that ASCAP and BMI have excluded SESAC from use of an electronic database of cue sheet information. The fact is that ASCAP and BMI have invested millions of dollars in that database and SESAC wants to "free ride" on that investment. The TMLC makes a similar complaint, but it is equally groundless.

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[2] Memorandum of the United States in Response to Public Comments on the Joint Motion to Enter the Second Amended Final Judgment, *United States v. ASCAP*, No. 41-1395 (S.D.N.Y. filed March 16, 2001).

Broadcasters have direct contractual relations with the suppliers of their programming and can request cue sheets from them if they so choose.

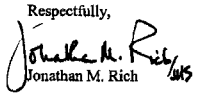
* * *

We also wish to comment on a few points in the TMLC's written testimony (our silence on other points does not indicate assent – it merely indicates our experience that those who have to pay for intellectual property will always seek to argue for lower fees). The TMLC claimed that a recent decision of the United States District Court for the Southern District of New York interpreting AFJ2 required "credits" to blanket license fees for "direct licensing initiatives." What the Court said was that, in setting a reasonable blanket license fee for a future period, the Court would take into account any direct licenses existing *at the time* the fee was set. The Court also explicitly said that it did not "contemplate a blanket license fee mechanism that provides credits or discounts for direct licensing arrangements that [users] may enter into during the term of the license."[4]

Finally, the TMLC's complaint that copyright holders are reluctant to issue direct licenses is not supported by the facts. More than four hundred television stations currently license music directly from ASCAP members and hold ASCAP per program licenses. Any instances in which copyright holders have decided not to issue direct licenses stem not from ASCAP's licensing practices, but rather from a decision by the copyright owner that it would prefer ASCAP to handle the licensing. In short, that is a result of competition and of a healthy marketplace.

Thank you again for the opportunity to present the facts and ASCAP's views.

Respectfully,



Jonathan M. Rich

[4] *United States v. ASCAP*, 323 F. Supp. 2d 588, 592-93 (S.D.N.Y. 2004).

ADDITIONAL TESTIMONY OF THE TELEVISION MUSIC LICENSE COMMITTEE (TMLC)

SYNDICATION CONTRACT PROVISIONS

After my testimony before the subcommittee on May 11, 2005, Rep. Wexler asked for further clarification regarding my statement that television stations cannot eliminate or change the music in syndicated programming. I offer the following information in response to his inquiry.

In order to broadcast syndicated programs, television stations obtain individual licenses from syndicators. Included in all those licenses, in some form or another, is a standard provision that requires the television station to broadcast the program in its entirety without any changes. For instance, under the heading "EXHIBITION REQUIREMENTS" in a license currently in effect between a local station and one of the largest syndicators, the agreement provides, "Licensee agrees to run the Programs licensed hereunder as delivered without any alterations . . ." If Licensee breaches this provision, the syndicator is entitled, among other remedies, to seek to collect any remaining fees due under the license agreement and to seek injunctive relief.

In another syndicated contract between a local television station and a syndicator, the language states, "Licensee agrees that, unless otherwise specified, it shall telecast each Program licensed hereunder in its entirety, without deletion of Program content . . . or addition to Program content . . ." Station network affiliation agreements include similar language. One network provision includes the following language, "Licensee agrees to broadcast . . . all (Network) programs in their entirety . . . without interruption, deletion, addition, squeezing, alteration or other changes . . ." This kind of language is included in these agreements in order to protect the creative integrity of the program taken as a whole, which is a separate creative unit and is separately copyrighted.

In addition to these contractual provisions, the programs are delivered in a format that would make it virtually impossible to physically delete the music from a program without also deleting the dialogue and other sound included in the program's soundtrack (Laugh track, sound effects, foreign-language translation if carried in the signal).

PREPARED STATEMENT OF KEITH F. MEEHAN, EXECUTIVE DIRECTOR, RADIO MUSIC LICENSE COMMITTEE (RMLC)

KEITH F. MEEHAN
executive director

Written Testimony of the Radio Music License Committee
On Oversight of the Public Performance Rights Organizations

For the Subcommittee on Courts, the Internet and Intellectual Property Committee on the Judiciary, U.S. House of Representatives

May 19, 2005

The Radio Music License Committee ("RMLC") directly represents more than 5,200 local commercial radio stations and indirectly represents the interests of virtually all local commercial radio stations in the United States (other than most religious broadcasters) in negotiating music performance licenses with ASCAP and BMI. The RMLC is comprised of volunteers from radio stations and station groups from throughout the United States, and includes representatives from large and small markets. The radio stations represented by the RMLC transmit over either the AM or FM bands, and run the gamut of music formats (such as "Country," "Top-40," "Classic Rock," "Adult Contemporary," "Oldies," and "Latin Music") and non-music formats (such as "Sports," "News" and "Talk").

The RMLC has reviewed, and supports the testimony submitted by Willard Hoyt, Executive Director of the Television Music License Committee. We offer this testimony to highlight some of the specific concerns of the radio industry regarding issues involving the performing rights organizations (PROs).

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web: www.radiomlc.com e-mail: keith@radiomlc.com or radiomlc@aol.com

ASCAP and BMI

For more than six decades, the Antitrust Consent Decrees that govern the licensing practices of ASCAP and BMI have offered important protections to radio stations in their dealings with these PROs. Among the most important of these protections have been: the requirement that ASCAP and BMI only obtain the rights to license their affiliates' works on a non-exclusive basis (leaving their affiliates free to license their works directly to music users); the obligation of these PROs to offer radio stations alternative forms of licenses to the "one size fits all" blanket license (for which the fees remain the same regardless of how much or little of the PRO's music the station uses); and (for ASCAP since 1950 and for BMI since 1994) the availability of an independent "rate court" to establish reasonable license fees in the event of a negotiating impasse between the parties (as well as related interim fee provisions).

Despite those protections, the radio industry has faced and still faces a number of challenges in dealing with ASCAP and BMI. One of the most significant challenges arises from the fact that the Consent Decrees governing ASCAP and BMI do not provide for the same Rate Court as a resort if negotiations are not successful. The absence of a single forum for determining reasonable license fees enables the PROs to engage in what we refer to as "leapfrogging." Each time a license is due to expire and/or a rate proceeding is threatened or initiated, ASCAP and BMI point to the other organization's license agreement and use it as a "benchmark" below which neither organization is willing to negotiate. Complicating this issue further is the fact that each PRO employs a different methodology to measure music use. The absence of a single court of last resort means (i) there is no one accepted accurate methodology for

measuring absolute and relative music use, and (ii) there is no mechanism to lower one PRO's fees when the other's goes up. The result is a tendency to ever-increasing fees. (The leapfrogging problem was most acute prior to 1994, when BMI used its ability to withhold licenses from radio stations and the threat of copyright infringement to force stations to accept fee increases but has persisted even with a BMI rate court because BMI insisted that a different judge from that assigned to ASCAP be assigned to BMI rate proceedings.) A single rate court covering all PRO's would provide a mechanism to adjust both ASCAP and BMI fees when the relative music use as between them changes (and would eliminate the need for users to duplicate costs through the commencement of multiple rate proceedings). At a minimum a common methodology by which to measure music use would serve to alleviate some of these concerns.

SESAC

One of the major music licensing issues facing the radio industry today is SESAC. Unlike ASCAP and BMI which, though far from perfect, are subject to Consent Decrees that provide certain protections to music users, SESAC is unconstrained in any way and takes full advantage of its combined copyright rights in ways that are coercive and unfair. The "SESAC scheme," which is intended to make a profit for its owners,[1] traps radio stations into performing SESAC music (sometimes unknowingly), and forces them to pay supra-competitive licensing fees for blanket licenses under the threat of the imposition of copyright infringement penalties. The effects created by the SESAC

[1] Both ASCAP and BMI are not-for-profit organizations.

scheme have worsened as there is no ready marketplace solution available to radio stations, and no prospect for any improvement.

As a result of SESAC's practices, by 2008, the fees charged to the radio industry by SESAC will have increased roughly ten-fold from 1995. After unilaterally raising fees payable by the radio industry by over one hundred percent in 1995, SESAC approached the Radio Music License Committee in or about 1997 seeking to negotiate yet another 100% fee increase over the following 5 years. Believing that the blanket license fees SESAC was seeking were unreasonable, the RMLC proposed setting blanket license fees in proportion to SESAC's share of music use by radio stations, to be determined through a joint music use study conducted by SESAC and the RMLC. (Under this proposal, if, for example, SESAC were determined to have five percent of feature music performances in the radio industry, its fees would be set at a figure equal to five percent of the aggregate fees of the industry for ASCAP, BMI and SESAC combined.) SESAC rejected this proposal. SESAC also rejected proposals for alternatives to the blanket license, including proposals for a per program license and a "commercial only" license. (For many radio stations, virtually the only SESAC music used is in commercials or other incidental uses rather than feature music.) When it became apparent that SESAC hoped to achieve for itself the benefits and efficiencies of an industry-wide license with no corresponding benefits to the radio industry, the RMLC terminated discussions. SESAC then promptly demanded that radio stations sign new licenses containing essentially the same operative terms and 100% fee increases that the RMLC had initially rejected, and refused to consider any changes to its form of license or the fees it was seeking. With no assurances that they could remove all SESAC music

from their broadcasts (especially commercials) and facing the threat of copyright infringement suits and potential willful infringement damages, stations had no choice but to sign the new licenses. When these agreements expired, SESAC imposed yet another 125% fee increase on the radio industry, using the same tactics it had used in the past (such as offering no evidence justifying dramatic fee increases, refusing to negotiate with stations over the level of fees payable under SESAC's rate card, refusing to offer any alternative forms of license such as a meaningful per program license, and making clear that SESAC would bring infringement cases against stations that were found to perform any SESAC music and who had failed to sign the license offered by SESAC).

SESAC is able to trap radio stations into unfair and anticompetitive licenses like these through a variety of tactics.

Targeting Composers and Entering into Exclusive Arrangements

SESAC attracts a sufficient number of composers whose music is hard or impossible to avoid into its licensing programs – so as to make it exceedingly difficult, if not impossible, for users to eliminate SESAC music and thus the need for a SESAC license – and locks those selected composers up legally and/or economically such that users (or those who supply their programming) lack the ability to deal around SESAC by entering into direct or "source" licensing arrangements with such composers. Whether taking the form of explicit grants of exclusive rights from key composers, or the crafting of economic terms bringing about the very same result, such as economic penalties or disincentives triggered by any direct or source licensing activities by the composer, the net effect is to tie up the composer. These terms include requirements that: (i) SESAC be designated as the composer's representative in any such direct or source license

negotiations; (ii) all source and direct license fees must be assigned by the affiliate to SESAC; and/or (iii) the price for such licensing be no less than SESAC would charge the user for the same rights. By tying up composers in such exclusive arrangements, SESAC effectively has eliminated the legal ability and/or economic incentive of key SESAC affiliates to enter into direct or source license arrangements. (In the 1940s, very similar de facto exclusive licensing provisions in ASCAP's member affiliation agreements were struck down as unreasonable restraints of trade, M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948), appeal dismissed, 177 F.2d 515 (8th Cir. 1949), and ASCAP's decree was subsequently amended to prevent ASCAP from entering into these types of de facto restrictions.) Although SESAC maintains that it does not have exclusive licensing relationships with its affiliates, we believe an examination of SESAC affiliation agreements will show, at a minimum, numerous de facto restrictions like those discussed above.

Refusing to Offer a Meaningful Per Program License

The license lock that SESAC has secured over radio broadcasters is strengthened and facilitated by SESAC's refusal to offer users a meaningful per program or other alternative to the blanket license. A practically available per program license would permit users to reduce fees if the user is able to clear rights to perform some of the music it uses through direct and source license transactions, or to eliminate or substitute the organization's music with other music (while providing the user with protection from copyright infringement if the user is unable to clear the rights to perform all of its music). A practically available per program license would also allow stations who play little or no SESAC music other than in commercials or other incidental uses to pay for the music

they actually use on a more equitable basis. The absence of any requirement that SESAC offer a realistically usable per program or similar license contributes to the imperative to obtain a SESAC blanket license, and facilitates SESAC's ability to charge supra-competitive rates for its blanket licenses.

To underscore the interlocking nature of the restraints with which SESAC users are forced to contend, even were SESAC to afford users a viable form of license the fees for which are calculated based upon the user's actual use of SESAC music, so long as SESAC were permitted to enter into exclusive licensing arrangements with key composers, the intended pro-competitive benefits of such alternate license forms would be diminished.

Hide the Ball Tactics

The coercive effect of SESAC's licensing practices is further enhanced by SESAC's refusal comprehensively and timely to disclose the identity of its affiliated composers and publishers and works under license. ASCAP is required under its consent decree to make available a public list containing the title, date of copyright, writer and publisher of all works in its repertory, and is barred from bringing an infringement action as to works not listed. SESAC is under no such obligations, and takes full advantage of this fact. As a result, music users have no comprehensive, reasonably up-to-date way of knowing whether the music they perform is licensed by SESAC (finding out after one has played the music is too late to avoid infringement). This lack of information contributes to the impossibility of eliminating SESAC music from programming and works in combination with the other elements of SESAC's licensing scheme to force reliance on a

SESAC blanket license at the risk of being sued for copyright infringement for failing to obtain one.

The "moving target" nature of the works comprising the SESAC repertory has especially pernicious consequences. Even assuming what we know is not true, i.e., that there was "perfect" information about SESAC's repertory, that SESAC did not place limitations on its affiliates' direct licensing, and that music users had absolute control over the music selected and embedded in the programming they transmit, music users still would be at risk of copyright infringement whenever SESAC lured away an ASCAP or BMI composer. In the absence of an automatic licensing mechanism, even were a user to undertake painstaking efforts to avoid use of the SESAC repertory, it would still be exposed to potentially millions of dollars in willful copyright infringement damages if music formerly covered by an ASCAP or BMI license suddenly became available only through SESAC. This is not a burden music users should be forced to carry.

Setting Fees Without Regard to Any Standard of Reasonableness and Threatening Copyright Infringement Suits

As demonstrated above in connection with the ten fold increase in fees SESAC has unilaterally imposed upon the radio industry, SESAC has taken full advantage of the fact that, unlike ASCAP and BMI, it is not required to offer licenses on request, and is not subject to a judicial mechanism (or any mechanism for that matter) for establishing a reasonable fee if the user and SESAC are unable to agree upon license fees and terms. SESAC's modus operandi routinely includes license brinksmanship – demands that negotiations conclude on SESAC's terms by a date certain, failing which the user – or in some cases an entire industry of users – will become unlicensed, with the

consequence that the user will be at risk for an infringement suit and potentially liable for substantial statutory damages. The impact of this weapon upon even large and sophisticated users' willingness to accede to unreasonable license terms should not be underestimated. The ability – and demonstrated willingness – of SESAC to point the copyright infringement gun at the heads of users, and then to pull the trigger, has enabled SESAC to extract license fees that are much higher than the fees that would prevail in a competitive market. To underscore the risks associated with refusing to take a SESAC license, in August 1998, SESAC commenced a copyright infringement action against a radio broadcaster in Pittsburgh in which SESAC sought, and was ultimately awarded, willful infringement damages dozens of times higher than the blanket license fees SESAC had requested from the station. See SESAC, Inc. v. WPNT, Inc., (W.D. Pa. 2003) (denying defendants' motion for a new trial).

In summary, by:

- eliminating and suppressing price competition between and among SESAC affiliates in the licensing of performing rights in copyrighted musical compositions;
- establishing and maintaining non-competitive price structures for performing rights;
- depriving users of the benefits of free competition in the determination of prices, royalty rates and fees for performing rights in copyrighted musical compositions;
- denying users the opportunity to license one or several SESAC compositions on any basis other than through a blanket license covering all the copyrighted musical compositions in SESAC's repertory;
- denying users the opportunity to license one or several SESAC compositions on any basis other than one which requires them to forgo a free choice in licensing performing rights in copyrighted musical compositions, and one which compels users to accept and pay for performing rights that they neither use nor want in order to obtain the performing rights they desire;

- denying users the opportunity to license one or several SESAC compositions on any basis other than one which requires it to pay an artificially high, discriminatory, and arbitrarily determined fee that bears no relation to the extent to which or the manner and nature in which music is actually used, or the amount or quality of music actually performed; and
- forcing users to pay excessive license royalties that they otherwise would not have paid or become indebted for in the absence of SESAC's conduct,

SESAC has eliminated any possibility of meaningful choice to music users seeking to license such music. We thus believe that there is a compelling case for Congress to act on this issue. SESAC should be subject to the same rules and SESAC users should have the same protections that apply to ASCAP and BMI.

Respectfully submitted,
Radio Music License Committee

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PREPARED STATEMENT OF RUSSELL R. HAUTH, EXECUTIVE DIRECTOR OF THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE (NRBMLC)

Mr. Chairman and distinguished members of the Subcommittee, the National Religious Broadcasters Music License Committee (NRBMLC) appreciates the opportunity to submit this written statement to the record of your oversight hearing on music performing rights organizations in the United States.

I am the Executive Director of the NRBMLC. The NRBMLC is a standing committee established under the auspices of the National Religious Broadcasters to represent the interests of religious, classical and other specialty format local radio stations that use relatively limited amounts of copyrighted music in their broadcast programming and that do not fit neatly into the all-talk or all-music categories that characterize mainstream radio. The ASCAP Rate Court determined in 1996 that the stations represented by the NRBMLC are not "similarly situated" with those represented by the mainstream Radio Music License Committee. The special character of the stations represented by the NRBMLC has since been recognized by all of the music performing rights organizations.

I submit this statement today to express the Committee's serious concerns about SESAC and its abuse of the market power it has gathered by aggregating and fixing the prices for many thousands of copyrighted works free from any oversight or regulation. The experience of the NRBMLC over the past ten years confirms and highlights many of the issues raised by Willard Hoyt of the Television Music License Committee when he testified before the Subcommittee on May 11. Specifically, the NRBMLC has learned through experience that:

- SESAC functions as a seller with which all radio stations must deal. It thus exercises true monopoly power. Contrary to Mr. Swid's statements before the Subcommittee, it is effectively impossible for a radio station to eliminate all SESAC music from its broadcasts.
- The absence of any neutral third-party fee-setting mechanism and SESAC's use of the threat of infringement liability as leverage permits it to extract supracompetitive fees from radio stations. SESAC's license fees are far in excess of the relative value of its repertory in relation to ASCAP and BMI, both of which are subject to rate court supervision that moderates but does not completely eliminate their market power.
- Contrary to the suggestion of Mr. Swid in his testimony before the Subcommittee, SESAC does not offer most licensees the ability to arbitrate license fees. In fact, the NRBMLC has requested fee arbitration with SESAC and has been flatly refused.
- When SESAC imposed its most recent unilateral fee increases, SESAC refused even to negotiate with the NRBMLC.
- SESAC has repeatedly refused to offer NRBMLC stations a license with a fee that varies depending on the amount of SESAC music actually performed. Thus, a station other than one that meets SESAC's definition of "all talk" and that performs any SESAC music at all (whether in commercials, as background, in syndicated programs or otherwise) must pay at least 55% of SESAC's full blanket license fee applicable to all-music radio stations, even if it only uses SESAC music incidentally or sporadically.

SESAC functions as a monopolist. It abuses rights granted under the Copyright Act to force music users to purchase licenses at prices far in excess of the value that would exist in a competitive marketplace. Negotiations have not worked. Most recently, negotiations have been refused. The Department of Justice has not acted to curb these abuses and to regulate SESAC in the manner that the other music performing rights organizations are regulated. Under these circumstances, the NRBMLC asks Congress to act, to create a reasonable and useable third party mechanism to determine license fees charged by music performing rights organizations that are not otherwise subject to a rate court mechanism. I present a fuller proposal in Part III, below.

I. BACKGROUND-SESAC AND MUSIC PERFORMANCE RIGHTS

The testimony of other witnesses submitted in this hearing describes the workings of the three music performing rights organizations and how ASCAP and BMI control between 90 and 95% of the copyrighted music performed on radio in the United States. Both ASCAP and BMI are subject to antitrust consent decrees designed to protect music users. Those decrees establish certain minimum standards for the operation of a collective music performing rights organization, including: (i) a neutral third party to determine license fees and terms; (ii) a procedure that allows music

users to be licensed on an interim basis subject to later determination of reasonable fees; (iii) reasonable discovery to permit music users to obtain information necessary to establish their case for reasonable fees; (iv) prohibition on the securing of exclusive rights; and (v) the requirement to offer licenses with fees that vary according to the amount of the collective's music that is actually performed and that offer a genuine economic alternative to the flat-fee blanket license, in order to permit the development of a competitive market for direct licenses and licenses from other organizations. These safeguards do not wholly eliminate the ASCAP's and BMI's market power, but they do provide some control over it.

SESAC, although it controls a very small fraction of the nation's music, has the same monopoly power in its dealings with music users. Although the exact totals are not known, SESAC is believed to control many thousands of copyrighted compositions, including, notably, many jingles used in commercial announcements.

Contrary to the testimony offered by SESAC, it is not reasonably possible for a radio station to eliminate all SESAC music from its broadcasts. First, reliable and efficient information systems do not exist that would permit licensees to identify SESAC music in any economically reasonable way. Second, much music played on the radio is beyond the control of the radio station. For example, radio stations cannot control what is performed at live events the station is broadcasting. Further, the advertiser, not the radio station, typically selects the music in a commercial announcement. The only way to eliminate the music is to forego the ad entirely, which obviously represents revenue to the station far greater than the value of the jingle used in the commercial. Similarly, many of the religious stations represented by the NRBMLC sell "block program time" to third parties, who use the time to air programs that present their message to the public. Again, the station cannot control the choice of background and other music in such programs, and the station's only choice is to forego that program entirely, and to forego revenue far in excess of the value of any SESAC music that might happen to be in the program. In other words, SESAC is able to exploit the existing market structures, the lack of options available to radio stations and its aggregate market power to secure license fees far in excess of any competitive market value of the rights it controls.

Third, even if it were possible for a radio station to eliminate some SESAC music from its broadcasts, it would still be forced to take a full-priced SESAC license on SESAC's terms unless it could eliminate all of the music controlled by SESAC. Thus, there is no incentive even to try to reduce the amount of SESAC music a station performs or develop competing sources of licenses. In this way, SESAC effectively forecloses (i) any direct licensing options, (ii) any control of SESAC music use, and (iii) any competition between SESAC and other suppliers of music rights.

II. SESAC AND THE NRBMLC

Until 1999, the primary focus of the NRBMLC was on ASCAP and BMI. Although broadcasters, including the NRBMLC, questioned SESAC's legitimacy and its unregulated operation, the fees sought by SESAC were typically low enough that they did not justify a sustained effort to challenge. However, a fee increase in 1995, followed by unilateral fee doubling over the period from 1999–2003, followed by unilateral fee increases for the period from 2004–2008 that again almost doubled SESAC's fees (taking into account the raw fee increases and the re-definition of markets and reclassification of stations), have made SESAC a major concern of the NRBMLC.

SESAC first sought to increase the fees it charged to the radio industry in 1995, after its acquisition by its current ownership group. The NRBMLC objected to this increase and entered into a "standstill" agreement with SESAC preserving the right of the stations then represented by the NRBMLC to pay on the pre-1995 basis.

A. The 1999–2003 Fee Doubling

In 1999, SESAC unilaterally announced that it was more than doubling the fees charged to commercial radio stations, phased in over the period from 1999–2003. The NRBMLC again objected and questioned the basis for any increase. The Committee urged SESAC to offer a license with a fee that varied depending on the amount of SESAC music performed by the station. Using the stations owned by Salem Communications Corp. as an example, the NRBMLC demonstrated the disparity between SESAC's fees and its repertory, informing SESAC that under SESAC's pre-increase 1998 fee schedule, the Salem stations with an ASCAP and BMI per program license would pay SESAC, on average, 33% and 34% of their payments to ASCAP and BMI, respectively. Under SESAC's proposed fee increases for 1999 alone, the stations would have paid SESAC approximately 45% of the stations' 1998 ASCAP fees and 47.5% of the stations' 1998 BMI fees. By contrast, data developed by the NRBMLC during the negotiations demonstrated that the share of SESAC music performed on religious stations represented by the Committee was

about 5%. The share of SESAC music performed on classical stations represented by the Committee was a mere .04%. Moreover, these percentages likely overstated the relative size of SESAC's repertory substantially, as they did not reduce SESAC's share to account for the number of SESAC compositions that also appeared in ASCAP's or BMI's repertory and were therefore already licensed under the stations' ASCAP and BMI licenses.[1]

SESAC did not hesitate to use the threat of infringement liability as leverage in the 1999 negotiations. First, SESAC did not consider stations represented by the NRBMLC that were acquired after 1997 to be licensed under the standstill agreement, and continuously referred to their unlicensed status, despite efforts by the NRBMLC to have the stations licensed under the terms then applicable to Committee stations. Second, SESAC terminated the standstill agreement for all NRBMLC stations by letter of October 13, 1999, thereby putting the gun of infringement liability firmly to the head of all stations represented by the Committee.

As a result of SESAC's tactics, particularly its threat of infringement liability, the NRBMLC had no choice but to accept a license under unsatisfactory terms. The parties agreed that stations operating under *both* the ASCAP and BMI per program licenses would be offered a 45% reduction from SESAC's *newly raised* fees. Stations not able to operate under both the ASCAP *and* BMI per program license were required to pay full SESAC fees, even if their format used sufficiently little music that the station could use one of the other organization's per program license.[2] In any event, the fee paid by the station depended not at all on the amount of SESAC music performed.

B. The 2004–2008 Fee Increase

In late 2003, SESAC again unilaterally announced fee increases for the period 2004–2008 that, after taking into account the redefinition of markets and the reclassification of stations, again approximately doubled SESAC radio fees. This increase was to apply pro rata to stations on the "Talk Amendment" and to stations entitled to the 45% reduction from SESAC full fees on the basis of their use of ASCAP and BMI per program licenses.

On November 26, 2003, the NRBMLC wrote to SESAC questioning the appropriateness of the new unilateral increase, expressing a willingness to listen in good faith to SESAC's rationale and "to discuss the matter with an open mind." The NRBMLC proposed a "standstill agreement" similar to those used in the past to permit time for discussions free from the threat of infringement liability.

SESAC took only one day to reject not only the standstill proposal, but also any negotiations whatsoever. On December 2, SESAC responded to the letter it had received on December 1, with the arrogance of the monopolist: "When the NRBMLC and SESAC reached agreement in 2000 on economic benefits to be enjoyed by NRBMLC members, it was certainly not SESAC's intention to negotiate further accommodations with the NRBMLC at the end of each term of SESAC's radio industry license agreement." In other words, the new increases were advanced on a "take it or leave it" basis, with no possibility even for discussion.

The NRBMLC responded on January 23, 2004, again questioning the basis for the increases, requesting a license that would allow a station to control its SESAC fees by controlling its use of SESAC music or obtaining direct licenses, and requesting arbitration over the fee increase. SESAC again refused any use-based license. It also flatly refused any alternative dispute resolution process. The NRBMLC stations had no choice but to pay the increased fees under protest, or face ruinous liability for copyright infringement.

In response to SESAC's move, the NRBMLC undertook an informal research project to determine whether SESAC's share of music performed by NRBMLC-represented stations had, in fact, increased. The Committee examined 6,477 titles chosen from the playlists of stations it represents in seven genres (not including classical). Of those titles, 134, or 2.1% appeared in the SESAC database. Moreover, the Committee checked a further sampling of 37 of the titles identified by SESAC to

[1] It is not uncommon where there are multiple writers involved in creating a composition for them to be affiliated with different performing rights organizations. Copyright law requires a user to have a license from only one copyright owner where there are multiple owners.

[2] Stations with an *all talk* format that did not contain any feature music programming, were entitled to use the "All-Talk Amendment" that SESAC offered to the industry at large, which charged 25% of the prevailing SESAC blanket fee. A station with no SESAC feature performances could not use this license if its programming contained feature performances of ASCAP or BMI music. Even this amendment compares unfavorably to the ASCAP and BMI per program licenses, which at the time typically charged mainstream talk stations roughly 15% of the corresponding blanket license fee, and which charged NRBMLC stations considerably less, as a result of the 1996 Rate Court decision.

see if the compositions were also licensed by ASCAP or BMI. Fully 23 of the 37 (62%) were also licensed by ASCAP and BMI, so a SESAC license would not be necessary to perform them.

SESAC's fees continue to represent a far greater percentage of total music licensing fees than the small size of its repertory would justify. Again, using stations owned by Salem Communications Corp. as an example, ten religious teaching stations that rely on a mixed format of talk with some music paid SESAC 15.4% of the sum of their payments to ASCAP and BMI in 2003. With SESAC's fee increases, that percentage is estimated to rise to 18% in 2005 and more than 19% in 2006. Five all-talk stations (that qualified for SESAC's Talk Amendment) paid SESAC 12.4% of the sum of their payments to ASCAP and BMI in 2003, with that percentage estimated to rise to 14.6% in 2005 and more than 15% in 2006.

III. A REASONABLE SOLUTION

The NRBMLC believes it is essential to control SESAC's unchecked market power, price fixing and abuse of its aggregation of thousands upon thousands of copyrights. The best approach would be to adopt either a rate court or arbitration structure comparable to that which already exists for ASCAP and BMI. Specifically, Congress should enact legislation:

1. Providing for a neutral decision maker to determine disputes over the fees and terms applicable to SESAC licenses. This could take the form of granting jurisdiction to one or more federal district courts or establishing a right to arbitration when a music performing rights organization is not otherwise subject to a consent decree establishing a rate court.
2. Establishing that users are licensed upon application for a license, subject to a retroactive obligation to pay once reasonable fees are determined, to prevent SESAC from holding up a music user's business.
3. Ensuring that adequate discovery is available to permit the parties to learn and present relevant information. Experience has demonstrated that such discovery is essential to provide data necessary to evaluate the rights at issue against relevant benchmarks.
4. Prohibiting SESAC from acquiring exclusive rights or taking any actions to deter or discourage its affiliates from granting direct licenses.
5. Obligating SESAC to offer alternative forms of licenses with fees that vary according to the amount of the collective's music that is actually performed and that offer a genuine economic alternative to the flat-fee blanket license. Experience has demonstrated that performing rights organizations often are loath to offer such licenses on reasonable terms, so care needs to be taken. The provisions of ASCAP's Second Amended Final Judgment embody a number of important safeguards that should be considered.

At the May 11 hearing, Mr. Swid argued that an arbitration obligation would be too expensive. That is nonsense. Arbitration would provide a check on the existing abuses and would create an even incentive on both parties to reach agreement on reasonable fees and terms that more closely approximate those that would pertain in a competitive market.

Thank you again for the opportunity to submit this statement. The NRBMLC looks forward to working with the Subcommittee in crafting legislation that will create a level playing field for music users and creators alike and that will preserve the integrity of the copyright laws.

LETTER FROM JOHN S. ORLANDO, EXECUTIVE VICE PRESIDENT, GOVERNMENT RELATIONS, NATIONAL ASSOCIATION OF BROADCASTERS (NAB)

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May 19, 2005

The Honorable Lamar Smith
Chairman
Courts, Internet & Intellectual Subcommittee
United Stated House of Representatives
2184 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Howard Berman
Ranking Member
Courts, Internet & Intellectual Subcommittee
United Stated House of Representatives
2221 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Berman:

We write in support of the concerns expressed by the Television Music License Committee (TMLC), the Radio Music License Committee (RMLC), the National Religious Broadcasters Music License Committee (NRBLMC), and others about a serious gap that has emerged under current copyright law. That gap permits certain performing rights organizations (PROs) unfairly to exploit and undermine the system by which radio and television stations license music. In order to understand this serious problem that stations are confronting, a brief understanding of the music licensing process for broadcasting is necessary.

Local stations license syndicated programming months and often years in advance. It is some of the most popular programming they broadcast. Stations' costs to acquire and promote highly coveted programs like "Seinfeld," "Oprah" and "Friends" are huge. The only creative right not included in a syndicated program license is the music performance right. The music is embedded in these programs by the producers and, under syndicated license agreements, the station cannot eliminate or change the music in these programs. This fact allows a PRO to control the licensing of performance rights within designated television programs and then insist that the program cannot be aired unless the television station pays its price.

There are three PROs operating in the United States today . . . ASCAP, BMI and SESAC. While ASCAP and BMI are subject to antitrust consent decrees containing provisions and mechanisms to assure that music licensing fees and the manner in which they are established are fair, and not subject to anticompetitive abuse, SESAC operates under no such constraints. Accordingly, for example, if SESAC signs a composer formerly associated with BMI or ASCAP whose music is part of one of the more popular shows, a station is forced to sign a license agreement with SESAC in order to protect a significant investment in its syndicated program. The resulting license fee with SESAC can be significantly more than the previous BMI or ASCAP fee for the same exact music

in the same program. As another example, SESAC required ABC, CBS and NBC to sign separate performance rights agreements covering music in their network programming, which previously had been included in the local station license.

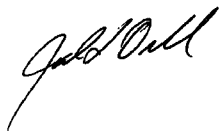
Since most, if not all, of the SESAC affiliates were previously ASCAP or BMI members and most of their music has already been written and pre-recorded in television programming, SESAC licenses do not create a music licensing market, increase output, afford composers competitive license fees of which they otherwise would be deprived, or offer any other meaningful efficiencies for consumers. SESAC licenses instead impose a new and unjustifiable cost for music that otherwise would be included within licenses already paid for by local stations. And when a composer switches to SESAC from ASCAP or BMI, the ASCAP and BMI rates do not fall commensurately to account for the change. The effect of SESAC's licensing practices is further exacerbated by its inability or unwillingness to disclose the identities of all of its affiliates composers and publishers and works under license in a comprehensive and timely manner. In contrast, ASCAP and BMI are required under their consent decree to make available a public list containing the title, date of copyright, writer, and publisher of all works in their repertories, and are barred from bringing an infringement action as to works not listed.

While SESAC provides lists of affiliated composers whose works appear on a recurring basis in local broadcast television programming, SESAC has not undertaken comprehensively to identify all of the works that may appear on local television, and enjoys the leverage that such lack of full knowledge on the stations' part provides. Thus, even if local stations were scrupulously to avoid programming reflected in SESAC's lists, they still would face significant risk of copyright infringement if they unknowingly broadcast SESAC music in commercials or unknowingly make identical or occasional uses of SESAC music in other programming. In contrast to ASCAP and BMI there is no restriction on SESAC's ability to sue for infringing uses of music in the SESAC repertory not identified on lists provided to stations.

Local television stations thus have no alternative to taking a SESAC license. This lack of information contributes to the impossibility of eliminating SESAC music from programming and works in combination with the other elements of SESAC's licensing practices to force reliance on the blanket license at the risk of being sued for copyright infringement for failing to obtain one.

Under sections 504(c) and 505 of the Copyright Act, plaintiffs who prove willful copyright infringements may be awarded damages of up to $150,000 *per work infringed*, as well as costs and reasonable attorney's fees. Thus, if 1,200 stations were found liable for the infringement of just one song, the total damages at $150,000 per song would be $180 million. These damages would far exceed any reasonable cost of a license to perform music on local television.

SESAC's ability to demand supracompetitive rates from consumers is based on its ability to aggregate the licensing authority of strategic composers and use the hammer of copyright infringement damages to force a fee resolution to SESAC's satisfaction. We urge you to continue to investigate and study SESAC's practices and craft fair and appropriate remedies.



SUPPLEMENTAL QUESTIONS FOR BROADCAST MUSIC INC. (BMI)

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CHRIS VAN HOLLEN, Maryland

May 31, 2005

Mr. Del Bryant
Broadcast Music Inc.
c/o Mr. Michael J. Remington
Drinker Biddle & Reath
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209

Dear Mr. Bryant:

Thank you again for appearing at the May 11th oversight hearing on Public Performing Rights Organizations. An extensive hearing record is being developed from your testimony and that of the other witnesses. Due to the abbreviated nature of the hearing, several Members of the Subcommittee have submitted additional questions that I am enclosing for you to answer.

These questions and your answers will be made part of the formal hearing record. Please respond in writing to the questions by COB Tuesday June 7th and fax a copy of your reply and this cover letter to (202) 225-3673, attention Eunice Goldring.

If you have any questions about the enclosed questions, please contact Joe Keeley on the Subcommittee on Courts, the Internet, and Intellectual Property at (202) 225-5741.

Sincerely,

Lamar Smith

LAMAR SMITH
Chairman
Subcommittee on Courts, the Internet
and Intellectual Property

LS/jk:eg
Enclosure

Questions for BMI

Has BMI ever asked for the termination of its consent decree? If yes, when? If no, why not?

Does BMI feel that its consent decree needs to be updated such as just occurred with the ASCAP decree?

How does BMI respond to SESAC's testimony that consent decrees are not awards for good corporate citizenship?

What component of parity with the other two PRO's that BMI feels is most important – parity of contract length, parity of rates, parity of arbitration / rates courts, etc…?

Although ASCAP signs artists to one year contracts, BMI does not. What minimum and maximum length of contract does BMI feel is warranted and why?

How much did BMI collect from commercial radio stations in 2004, 2003, 2002, 2000, 1998?

RESPONSES TO SUBCOMMITTEE QUESTIONS FROM BMI

Del R. Bryant
President
Chief Executive Officer

June 7, 2005

Honorable Lamar Smith
Chairman
Subcommittee on Courts, the Internet
and Intellectual Property
B352 Rayburn House Office Building
Washington, DC 20515

Attn: Eunice Goldring

Dear Chairman:

Thank you for your letter of May 31, 2005, stating that due to the abbreviated nature of the May 11th oversight hearing on Public Performing Rights Organizations additional questions should be answered in writing for the hearing record. On behalf of Broadcast Music, Inc., I hereby submit BMI's answers to the questions.

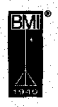
I am grateful to you for the courtesies you extended to me during the hearing and for giving BMI a public opportunity to tell our history and state our point of view. On behalf of BMI's 300,000 affiliated songwriters, composers and music publishers, we salute your leadership on these issues.

Sincerely,

Del Bryant
President and CEO

Attachment

cc: Honorable Howard Berman
Joe Keeley
Shanna Winters



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RESPONSES OF BROADCAST MUSIC, INC.
TO THE MAY 31, 2005 QUESTIONS BY THE
HOUSE SUBCOMMITTEE ON COURTS, THE INTERNET
AND INTELLECTUAL POLICY

JUNE 7, 2005

1. Has BMI ever asked for the termination of its consent decree? If yes, when? If no, why not?

To the recollection of BMI's management, which dates back decades, BMI has never sought the termination of its consent decree since the original consent decree was entered into in 1941. BMI's current consent decree was entered into in 1966, and amended in 1994.

BMI believes that its consent decree serves the purposes of BMI's affiliated songwriters, composers and publishers as well as BMI's music-using licensees. Specifically with regard to licensing, there are several provisions in the decree which benefit music users by ensuring that: (1) BMI cannot discriminate in rates charged to similarly situated customers (absent business conditions that warrant differences); (2) BMI must make available "per program" licenses to broadcasters and "through to the viewer" licenses to broadcasting networks; and (3) BMI obtains only non-exclusive rights from its affiliated songwriters, composers and publishers, allowing BMI's affiliates to issue licenses directly to the public. BMI has no quarrel with these limitations, which the Supreme Court and other courts have noted with favor. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

Until 1994 BMI did not have an automatic licensing provision, with an attendant rate court mechanism to resolve disputes about reasonable fees, similar to the rate court provision ASCAP had since 1950. It was BMI – not the Department of Justice – that sought an amendment to the 1966 BMI decree to put in place a BMI rate court that would be similar in nature to, but independent in operation from, the ASCAP rate court. In November 1994, BMI's motion to amend the decree was granted. Since that time, the rate court has served the salutary purpose of providing a neutral forum for the adjudication of fee disputes between BMI and music users. Only one licensee, a subscription satellite and cable music program service, has litigated a rate proceeding with BMI. A handful of other license fee disputes have been brought before the rate court but those that have been resolved have resulted in settlements on agreed-upon license rates and terms prior to trial. Even when it is not actually invoked, the mere existence of the rate court option has helped the parties reach reasonable agreements.

BMI believes that it is useful to maintain the consent decree for several reasons. First, having the automatic licensing/rate court provision ameliorates the situation where

4. **What component of parity with the other two PRO's that BMI feels is most important - parity of contract length, parity of rates, parity of arbitration / rates courts, etc...?**

BMI does not believe it is now necessary for BMI to be given regulatory parity with SESAC. We leave it to others to determine whether it is appropriate to regulate SESAC. So long as SESAC abides by the antitrust law and other laws of general application, BMI expects that the market – both songwriters and music users – will decide whether SESAC succeeds or fails. Generally, BMI believes that competition among the performing right organizations (PROs) should not be hindered by undue regulation. At present BMI believes that there is lively competition among the PROs and that this serves the interests of the songwriting community as well as the many music-using businesses that we license.[1] If and to the extent that the Department of Justice determines that SESAC's activities, as alleged by the music users' testimony, may raise concerns under the antitrust laws, the Department of Justice can and should address this matter with SESAC in the first instance. In addition, the Television Music License Committee and other music user groups can, of course, sue SESAC under the antitrust law if they believe they have legally valid claims.

That being said, BMI certainly believes that having a rate court substantively similar to ASCAP's is an important benefit both for BMI and BMI's customers. It would harm BMI substantially if its successful rate court mechanism were impaired or tinkered with. Contrary to the statement of the Radio Music License Committee, BMI strongly believes that keeping BMI rate proceedings separate from ASCAP's is procompetitive, preventing the entanglement of BMI in ASCAP negotiations and vice versa, and encouraging separately negotiated voluntary agreements. Music users have never had to face simultaneous proceedings in both rate courts, and the judges are certainly capable of guarding against the "leapfrogging" the RMLC says it fears. In fact, music users have themselves cited BMI license agreements in the ASCAP rate court in their efforts to lower ASCAP license fees.

5. **Although ASCAP signs artists to one year contracts, BMI does not. What minimum and maximum length of contract does BMI feel is warranted and why?**

BMI's current term of license agreement for songwriters is two years. BMI does not believe it is necessary or warranted by any current or anticipated market circumstances to require a one-year term. First, BMI has considerably more affiliates than any other performing right organization, over 300,000. To have to renew each agreement after one year would place a large administrative burden on BMI, for little benefit. Second, the work that BMI does in fostering the career development of its

[1] Incidentally, BMI also feels that fairness requires a rejoinder to the claim by SESAC that it "rescued the Latin radio format." BMI has always enjoyed a strong share of songs in the Latin music category. BMI is proud of its Latin music repertoire and pioneered a Latin music awards program to recognize the growing importance of this music genre.

music users desired BMI licenses but refused to agree to BMI's fee quotation, thus creating an environment of continuing daily infringements. BMI's broadcast users have always had the ability to directly license their works from individual copyright owners, but prefer to clear the rights through a one-stop BMI license for its cost efficiency, and the rate court mechanism allows them the opportunity to challenge BMI's fee proposals if they desire to do so in a neutral forum.

2. Does BMI feel that its consent decree needs to be updated such as just occurred with the ASCAP decree?

BMI does not believe that its consent decree needs to be updated. The core licensing provisions of the BMI consent decree, including the rate court mechanism, are functioning well and working in the interests of both BMI's affiliates and music users alike. One change in the ASCAP decree was to lessen regulation of ASCAP relations with its members – restrictions BMI never had – in favor of competition. Another change was to make explicit that the decree covers the Internet. The BMI rate court has already set a rate for an Internet use, so there is no dispute that the existing decree protects Internet music users.

3. How does BMI respond to SESAC's testimony that consent decrees are not awards for good corporate citizenship?

BMI rejects SESAC's claim that the BMI consent decree generally and the BMI rate court mechanism specifically were imposed upon BMI to "remedy improper conduct" or misuse of "market power or leverage". A review of the history of BMI's consent decree will not reveal any findings of wrongdoing by BMI. The 1941 decree was agreed to by BMI virtually at its founding, when it was a tiny organization, simply to create a level playing field with ASCAP, which had been litigating with the Department of Justice and was agreeing to a consent decree at the same time.

A lawsuit was filed against BMI by the Department of Justice in the early 1960s to address complaints from ASCAP that broadcasters were favoring BMI music over ASCAP, but that legal theory was abandoned because there was no evidence whatsoever to support the allegations. The BMI decree was updated in 1966 by agreement between BMI and the Department of Justice. There have been no findings of "improper conduct." Indeed, since the 1970s there have been four unsuccessful antitrust actions brought against BMI by a television network, by a nightclub owner, by the local television stations (through the Television Music License Committee), and by the cable television industry (through the National Cable Television Association). The Supreme Court endorsed blanket licensing and rejected this line of attack in *BMI v. CBS*, as have the other courts that considered the charges. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), *on remand, Columbia Broadcasting System, Inc. v. American Society of Composers, Authors & Publishers*, 620 F.2d 930 (2d Cir. 1980); *Buffalo Broadcasting Co. v. American Society of Composers, Authors and Publishers*, 744 F.2d 917 (2d Cir. 1984); *National Cable Television Ass'n v. Broadcast Music, Inc.*, 772 F. Supp. 614 (D.D.C. 1991); *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981).

affiliates is work that takes time to nurture and develop. A two-year term over the life of the writer's career is not an excessive period for this relationship to take place. It should be noted that BMI's affiliates retain the right to give non-exclusive licenses directly to music users throughout the term of their affiliation with BMI, so music users' rights are not affected by the two-year term in any way.

Regarding potential maximum terms. BMI would be concerned if any PRO entered into exclusive agreements of more than five years in duration, because that might unreasonably limit the songwriters' ability to choose a competing PRO for too great a proportion of his or her career.

6. How much did BMI collect from commercial radio stations in 2004, 2003, 2002, 2000, 1998?

The calendar year income (annualized billings less adjustments for reserves for bad debts) for commercial radio for the years in question were:

2004 - $179,525,346.15
2003 - $172,495,027.82
2002 - $151,183,670.36
2000 - $165,604,410.15
1998 - $131,515,863.39

* * *

SUPPLEMENTAL QUESTIONS FOR SESAC

F. JAMES SENSENBRENNER, JR., Wisconsin
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ADAM SMITH, Washington
CHRIS VAN HOLLEN, Maryland

May 31, 2005

Mr. Stephen Swid
SESAC, Inc.
152 West 57th Street, 57th Floor
New York, New York 10019

Dear Mr. Swid:

Thank you again for appearing at the May 11th oversight hearing on Public Performing Rights Organizations. An extensive hearing record is being developed from your testimony and that of the other witnesses. Due to the abbreviated nature of the hearing, several Members of the Subcommittee have submitted additional questions that I am enclosing for you to answer.

These questions and your answers will be made part of the formal hearing record. Please respond in writing to the questions by COB Tuesday June 7th and fax a copy of your reply and this cover letter to (202) 225-3673, attention Eunice Goldring.

If you have any questions about the enclosed questions, please contact Joe Keeley on the Subcommittee on Courts, the Internet, and Intellectual Property at (202) 225-5741.

Sincerely,

Lamar Smith

LAMAR SMITH
Chairman
Subcommittee on Courts, the Internet
and Intellectual Property

LS/jk:eg
Enclosure

Questions for SESAC

What percentage of SESAC's contracts with artists requires exclusive representation?

Would SESAC object to statutory language that required all PROs to offer only non-exclusive contracts?

Would SESAC be willing to negotiate in advance with syndicators of television shows a formula for the royalties that would be due from the use of background music in television shows?

Would SESAC be willing to accept an automatic licensing provision similar to the ASCAP/BMI automatic licensing provision that grants a license once an application is filed?

Would SESAC agree to refrain from suing any user for infringing a work that was not included in its database?

Has SESAC ever offered per-program licenses or does it intend to at some point in the future? Would SESAC support a requirement that all PROs offer per-program licenses?

How does SESAC's presence impact the music performing rights marketplace in the United States?

SESAC testified, and SESAC's website states, that SESAC uses monitoring by BDS to determine the extent to which music in the SESAC repertory is performed on radio stations. Based upon this information,

1. What percentage of total feature performances identified by BDS on radio stations are performances of compositions in the SESAC repertory? Please provide data for 2004, 2002, 2000 and 1998. (Feature performances refer to performances where the primary focus of the audience's attention is on the musical performance).

2. What percentage of total feature performances identified by BDS on radio stations are performances of compositions in the SESAC repertory that are not "split works" that also appear in the ASCAP or BMI repertory? Please provide data for 2004, 2002, 2000 and 1998.

How much did SESAC collect from commercial radio stations in 2004, 2003, 2002, 2000, 1998?

Considering only radio stations with a classical music format, what percentage of total feature performances of musical compositions on such radio stations were performances of compositions in the SESAC repertory? What percentage of total feature performances of musical compositions on such radio stations were performances of compositions in the

SESAC repertory that are not "split works" that also appear in the ASCAP or BMI repertory? Please provide data for 2004, 2002, 2000 and 1998.

The TMLC testified that SESAC is "the only organization that operates with a profit motive." Can SESAC tell me how much profit it made in comparison to the other parties testifying?

RESPONSES TO SUBCOMMITTEE QUESTIONS FROM SESAC

Questions for SESAC

A. What percentage of SESAC's contracts with artists requires exclusive representation?

ANSWER:

As Stephen Swid, Chairman and CEO of SESAC, stated in his oral testimony before this Subcommittee on May 11, 2005, SESAC has not entered into any exclusive licensing arrangements with composers and music publishers. In one single instance, SESAC did enter into an agreement for exclusive representation of a composer's interest in his works only – thus allowing any music user to license directly with the music publisher for performing rights.

B. Would SESAC object to statutory language that required all PROs to offer only non-exclusive contracts?

ANSWER:

Yes. There is nothing per se improper or illegal about exclusive contracts. Indeed, the very agreements into which TMLC local television station members enter with program producers call for exclusivity in a given market. SESAC believes that the requirement of non-exclusive contracts imposed upon ASCAP and BMI by the Department of Justice under their respective Consent Decrees are punitive remedies in response to their anticompetitive conduct and monopolistic market power. These remedies include provisions that "fence in" the conduct of ASCAP and BMI, that is, they prohibit these PROs from engaging in certain kinds of conduct that would otherwise be lawful if the firms had not restrained competition. To impose such remedies on SESAC, a small business concern that is not being charged with conduct in violation of the Sherman Anti-Trust Act, would be punitive. Antitrust courts have long recognized that exclusive contracts, especially when used by firms with small market shares, have significant benefits for all parties in reducing transaction costs and creating incentives to exploit fully the copyright owners' works. Because ASCAP and BMI already are subject to the nonexclusivity requirement, any such statutory language addressed to "all PROs" would effectively single out SESAC for punitive treatment. Drawing an analogy from recent news headlines, to the same extent that Martha Stewart's competitors should not be expected to wear electronic monitoring bracelets and suffer home confinement like Ms. Stewart during her probation, SESAC should not be asked or compelled to undertake the punitive remedies imposed upon ASCAP and BMI by the Department of Justice. SESAC should not be made to "pay the price" for other parties' misbehavior.

C. Would SESAC be willing to negotiate in advance with syndicators of television shows a formula for the royalties that would be due from the use of background music in television shows?

ANSWER:

If music publishers chose to license their music directly, such a license would encompass all music contained in the program, including background, theme, and feature music. In any

event, negotiating with syndicators of television shows would be of no use to them or to SESAC; to the best of SESAC's knowledge, the syndicators do not own or control the rights to license the music contained in the television programs. In almost all instances, the musical compositions created for television shows are "works for hire." The copyrights in the music and the corresponding right to license it are owned or controlled by the music publisher, who in many instances is an entity related to either the program producer or the local television station owner. Despite these interlocking relationships, each of the entities apparently seeks to justify its existence and maximize its profits on a "stand alone" basis. Among them, the music publisher desires to get paid fairly and reasonably for the music contained in the program; that music is a creative work and an integral part of the program which adds substantial value to it. The local television stations choose not to negotiate for and obtain public performance rights in the music "up front," during either the "pilot" airings or first season network run, but choose instead to pay for the music rights on the "back end" when they know which programs have been successful and will be offered in syndication. Even at this point the television stations can negotiate directly with the producer/publisher, often a related entity, or the composer who created the "work for hire" to obtain the public performance rights.

For example, ABC/Disney currently produces "Grey's Anatomy," a new 2005 hour-long drama appearing on the ABC television network during prime time on Sunday evenings. The music publishing rights to the music in that series are owned by South Song/ABC/Disney. Perhaps the question should be posed to the TMLC: "Has any local television station approached the music publisher with a formula to acquire the publishing rights in the event that program is placed in syndication, or has any local television station offered a fee to directly license the public performance rights to the music in the event that "Grey's Anatomy" is syndicated five years from today?" The same question could be asked concerning other currently popular network programs, such as "Desperate Housewives," where the music is published by Buena Vista, a Disney/ABC subsidiary.

The TMLC, the Radio Music License Committee, and other large industry negotiating groups ironically complain that SESAC has market power over certain types of music. But there is no question that, even assuming their incorrect arguments for the moment, their members use many musical works from SESAC that do not fall in this category of supposed "monopoly power." It is textbook antitrust analysis that, where a seller competes in a market with some products in which it may have some element of market power and others where it does not, buyers can "punish" the seller for trying to act anticompetitively with respect to the former products by exercising their negotiating strength with respect to the latter products. Of course, SESAC does not, and cannot, have market or monopoly power over any particular type of music, and these licensee groups have not offered any evidence to the contrary. The negotiating committees have not shown that SESAC has a dominant share of a type of music, or that there are no composers who are currently working or could enter the business to write a certain type of music for television shows, commercials, or other programs.

D. Would SESAC be willing to accept an automatic licensing provision similar to the ASCAP/BMI automatic licensing provision that grants a license once an application is filed?

ANSWER:

No. The "automatic licensing" requirement, which grants a license once an application is filed, is a remedial measure imposed by the Department of Justice upon ASCAP and BMI to offset those entities' monopolistic market power and anticompetitive practices that gave rise to the Consent Decrees. It would be unfair to expect SESAC, a small business that is neither a monopolist nor a copyright abuser, to willingly accept the punitive remedies that the Department of Justice has deemed appropriate for ASCAP and BMI. To impose this "automatic licensing" requirement upon SESAC would encourage potential licensees to "nickel and dime" SESAC indefinitely and effectively discourage a resolution of licensing discussions, because the potential licensee would know that there was no "downside." Taken to its logical extreme, this mechanism would permit music users to obtain SESAC licenses without ever coming to terms on a fee amount. For example, the average SESAC license fee per day for health clubs is $.24. Under an "automatic licensing" requirement, if any health club contended that this fee was excessive and sought instead to pay, for example, $.23 per day, the club would know that any dispute resolution would be exponentially more expensive for SESAC than the amount in dispute; all the while the club would be permitted to use SESAC music indefinitely without paying any fees.

Although SESAC is not a litigious company and does not have a history of suing music users who seek licenses, the knowledge by those music users that they must obtain authorization and agree to pay for their music use is a factor that permits the marketplace to operate properly for a small player among giants. To impose upon SESAC burdensome remedies reserved for antitrust law violators without a determination of wrongdoing by the Department of Justice or any court would turn the judicial system upside down. On the other hand, to the extent that music users have incentives to avoid taking a SESAC license, which would be the result if SESAC misjudged the level of license fees that competition would allow, the threat of copyright infringement is itself a competitive constraint on SESAC. Ironically, a system of automatic licensing would undermine this constraint.

E. Would SESAC agree to refrain from suing any user for infringing a work that was not included in its database?

ANSWER:

Yes, SESAC would agree to refrain from suing any user for infringing a work that had not yet been listed in its database, notwithstanding the fact that there are writers whose SESAC affiliation is so well known that music users should not be excused from either a presumption or actual knowledge that their works – whether newly written or released from another PRO – are in the SESAC repertory. However, once a song is included in the database, there should be no further "safe haven." It should always be the obligation of the music user, in the first instance, to determine the identity of and obtain authorization either directly from the copyright owner or through the appropriate PRO before publicly performing the song; this is a fundamental concept of property law generally, and of copyright law specifically. The Supreme Court, in rejecting challenges to the lawfulness of blanket licenses, noted that one of the benefits to competition that is made possible through the use of blanket licenses is the greatly improved ability of copyright owners to enforce their copyrights. A violation of copyright can be redressed far more

efficiently when the copyright is one of thousands represented by a PRO who can enforce the copyrights more efficiently than an owner of a single copyright.

SESAC undertakes to maintain the accuracy of its database by updating it in a timely fashion. However, given the fact that compositions are constantly added to the database, any "snapshot" of current information would, as a practicable matter, be quickly rendered out-of-date. The better analogy would be to view the database as an ever-changing movie as opposed to a snapshot. Accuracy of databases, in fact, has been a continuing bone of contention between SESAC and ASCAP. Despite numerous requests from SESAC, ASCAP in the past continued to list songwriters and repertory that had moved from ASCAP to SESAC, thus misleading music users who relied to their detriment on ASCAP's database in attempting to discern – and pay – the correct PRO for the music that they intended to use. This misrepresentation was willful, as proven by the fact that, at one point ASCAP removed the misinformation, only to reinstate it at a later date in its database.

F. Has SESAC ever offered per-program licenses or does it intend to at some point in the future? Would SESAC support a requirement that all PROs offer per-program licenses?

ANSWER:

The Radio Music License Committee complains of its members' "lack of free choice" to license "one or several" copyrighted works, and other large industry organizations make similar complaints. There is no legal requirement to offer a "per program" license in order to make the offer of a blanket license lawful. The efforts by the rate court judge to encourage ASCAP and BMI to offer "per program" licenses must be understood in the context of the continuing concern by the court and by the Department of Justice over those PROs' market power. An essential element of the lawfulness of blanket licenses, as noted by the Supreme Court, is the enormous efficiency that is obtained when many thousands of copyrighted works are combined in a license that is available to many types of users. To the extent that "per program" licenses comprise smaller sectors of copyrighted works, or types of users, or both, the efficiencies of such licenses diminish. Nevertheless, SESAC has offered an appropriate "per program" license to respond to the requirements of its customers, thus demonstrating that SESAC's business model does not restrain competition and, indeed, fosters it.

SESAC has developed what amounts to a second generation "per program" license for the local television industry. As a result of arms length negotiations with the TMLC approximately ten years ago, SESAC agreed in 1996 to offer a form of "per program" license to local television stations. The license that SESAC continues to offer to TMLC members is a departure from - and a significant improvement upon - the Consent Decree form of "per program" license. The ASCAP and BMI "per program" licenses require stations to furnish the amounts of program revenues to ASCAP and BMI; permit audits by ASCAP and BMI; and permit ASCAP and BMI each to "claim" 100% of the same program's revenue for fee calculation purposes if any percentage of ASCAP or BMI music is contained in a program.

SESAC examined the ostensible purpose of the "per program" license – to permit a music user to pay only for the actual music contained in a program – and crafted a license that effectively sought payment solely for SESAC's actual share of music in programs broadcast by

each respective television station. SESAC's license would not cost millions of dollars to create or millions of dollars to administer; it would not require the television stations to share their revenue figures with SESAC and would not permit SESAC to audit the television stations' program revenues. Unlike the ASCAP and BMI "per program" licensing systems, which impose enormous expense in time and money (the rate court awarded ASCAP over $4.6 million for the associated costs related to "per program" license administration), SESAC's approach to the valuation of its music simply asks for an allocable share of fees for its affiliates' music in programs s reflected in the cue sheets and avoids the imposition of millions of dollars in associated "per program" license costs on the TMLC's members.

The transaction costs attributable to SESAC's alternative system are negligible for all parties. By contrast, the TMLC's desired imposition upon SESAC of a mirror image of the ASCAP and BMI "per program" licenses would be administratively impracticable. SESAC has developed an equitable model that properly weighs local television programs in relation to the value that those programs contribute to the "bottom line" revenue of individual station licensees; the ease of its application is what makes this model so truly innovative. Indeed, the former executive director of the TMLC frankly admitted to SESAC that, "if SESAC's approach to broadcast licensing were employed by ASCAP and BMI, it would lead to the most equitable and efficient system for the broadcasters."

Unfortunately, instead of permitting this allocation of local television license fees on a simple, cost effective, and equitable "pay for what you use" basis, the TMLC rejected SESAC's method of "per program" licensing. Instead, the TMLC determined to allocate the SESAC total industry fees through its own arcane methods; during the course of negotiations, the TMLC insisted that it alone would retain the right to allocate SESAC license fees among its members (whereas, SESAC had undertaken the allocation process under the prior agreement with the TMLC). SESAC believes that it is the TMLC's fee allocation process and methodology that is anticompetitive, serving to favor certain music users over others and seeking to address the competing interests of its members by disregarding their respective actual music use. In this respect, the TMLC acts as a classic cartel to regulate its members' license fees and, thus, collectively determine the incentives that each member has to use SESAC's music. This is the essence of anticompetitive behavior. The TMLC's allocation does a disservice to many of its constituent stations; because it is not transparent and not consistent with SESAC's calculation of actual music use. It also creates ill will on the part of those stations, who could not be blamed for assuming that the fees set forth in their SESAC bill were calculated and allocated by SESAC and not by the TMLC. (Perhaps the unhappiness with SESAC about which the TMLC purports to complain on behalf of its local station members is rooted in the TMLC's inequitable allocation of SESAC license fees upon its less influential members.)

SESAC does not – and is not required to – offer a "cookie cutter" version of the "per program" license imposed by the Department of Justice in the ASCAP and BMI Consent Decrees. Again, SESAC would not agree to the imposition of such a punitive remedy. The basis for the "per program" license requirement is the Department of Justice's determination that ASCAP and BMI, by reason of their size and the entrenched power that they exercise to this day, should continue to be "fenced in" with regulations that would be not required of other entities. The Supreme Court's decision upholding the legality of blanket licensing was not conditioned

upon a PRO's offer of alternative licenses (other than, arguably, the option of direct licensing by ASCAP and BMI affiliates). In a competitive marketplace where no entity was trying to monopolize the business, no PRO would be required to offer licenses that, as a matter of business judgment, it did not wish to offer.

In any event, SESAC routinely offers licenses crafted for the unique needs of its music user customers, to the mutual satisfaction of those customers and SESAC's songwriter and music publisher affiliates.

G. How does SESAC's presence impact the music performing rights marketplace in the United States?

ANSWER:

SESAC has competed through technological innovation, better service to songwriter and music publisher affiliates, and efficiency in licensing. SESAC is a small business which has a market share of approximately 5% of performing rights revenues and which competes against two dominant and monopolistic organizations. Despite – or perhaps because of – SESAC's position, it has brought several significant innovations to the marketplace for music users. SESAC has enhanced competition, resulting in songwriters and music publishers being given a choice and freedom of movement between PROs. As a for-profit company, SESAC is not tethered to the past or guided by the status quo. (By contrast, SESAC's two competitors have an entrenched way of doing business that has barely changed in decades.)

For example, SESAC was the first PRO to adopt digital fingerprinting as a means of identifying and tracking broadcast music use. It did so after both ASCAP and BMI had refused to adopt this technology. Today, digital fingerprinting is a universally recognized music recognition tool used by all three PROs, as well as broadcasters and advertising agencies. Additionally, SESAC pays its songwriter and music publisher affiliates more quickly than either ASCAP or BMI, who choose to pay from six to nine months in arrears. By contract, SESAC pays 90 days after each corresponding quarter. Moreover, when one of SESAC's affiliates chooses to leave, SESAC – unlike ASCAP – will pay for every day that his or her musical compositions were represented by SESAC, and the affiliate is entitled to immediately take the entire musical catalog to the other PRO. SESAC's policy permitting free and unfettered movement of affiliates among the PROs enhances the competitive landscape for all songwriters, publishers, and music licensees, including TMLC members. Also, by increasing competition for the business of songwriters and music publishers, SESAC creates greater incentives for those individuals to increase their creation of new works.

As a for-profit company, SESAC recognizes that it must also seek to serve the needs of its music users; its licensees are customers, not adversaries. SESAC has attempted to listen to its customers and has introduced several innovative music licenses to meet their requests. The first was SESAC's "mini" blanket license offered to Hispanic broadcasters, who had complained that they did not need or want to pay for access to a large catalog of ASCAP and BMI English-language music that they did not and could not use. The SESAC license allows them to pay only for their actual use of SESAC music. Similarly, when the TMLC requested a license that charged only for the actual percentage of SESAC music use in a television program (a type of

license that is not offered by either ASCAP or BMI), SESAC created and offered such a license. Unfortunately, the TMLC demanded that it, not SESAC, determine the fee allocation among its member stations and refused to allocate the license fees in accordance with actual station music use. (Rather, the TMLC insisted on an arcane method that allocated a portion of the SESAC license fee to its member stations based upon their average station size, regardless of whether their use of SESAC music was large, small, or nonexistent. This illogical method breeds ill will with the TMLC's membership and flies in the face of the TMLC's purported goal to pay only for the music its members use.)

SESAC has created unique, "one of a kind" licenses for business operators in the airline industry, the restaurant industry, the hospitality industry, the broadcast and cable television industries, and many other industries to which it supplies licensing services. SESAC's success, in fact, depends upon its ability to deliver the licensing services required by the music user at a cost that is mutually agreed upon through the give and take of the negotiation process. SESAC is the quintessential model of an innovative American small business operating successfully, and providing needed competition, in a challenging industry.

H. SESAC testified, and SESAC's website states, that SESAC uses monitoring by BDS to determine the extent to which music in the SESAC repertory is performed on radio stations. Based upon this information,

1. What percentage of total feature performances identified by BDS on radio stations are performances of compositions in the SESAC repertory? Please provide data for 2004, 2002, 2000 and 1998. (Feature performances refer to performances where the primary focus of the audience's attention is on the musical performance).

ANSWER:

SESAC lacks sufficient data to respond accurately concerning 1998. For 2000, 2002, and 2004, SESAC's percentage of BDS-tracked performances on English-language formatted radio stations ranged from approximately 2% in 2000 to approximately 4% in 2004.

2. What percentage of total feature performances identified by BDS on radio stations are performances of compositions in the SESAC repertory that are not "split works" that also appear in the ASCAP or BMI repertory? Please provide data for 2004, 2002, 2000 and 1998.

ANSWER:

All PROs represent "split works." A split work is a copyrighted musical composition created by more than one songwriter/composer, which is represented by more than one PRO by virtue of the chosen affiliations of those songwriter/composers who created it. Split works have become the norm in many popular genres of music. For example, in Country Music, R&B, Top 40, and Rock, it has become standard fare that copyrighted compositions have more than

one composer and often more than one music publisher with interests in the copyrights. SESAC (like ASCAP and BMI) does not require its composer and music publisher affiliates to collaborate only with other SESAC affiliates when creating or publishing music.

Songwriters have the ability to switch affiliations among PROs and may bring their catalogs of music to a new PRO. Accordingly, it is difficult to determine the percentage of songs that are split works when the royalties are actually paid. However, SESAC has no reason to believe that its proportionate share of split works is any different than the proportionate share of split works administered by ASCAP or BMI. In any event, all parties having an ownership interest in a copyrighted composition are entitled – and deservedly so - to be paid for their proportionate ownership share.

I. How much did SESAC collect from commercial radio stations in 2004, 2003, 2002, 2000 and 1998?

ANSWER:

In 2004, SESAC collected approximately 4% of the music performance rights fees paid by the English-language formatted radio industry. For each of the other years in question, SESAC collected license fees in approximate proportion to its share of music use in the English-language formatted radio industry.

J. Considering only radio stations with a classical music format, what percentage of total feature performances of musical compositions on such radio stations were performances of compositions in the SESAC repertory? What percentage of total feature performances of musical compositions on such radio stations were performances of compositions in the SESAC repertory that are not "split works" that also appear in the ASCAP or BMI repertory? Please provide data for 2004, 2002, 2000 and 1998.

ANSWER:

SESAC does not have such data; BDS, the technology by which SESAC tracks performances, does not conduct surveys of classical music stations. Out of more than twelve thousand radio stations in the United States, there are only 143 classical music stations; 117 are operated as non-commercial non-profit stations, 102 of which are affiliates of National Public Radio. National Public Radio stations enjoy "special treatment"; their license fees are negotiated in a bloc by representatives of National Public Radio, the Public Broadcasting System and the Corporation for Public Broadcasting, resulting in negotiated "flat sum" fees paid for five-year license terms. Of the remaining 26 commercial classical music radio stations, 10 stations are eligible for license fee discounts as a result of negotiations concluded on their behalf between SESAC and the National Religious Broadcast Music License Committee. SESAC does not have any information regarding split works in the classical music genre. (SESAC would note, however, that many classical music works performed on the radio are actually fully protected copyrighted arrangements of compositions that might or might not have entered into the public domain.) SESAC has no reason to believe that its proportionate share of split works in the

classical genre is any different than the proportionate share of split works administered by ASCAP or BMI.

K. The TMLC testified that SESAC is "the only organization that operates with a profit motive." Can SESAC tell me how much profit it made in comparison to the other parties testifying?

ANSWER:

SESAC does not know how much profit it made "in comparison to the other parties testifying." Stephen Swid, SESAC's Chairman and CEO, stated in his oral testimony before this Subcommittee on May 11, 2005, that SESAC is a for-profit company as are 99.9% of its licensees. In fact, the broadcasters, including CBS, NBC, ABC, Fox, The Tribune Company, Newsweek, etc., reported, in their 2003 annual reports, multiple billions of dollars in profits from their local television stations. Moreover, ASCAP and BMI recently reported that they each had retained approximately $100 million of revenue after distributions to song writers and music publishers.

SESAC hopes that these responses will be helpful in providing additional information to Subcommittee, and would be willing to meet with the Chairman and/or other members of the Subcommittee to discuss these responses in more detail. SESAC would request that it be permitted to submit under seal any information sought by the Subcommittee that is confidential and proprietary information concerning its internal business operations.

SUPPLEMENTAL QUESTIONS FOR ASCAP

F. JAMES SENSENBRENNER, JR., Wisconsin
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May 31, 2005

Mr. Jonathan Rich
Morgan, Lewis & Bockius
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Rich:

Thank you again for appearing at the May 11th oversight hearing on Public Performing Rights Organizations. An extensive hearing record is being developed from your testimony and that of the other witnesses. Due to the abbreviated nature of the hearing, several Members of the Subcommittee have submitted additional questions that I am enclosing for you to answer.

These questions and your answers will be made part of the formal hearing record. Please respond in writing to the questions by COB Tuesday June 7th and fax a copy of your reply and this cover letter to (202) 225-3673, attention Eunice Goldring.

If you have any questions about the enclosed questions, please contact Joe Keeley on the Subcommittee on Courts, the Internet, and Intellectual Property at (202) 225-5741.

Sincerely,

Lamar Smith

LAMAR SMITH
Chairman
Subcommittee on Courts, the Internet
and Intellectual Property

LS/jk:eg
Enclosure

Questions for ASCAP

Has ASCAP ever asked for the termination of its consent decree? If yes, when? If no, why not?

Would ASCAP prefer to sign artists to contracts longer than one year and, if so, how long?

What component of parity with the other two PRO's that ASCAP feels is most important – parity of contract length, parity of rates, parity of arbitration / rates courts, etc…?

How does ASCAP respond to SESAC's testimony that consent decrees are not awards for good corporate citizenship?

Why does ASCAP withhold money from composers and publishers that ASCAP has earned from licensing their compositions through the term of their membership? Is this anywhere publicly stated other than in fine print in their multiple page Membership Agreement? Is this ethical?

Why did ASCAP accept an $18 million reduction in licensing fees from the TMLC?

How much did ASCAP collect from commercial radio stations in 2004, 2003, 2002, 2000, 1998?

RESPONSES TO SUBCOMMITTEE QUESTIONS FROM ASCAP

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202-739-5433
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June 7, 2005

Hon. Lamar S. Smith
Chairman
Subcommittee on Courts, the Internet, and Intellectual Property
B-352 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Thank you very much for giving ASCAP the opportunity to respond to the Subcommittee's questions. We trust that you will find the responses below helpful.

* * *

Has ASCAP ever asked for the termination of its consent decree? If yes, when? If no, why not?

ASCAP has not asked for termination of its consent decree. Although ASCAP has not violated the antitrust laws, when ASCAP began negotiations concerning what became the new consent decree (AFJ2) with the Department of Justice in 1995, it became apparent that the Department was not interested in terminating the decree. ASCAP made a business decision to negotiate rather than to litigate.

Would ASCAP prefer to sign artists to contracts longer than one year and, if so, how long?

ASCAP thinks that <u>all</u> writers and publishers should be free to move among <u>all</u> PROs annually. When AFJ2 went into effect in 2001, ASCAP was freed from the <u>obligation</u> to allow members a right of annual resignation; the only limitation in AFJ2 is that members must be allowed to resign after five years. However, ASCAP's Board of Directors believed that songwriters and music publishers should be free to move between PROs, and so <u>chose</u> to continue the right of annual resignation, even though other PROs tie up their affiliates for longer periods of time. ASCAP is the only PRO that allows members to resign annually.

What component of parity with the other two PRO's that ASCAP feels is most important - parity of contract length, parity of rates, parity of arbitration / rates courts, etc...?

The "components" are all interrelated and cannot be separated. Tying writers and publishers up for more than a year prevents free movement between PROs, and so "shackles" the repertory. That in turn could affect the value of each PRO's repertory, which could affect the amount of revenues received, which in turn could affect the ability to attract new members. Similarly, the uneven playing field that results from ASCAP being subject to a rate court while, for example, SESAC is not, could affect negotiations, which in turn could affect the amount of revenues received, the ability to attract new members, and so on. The entire playing field should be level, not just the infield or the outfield.

How does ASCAP respond to SESAC's testimony that consent decrees are not awards for good corporate citizenship?

The entry of the ASCAP consent decree (and, indeed, any consent decree entered before trial) did not imply any wrongdoing – it was a way of settling litigation without an admission or finding of an antitrust violation. AFJ2 explicitly states that it was entered "without trial or adjudication of any issue of law or fact" and "without admission by [ASCAP] with respect to any such issue." Recognizing that such decrees are the product of compromise and not evidence of wrongdoing, the Clayton Act exempts consent decrees from the usual rule that a final judgment in a Government antitrust case is prima facie evidence against the defendant in any later private action. 15 U.S.C. § 16(a). A consent decree is neither penalty nor punishment. It is a compromise. As the Supreme Court wrote, consent decrees "normally embod[y] a compromise" and therefore "cannot be said to have a purpose." United States v. Armour & Co., 402 U.S. 673, 681-82 (1971). In sum, the fact that an antitrust lawsuit was brought does not mean that the claims made were valid – on the contrary, the Government loses antitrust lawsuits all the time, and private antitrust actions against ASCAP have uniformly failed over the past 55 years.

Why does ASCAP withhold money from composers and publishers that ASCAP has earned from licensing their compositions through the term of their membership? Is this anywhere publicly stated other than in fine print in their multiple page Membership Agreement? Is this ethical?

The suggestion that ASCAP withholds money from composers and publishers is flatly untrue. ASCAP pays all its members – including resigned members – on the same cash basis. Because of the time it takes to process performance survey information, that information is not available for two (for publishers) or three (for writers) calendar

quarters after the performances are given. Therefore, each calendar quarter, ASCAP takes the money received from licensees during that calendar quarter, and distributes it to members based on performances that occurred two or three calendar quarters earlier. ASCAP's Board determined that it was in the best interest of the members to get the money available each calendar quarter into members' hands as soon as it comes in, rather than letting it sit in an account for six to nine months. And, because ASCAP tracks all performances (not just those of ASCAP music), writers and publishers who join ASCAP from another PRO start receiving distributions from the date they join, based on performances that occurred before they joined – again, because distributions are on a cash basis. The cash basis for royalty distribution is clearly stated in ASCAP's Distribution Resource Documents, which are posted on ASCAP's website and made available to all members. ASCAP's practice of treating all members (including resigned members) alike, under clearly stated distribution rules is, sadly, not followed by other PROs. In sum, resigned members receive every penny of their share of all the cash received during the entire period of their membership. All ASCAP members, including resigned members, are paid on the same cash basis – not one cent is "withheld" from any member, including any resigned member.

Why did ASCAP accept an $18 million reduction in licensing fees from the TMLC?

Many factors enter into the negotiations with user groups, among them the lower fees that competitors have accepted and the anticipated substantial cost of rate litigation.

How much did ASCAP collect from commercial radio stations in 2004, 2003, 2002, 2000, 1998?

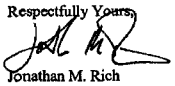
ASCAP has made public its collections from all of the approximately 11,000 United States radio stations, for the years in question; the overwhelming bulk of those revenues are attributable to commercial stations. ASCAP music is, of course, a mainstay of their programming. The public figures are:

2004: $181,615,000
2003: $173,369,000
2002: $144,663,000
2000: $167,696,000
1998: $133,130,000

Morgan Lewis
COUNSELORS AT LAW

Thank you again for all of your kind attention. We, of course, remain available to answer any additional questions the Subcommittee may have.

Respectfully Yours,



Jonathan M. Rich

cc: Hon. Howard L Berman
Ranking Member

1-WA/2402097.1

SUPPLEMENTAL QUESTIONS FOR TELEVISION MUSIC LICENSE COMMITTEE (TMLC)

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May 31, 2005

Mr. Will Hoyt
c/o Waterman & Associates
900 2nd Street, N.E.
Washington, D.C. 20002

Dear Mr. Hoyt:

Thank you again for appearing at the May 11th oversight hearing on Public Performing Rights Organizations. An extensive hearing record is being developed from your testimony and that of the other witnesses. Due to the abbreviated nature of the hearing, several Members of the Subcommittee have submitted additional questions that I am enclosing for you to answer.

These questions and your answers will be made part of the formal hearing record. Please respond in writing to the questions by COB Tuesday June 7th and fax a copy of your reply and this cover letter to (202) 225-3673, attention Eunice Goldring.

If you have any questions about the enclosed questions, please contact Joe Keeley on the Subcommittee on Courts, the Internet, and Intellectual Property at (202) 225-5741.

Sincerely,

Lamar Smith

LAMAR SMITH
Chairman
Subcommittee on Courts, the Internet
and Intellectual Property

LS/jk:eg
Enclosure

Questions for TMLC

The Subcommittee understands the difficulty, if not the impossibility, of replacing background music in syndicated shows. However, what efforts have the TMLC or the stations the TMLC represents undertaken to urge and/or require the sellers of syndicated shows to either arrange in advance the formula for determining the appropriate royalty rate for SESAC artists or to negotiate an upfront payment for such music?

What legislation has the TMLC supported in the past to address the issue of background music in television shows? Does TMLC continue to support such legislation, or does it only support imposing new requirements on SESAC?

To what extent do the stations the TMLC represents offer binding two-way arbitration for disputes over non-music services such as advertising rates, station employee salaries, etc…?

Does the TMLC have any evidence that demonstrates that SESAC has entered into de facto or de jure exclusive licensing arrangements with any of its composer affiliates?

If ASCAP's blanket license fee was $98 million in 2004 and the per program fees should equal the blanket license as the TMLC even states in their brief why were they only being paid $85 million?

If the TMLC reduced ASCAP's license fees by $18 million from 2004 to 2005 because they lost market share to SESAC, why shouldn't SESAC's fees go up by $18 million?

As music is one of the three creative elements – script, acting and music in a television program, why, if programming values go up, wouldn't license fees go up commensurately?

Will the TMLC explain why "fair" only means a reduction to composers?

Should the rates for music in a show depend upon the total cost and/or profits of the show to the station or should it be a flat rate that does not take into account the cost and/or profits made by that show?

The TMLC articulates in its testimony that SESAC is "the only organization that operates with a profit motive." Can you elaborate on why you think that a profit motive would be a bad business model?

The TMLC states that SESAC operates without the same legal constraints that are imposed on BMI and ASCAP. Does that mean that SESAC has yet to engage in behavior that would trigger Department of Justice intervention?

RESPONSES TO SUBCOMMITTEE QUESTIONS FROM TELEVISION MUSIC LICENSE COMMITTEE

Television Music License Committee

Responses to Subcommittee Questions

For Oversight Hearing on Performing Rights Organizations

June 6, 2005

The Subcommittee understands the difficulty, if not the impossibility, of replacing background music in syndicated shows. However, what efforts have the TMLC or the stations the TMLC represents undertaken to urge and/or require the sellers of syndicated shows to either arrange in advance the formula for determining the appropriate royalty rate for SESAC artists or to negotiate an upfront payment for such music?

Within the allowable limits of the antitrust laws, there have been a significant number of unsuccessful attempts by television stations to convince producers to include music performance rights in syndicated programming. This track record confirms that producers insist on adhering to the current system.

In addition, in the late 1980's the TMLC unsuccessfully advocated for legislation to require producers of syndicated programs to include music performance rights as part of the rights conveyed in their programming contracts with stations.

There is simply no economic incentive for the producer to negotiate with television stations for these rights. As indicated in SESAC's testimony, under the current system producers do not have to pay for performance fees until they know they have a successful program. When producers do have a successful program, they know they will receive significant payments from the PROs through publishing companies that they own.

Under the current SESAC license fee structure, there is no incentive for stations to source license music within syndicated shows unless all of the SESAC music within all of the syndicated shows broadcast on local stations were source licensed. Source licensing less than all of these shows would require the station to pay twice for the same music – once to the producer and again to SESAC.

SESAC's suggestion that local stations that broadcast syndicated programming can somehow control the pricing of performance rights at the producer level is incorrect.

What legislation has the TMLC supported in the past to address the issue of background music in television shows? Does TMLC continue to support such legislation, or does it only support imposing new requirements on SESAC?

In the 1980's, the TMLC proposed legislation that would have required producers of syndicated programs to include music performance rights as part of the rights conveyed in their programming contracts with stations. After two years of effort, significant lobbying and legal costs and opposition from the PROs and the Hollywood production community, this legislation failed. Although the TMLC still believes that this type of legislation would create a truly competitive market for music performance rights, the TMLC has no reason to believe that the overall climate has changed such that a renewed effort along these lines would meet with success.

In contrast, the TMLC's current legislative proposal for a third-party resolution process is a modest one that would essentially require all PROs to be subject to similar rules when it comes to wielding collective copyright power in dealing with users. SESAC has now twice invoked third- party arbitration in circumstances where it believed it to be tactically desirable. This suggests that SESAC itself views the process as a viable one. Our legislative proposal would simply provide users with the equivalent opportunity to resort to such a process where negotiations fail to resolve the issue of reasonable fees to be paid for music performance rights.

To what extent do the stations the TMLC represents offer binding two-way arbitration for disputes over non-music services such as advertising rates, station employee salaries, etc...?

"Two-way" arbitration is not required where there is an established competitive market for the services consumed. This competitive market exists in "non-music services such as advertising rates, station employee salaries, etc...."

Does the TMLC have any evidence that demonstrates that SESAC has entered into de facto or de jure exclusive licensing arrangements with any of its composer affiliates?

The TMLC possesses documents that it believes are directly responsive to this question. Those documents were obtained from SESAC's business records during the Committee's last arbitration with SESAC. Because those documents were produced subject to a confidentiality order that prevents their public disclosure without SESAC's consent, on June 1, 2005 outside counsel for the TMLC requested through outside counsel for SESAC that SESAC waive that restriction for the purpose of allowing the TMLC to provide the relevant documents to this subcommittee. We were advised on June 2nd that SESAC has refused to permit that disclosure. We regret that SESAC has chosen to block this subcommittee's access to such highly relevant information and urge the subcommittee to seek to secure these materials directly.

If ASCAP's blanket license fee was $98 million in 2004 and the per program fees should equal the blanket license as the TMLC even states in their brief why were they only being paid $85 million?

*TMLC stations did not **pay** ASCAP $85 million in 2004 and per program fees do not equal blanket fees. Under the current ASCAP consent decree, music users are entitled to a reduction of the blanket fee to the extent they are able to realize savings under the provisions of a per program license. The TMLC estimates that net payments to ASCAP in 2004 were approximately $70 million and that 2005 net payments will be between $60 and $65 million.*

If the TMLC reduced ASCAP's license fees by $18 million from 2004 to 2005 because they lost market share to SESAC, why shouldn't SESAC's fees go up by $18 million?

*Although this question is one more appropriately addressed in an arbitration setting and deals with rates rather than policy, the reduction in ASCAP fees was far less than $18 million on a net basis and was **not** based primarily on a loss of share to SESAC. The reduction was based on a number of factors that include a decrease in television viewing audience and a decrease in the overall use of ASCAP music in local television.*

As music is one of the three creative elements - script, acting and music in a television program, why, if programming values go up, wouldn't license fees go up commensurately?

There are many more than three creative elements in any television program, and music is far from a dominant one. The list includes the script writer, the director, the cinematographer, the choreographer, the lighting technician, the audio technician and the makeup artist. It should be noted that all of these creative elements, with the exception of music performance rights, are included in the rights conveyed to the broadcaster in the syndication agreements entered into between the syndicator and a local television station. Even music synchronization rights (i.e., the rights to record the same music that is to be performed into the soundtrack of the programming) are included in the rights conveyed.

If music performance rights were included as part of the overall production rights package by the producer, they would reflect competitive rates resulting from the producers' ability to select among competing composers and musical compositions. The current system, in contrast, locks in the music chosen by the producer without including the performance right. The broadcaster is forced to acquire the performance rights to that music having no choice but to use it as part of the broadcast programming.

Will the TMLC explain why "fair" only means a reduction to composers?

The TMLC's position is that "fair" license fees should be measured by competitive market value. Fair market value for such fees may result in either higher or lower payments to composers. Station direct and source licenses have, in fact, resulted in payments to some composers in excess of what they would have received under PRO blanket systems.

Should the rates for music in a show depend upon the total cost and/or profits of the show to the station or should it be a flat rate that does not take into account the cost and/or profits made by that show?

The rates for music in a show should, as with all of the other creative elements, be determined by their value in a competitive market.

The TMLC articulates in its testimony that SESAC is "the only organization that operates with a profit motive." Can you elaborate on why you think that a profit motive would be a bad business model?

There is nothing inherently wrong with a profit motive and the TMLC has never taken a position to the contrary. The key public policy consideration at issue is whether a company should be entitled to misuse the privileges conferred through the copyright laws by aggregating the license rights of composers to charge supracompetitive rates.

The TMLC states that SESAC operates without the same legal constraints that are imposed on BMI and ASCAP. Does that mean that SESAC has yet to engage in behavior that would trigger Department of Justice intervention?

The facts are clear. SESAC is not required to offer a license where the fee is based on use of music. SESAC can offer exclusive affiliate contracts. SESAC is not subject to a third-party reasonable fee process that protects consumers against price gouging and potential copyright infringement liability. We do believe that SESAC's behavior raises serious competitive concerns that warrant careful examination by the Department of Justice. We also believe that SESAC's manipulation of current copyright law is evidence of a broader public policy concern that only Congress can address relative to any PRO not under a consent decree.

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