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HOW MUCH FOR A SONG?: THE ANTITRUST DECREES THAT
GOVERN THE MARKET FOR MUSIC

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TUESDAY, MARCH 10, 2015

United States Senate,
Committee on the Judiciary,
Subcommittee on Antitrust, Competition
Policy and Consumer Rights
Washington, DC

The Committee met, pursuant to notice, at 10:00 a.m.,
Room 226, Dirksen Senate Office Building, Hon. Mike Lee,
Chairman of the Subcommittee, presiding.

Present: Senators Hatch, Perdue, Tillis, Klobuchar,
Franken and Coons.

1 OPENING STATEMENT OF HON. MIKE LEE, A U.S. SENATOR FROM
2 THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON ANTITRUST,
3 COMPETITION POLICY AND CONSUMER RIGHTS, COMMITTEE ON THE
4 JUDICIARY

5

6 Chairman Lee. Welcome. This is the first hearing
7 in this Congress of the Subcommittee on Antitrust,
8 Competition Policy and Consumer Rights.

9 I would like to begin by thanking my friend and
10 colleague, Senator Klobuchar, for the tremendous job she
11 did in chairing this committee before me. And I will
12 note that she and I both always had a very good working
13 relationship and we share the same basic goals for this
14 subcommittee, which involves ensuring, first and
15 foremost, that consumers are protected from those who
16 would abuse the marketplace and, second, that we perform
17 effective oversight of the Department of Justice's
18 Antitrust Division and of the competition side of the
19 Federal Trade Commission.

20 I look forward to continuing that bipartisan work in
21 this Congress and I would like to thank Senator Klobuchar
22 and her staff for their hard work in preparing for this
23 hearing.

24 I would also like to thank the Chairman of the full
25 Committee, Senator Grassley, for supporting this hearing.

1 Senator Grassley was planning to be here today, but he is
2 stuck on the floor managing some human trafficking
3 legislation that is pending this week.

4 A few housekeeping matters before we begin that I
5 would like to address. After Senator Klobuchar give some
6 opening remarks about the hearing, we will hear from our
7 panel of witnesses, who I will introduce a little bit
8 later on, and then we will have 5-minute question rounds
9 with our panelists.

10 Today's hearing deals with a serious issue and I
11 trust that members of the public who are here will act
12 accordingly.

13 I want to note at the outset that the rules of the
14 Senate prohibit outbursts, clapping or demonstrations of
15 any kind and this would include blocking the view of
16 people around you. So please be mindful of the rules as
17 we conduct this hearing.

18 I do not think this will be necessary, I certainly
19 hope it will not, but I will ask the Capitol Police --
20 Senator Klobuchar. Well, it depends on what you
21 say, because they could be allowed to clap.

22 Chairman Lee. Exactly, yes. I guess we have some
23 rule on that. But if it becomes necessary, I will ask
24 the Capitol Police to remove anyone who violates the
25 rules.

1 If you will indulge me, I want to provide some
2 background on this complicated issue, an issue that
3 perhaps could be familiar to some in the room, but is not
4 familiar to most Americans.

5 This hearing is about the market for music.
6 Specifically, it is about the market for licenses to
7 publicly perform copyrighted musical compositions.

8 What does this mean? Well, every song has an author,
9 the person who wrote it, not necessarily the person who
10 performed it or the person who recorded it, and that
11 author has a copyright in that song, meaning that anyone
12 who wants to perform it in public has to get a license
13 from the author in order to do so, which turns out to be
14 a lot of people.

15 Lots of businesses play music for customers, radio
16 stations and Internet streaming services like Pandora or
17 iHeart Radio are the obvious examples. But there are all
18 sorts of other examples. You have got bars and
19 restaurants that play music to set an ambience. You have
20 got retail stores that do the same thing.

21 Television networks and cable companies that air
22 college football games where there is a marching band in
23 the background and that marching band tends to play music
24 and that music tends to be copyrighted.

25 All those people need a license for every song they

1 play or else they have to pay enormous damages to the
2 copyright-holder. But the market could not function if
3 every neighborhood restaurant had to go look for every
4 author of every song it wanted to play and negotiate with
5 each one of those authors for license fees nor do
6 individual copyright-holders have time to contact every
7 bar in America and ask them for license payments.

8 As a result, for more than 70 years, publishers and
9 songwriters have relied on performing rights
10 organizations, or PROs as they are known in the industry,
11 to license music on their behalf and then collect and
12 distribute the royalties.

13 The two largest PROs are called ASCAP and BMI, and we
14 are pleased to have representatives of both of those
15 organizations here today as witnesses.

16 Well, ASCAP and BMI sell blanket licenses to all
17 works in their inventories and between the two of them,
18 those licenses will cover most every song, roughly
19 speaking and the number is debatable. ASCAP and BMI each
20 control approximately 45 percent of the market. The
21 remaining roughly 10 percent belongs to two other PROs,
22 SESAC and Global Music Rights.

23 So what does this have to do with antitrust law?
24 Well, it turns out that virtually the entire market for
25 the licenses we are talking about is governed by a pair

1 of antitrust consent decrees from a long time ago.

2 In the 1940s, the Department of Justice separately
3 sued ASCAP and BMI over concerns that they had violated
4 the Sherman Act through aggregating control of the music
5 license market. DOJ settled these cases and entered into
6 separate consent decrees with ASCAP and BMI in 1941.

7 The consent decrees are somewhat unusual. They are
8 perpetual in duration and they essentially function as a
9 kind of regulatory system for the price of these music
10 licenses.

11 The decrees contain requirements that look very much
12 like a compulsory license and royalty scheme.
13 Specifically, they require that the PROs offer a fair
14 rate on a non-exclusive basis to any user requesting a
15 license and that they not discriminate among similar
16 licensees.

17 Any disputes about the rates are to be resolved by
18 the judge in the Southern District of New York who
19 oversees the degree, a process that has come to be know
20 as rate court.

21 For almost 75 years, the consent decree-ruled ASCAP
22 and BMI blanket licenses have allowed consumers of music
23 to have access to virtually the entire catalog of written
24 music by negotiating with just a few entities. The
25 system has allowed innovative distribution methods to

1 arise while enabling individual songwriters to get
2 royalties from thousands of bars, restaurants and radio
3 stations across the country.

4 Then came the Internet and things changed. In 1995,
5 after the advent of Web streaming, Congress decided to
6 require Internet companies who publicly perform music,
7 but no one else, to pay royalties to recording artists
8 and record labels and all the guys who play the songs
9 rather than the people who write them in exchange for
10 requiring the record labels to license their works.

11 In other words, Congress set up a scheme on the sound
12 recording side that looks very much like the scheme the
13 consent degrees set up on the musical composition side.
14 The major difference, however, is that the price of
15 royalties for composers is ultimately controlled by
16 judges, judges applying antitrust law, and the price of
17 royalties for recording artists is controlled by the
18 Copyright Royalty Board, which is a panel of
19 administrative judges housed in the Library of Congress.

20 These two groups of people do not agree about the
21 price of a license to play music on the Internet. The
22 Royalty Board sets rates for sound recordings played on
23 Internet radio that were substantially higher than those
24 the rate court had set for the underlying compositions.

25 For example, in 2013, Pandora paid approximately 48

1 percent of its revenue to recording artists and record
2 labels and only about 5 percent of its revenue to
3 songwriters and to publishers.

4 This disparity in rates led publishers to believe
5 that they would be able to achieve better rates outside
6 the consent decrees. So they made a request of ASCAP and
7 BMI. They asked ASCAP and BMI to change their membership
8 rules to allow something called partial withdrawal,
9 meaning the right to exclude digital services from the
10 blanket licenses that they normally sell.

11 That would require companies like Pandora to
12 separately negotiate with publishers for public
13 performance licenses at whatever price the market would
14 bear.

15 All of that led to litigation that is still pending.
16 It also led to allegations that the music publishers who
17 think that their judge-set royalty rates are too low were
18 colluding to keep Pandora's prices high instead of
19 competing with each other to drive consumer prices down.

20 In a lengthy opinion, Judge Denise Cote of the
21 Southern District of New York ruled that publishers had
22 no right to partially withdraw their digital rights from
23 the blanket license under the ASCAP consent decree.

24 Judge Cote also rejected publishers' attempts to use
25 the prices they negotiated with Pandora while they tried

1 partial withdrawal as benchmarks for setting prices
2 generally, noting evidence that the publishers had
3 cooperated instead of competing in those negotiations.

4 That case is now pending on appeal and even as we
5 speak, a different judge in the U.S. District Court for
6 the Southern District of New York is now conducting a
7 trial concerning similar questions under the separate BMI
8 consent decree.

9 Meanwhile, the Department of Justice's Antitrust
10 Division is currently considering an effort to modify the
11 consent decrees to allow partial withdrawals, among other
12 things. That would have a number of important
13 consequences that today's panel can discuss.

14 On the one hand, the publishers say that partial
15 withdrawal will allow them to negotiate prices with
16 Internet companies in a free market, and surely the most
17 striking feature of the current system is that there is
18 no free market at work.

19 On the other hand, others believe that after partial
20 withdrawal, the market will not really be free because a
21 few music publishers control most of the licenses and
22 they have been accused in the past of colluding to drive
23 up prices for consumers.

24 In short, what to do about these consent decrees is a
25 hard problem and it is one ultimately that affects many

1 millions of Americans.

2 Today we will hear from a variety of parties affected
3 by the consent decrees, each with a slightly different
4 place in the market. Here we have an opportunity to
5 discuss openly the topics that DOJ is discussing
6 privately.

7 As we listen today, we must remember that we have
8 both a responsibility to encourage creativity by
9 recognizing the value of copyrights and we also have a
10 duty to ensure that prices for music remain competitive
11 for consumers.

12 [The prepared statement of Senator Lee appears in the
13 appendix.]

14 Chairman Lee. Senator Klobuchar?

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1 OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR
2 FROM THE STATE OF MINNESOTA

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4 Senator Klobuchar. Thank you very much, Mr.
5 Chairman. I congratulate you on taking over the
6 subcommittee. We do not really have a formal passing of
7 the gavel at the subcommittee level, but it is exciting
8 and we have worked -- yes, here you go. There are you.
9 Thank you.

10 [Laughter]

11 Senator Klobuchar. And we have worked very well
12 together, as Senator Lee noted, and I know the majesty --
13 the majesty -- and I know that is going to continue.

14 This hearing focuses on an important and timely
15 topic, the state of competition in the music industry and
16 a pair of antitrust consent decrees that govern licenses
17 for the public performance of musical works.

18 Now, we are not here to talk about the sound
19 recording side of musical licensing. That set of
20 copyrights is governed by a different structure and a
21 different set of rules.

22 Today's hearing is about the underlying musical
23 works, the lyrics and the composition that songwriters
24 create, music publishers work to get out into the world,
25 and that licensees like broadcasters and digital music

1 services help us all enjoy.

2 As Senator Lee noted, the consent decrees under which
3 ASCAP, which is the American Society of Composers,
4 Authors and Publishers, and BMI, which, outside of this
5 room, refers to body mass index, for anyone that has gone
6 on a diet.

7 [Laughter]

8 Senator Klobuchar. But inside of this room refers
9 to the Broadcast Music, Inc. Those consent decrees under
10 which they operate have been modified several times in
11 their history. It is appropriate from time to time for
12 the Department of Justice to review these consent decrees
13 to ensure that they are meeting their intended goal of
14 preserving and promoting competition.

15 There are some who argue that the consent decrees
16 have run their course and should be sunsetted, while
17 others maintain that the consent decrees serve a role in
18 protecting against competition concerns and should be
19 strengthened.

20 The DOJ's review of the consent decrees is also
21 informed by recent activity in the courts both in
22 enforcing the consent decrees and through private
23 antitrust litigation.

24 As Chairman Lee mentioned, there is recent litigation
25 in the U.S. District Court for the Southern District of

1 New York, which includes some of the parties who are
2 witnesses here today.

3 It is against this complicated backdrop that DOJ is
4 taking a fresh look at the consent decrees. Our focus
5 today is on striking the right balance between the
6 impacts on consumers, main street businesses, and those
7 broadcasting content through radio, TV, satellite, and
8 new digital services, and respecting the rights and value
9 owed to the creators of the music that we all enjoy.

10 When the consent decrees first went into effect,
11 noone imagined the Discman or the boom box, much less the
12 iPod and digital streaming over the Internet.

13 In addition to innovations, restructuring, and new
14 players entering the market, Congress has also acted
15 throughout this time to recognize new rights in music.
16 We have acted to recognize new copyrights for sound
17 recordings, production and distribution, and, most
18 recently in 1995, for public performance of digital sound
19 recording.

20 Although this area is at the intersection of
21 antitrust and copyright law, our hearing today is going
22 to focus on the antitrust side and any competition issues
23 in the present day market for licensing musical works.

24 I look forward to hearing from all of our witnesses
25 today about the ongoing DOJ review and your

1 recommendations on the best path forward.

2 Thank you.

3 [The prepared statement of Senator Klobuchar appears
4 in the appendix.]

5 Chairman Lee. Thank you, Senator Klobuchar.

6 Before we introduce and swear in our witnesses, I
7 want to note at the outset that we have received some
8 letters from members of the public concerned about this
9 issue. Unless there is objection, this will be entered
10 into the record.

11 [The letters referred to follow:]

12 / COMMITTEE INSERT

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1 Chairman Lee. Now I would like to introduce our
2 witnesses and then we will swear them in. We will move
3 from this side of the table over.

4 First, we have got Beth Matthews, who is the CEO of
5 ASCAP, the full title, of course, being the American
6 Society of Composers, Authors and Publishers.

7 To her immediate left is Chris Harrison, the Vice
8 President of Business Affairs for Pandora Media, Inc.

9 Then we have Matt Pincus, who is the Founder and CEO
10 of SONGS Music Publishing.

11 Next, we have Mr. Mike Dowdle, who is from my home
12 State of Utah. Mr. Dowdle is the Vice President of
13 Business Affairs and also the general counsel for
14 Bonneville International.

15 Lee Thomas Miller is with Broadcast Music, Inc.
16 Songwriter Affiliate, and also the President of the
17 Nashville Songwriters Association International.

18 Finally, we have Jodie Griffin, who is a senior staff
19 attorney with Public Knowledge.

20 Will each of our witnesses please stand and be sworn?

21 [Witnesses sworn.]

22 Chairman Lee. Thank you.

23 We will now hear from each of our witnesses,
24 beginning with Ms. Matthews and then continuing to her
25 left until we get over to Ms. Griffin. After that, we

1 will proceed to questions.

2 Ms. Matthews?

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1 TESTIMONY OF BETH MATTHEWS, CEO, AMERICAN SOCIETY OF
2 COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP)

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4 Ms. Matthews. Good morning, Chairman Lee, Ranking
5 Member Klobuchar, and members of the subcommittee.

6 My name is Elizabeth Matthews and I am the Chief
7 Executive Officer of the American Society of Composers,
8 Authors and Publishers, which was formed 100 years ago by
9 songwriters.

10 ASCAP is a membership association operating on a not-
11 for-profit-basis. We are comprised of more than 525,000
12 songwriters, composers, lyricists, and music publishers,
13 and we represent over 10 million musical compositions.

14 Songwriters are the unsung heroes behind American
15 music. Every song you hear comes from the hearts and
16 minds of a songwriter. Songwriters create the notes and
17 the lyrics on the page. This is the copyright in the
18 musical composition that any artist may record.

19 Unlike recording artists, however, songwriters do not
20 earn money from selling merchandise or touring. Many
21 songwriters do not have salaries, benefits, or other
22 reliable sources of income. They rely on public
23 performance royalties to earn a living, to feed their
24 family, and pay the rent.

25 ASCAP's job is to ensure that songwriters can make a

1 living creating the music that we all love, because music
2 matters. Music is not just a business. It is an
3 important and continual contribution to our society and
4 to our day-to-day lives.

5 ASCAP licenses the right to publicly perform our
6 members' music to over 700,000 licensees in the United
7 States and we work with over 100 public performance
8 societies globally who, in turn, license our members'
9 works outside the United States.

10 In 2014 alone, we processed payment for over 500
11 billion public performances, more than double the year
12 before, and we are only one of several market actors.

13 In 1941, ASCAP entered into a consent decree with the
14 Department of Justice because ASCAP did not have
15 significant competition. Fast-forward 74 years and
16 today, competition with ASCAP is alive and well. We
17 compete directly with BMI and with unregulated
18 competitors, including SESAC, new licensing companies,
19 the foreign PROs, and even with our own music publisher
20 members whom are always free to directly license their
21 works.

22 The barriers to entry for new market competitors are
23 quite low, and yet we are still governed by a World War
24 II era consent decree which was last updated before the
25 invention of the iPod.

1 There have been seismic changes in the music
2 landscape. People no longer buy the music they love.
3 The stream it. Streaming services offer more choice and
4 more consumer control. As a result, they require access
5 to a massive variety of songs in order to provide users
6 with an optimally tailored content experience.

7 This means that the use of music has increased
8 exponentially, but the payments have not followed. For a
9 songwriter, this is a terrifying trend.

10 New and innovative market players require
11 experimentation and novel approaches to music licensing,
12 and yet the consent decree restricts our ability to adapt
13 because it is still stuck in 1941.

14 Some digital music services are unwilling to pay
15 songwriters a fair market rate, making it impossible for
16 songwriters to earn a sustainable living. As a result,
17 major music publishers are threatening to resign from
18 ASCAP and BMI entirely, which would be a devastating blow
19 to collective licensing and to songwriters.

20 In response, we have proposed a number of changes to
21 the ASCAP consent decree, including the following.
22 First, rate disputes with businesses that use music
23 should not be decided in an expensive, time-consuming
24 Federal rate court litigation. We propose a faster, less
25 expensive process.

1 Second, our membership have the flexibility to grant
2 ASCAP the right to license their music for some uses,
3 while retaining the right to license the other uses
4 directly. ASCAP fully supports transparency for
5 licensees in this regard. That approach is both pro
6 competitive and consistent with the U.S. copyright law.

7 Third, we need to simplify the music licensing by
8 allowing ASCAP to license more than just the right of
9 public performance. ASCAP may facilitate one-stop
10 shopping, a single destination where businesses may
11 secure every right that they need, if the consent decree
12 is changed.

13 The department of justice is undertaking a review of
14 our consent decree and we look forward to working with
15 them to make these pro competitive changes. We have also
16 engaged with Congress in our efforts to modernize the
17 current music licensing system. In that regard, we
18 applaud the leadership of Senator Hatch and others who
19 are introducing the Songwriter Equity Act, which
20 represents an important first step in reform.

21 If the consent decrees are not changed and major
22 music publishers resign from ASCAP and BMI, then the
23 system of collective licensing may collapse and everyone
24 loses. Copyright owners, licensees, music fans
25 everywhere, and, most importantly, the songwriters, who

1 are the heart and the soul of the music industry.

2 Thank you.

3 [The prepared testimony of Ms. Matthews appears in
4 the appendix.]

5 Chairman Lee. Beautifully timed, by the way. You
6 closed that out just as the final second ticked off the
7 clock.

8 Mr. Harrison?

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1 TESTIMONY OF CHRIS HARRISON, VICE PRESIDENT OF BUSINESS
2 AFFAIRS, PANDORA MEDIA, INC.

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4 Mr. Harrison. Chairman Lee, Ranking Member
5 Klobuchar, a distinguished members of this subcommittee,
6 thank you for inviting me to testify.

7 My name is Christopher Harrison. I am the Vice
8 President-Business Affairs at Pandora Media.

9 Launched less than 10 years ago, Pandora is now the
10 most popular Internet radio service in America, reaching
11 more than 80 million participants -- 80 million listeners
12 each month.

13 The mission of Pandora and our more than 1,400
14 employees is to unleash the infinite power of music by
15 being the effortless source of personalized music
16 enjoyment and discovery for millions of listeners.

17 Where others may see a music industry in turmoil,
18 Pandora sees abundant opportunities for new leadership to
19 create a music industry that benefits the entire
20 ecosystem.

21 The recent launch of Pandora's artist marketing
22 platform, which gives free access to artists to see how
23 their music performs on our platform is the first of many
24 initiatives intended to unlock the power of Pandora to
25 enable music-makers to grow their audience.

1 In addition, Pandora represents a significant new
2 revenue stream, with world the payments approaching \$450
3 million last year alone and more than \$1.2 billion since
4 we launched in 2005.

5 Ensuring a vibrant and growing music industry in the
6 years to come requires a marketplace that is open,
7 transparent, and vigorously competitive. Unfortunately,
8 there are a number of significant obstacles that threaten
9 this future and require the attention of this
10 subcommittee.

11 It has been nearly 3 years since this subcommittee
12 reviewed competition in the music industry, with its
13 hearing on Sony ATV's acquisition of EMI, which reduced
14 the number of major music publishers from 4 to 3.

15 Among the most important obstacles is an alarming
16 lack of transparency. As I describe in my written
17 testimony, this lack of transparency was a key factor in
18 Pandora's inability to obtain competitive market
19 agreements with the music publishers who had allegedly
20 withdrawn their digital performance rights from ASCAP and
21 BMI.

22 I commend Mr. Pincus for making the repertory of
23 songs available publicly and I hope that other publishers
24 and PROs follow his example.

25 In order to foster competition, we recommend the

1 creation of a publicly available database of record to
2 house all relevant music copyright ownership information.

3 By enabling services to quickly ascertain who owns
4 which work, a single database of record would enable
5 services to identify on a catalog-by-catalog basis the
6 owners of the songs they perform, which would encourage
7 true competition among copyright owners for distribution
8 on digital platforms.

9 While the transparency provided by such a database
10 would mitigate the anticompetitive behavior Pandora
11 recently experienced, transparency alone is insufficient
12 to solve the problems that Pandora faced over the past
13 few years.

14 As this hearing takes place, the largest music
15 publishers and PROs are demanding changes to the very
16 decrees designed to forestall their now well documented
17 into the competitive conduct.

18 In the past year, four different Federal District
19 Court judges found evidence of the same types of
20 egregious anticompetitive conduct that gave rise to the
21 original consent decrees 70 years ago.

22 Pandora directly experienced some of that
23 anticompetitive behavior, which I detail in my written
24 remarks.

25 While we are open to sensible modifications to the

1 consent decrees, any modification must ensure a
2 competitive vitality and independent pricing activity
3 that does not exist at this time.

4 To amend the decrees in the manner the PROs and
5 publishers seek would seriously harm competition by
6 turning a blind eye to harmful misconduct, permitting
7 publishers and PROs to artificially inflate prices and
8 ultimately harm consumers' access to the music they love.

9 While we remain optimistic about the future of music
10 streaming, the government has a critical role playing to
11 guarantee a functionally competitive music licensing
12 ecosystem.

13 As evidenced by the coordinated behavior I described
14 previously, there is a continued need for government
15 oversight to ensure that certain participants in this
16 highly consolidated industry cannot leverage the market
17 power run your game.

18 Thank you for your consideration of this important
19 issues. I look forward to answering any questions.

20 [The prepared testimony of Mr. Harrison appears in
21 the appendix.]

22 Chairman Lee. Thank you, Mr. Harrison.

23 Mr. Pincus?

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1 TESTIMONY OF MATT PINCUS, FOUNDER AND CEO, SONGS MUSIC
2 PUBLISHING

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4 Mr. Pincus. Good morning, Chairman Lee, Senator
5 Klobuchar, and members of the subcommittee.

6 I am honored to provide my perspective as a music
7 publisher and a small business owner. The fundamental
8 question of today's hearing is simple. Why are the
9 property rights of songwriters and publishers subject to
10 perpetual, heavy-handed government regulation?

11 I am the CEO of SONGS Music Publishing. I represent
12 350 contemporary songwriters. The current environment is
13 very hard on songwriters and perpetual government
14 regulation is making it worse.

15 I am an avid user of many digital music services.
16 Somewhere in the many models out there is the answer to
17 future growth for my company.

18 I started SONGS in 2004 to transact with the digital
19 market freely and easily. However, as I detail in my
20 written testimony, the current consent decrees are
21 artificially depressing the performance royalties that
22 digital services pay, because I am unable to negotiate
23 for my property rights in a free and free market.

24 Three successful songwriters I represent wrote a song
25 for the recording artists, Jason Derulo. The song went

1 number one. It was streamed 124 million times on
2 Pandora.

3 As a songwriter, it does not get any better than
4 this, and yet their 50 percent interest in this song
5 generated only \$3,158.05 in royalties to be shared among
6 the three of them.

7 If streaming music is the future, then it is clear
8 that all songwriters and publishers should be very
9 concerned. This rate of monetization is not fair for my
10 songwriters.

11 Like any businessman, I am best suited to determine
12 the fair price for the property rights I represent and to
13 say no when I feel unfairly compensated for them.
14 Instead, I am compelled to allow anyone to use my songs,
15 no matter what the terms, because of perpetual government
16 regulation.

17 Those lobbying for continued regulation often cite
18 the high earnings of the top 1 percent of recording
19 artists. While I represent the creators of some of the
20 most recognizable songs in the world, the reality is that
21 many of the creators I represent are struggling to make
22 the minimum wage from their music.

23 Like the acclaimed indie rock songwriter, a husband
24 and father who has been plagued by illness and unable to
25 afford proper medical treatment, his sole income comes

1 from creating music. Despite achieving notoriety for a
2 song streamed over 11 million times on Pandora, he was
3 paid only \$642.

4 I have a responsibility to secure fair compensation
5 for the talented songwriters I represent and I am unable
6 to do so due to perpetual regulation, because under the
7 current consent decrees, I have only two very bad choices
8 in seeking fair rates for my songwriters: accept unfair
9 government regulation that depresses property value or
10 withdraw entirely from the collective licensing system
11 and incur tremendous costs and terrible inefficiencies.

12 To the benefit of both rights-holders and businesses
13 that use our music, our songs are licensed collectively
14 through performing rights organizations such as ASCAP and
15 BMI. However, despite radical changes in how music is
16 used and consumed, today's songwriters and music
17 publishers continue to be highly regulated by consent
18 decrees imposed during World War II.

19 In my written testimony, I identify modifications to
20 the decrees that I believe will allow for a more
21 competitive, free and fair market for all copyright
22 owners and music users.

23 Critical changes to the consent decrees include
24 amending rate-setting procedures to allow for
25 negotiations and payments that more closely reflect the

1 free market; allowing direct licensing of performance
2 rights; establishing a formal mechanism for sunset or at
3 least periodic review of the decrees; and, providing
4 music publishers and their agents the flexibility to
5 license digital services seeking multiple rights.

6 I believe the Department of Justice has an important
7 role in enforcing antitrust laws against any real
8 anticompetitive actions of specific parties, but that
9 role should not be used to regulate small business owners
10 and prevent a free market development of an entire
11 industry rose 75 years.

12 As a music publisher, my livelihood depends on widely
13 licensing my songs. That is the reality in a free
14 market. If given the freedom, like any other music
15 publisher, I will exercise it responsibly to the benefit
16 of my songwriters.

17 Thank you again for the opportunity to share my views
18 with you today.

19 [The prepared testimony of Mr. Pincus appears in the
20 appendix.]

21 Chairman Lee. Thank you, Mr. Pincus.

22 Mr. Dowdle?

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1 TESTIMONY OF MIKE DOWDLE, VICE PRESIDENT OF BUSINESS
2 AFFAIRS AND GENERAL COUNSEL, BONNEVILLE INTERNATIONAL

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4 Mr. Dowdle. Good morning, Chairman Lee, Ranking
5 Member Klobuchar, and members of the subcommittee.

6 My name is Mike Dowdle and I am Vice President of
7 Business Affairs and General Counsel for Bonneville
8 International Corporation, which owns television and
9 radio stations in Salt Lake City, Los Angeles, Seattle,
10 and Phoenix.

11 I am pleased to testify today on behalf of the
12 National Association of Broadcasters and its thousands of
13 free local radio stations throughout the Nation.

14 My testimony will focus on the continued necessity of
15 the ASCAP and BMI consent decrees. Absent these consent
16 decrees, no fair competitive market would exist for the
17 licensing of musical works. This would harm not only
18 broadcast audiences whose access to our programming would
19 be jeopardized, but customers of the countless businesses
20 that publicly perform music every day, including
21 restaurants, bars, retailers, and sporting venues in your
22 local communities.

23 To illustrate the issue, let me provide an example.
24 KSL-TV, Bonneville's NBC affiliate in Salt Lake City, has
25 music interwoven throughout its programming. These

1 musical performances take place in the background of its
2 movies and television shows and live sporting events and
3 local news, during transitions between programs and even
4 within commercials.

5 For its locally produced content, KSL-TV has
6 editorial discretion over which specific songs it airs.
7 So in the event that it could not obtain the rights to a
8 certain song, KSL could likely take steps to ensure that
9 the song is not performed.

10 But for a significant portion of its content, namely,
11 network and syndicated programming, live events, and
12 commercials, it has no editorial control. If KSL lacks
13 the right to publicly perform a song, it runs the risk of
14 significant penalties under Federal copyright law.

15 Our radio stations that air syndicated programming,
16 commercials, and live events run the same risks. They
17 simply must have the public performance rights to the
18 full catalog of musical works in order to operate
19 lawfully.

20 Even the right to a single musical work gives the
21 copyright-owner significant market power. The risk of
22 anticompetitive abuse is compounded when these rights are
23 aggregated, which is exactly what the performing rights
24 organizations or PROs do.

25 ASCAP and BMI control more than 90 percent of the

1 public performance rights to musical works in the United
2 States. Aggregate those rights into blanket licenses,
3 and then fix a single price roll music within that
4 license, irrespective of which songs are actually used.

5 In any other industry, this would constitute per se
6 violation of the antitrust laws. But the consent decrees
7 entered into between the DOJ and both organizations more
8 than 70 years ago serve as antitrust lifelines that allow
9 ASCAP and BMI to continue to operate in spite of their
10 anticompetitive nature.

11 Absent the protections and framework afforded by the
12 consent decrees, ASCAP and BMI would have unfettered
13 ability to extract above market prices and terms for the
14 rights and those works from broadcasters and other
15 licensees.

16 Let me be clear. Broadcasters would cease operations
17 without the ability to clear these rights and the consent
18 decrees are critical to that end.

19 Before I conclude, I want to touch on two specific
20 points that are central to today's hearing. First, in an
21 attempt to circumvent the consent decrees, large music
22 publishers have sought to selectively withdraw from ASCAP
23 and BMI to directly negotiate with certain digital
24 services.

25 Two Federal courts interpreted the consent decrees to

1 prohibit such partial withdrawals, and now the PROs are
2 asking both DOJ and Congress to amend them.

3 Such a modification for partial withdrawals should
4 not be allowed. The fact is any music publisher with
5 sufficient size and scale to consider direct negotiations
6 for selected rights, such as digital rights, would have
7 essentially the same power in the market as the PROs and
8 raise the same antitrust concerns.

9 Relaxing the consent decrees in this way would enable
10 music publishers to engage in the same behavior that
11 prompted the consent decrees in the first place and that
12 has been condemned by the courts cents.

13 Second, this subcommittee need look no further than
14 the recent antitrust actions brought against the third
15 major PRO, SESAC, to glimpse the anticompetitive
16 licensing practices undertaken by an unregulated
17 collective. These practices, which resulted in a \$58
18 million settlement between SESAC and the television
19 industry just a month ago are detailed in my written
20 testimony and provide a real world example of the
21 antitrust abuses that would be unavoidable outside of
22 this consent decree framework.

23 In conclusion, this subcommittee has long recognized
24 the important role that the antitrust laws play in
25 ensuring free and competitive markets for the benefit of

1 consumers.

2 The ASCAP and BMI consent decrees remain vital to
3 television and radio broadcasters' ability to fairly,
4 efficiently, and transparently license musical works to
5 the benefit of their audiences and your constituents.

6 Thank you for inviting me to testify today. I look
7 forward to answering any questions.

8 [The prepared testimony of Mr. Dowdle appears in the
9 appendix.]

10 Chairman Lee. Thank you, Mr. Dowdle.

11 Mr. Miller?

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1 TESTIMONY OF LEE THOMAS MILLER, BROADCAST MUSIC, INC.
2 SONGWRITER AFFILIATE, PRESIDENT OF THE NASHVILLE
3 SONGWRITERS ASSOCIATION INTERNATIONAL

4

5 Mr. Miller. Good morning. My name is Lee Thomas
6 Miller. I am an American songwriter.

7 I grew up on a small tobacco farm in Kentucky. When
8 I was 11, and started playing piano, then guitar, then
9 violin. Music has a way of kind of taking you over.

10 I knew early on that it was not just a hobby. I went
11 to college and instead of studying something sensible
12 like business, as my mother wished, I studied classical
13 music composition, which basically just meant I was over
14 qualified for my job, singing and playing in the bars at
15 night.

16 But there I was classically trained and writing honky
17 tonk songs on the side.

18 Then I learned about Broadcast Music, Incorporated.
19 I was always looking for an excuse to visit Nashville.
20 So I took a trip to BMI. I met with a songwriter
21 representative who explained to me what BMI did.

22 When your song plays on the radio, we collect the
23 money, he said. And I said sign me up. Then I played
24 him my self-made recordings of the songs I had been
25 writing, and he was very blunt. You are not much of a

1 singer and guitar players are a dime a dozen. But I
2 believe you can be a songwriter.

3 So I graduated college, said \$1,000, and moved to
4 Music City. For years I wrote songs, hundreds of songs.
5 I played in bands and took temporary jobs to pay the
6 bills. I studied the songs I heard on the radio and
7 began meeting and learning from the songwriters who wrote
8 them.

9 At the time, the music business was healthy and music
10 publishers could take chances. A prominent publisher
11 took a chance on me, and then the real work began.

12 My first cuts were not memorable. When BMI sent me
13 my first performance royalty check, it was for \$4.69.
14 Today it is framed and hanging on my office wall. That
15 check meant everything. That check meant that I was a
16 professional songwriter.

17 All in all, it took 11 years after I moved to
18 Nashville to have a hit on the radio. In 2003, I
19 received my first BMI award, an award given to the 50
20 most played songs of the year. It was a song titled "The
21 Impossible."

22 Ironically, the song was about overcoming
23 insurmountable odds through faith and determination and
24 believing anything is actually possible.

25 To me, earning that first BMI award was like a

1 ballplayer going from AAA to the major leagues.

2 In today's music industry environment, songwriters
3 count on their performing rights societies. The one
4 thing keeping us afloat is that performance royalty
5 check. We do not tour. We do not sell tee shirts. We
6 write songs all day every day. And when we succeed, we
7 pay self-employment income tax. With what remains, we
8 buy gas and bread and white picket fences.

9 But since the year 2000, the National Songwriters
10 Association, where I serve as president, estimates that
11 America has lost between 80 and 90 percent of its
12 professional songwriters, whose primary income is from
13 royalties.

14 I am talking about creators, and what we create is
15 not some obsolete, irrelevant cultural product of days
16 gone by. It is music.

17 What we create is there when you fall in love. It is
18 there when your heart breaks. It heals. It inspires.
19 It time travels. It crosses party lines.

20 So how does the BMI consent decree impact me? Well,
21 I feel that it puts BMI and songwriters at a disadvantage
22 in several important ways. For instance, if rate
23 disputes could be resolved by arbitration rather than
24 expensive litigation, that would feel like a win for
25 everyone. New services could launch and songwriters

1 could get paid quickly without spending lots of money on
2 lawsuits.

3 Songwriters also worry that BMI is not allowed to
4 license rights other than the performance right. Most
5 new services need several rights. a one-stop license
6 from BMI would be a quick and efficient way to get those
7 services off the ground.

8 These aspects of the BMI consent decree, in my view,
9 have devalued the musical composition to the point where
10 the songwriters are being crushed. It is bad enough that
11 it is so easy to steal the music today, but a legal
12 framework that allows songs to be streamed for nearly
13 free will destroy the livelihood of the American
14 songwriter if it is allowed to continue.

15 The U.S. Department of Justice is presently
16 undertaking a comprehensive review of the ASCAP and BMI
17 consent decrees and we hope that they will recommend
18 substantial changes that will allow us the flexibility we
19 need to operate in the free market.

20 I am America's smallest small business. I sit down
21 and make stuff up. I can make you laugh, I can make you
22 cry. I can make you do both with one 3-minute story.
23 That is the power of music and it all begins with a song.
24 But I am here to tell you there are not many of us left.

25 Thank you, Chairman Lee, Ranking Member Klobuchar and

1 members of the committee.

2 [The prepared testimony of Mr. Miller appears in the
3 appendix.]

4 Chairman Lee. Thank you, Mr. Miller.

5 Ms. Griffin?

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1 TESTIMONY OF JODIE GRIFFIN, SENIOR STAFF ATTORNEY, PUBLIC
2 KNOWLEDGE

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4 Ms. Griffin. Chairman Lee, Ranking Member
5 Klobuchar, and members of the subcommittee, thank you for
6 inviting me to testify today. And I would like to thank
7 you, Mr. Chairman, for your remarks emphasizing that
8 competition policy is, first and foremost, about
9 protecting consumers.

10 My name is Jodie Griffin and I am a senior staff
11 attorney at Public Knowledge, an organization that
12 advocates for policies that promote freedom of
13 expression, affordable communications tools, and the
14 public's ability to create and access creative works.

15 Before Public Knowledge, I was a musician and helped
16 launch and worked for the five-time Grammy-nominated
17 independent label, BMOP/sound.

18 The Department of Justice's review of its antitrust
19 consent decrees with ASCAP and BMI comes at a pivotal
20 time for the music business. Now more than ever, it is
21 crucial that policymakers promote competition and
22 innovation in music distribution to benefit listeners and
23 artists alike.

24 New music services give consumers convenient ways to
25 legally access music at reasonable prices and they have

1 the potential to give artists greater control over their
2 own careers. However, this market is still new and it is
3 still growing and it is crucial that we encourage
4 competition and innovation or consumers and artists will
5 only be left with fewer options and less leverage in the
6 marketplace.

7 Antitrust and copyright policies should promote a
8 robust and competitive music marketplace, where artists
9 can get their music out on the market and receive a fair
10 price for it and users have competitive choices among
11 legal music services.

12 Yet all of the middlemen in the music business, from
13 publishers to labels to distributors, are facing robust
14 competition that forces them to be accountable to
15 musicians and their audiences. But if an intermediary
16 can leverage a large catalog of copyright acquisitions to
17 dominate the market, it has the power and the incentive
18 to use that leverage to raise prices for consumers, pass
19 less revenue on to artists, and prevent new services that
20 would challenge its dominance.

21 For example, on the sound recording side of the music
22 business, when the major labels negotiate licenses
23 directly, they have been able to use their market power
24 to obtain large lump sum cash advances and equity in the
25 new companies, the benefits of which are not passed on to

1 artists and independent labels argue that the majors can
2 demand royalties disproportionate to their actual market
3 share because they have enough market power to veto new
4 services.

5 The very act of creating large collective licensing
6 organizations concentrates market power and the market
7 for public performance rights and compositions is very
8 concentrated. This has been the case for decades, and so
9 for decades we have had antitrust settlements, ensuring
10 that the largest performing rights organizations offer
11 reasonable licenses despite their market power.

12 This does not mean it is inappropriate to
13 periodically review and update the consent decrees to
14 encourage a more competitive market, but at this moment
15 we can already see multiple warning signs that
16 dismantling the protections in the consent decrees would
17 result in a less competitive and innovative market with
18 fewer choices for consumers.

19 In recent years, the music publishing industry has
20 only gotten more consolidated as the biggest publishers
21 buy up smaller firms. Ironically enough, some of those
22 mergers were even justified by the argument that post-
23 merger publishers could not possibly act
24 anticompetitively because we can rely on the market
25 protections in the consent decrees and in statutory

1 licenses.

2 And even more recently, a Federal judge has found
3 that when the major publishers attempted to license their
4 digital rights directly to the Pandora, they chose
5 collusion over competition. They could have used that
6 opportunity to compete with each other and with ASCAP,
7 but instead they chose to coordinate with each other,
8 despite the objections of some songwriters and
9 independent publishers within ASCAP.

10 A Federal judge later examined these negotiations and
11 found that the publishers' behavior magnified their
12 already very considerable market power, so much so that
13 the resulting licenses could not even be honestly
14 considered free market benchmarks.

15 Again, this does not mean that we must always have
16 consent decrees nor that they can never change, but the
17 evidence shows that at this moment in time, we need to
18 protect competition more than ever.

19 As the Department of Justice and Congress review
20 competition in the music licensing marketplace and the
21 antitrust consent decrees in particular, it is crucial
22 that we continue to support policies that encourage a
23 competitive market in which no company has the power to
24 pick winners and losers.

25 A marketplace that allows new entrants to compete,

1 whether among copyright-holders or distribution services,
2 ultimately benefits consumers and artists alike.

3 Thank you and I look forward to your questions.

4 [The prepared testimony of Ms. Griffin appears in the
5 appendix.]

6 Chairman Lee. Thanks to all of you for your opening
7 statements. Those were very helpful.

8 We will now begin our question-and-answer period with
9 5-minute rounds. I will go first, and then Senator
10 Klobuchar, and then we will alternate on each side of the
11 aisle.

12 Ms. Matthews, we will start with you. So your
13 consent decree has been around since the early 1940s. So
14 I guess it is the second oldest of the two consent
15 decrees.

16 When we look at the music market today, we can see
17 that it has changed a lot over the last 75 years. We
18 certainly see that delivery methods, in particular, have
19 changed a great deal since the early 1940s.

20 What can you tell me about this, about how the market
21 has changed over the last 75 years, and how those
22 changes, in your opinion, bring about the need for some
23 kind of modification of the status quo?

24 Ms. Matthews. The competitive market has increased
25 dramatically since the 1940s. We compete both with

1 regulated competitors, such as BMI, and several
2 unregulated new market entrants have shown up on the
3 scene in the last several years.

4 The most important change I think that has happened,
5 though, in the past decade has been consumer behavior.
6 Because people are no longer buying music, a major source
7 of revenue related to mechanical reproductions has
8 steeply declined for songwriters. So as a result, the
9 reliance on public performance is increasing.

10 Digital services are becoming increasingly more
11 customized and personalized with the proliferation of
12 wireless device adoption, broadband penetration rates
13 with high-speed services to the home, more music is being
14 played than ever before.

15 So while the volume of music has increased in terms
16 of overall public performances, the revenue is simply not
17 tracking in terms of increase. And at the end, the
18 songwriters are being harmed.

19 As a result, major music publishers are threatening
20 to resign. If they resign, collective licensing will
21 collapse.

22 Chairman Lee. Thank you.

23 Mr. Harrison, I am presumptively always supportive of
24 free market solutions to competition issues. Now, you
25 have suggested that these very old consent decrees are

1 not outdated all.

2 What evidence in the market leads you to believe that
3 the consent decrees that we are talking about today, as
4 they are written, are necessary even in the digital age
5 and even in the digital sector?

6 Mr. Harrison. Well, I think there are two -- two
7 things I would point -- I would point you to. First is
8 just the structure of ASCAP and BMI. They are horizontal
9 joint sales agents. The take works from otherwise
10 competing publishers, aggregate those catalogs together,
11 and then fix a single price across all of their members'
12 catalogs.

13 As Mr. Dowdle indicated earlier, that is normally
14 viewed as a per se antitrust violation and the consent
15 decrees provide -- because of the protections they
16 provide have immunized ASCAP and BMI to prior private
17 antitrust claims.

18 More contemporaneously, Pandora over the last 2 years
19 has experienced what happens when publishers attempt to
20 partially withdraw. You alluded to Judge Cotes' opinion
21 in which she found that when given the opportunity to
22 compete against each other, the publishers and ASCAP
23 chose not to and instead chose to coordinate their
24 behavior, use their market power and drive rates above
25 the competitive market rate.

1 Chairman Lee. And speaking of that litigation and
2 speaking of Judge Cote, I want to turn back to you for a
3 minute, Ms. Matthews.

4 In the Pandora v. ASCAP litigation, the rate judge
5 discussed several examples of this behavior that she
6 found to be questionable. As this issue continues to
7 arise, I would like to give you a chance to respond to
8 some of those.

9 Now, if the publishers are permitted to partially
10 withdraw, will ASCAP view them as competitors in the
11 market for music licenses; and, if so, do you think that
12 will result in competitive pricing?

13 Ms. Matthews. It is counterintuitive, I know, but
14 ASCAP views the major publishers and independent
15 publishers as competitors today. We only accept a non-
16 exclusive grant of right, meaning that they are always
17 free to direct license with any music service, including
18 Pandora.

19 If they were allowed to, I will say, grant us a
20 partial grant of rights, which is supported by the U.S.
21 copyright law, because copyrights are divisible, they
22 would simply remove those rights from ASCAP in their
23 entirety. So we would not be competing for them with
24 respect to that particular license, but it would be pro-
25 competitive in the sense that it would create more choice

1 for music licensing services.

2 Chairman Lee. I will probably want to follow-up on
3 that a little bit later, but my time has expired and I
4 will turn it over to Senator Klobuchar.

5 Senator Klobuchar. I think I will start with where
6 you left off there, Senator Lee.

7 So a significant amount of the attention has been
8 placed on the partial withdrawal of certain rights from
9 the performance rights organization. As discussed, a
10 recent letter of the DOJ filed with the second circuit on
11 Friday indicates that the department believes the consent
12 degrees, as currently written, do not permit partial
13 withdrawals.

14 Ms. Matthews you answered that in part. But, Mr.
15 Pincus, why do we not start with you? Why are the
16 partial withdrawals needed, in your view?

17 Mr. Pincus. Well, the current system works quite
18 well with respect to most aspects of collective
19 licensing. I think there is broad satisfaction with the
20 radio licensing system, the television licensing system,
21 the bars, restaurants, stadiums' licensing system.

22 But with respect to the additional rights, I believe
23 that the rates are artificially suppressed.

24 If you look at market comparative rates, they have
25 been up to three to four times higher in multiple

1 situations. There are many companies that are doing
2 business in an unregulated way in the digital market that
3 are functioning just fine without government oversight,
4 and that puts us in a position where we feel like if we
5 are earning -- if our earnings are going down and the
6 listenership of radio is migrating to the lower-paying
7 rate, then our businesses are going to suffer over the
8 long term.

9 And what we would rather be able to do, like in any
10 other small business, is to be able to negotiate directly
11 for those rights.

12 Senator Klobuchar. Mr. Dowdle, do you want to
13 respond to that, this idea of the partial withdrawal?

14 Mr. Dowdle. Yes. Thank you, Senator Klobuchar.
15 There is an old adage -- as a young lawyer, I was a
16 litigator and there is an old adage, time honored in that
17 profession that says that facts made bad law,
18 hypothetical situations make worse law.

19 In this case, I would just urge the members of this
20 committee not to make a decision based on hypothetical
21 threat. That is first.

22 Second of all, the very fact that the music
23 publishers we are talking about are big enough to make a
24 threat that scares ASCAP and BMI should raise a lot of
25 eyebrows on this committee and at the Department of

1 Justice.

2 Those withdrawals are best put in -- as has been
3 mentioned here, the possibility of those withdrawals are
4 best put in the light of what might happen if you take a
5 look at what happened when they threatened them.

6 They engaged immediately inclusive in anticompetitive
7 activity. If you want to see what will happen, that
8 gives you a pretty good idea of what should happen.
9 That, I think, should really raise some eyebrows and
10 raise a question of whether or not they ought to have
11 their own consent decrees, frankly.

12 Senator Klobuchar. Do you want to respond at all,
13 Mr. Harrison?

14 Mr. Harrison. I agree with what Mr. Dowdle said.
15 The concern is not partial withdrawals, in theory. The
16 concern is partial withdrawals in practice. And what we
17 experienced over the last 2 years, when given an
18 opportunity to compete, when they actually believed they
19 had partially withdrawn, the publishers chose not to.
20 And to the extent that the department is looking into
21 this issue, I think it is wise for this subcommittee to
22 be mindful of actual behavior, not what folks might say
23 they want to do.

24 Senator Klobuchar. My last question. There are a
25 number of different ways that licensing rates are set

1 throughout the industry. Some have argued that rate
2 should be set in the free market rather than being
3 subject to terms administered and regulated by the
4 government.

5 Mr. Pincus, in your written testimony, you talk about
6 the right of public performance is, quote, "inherently a
7 free market right." What do you mean by that? And if
8 you could just answer briefly so I can get some other
9 comments on that.

10 Mr. Pincus, if it were not for the consent decrees
11 governing ASCAP and BMI, the negotiation would be between
12 publishers and licensees directly.

13 Senator Klobuchar. Do you think that is a good idea
14 then?

15 Mr. Pincus. I do. I think that while I understand
16 that there are anticompetitive concerns, I, for one, have
17 never been accused of acting anticompetitively. My
18 business is not scale enough and yet I am regulated
19 broadly by a system that is meant to protect against
20 anticompetitive behavior on a blanket basis.

21 Senator Klobuchar. Ms. Griffin, do you want to
22 respond to that?

23 Ms. Griffin. I think -- so when I think of what a
24 true free market is, it is one that has competition, one
25 that brings more choices and lower prices to consumers.

1 When we look at the publishing market right now, it
2 is hard to know what a true free market rate is because
3 we do not have examples of negotiations where the
4 licensee can say no and still stay in business. And that
5 is why we still need the competition protections, like a
6 statutory license or here the consent decrees.

7 Senator Klobuchar. Does anyone else want to respond
8 to that, this idea? Ms. Matthews?

9 Ms. Matthews. I would just like to point out that
10 under the current consent decrees for both ASCAP and BMI,
11 the license is compulsory, meaning that there is no
12 negotiation whatsoever in order to have access to the
13 assets.

14 It is the antithesis of a free market negotiation. A
15 licensee applies for a license. They immediately can
16 exploit those copyrights.

17 Senator Klobuchar. All right. Thank you very much.
18 I will turn it over to my colleagues.

19 Chairman Lee. Mr. Tillis?

20 Mr. Tillis. Mr. Dowdle, if the partial withdrawal
21 is allowed, how is this going to affect broadcasters that
22 simulcast through digital channel?

23 Mr. Dowdle. Well, we will be faced with having to
24 negotiate, if you can call it a negotiation, with people
25 who we do not know how much of their product may be used

1 in our programming. Therefore, we have to have those
2 licenses.

3 Our hands are tied. We have to come to an agreement
4 with them. That gives them an uneven field on which we
5 have to play immediately. We do not have a choice. We
6 have to sit down. We cannot say no.

7 Second of all, we have already seen how they behave
8 in a, quote-unquote, "free and open marketplace." They
9 collude. They will immediately go to the conduct, we
10 believe, that they have already proven they go to. That
11 is, they will tend to conduct themselves in an
12 anticompetitive way.

13 That is what we will be faced with -- a gun to hour
14 head and no market power.

15 Senator Tillis. Ms. Griffin, what is the consumer
16 interest here? How do consent decrees help consumers?

17 Ms. Griffin. Thank you, Senator. Consumers benefit
18 when they have choices for different services that give
19 them different types of offerings and different price
20 points. And so here, the role of the consent decrees in
21 creating that market is allowing prospective new
22 licensees to enter the market, pay artists, and then
23 launch a service and give consumers a new choice.

24 Senator Tillis. I have, I guess, a general question
25 for anyone that would like to speak on it. I am trying

1 to get a sense, in each of your view, what fair market
2 value means, from your perspective. And I am happy to
3 have anyone, but I am really just trying to understand
4 how the consent decree stands in the way of achieving it,
5 as well.

6 But to anyone. We can start down here with Ms.
7 Matthews.

8 Ms. Matthews. So a free market would encompass a
9 willing buyer and a willing seller negotiating openly.
10 And in an instance where they do not agree, either party
11 can simply walk away. When they do agree, presumably
12 they would reach a free market rate.

13 Conversely, under the consent decrees, that
14 negotiation does not happen because the right is
15 compulsory. ASCAP and BMI do not have the right to say
16 no.

17 Senator Tillis. Mr. Harrison?

18 Mr. Harrison. I would agree with Ms. Matthews'
19 first characterization of fair market value. It is the
20 value that clears a market when you have a willing buyer
21 and a willing seller, without an information asymmetry
22 and with the ability to walk away.

23 I would also agree with Mr. Dowdle's characterization
24 of services and certainly the experience of Pandora that
25 when publishers will not tell you what they own and then

1 threaten willful copyright infringement, which comes
2 along with \$150,000 damage potential for each work
3 infringed, services do not feel they have the ability to
4 walk away either.

5 Senator Tillis. Mr. Pincus?

6 Mr. Pincus. As a small businessperson, I think a
7 free market is a place where I can decide what is most
8 appropriate for my business and in this context, I do not
9 feel like I can do that.

10 Mr. Dowdle. Senator, with all due respect to our
11 discussion about a free market, we have actors that their
12 very existence would not exist in a true free market. We
13 have collectives that are sanctioned in their activity.
14 Their very existence does not allow a free market as such
15 to really operate. And so you have to come outside of
16 this sort of theoretical free market immediately when you
17 give the right to collectives to bargain in the way that
18 they do.

19 There has to be a construct to govern that sort of
20 activity. I agree that if one seller and one buyer are
21 talking, that would work. When you are talking about a
22 seller of the size and magnitude of large music
23 publishers or collective societies, you do not have a
24 free market.

25 Senator Tillis. Mr. Miller?

1 Mr. Miller. Well, free market is something that the
2 songwriters can only dream of. We have never had this.
3 We have been told what our copyright was worth since the
4 beginning of writing songs and it has got us to the place
5 today where it is quickly becoming unsustainable.

6 The thought of being able to sit down and have a
7 negotiation in 2015 of what our craft may be worth would
8 be life-changing to our profession. We are the ultimate
9 player that cannot say no. We are handcuffed to the
10 bottom of the ocean and we are just looking for some
11 relief.

12 Senator Tillis. Ms. Griffin?

13 Ms. Griffin. I would agree with Ms. Matthews that a
14 free market is one where either side can walk away
15 without going out of business entirely. And I would
16 note, I think Mr. Miller mentioned how songwriters feel
17 that they have to go through these licenses and I think
18 part of the reason that songwriters feel that way is that
19 the PROs dominate the business so much that you do have
20 to go through them, and that is what makes it so
21 dangerous from a competitive perspective.

22 Senator Tillis. Thank you. Thank you, Mr. Chair.

23 Chairman Lee. Senator Coons?

24 Senator Coons. Thank you, Chairman Lee.

25 Ms. Matthews, if I might, just to go back to your

1 opening statement that the competitive environment that
2 ASCAP faces today has become more and more challenging.

3 How does ASCAP compete with the other PROs? Just
4 give me a little more detail on how that competition
5 today actually plays out. And in answering my question,
6 do not licensees really end up needing a license from all
7 the PROs?

8 Ms. Matthews. Well, the current business practice
9 is most licensees obtain a blanket license agreement from
10 the three largest PROs, SESAC, BMI and ASCAP. They are
11 always free, however, to license around, meaning they can
12 program around those assets purposely because they have
13 complete creative control over their programming, except
14 in an instance where, as Mr. Dowdle pointed out, that
15 perhaps they are licensing programming from other
16 sources.

17 The barriers to enter the space, however, today are
18 so low, an individual could simply buy one catalog of
19 copyrights and compete with a PRO. Publishers are
20 directly competing with PROs. International foreign
21 societies are competing with PROs. And I would not be
22 surprised if technology companies enter the space and
23 start competing with PROs.

24 Senator Coons. Mr. Dowdle, your view on that same
25 comment, on how the competitive marketplace looks to

1 broadcasters and others in your role?

2 Mr. Dowdle. Thank you, Senator. Yes. First of
3 all, I am a member of ASCAP and have been for over 20
4 years. I am a very unimportant member of ASCAP, but I am
5 a member of ASCAP and still have publishing interests, as
6 well, in musical works.

7 These are friends of mine. So I am not trying to say
8 anything personal about their personal behavior. But
9 they do not really compete as to a particular work
10 because they do not allow people to license with both
11 societies.

12 As to the works in their catalog, they deal
13 exclusively. I do not think that is competition,
14 frankly.

15 Senator Coons. Ms. Griffin, could I just ask you
16 what risks do we run if DOJ were to disband the consent
17 decree wholesale and then address any subsequent
18 antitrust violations just as they arise, if we really got
19 to a free market and relied on antitrust statutes? And
20 how does partial withdrawal mitigate or aggravate those
21 risks?

22 Ms. Griffin. So if we were to disband the consent
23 decrees entirely, I think the three major publishers
24 would have the market power to demand whatever they want
25 for licenses. They may or may not be able to efficiently

1 license the non-digital pieces of the market, like
2 restaurants and bars and cafes, and that could be a big
3 mess, as well.

4 But just looking at the digital side, I think the
5 issue is that -- you know, I come from the recording side
6 of the business and we see that there in the major labels
7 when they license uses that are not governed by statutory
8 licenses.

9 We have seen them demand equity stakes in new
10 companies so they can get vertically integrated. We have
11 seen them get large lump sum advances, which they will --
12 it is reported that they will often say that that is not
13 attributable to their artist contracts, so it does not go
14 down to the artist at the end of the day.

15 And then the independent labels say that the majors
16 get royalties that are more than their share of the
17 market, so much so that some of the independent labels
18 are asking for more statutory licenses, which is a pretty
19 telling example of what the state of competition is
20 there.

21 So I think that the publishers would be able to begin
22 to act like that because they have similar levels of
23 market concentration.

24 And for partial withdrawals, I think the danger with
25 partial withdrawals over just disbanding the consent

1 decrees entirely is that we have seen how the PROs and
2 ASCAP act when they think that they can partially
3 withdraw and it resulted in a lot of competition
4 problems. And my concern is that if the DOJ was to then
5 say having seen that, now you can partially withdraw, it
6 could be, even inadvertently, seen as giving the
7 imprimatur of the government to that kind of behavior in
8 the market.

9 Senator Coons. Let me ask a last question, if I
10 might.

11 Mr. Miller, I really appreciated your testimony.
12 Just as a reminder of the creative individuals who are,
13 in many ways, at the beginning of this conversation,
14 although Ms. Griffin also reminds us consumers are also a
15 critical piece, there are a lot of different folks
16 involved in this at a lot of different stages.

17 Mr. Miller, not all songwriters want to have some of
18 their performance rights pulled out of PROs. Why is that
19 and do you agree or disagree with that perspective?

20 Mr. Miller. Well, that does create a lot of
21 hypotheticals in a complicated music relicensing
22 situation. My take on partial withdrawal is if that is
23 the only way that songwriters can achieve higher rates,
24 then, yes, it makes sense.

25 But we are accustomed to our share being paid

1 directly to us through our PROs, mine being BMI. That,
2 for me, has worked efficiently and stable. The copyright
3 office has recommended that the services pay the
4 songwriters directly under partial withdrawal.

5 So I think that from that standpoint, it makes sense.
6 Again, if the end game is we find a way to revalue the
7 copyright and get out from under the government
8 restrictions that say it is worth micro pennies in the
9 digital space, then I think that it is a win for the
10 songwriters, because we are in a situation now where
11 millions of spins in the digital space equals tens of
12 dollars, and that is what it comes down to at the end of
13 the day at my house for my family.

14 Senator Coons. Thank you. Thank you all for your
15 testimony today.

16 Chairman Lee. Thank you, Senator Coons.

17 It is now my honor to recognize my friend and
18 distinguished colleague, who happens to be an actual
19 songwriter, Senator Hatch.

20 Senator Hatch. Do not hold it against me.

21 We are happy to have all of you here and I am pleased
22 that our leaders are holding this hearing.

23 Let me just ask this to the panel. Last June,
24 Senator Whitehouse and I wrote to Attorney General Holder
25 about the consent decrees that govern ASCAP's and BMI's

1 licensing practices.

2 I would ask unanimous consent that that letter be
3 placed in the record at this point.

4 Chairman Lee. Without objection.

5 [The letter referred to follows:]

6 / COMMITTEE INSERT

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1 Senator Hatch. In the letter we encouraged the
2 Department of Justice to modify the consent decrees to
3 allow for competitive benchmarks and rate-setting,
4 licensing flexibility, arbitration as an alternative to
5 litigation, and bundled rights.

6 Now, some of you have argued that modernizing the
7 consent decrees would be a bad thing and that the decrees
8 need to be preserved in their current form in order to
9 prevent anticompetitive conduct by PROs.

10 But tell me, why would allowing for arbitration in
11 lieu of expensive litigation trip the so-called antitrust
12 wire? I would really like to know that. Or why would
13 allowing all performance rights organizations to bundle
14 rights disturb the free market? These seem like common
15 sense changes to me.

16 Maybe we can start with you over on that end.

17 Ms. Matthews. Thank you, Senator Hatch. We agree
18 with you. These are common sense changes.

19 To be clear, we are not asking to terminate the
20 consent decree. We are merely asking for the changes
21 that Senator Hatch just referenced.

22 Our request for alternative dispute resolution seems
23 to be a win-win for everyone. We should be able to reach
24 consensus without time-consuming, incredibly costly
25 Federal litigation that gets repeated again in a second

1 rate court proceeding with our competitor, BMI, with a
2 different Federal judge, which oftentimes leads to
3 inconsistent decisions.

4 Bundling also seems to be a win-win for people.
5 Services often require more than one right, not just the
6 right of public performance. If we could offer to be a
7 one-stop-shop for them, that seems to have a pro-
8 competitive and an efficiency benefit for everyone.

9 Partial grant of rights, I am hearing concerns
10 regarding transparency and you should know that ASCAP
11 fully supports transparency. We believe licensees have
12 the right to know what they are licensing and from whom.

13 Senator Hatch. All right.

14 Mr. Harrison. Senator, I think the concern I would
15 have about arbitration, at least the way it has been
16 characterized so far, is that it would be mandatory and
17 binding. There is often significant sums at issue. When
18 the Radio Music License Committee settled its disputes
19 with ASCAP and BMI in 2012, the Radio Music License
20 Committee estimated that that agreement was going to save
21 them \$1 billion over the following 7 years.

22 While -- as someone who has litigated rate cases
23 against ASCAP and is currently in a rate vetting with
24 BMI, I understand how expensive they are. But the
25 protections of the Federal Rules of Civil Procedure and

1 the Federal Rules of Evidence is what allowed Pandora to
2 discover the behavior that Judge Cote ultimately
3 concluded was coordinated and that the benchmarks that
4 ASCAP had introduced as allegedly competitive benchmarks
5 were not.

6 Without those protections, my concern is that we
7 choose the cheap answer, not the right answer.

8 Mr. Pincus. Well, I am not a lawyer or a litigator,
9 but as a small businessperson, I know enough to know that
10 when lawyers and litigation enter the business process,
11 things slow down and get very costly.

12 So anything that moves us away from that environment
13 makes it easier for me to plan for my business for the
14 long term.

15 Mr. Dowdle. Senator Hatch, thank you.

16 We -- our experience has been, through the license
17 committees that we have, that arbitration, which we have
18 had to resort to with regard to SESAC from time to time
19 prior to the antitrust suits that have been filed, is
20 really not any less expensive or less time-consuming,
21 frankly. And what you give up is the expertise that the
22 rate courts have on these issues.

23 There is deep and broad experience in these rate
24 courts with these issues and they understand the lay of
25 the land.

1 It has also been brought up by Mr. Harrison, you have
2 protections within the Federal court system. These are
3 proven venues and have been relied upon for a long time
4 by both parties as they have resorted to them. ASCAP and
5 BMI have gone to these rate courts themselves many times
6 over the years.

7 And I do not think that throwing the baby out with
8 this particular bath water would be a very good thing to
9 do. It is probably under the scenario of be careful what
10 you wish for.

11 Mr. Miller. Sir, first, thank you for your
12 championing of our Songwriter Equity Act. Speaking as a
13 songwriter and, like Matt, not a lawyer, all I can say is
14 these issues just show how our back is against the wall.
15 We have very little say. We had no say in what got us to
16 where we are today as far as the way the rules are
17 written and it seems like -- certainly, when we get into
18 lawsuits and we need all the relief we can get as far as
19 that goes, because we get pounded pretty quick because we
20 are the smallest guy in the room.

21 So I think that, yes, these do seem like common sense
22 asks. It also seems like common sense that we are asking
23 for something to be done about 1941 regulations. I do
24 not know what other businesses in America are as
25 constrained as we are by something that happened during

1 World War II.

2 Senator Hatch. Thank you. Ms. Griffin?

3 Ms. Griffin. I think for -- especially considering
4 bundling and arbitration, my concern is that both of
5 those would ultimately increase the power of the largest
6 players at the expense of the smaller ones, including the
7 smaller rights-holders.

8 For example, for bundling, if the PROs were allowed
9 to require mandatory bundling for licensees, that would
10 make it harder for smaller rights-holders to license
11 those mechanical rights separately. And for arbitration,
12 there are a lot of transparency concerns for me on that
13 side.

14 In order to have a true free market, we have to know
15 what you are buying in order to figure out how much it
16 should cost. And, also, I would note that on the
17 songwriter side, Songwriters Guild, the Future Music
18 Coalition, they have brought up concerns about
19 transparency because arbitration might lead to issues
20 where the artists themselves do not necessarily know what
21 the rate is or how it was decided.

22 Senator Hatch. I think my time is up, Mr. Chairman.

23 Chairman Lee. Thank you. Senator Franken?

24 Senator Franken. Thank you, Mr. Chairman, for this
25 hearing.

1 Mr. Harrison, you talked about this \$150,000 fine
2 that could be imposed for infringing. Have you ever paid
3 such a fine?

4 Mr. Harrison. No, sir.

5 Senator Franken. How many times has that fine, in
6 your experience, to your knowledge, been imposed?

7 Mr. Harrison. Well, in the context of Pandora, I
8 mean, it was not --

9 Senator Franken. Just in the whole eco system of
10 this.

11 Mr. Harrison. Oh, there are hundreds, if not
12 thousands of copyright infringement cases going on right
13 now. Pharrell Williams is involved in a lawsuit with
14 Marvin Gaye's estate over "Blurred Lines," where
15 statutory damages and willful infringement are being
16 sought by -- by the plaintiffs.

17 Senator Franken. I go back to the question. How
18 many times has this \$150,000 fine been imposed?

19 Mr. Harrison. The maximum \$150,000, I cannot give
20 you an actual number.

21 Senator Franken. Because it was brought up as a --
22 you brought that up.

23 Mr. Harrison. Yes. We were -- Pandora was
24 threatened by -- by music publishers, by their outside
25 counsel.

1 Senator Franken. I want to know how real a threat
2 that is.

3 Ms. Matthews, in your testimony, you say Section
4 114(I) of the Copyright Act prohibits the rate court from
5 setting fees for the performance of musical works, from
6 looking at fees paid by those same services to the
7 recording industry for the performance of sound
8 recordings, leading to rate disparities in favor of sound
9 recordings on the order of 12-to-1."

10 I think this is why Mr. Miller is saying that in the
11 digital area, there is just an imbalance. And I do not
12 want to get into this is about PROs today, but it seems
13 very ironic that in terrestrial, which is what we have
14 been living with since 1941, the performers get nothing
15 and the copyright holder -- the songwriters and
16 publishers, there is an imbalance for them, obviously.
17 And here we have just got the exact reverse, where the
18 performers do very well and the songwriters get next to
19 nothing.

20 I mean, this is why we are here is what is going on
21 in the digital space. That is why I think we are here,
22 big reason why we are here, because in digital space, it
23 is nothing, practically nothing. I mean, it adds up
24 after billions of plays to a little something, but this
25 ain't no way to earn a living.

1 If you want to use that, Mr. Miller, this ain't no
2 way to earn a living.

3 [Laughter]

4 Mr. Miller. It will be demo'd by the end of the
5 week.

6 [Laughter]

7 Mr. Franken. And I would get, what, half.

8 [Laughter]

9 Mr. Miller. Would you like to know what that is
10 going to equate on a stream?

11 Mr. Franken. Yes. On a stream, I would like to
12 know, three plays.

13 Can I talk to the whole panel here about this issue?
14 And I know it gets into something we are not really
15 discussing, which is the right of the performer. But
16 what would it entail to try to address this where you
17 would sort of equalize -- and I know that the performers
18 would go, like, "Oh, great, we have been doing radio for
19 70 years and now you want to equalize this."

20 But what would that entail besides looking at these
21 consent decrees? What would this all entail? If anyone
22 wants to handle that. How would you sort of -- knowing
23 that we are going more and more and more into digital and
24 this is going to kill the songwriter, how would you
25 equalize this more? Anybody?

1 Mr. Harrison. Mr. Franken, if I may. You should
2 recall that the largest record label in the world owns
3 the second largest publisher in the world and the second
4 largest record label in the world owns the world's
5 largest publishing company.

6 At the end of the day, if rights-holders believed
7 that there was a different distribution of the royalties,
8 the \$450 million in 2014 that I referenced Pandora
9 paying, if the rights-holders themselves wanted to
10 distribute that money differently, they are controlled by
11 the same corporate parent and could make that -- are,
12 frankly, in the best position to understand the relative
13 value of the inputs for our -- to our service.

14 Senator Franken. Does that sound right to you guys?

15 Mr. Pincus. If I may.

16 Senator Franken. First, Mr. Pincus, and I am sorry,
17 but --

18 Mr. Pincus. I am a music publisher who does not
19 share a corporate parent with a record company.

20 Senator Franken. Right.

21 Mr. Pincus. And what I would say is that in one
22 very good example of where there is a free market for
23 these two rights, the rights are 50/50. They are equal.

24 Ms. Matthews. Mr. Pincus is referring to the market
25 for audiovisual synchronization. And I would also like

1 to point out anecdotally that outside of the United
2 States, oftentimes those two copyrights, the copyright
3 and the sound recording versus the copyright and the
4 musical composition, are equally valued.

5 So our proposal would be as part of copyright reform,
6 we have platform-neutral, technology-neutral laws, and we
7 let the free market decide what the allocation of value
8 should be between those two rights.

9 Senator Franken. Thank you, Mr. Chairman.

10 Chairman Lee. Thank you, Senator Franken.

11 Senator Hatch is the Chairman of the Finance
12 Committee and he has to get back to a meeting. So we are
13 going to let him take a few more minutes before he has to
14 leave us.

15 Senator Hatch. Well, I appreciate that, Mr.
16 Chairman. I am in the middle of a big hearing on taxes,
17 and all of you will be very interested in that, I am
18 sure.

19 Let me ask Ms. Matthews this. The notion that
20 copyright law prohibits the rate court judge from taking
21 into account evidence of what other rights-holders are
22 paid for the same piece of music, that does not make much
23 sense to me.

24 That is why last week, together with Senators
25 Whitehouse, Alexander and Corker, I introduced the

1 Songwriter Equity Act to remove this evidentiary barrier.
2 The Songwriter Equity Act would authorize the rate court
3 judge to consider rates paid to other rights-holders,
4 such as performers, as part of determining a fair market
5 rate.

6 Now, do you believe this reform makes sense and how
7 will it help the rate-setting process?

8 Ms. Matthews. I do believe that this reform makes
9 sense. I think it is a step in the right direction. We
10 believe it would be helpful and directionally incredibly
11 important for a judge to be able to have all of the
12 information about how the money flows.

13 Senator Hatch. Thank you. Mr. Harrison, in your
14 testimony, you express support for the creation of a
15 single database for record of all music copyright
16 information to enable services to identify on a catalog-
17 by-catalog basis the owners of the songs they perform.

18 Now, this sounds like a good idea, but how much would
19 that cost and who would pay for it and who would manage
20 the database?

21 Mr. Harrison. All excellent questions, Senator. I
22 think the best answer I could is Pandora and services
23 like Pandora would certainly be willing to bear their
24 share of that burden in creating such a database, because
25 it is vitally important for the transparency that

1 currently lacks in the system. And so we would be more
2 than happy to contribute to its creation.

3 Senator Hatch. Thank you.

4 Mr. Dowdle, the ASCAP and BMI consent decrees are
5 over 70 years old and have been amended only twice. In
6 light of the significant technological advancements in
7 the music industry over the last 70 years, do you support
8 making any modifications to the decree?

9 Mr. Dowdle. Thank you, Senator Hatch. I think we
10 have to be a little bit more mindful of the fact that the
11 nature of the music services and the distribution models
12 may change. There may be modifications that could be
13 undertaken to address those types of issues.

14 But the actual anticompetitive nature of the PROs and
15 the market power that they wield in this space does not
16 change and the nature of the rights really that they are
17 administering does not change.

18 So even if you have to address new technology, the
19 actual underlying problems still remain. And so any
20 changes that would be proposed have to keep in mind that
21 it has to be within a construct that allows and enables
22 the market to function.

23 If you take it outside of that construct, you are
24 going to have a difficult time having an efficient
25 system.

1 Senator Hatch. Thank you.

2 Ms. Matthews, again, can you tell me what your
3 experience has been with the rate court process and how
4 does that process impact songwriters?

5 Ms. Matthews. Since 2001, ASCAP has spent
6 approximately \$86 million on rate court litigation. In
7 the Pandora litigation alone, we discovered more than
8 75,000 documents. We deposed more than 35 individuals.

9 These rate court proceedings sometimes last years and
10 sometimes require an appeal process to the second
11 circuit.

12 We think any other form of alternative dispute
13 resolution is better than the process that we have now.
14 For every dollar that we spend that goes to outside
15 counsel, to lawyers, those are dollars coming out of the
16 pockets of the songwriters.

17 Senator Hatch. Let me go to Mr. Harrison again.
18 Compared to the 48 percent of revenue that you pay for
19 performances of musical works, is paying 1.7 percent to
20 songwriters, the amount you proposed to the rate court
21 judge, is that really an equitable rate for songwriters?

22 Mr. Harrison. So that 1.7 percent that Pandora
23 proposed in the ASCAP rate proceeding is actually the
24 rate that terrestrial radio pays for -- to songwriters to
25 publicly perform their works.

1 We compete most closely with terrestrial radio both
2 for listeners and for ad dollars. So if we are going to
3 have a distribution-neutral royalty structure, the 1.7
4 percent of revenue was the -- would be appropriate.

5 Senator Hatch. Thank you. Mr. Chairman, could I
6 ask just one more question? I apologize to my fellow
7 Senators, but I have got to get back to the income tax
8 matter.

9 Some songwriter groups have expressed concern over
10 the lack of transparency in direct licensing deals, the
11 terms of which are often subject to nondisclosure
12 agreements.

13 Under these confidential arrangements, songwriters
14 and composers do not even know the details of the
15 agreements under which they are supposed to be paid.

16 Do any of you have any ideas about how to address
17 that particular problem, because it is a big problem, as
18 far as I can see? Does anybody want to take a crack at
19 that?

20 Mr. Pincus. One of the roles that the PROs play for
21 people like me who would have a hard time replicating the
22 scale of what they do is providing transparency in the
23 market in the same way.

24 So I think having the PRO play a constructive role in
25 administering digital agreements would be a very good way

1 to handle withdrawn rights.

2 Mr. Harrison. Senator Hatch, one of the things that
3 Pandora did last year was launch its artist marketing
4 platform. Now, admittedly, it is geared toward recording
5 artists, but it allows any recording artist to sign onto
6 the service and see how their music is performed, the
7 number of times it is performed, who their audience is,
8 where their audience is.

9 There is nothing that would prevent us, other than
10 the lack of transparency into music publishing ownership,
11 for Pandora to provide the same kind of visibility. It
12 may not allow a songwriter to track the dollars that come
13 from the service into their checking account, but it
14 would certainly enable them to see how their music is
15 performed on the service and whether they are actually
16 getting the money they believe they deserve.

17 Mr. Dowdle. Senator Hatch, if I might. I think the
18 one thing, given that Ms. Matthews has already opined on
19 this and I appreciate her statement, the one thing I
20 think all of us on this panel could agree with is that if
21 the consent decrees are modified at all, they should be
22 modified in a way to create better transparency
23 throughout the system, both for licensees, for
24 songwriters, for the PROs, for that matter.

25 We ought to know what it is that we are licensing,

1 how much is being paid, by whom and to whom so that this
2 is all public. It is all available to those who are a
3 participant in the system.

4 I think we can all agree that transparency is a
5 really big issue and anything comes out of this hearing,
6 it should be that.

7 Senator Hatch. Thank you, Mr. Chairman. I
8 appreciate that courtesy.

9 Chairman Lee. Thank you, Chairman Hatch, and we
10 wish you the best of luck as you reform our tax code.

11 Senator Hatch. It is going to take a lot of luck.

12 [Laughter]

13 Chairman Lee. Senator Perdue?

14 Senator Perdue. Thank you, Mr. Chairman. I would
15 like to thank you and the Ranking Member for raising this
16 meeting.

17 Thank you, panelists, for being here.

18 This is an important topic here today in our free
19 enterprise system. In recent years, Georgia has played
20 an increasingly important and prominent role in our
21 Nation's music industry.

22 As one that moved from Nashville to Atlanta, I can
23 tell you that there is a lot of music activity in
24 Atlanta.

25 But I think every one of you agree that the music

1 marketplace has really changed and undergone radical
2 changes in the last few decades, since the BMI consent
3 decree was in made in 1994, a year in which, by the way,
4 the Billboard Top 100 Singles had singles by Bryan Adams
5 and Boyz II Men. Only my two kids know who they are.

6 I would like to start with a threshold question
7 today. It is a policy question about both consent
8 decrees.

9 In 1979, the Department of Justice revised the
10 consent decree policy and mandated that except in
11 extraordinary circumstances, all DOG
12 consent decrees would contain a sunset provision, as you
13 are well aware.

14 These sunset provisions would terminate the decree
15 within 10 years. This was in response to Congressional
16 action that strengthened the penalties for Sherman Act
17 violations.

18 So for more than 35 years, it has been DOG policy
19 that consent decrees should not be perpetual and should
20 terminate in under a decade, unless exceptional industry-
21 specific circumstances are present.

22 The policy was, of course prospective, but I think
23 the rationalize underlying it is worth considering in the
24 context of the consent decrees we are looking at today.

25 My question is this. I would like to get each of you

1 to respond to this. For those witnesses who support
2 continuation of the consent decrees in their present
3 form, can I get a quick description from each of you
4 regarding the characteristics of the music licensing
5 market that trumped DOJ's presumption favoring a 10-year
6 sunset? And for witnesses who favor the elimination of
7 this sunset provision or amendment of the consent
8 decrees, do you believe the sunset presumption applies
9 here?

10 Would you like to start, Ms. Matthews?

11 Ms. Matthews. So today ASCAP is not requesting a
12 termination of the consent decree. While I do think it
13 is appropriate to have some reasonable pathway to
14 consider regular modifications to the consent decree,
15 possibly eventual sunset, today we are only asking for a
16 few discreet changes to save collective licensing.

17 The hypotheticals of publishers leaving ASCAP is not
18 a hypothetical. This will happen if we do not make these
19 changes and it is our greatest fear for the songwriter
20 that we are running out of time.

21 Mr. Harrison. Senator, I think the key issue, what
22 makes this exceptional and suggests that sunset is not
23 appropriate is most of the time, when a consent decree is
24 entered, the behavior that gave rise to the consent
25 decree goes away and so the consent decree is no longer

1 needed.

2 At the end of the day, what ASCAP and BMI are are
3 horizontal sales agencies. They take otherwise competing
4 publishers, aggregate them together and then fix a single
5 price for what otherwise would be competing catalogs.

6 Unless that behavior changes, it does not seem
7 appropriate to do away with the protections that are
8 provided licensees for there to be abusive market power
9 and super-competitive rates.

10 Mr. Pincus. In the market today, there are many,
11 many digital music services that operate without the kind
12 of regulation that music publishers operate under and the
13 market is thriving.

14 As to transparency, for example, my understanding is
15 that the majority of publishing data is currently
16 available on a voluntary basis by private actors.

17 So I think where the market is more free in this
18 particular area, it becomes more competitive.

19 Mr. Dowdle. Senator Perdue, thank you for the
20 question. As Mr. Harrison said, these are very unusual
21 decrees. The Department of Justice entered into these
22 decrees not as it usually does to prevent and deter
23 anticompetitive conduct, they actually entered into these
24 decrees to enable anticompetitive product within a
25 construct that it could be regulated.

1 That makes them very unique and it makes them
2 necessary. If we are going to continue in the world and
3 have ASCAP, BMI, SESAC, Global Rights and all of these
4 others, plus the large publishers they represent, if they
5 can operate as a collective the way they do, there has to
6 be a construct or they will engage in anticompetitive
7 activity.

8 Mr. Miller. Well, in a perfect world, I think that
9 the consent decrees could go away. What we do not want
10 to see happen is we do not want to destabilize our
11 collective agencies, mine being BMI, because it is just
12 too important.

13 So we would hope that we could find ways to modify it
14 to give us some relief. It is just crucial to what we do
15 now. And the relationship with the PROs, by and large,
16 and the writers is good.

17 My wife of 23 years, as I was running some of these
18 technicalities by her looking for a little bit of wisdom,
19 she says, "I don't know what any of that means, but I do
20 know this. The only days I circle on my calendar every
21 year are the four days your BMI check is coming. Do
22 whatever you have got to do to keep that."

23 Senator Perdue. Thank you.

24 Ms. Griffin. Senator, I agree that the consent
25 decrees have been in place for an unusually long time,

1 because these are unusual circumstances here. And I would
2 say I do not think anybody at this table would be happier
3 than I would be if we found the silver bullet that
4 created competition in the marketplace and made the
5 consent decrees unnecessary.

6 But that is not the world we are living in right now.
7 So especially given that we have seen increasing
8 consolidation among the publishers, some of which was
9 justified because we had the consent decrees as a
10 backstop, and we have this Federal court case where a
11 judge found that the publishers had the opportunity to
12 compete and they coordinated with each other, that
13 sunsetting the consent decrees at this time would be
14 unnecessary.

15 But we should, of course, always be reevaluating as
16 we go forward.

17 Senator Perdue. Thank you all. Thank you, Mr.
18 Chairman.

19 Chairman Lee. I think I would like to start with
20 Mr. Dowdle in this round.

21 Mr. Dowdle, I think, as has been mentioned today, a
22 distinguishing characteristic of any free market system
23 is that two parties negotiating have the ability to walk
24 away from the negotiation if they cannot achieve a
25 mutually agreeable outcome.

1 Yet it has been suggested that music services and
2 broadcasters in particular cannot -- they literally
3 cannot walk away from license negotiations with the
4 publisher or with a PRO, because they do not have total
5 control over what music they publicly perform.

6 So let me just ask you that question. Can a
7 broadcaster remove a specific licensor's catalog from its
8 service? Is that possible?

9 Mr. Dowdle. Theoretically possible, not practically
10 possible, and here is why. We have various types of
11 programming that we put out over our airwaves. Some of
12 that we produce. For that that we produce, we identify
13 the music. We are able to do that exactly. But for a
14 very large --

15 Chairman Lee. If you identify the music, you can
16 then figure out who holds the copyright and whether or
17 not --

18 Mr. Dowdle. Exactly. And if we cannot come to an
19 agreement with them, we can cut that music out, the music
20 -- the program that we produce, such as our local news,
21 local magazine shows, things like that. But for a large
22 portion of our programming, we do not have the ability to
23 do that.

24 Now, part of that programming, which is network
25 programming, is cleared through to the viewer. So we do

1 not have to worry about that. The networks worry about
2 that. But all of our syndicated programming, all of our
3 commercials, and a lot of the stuff that comes in
4 between, we do not have that editorial control. We could
5 not do it if we tried.

6 Therefore, we are at the mercy literally of these
7 PROs. Everybody that is going to come to us and say if
8 you do not license for me, I am coming after you, we have
9 no way to avoid it.

10 Chairman Lee. Would any of that change if the
11 broadcaster were provided with a continuously updated
12 list of songs in the catalog at issue? Would that
13 change?

14 Mr. Dowdle. It would not change in the sense that
15 the producers of syndicated programming or the
16 commercials, they do not identify for us whose music they
17 are using. I do not know that that is within the realm
18 of possibility to have every single producer that is
19 going to provide music to us in our programming identify
20 music.

21 If you could do that, it is theoretical possible. It
22 is just not practically going to happen.

23 Chairman Lee. Right. You would basically have to
24 have the ability to see the future.

25 Mr. Dowdle. Yes.

1 Chairman Lee. If you had that superpower, then a
2 lot of other things would be better, too.

3 Mr. Dowdle. If we were king, it would be a
4 different place.

5 Chairman Lee. Ms. Griffin, I believe much of the
6 pressure on the Department of Justice to make changes to
7 the consent decrees may well stem from the threat of full
8 withdrawal by the publishers, which would seriously
9 threaten the current blanket license scheme that we have
10 in place today.

11 If the blanket license framework is truly at risk of
12 falling apart, what, in your view, is the best
13 alternative to the consent decree system when it comes to
14 ensuring robust competition in the marketplace for
15 performing rights licenses?

16 Ms. Griffin. In terms of alternative structures,
17 other than an antitrust consent decree, we do have
18 statutory licenses for certain uses in copyright law. If
19 we can come up with a statutory license that also
20 protects competition and provides transparency, helps
21 artists get paid directly, we would support that.

22 But at the time, we do not have that for these kinds
23 of uses. So I would be concerned about dismantling the
24 protections in these consent decrees until we have the
25 new structure set up.

1 Chairman Lee. Can you tell us whether you think it
2 makes sense to have this quasi-regulatory system -- it is
3 essentially a regulatory system -- administered by a
4 handful of DOJ regulators and a couple of judges or
5 should Congress consider legislation setting up some
6 other type of regulatory structure and, if so, what would
7 that legislation look like?

8 Ms. Griffin. So we do have other structures. As I
9 think was mentioned earlier, we have the Copyright
10 Royalty Board for statutory licenses. But in terms of
11 the consent decrees as they are now, I would say that the
12 Department of Justice has very deep antitrust expertise
13 and expertise evaluating how markets are working, which
14 is very important here.

15 And for the Federal judges, they are impartial, they
16 understand the law, and they, through the discovery
17 process, are able to obtain all the facts.

18 So I would say that I do not view that as a bad
19 system, but it is not that we cannot consider new ones.

20 Chairman Lee. Thank you. My time has expired.

21 Senator Klobuchar?

22 Senator Klobuchar. Thank you. Ms. Griffin, one of
23 the things that we know is that regardless of the consent
24 decree review, you were talking about some other things
25 with Senator Lee that are possibilities if we did not

1 have the consent decrees, and I think you said that there
2 would be a problem not to have it, from your perspective,
3 from a consumer standpoint.

4 But how about private enforcement of the antitrust
5 law? Even if DOJ is not pursuing competition issues,
6 private parties can still seek to address the issues in
7 the courts. Do you see downsides to relying on private
8 enforcement?

9 Ms. Griffin. Yes, Senator. My concerns with
10 private enforcement would be that the parties bringing
11 the cases could likely be much smaller or at least it
12 would make it relatively easier for a very large company,
13 like a Pandora or a large broadcaster to bring a suit,
14 although that itself would be burdensome, but the little
15 guys, it would be near impossible for them because of the
16 expense.

17 And, also, I would say that transparency is an issue
18 here because part of the problem is that it is difficult
19 to bring an antitrust lawsuit against somebody if you do
20 not know that they are coordinating.

21 Senator Klobuchar. Very good. Mr. Dowdle, do you
22 want to weigh in on that at all?

23 Mr. Dowdle. Frankly, I do not know if there is a
24 construct that we can come up with. Certainly, it is
25 problematic for a small broadcaster like us. We are not

1 very big, frankly. For us to be left with a private
2 antitrust enforcement against an entity such as ASCAP and
3 BMI is not very appealing.

4 Talk about expense, and that is not an expense spread
5 over an industry, that is our expense and I just do not
6 think that we could do it, not even talk the little
7 broadcasters that are much smaller than we are. It is
8 not even a practical possibility for them.

9 And so I just do not think that is a really workable
10 solution.

11 Senator Klobuchar. I just wondered. I want to get
12 people's views, because that has been thrown out.

13 Mr. Dowdle. Of course. Thank you, Senator.

14 Senator Klobuchar. And do you see any changes to
15 the consent decrees that you think would work with the
16 concerns that have been raised here?

17 Mr. Dowdle. I mentioned transparency. I think that
18 is huge. It has been mentioned by everyone and I think
19 agreed upon by everyone. Transparency in the process has
20 been historically a real problem. I know that because I
21 used to license all of the music used in the Intel
22 commercials before I came to Bonneville, among other
23 things.

24 Finding the songwriter and finding the record label
25 that actually controls the rights was a real problem and

1 without better use -- availability of data and use of
2 that data across all the system, I just do not think it
3 is workable.

4 Senator Klobuchar. Thank you. Mr. Pincus, do you
5 want to weigh in on this?

6 Mr. Pincus. Well, a couple of things. First, to
7 transparency, I agree, like all of the other panelists,
8 that that is a very important issue. I think the market
9 is solving that issues. There is more data available on
10 music publishing copyrights now than there ever has been
11 and it is getting better on almost a daily basis, not
12 only at the independent level, but also at the major
13 level.

14 And just quickly, to another point about the blanket
15 licensing system. Many of the arguments that are being
16 put forth here are a very good reason to preserve the
17 blanket licensing system. I agree with Mr. Dowdle that
18 the television licensing system should operate on a
19 blanket basis. The problem is that it is attached by the
20 cords to the digital licensing problem.

21 Digital licensing is much easier done on a direct
22 basis than, for example, television licensing. So that
23 is a very good argument for why partial withdrawal of
24 digital rights ought to be allowed to occur.

25 Senator Klobuchar. Mr. Miller?

1 Mr. Miller. Well, that is one of the million
2 technical questions that is probably beyond my pay grade.
3 I will say, as far as things such as transparency, that I
4 think would be relevant to maybe part of your question.

5 If I have a hit song, a million plays on terrestrial
6 radio is kind of a threshold. They send us a plaque at a
7 million plays. Okay. If I have one of those every now
8 and then, you now, I am raising a family and we are doing
9 okay. And now we get into a situation where we see these
10 numbers on digital of 50 million and 100 million spins,
11 and the songwriters are shaking our heads going "what are
12 you talking about." We cannot even comprehend.

13 I understand it is a different medium and we can talk
14 about the Internet and we talk about technology, but a
15 million plays, we are smiling and taking the kids to
16 movies; 100 million plays is worth a few thousand
17 dollars.

18 Now, we get transparency on that. We see those
19 numbers quite clear. So I think that is what we cannot
20 emphasize enough. How is that fair and where is the
21 middle ground?

22 Under those numbers, if you move that ledger around
23 just a little bit, doing what I do is a very profitable
24 business potentially because apparently music is more
25 popular than it has ever been, and I think everyone will

1 tell you that.

2 Mr. Harrison. Senator Klobuchar, I think it is
3 important, and as Mr. Miller talks about a million spins
4 on terrestrial radio versus the Internet and noted that
5 it is a different technology, Internet deliver is a one-
6 to-one delivery mechanism. It is not a one-to-many like
7 broadcast.

8 So if you look at -- if you wanted to do a real
9 apples-to-apples comparison, if you were to take a
10 million spins on Pandora to reach a million people on,
11 for example, Z100, the largest radio station in New York
12 City, you would only have to play that song 16 times.

13 If you wanted to reach that same million person
14 audience in Los Angeles, KISS-FM, the largest radio
15 station in Los Angeles, you would only need to play that
16 song 21 times.

17 So it is important that we contextualize what a
18 million spins on Pandora means relative to spins on a
19 terrestrial radio broadcast.

20 Senator Klobuchar. Thank you.

21 Chairman Lee. Senator Blumenthal?

22 Senator Blumenthal. Thank you, Senator Lee.

23 I have a question for Mr. Dowdle. In your testimony,
24 you talked about, I think, both the value of the consent
25 decrees generally and about the harm that would be caused

1 if composers and publishers could withdraw from some of
2 their rights without withdrawing all of their rights.

3 You did not address, I do not believe, the two
4 changes that ASCAP and BMI have proposed to the content
5 decree, bundling of additional rights and arbitration.

6 Would you give us your view of those proposals?

7 Mr. Dowdle. Yes, Senator Blumenthal. Thank you.

8 I gave my -- I think you were out of the room. I did
9 address arbitration. Arbitration is a poor, if even a
10 second choice, a very poor second choice to the system
11 that we have now for these reasons.

12 With an arbitrator, you do not know who you are going
13 to end up with, whether they even know anything about the
14 industry, and what you do know, with the rate courts that
15 we have, is that these courts have deep experience and a
16 lot of history with these consent decrees. They
17 understand the underlying dynamic that is going on. That
18 is first.

19 Second, in the Federal courts, you have a lot of
20 tools available. Mr. Harrison talked about this -- in
21 discovering information and getting that information in
22 front of the tribunal, having both sides able to engage
23 in that process freely and openly so that the full
24 panoply of information is in front of the tribunal.

25 With an arbitrator, you do not necessarily have that.

1 And I think substituting arbitration for what we have now
2 is not really a very good solution, in my opinion.

3 As to other licenses, from my standpoint, I mentioned
4 earlier I am a member of ASCAP and have been for over 20
5 years, owned music companies, and I think there is maybe
6 something to look at there in allowing these PROs to
7 administer additional rights.

8 Their competitors are certainly doing that. SESAC is
9 able to, Global Rights is able to. If ASCAP and BMI are
10 going to compete going forward, we should take a look at
11 that.

12 Senator Blumenthal. Let me ask, Ms. Matthews, if
13 you had your choice, would you abolish the consent decree
14 or just make reforms to it?

15 Ms. Matthews. I am sorry. If I had my choice,
16 would I abolish the consent decree or --

17 Senator Blumenthal. Would you eliminate the consent
18 decree or just reform it?

19 Ms. Blumenthal. So in a perfect world, I would
20 eliminate the consent decree. Sadly, we do not live in
21 that perfect world. So our immediate concern is keeping
22 high value writers and high value publishers in the
23 system, because if the system goes away, everybody loses.

24 Licensees lose because they will not have access to
25 millions of copyrights to clear at once through a blanket

1 license agreement. Consumers lose because once the money
2 stops flowing or once the songs stop flowing, the money
3 will stop flowing.

4 But we are mostly concerned about songwriters,
5 because they are simply not going to be capable of
6 licensing 700,000 establishments in the United States and
7 millions of establishments outside of the United States,
8 which means they will not get paid and their works will
9 be infringed.

10 Senator Blumenthal. And why do you think -- I think
11 I know the answer, but why would eliminating the consent
12 decrees be preferable in a perfect world?

13 Ms. Matthews. Because ASCAP believes the free
14 market works. Without regulation, we think you get to
15 the right results. And as copyright owners, we believe
16 at the core of our law is this principle that you should
17 control your assets, whether it is a real property asset
18 or an intellectual property asset. You should have
19 control as that owner. The consent decrees take that
20 control away.

21 Senator Blumenthal. Thank you. Thanks, Mr.
22 Chairman.

23 Chairman Lee. Thank you. Senator Tillis?

24 Senator Tillis. Mr. Harrison, you made an
25 interesting point about the one-to-one relationship of

1 streamers versus broadcast. In your opinion today -- and
2 I think that Mr. Miller's concern about being justly
3 compensated -- in your opinion today, when you normalize
4 in that way, do you feel like the streamers are justly
5 compensating?

6 Mr. Harrison. Pandora is the highest paying form of
7 radio there is. We pay more in total royalties than
8 terrestrial radio or satellite radio.

9 I think the best performing song by Mr. Miller on
10 Pandora is "Country Girl," which I believe was recorded
11 by Tim McGraw. Last year, 2014, Pandora would have paid
12 around \$7,000 to Mr. Miller, his two co-writers and the
13 six publishers that are listed on that song.

14 Candidly, Pandora would have paid close to \$90,000 to
15 Mr. McGraw and his record label. I understand that the
16 disparity is a motivating factor for Mr. Miller, Mr.
17 Pincus, and Ms. Matthews to seek to modify the consent
18 decrees, but at the end of the day, if Pandora is paying
19 50 percent of its revenue to the record labels and the
20 solution is to pay 50 percent of the revenue to the
21 publishers, I cannot make that up on volume.

22 If there is going to be a -- if the disparity is
23 going to be solved, it is going to have to be solved by
24 the copyright owners themselves, not on the back of
25 services like Pandora.

1 Senator Tillis. I have a general question for
2 anyone that would like to speak up.

3 Mr. Harrison was talking about this database to
4 increase transparency and Senator Hatch mentioned it. In
5 your opinion, is that a good idea or a bad idea? What
6 are your concerns or what are the merits? We can just
7 start with Ms. Matthews and run down the line.

8 Ms. Matthews. So as I stated earlier, ASCAP fully
9 supports transparency. We most recently made
10 modifications to our own proprietary system, which is
11 available to the public.

12 Senator Tillis. Ms. Matthews, would you have a
13 concern with the concept of what Mr. Harrison has
14 proposed or you feel like you are already achieving it
15 through existing -- I am trying to get a sense for this
16 net new idea and whether you have a specific concern with
17 it and for what reasons, if you do.

18 Ms. Matthews. So my specific concern would be
19 practically how one would require cooperation through the
20 entire sector, especially with unregulated actors, our
21 competitors. I know that ASCAP and BMI are fully willing
22 to cooperate, but I worry that if others do not
23 completely cooperate, licensees will never have access to
24 the full picture of data that is required.

25 Senator Tillis. Mr. Harrison, you mentioned it in

1 your opening comments. Do you have anything you would
2 like to add in terms of your rationale for it?

3 Mr. Harrison. I think it is the transparency and
4 certainly there -- we know that the databases exist. We
5 know that the publishers and the PROs assign unique
6 identifiers to all the works in their catalog. Mr.
7 Pincus has made his catalog publicly available. I have
8 already downloaded it and sent it to our engineers to
9 have them ingest it into our system so that we can
10 understand what songs are controlled by songs.

11 But the transparency piece has to go far enough to
12 allow us to understand that not just the owner of the
13 song, but also what sound recordings have been made of
14 that song.

15 Senator Tillis. Mr. Pincus?

16 Mr. Pincus. I think this is one of the issues on
17 which Mr. Harrison agree in terms of the open
18 availability of data.

19 My position, however, is that the market is taking
20 care of that problem and where the market can take care
21 of that problem, it is better than regulation taking care
22 of that problem.

23 One area, if I may, where we disagree is that I
24 understand Mr. Harrison's comment about not being able to
25 pay 50 percent to each party, but I would also say that I

1 am not sure that I feel, as a small business owner, that
2 it is my responsibility to subsidize a public company.

3 Senator Tillis. Mr. Dowdle?

4 Mr. Dowdle. Thank you, Senator. Yes. I think it
5 is problematic. I believe that Ms. Matthews is correct.
6 It is problematic to get everybody involved. But with
7 ASCAP and BMI controlling 90 percent, let us start there.
8 Let us start at 90 percent. That is a pretty good place
9 to start. And if you can get the other actors in
10 piecemeal, well, that is okay, but let us start with 90
11 percent and see where it goes.

12 Senator Tillis. Mr. Miller?

13 Mr. Miller. Mr. Pincus and Ms. Matthews can speak
14 to that much better than me on the technicalities.

15 I will clarify Mr. Harrison's comment. It's called
16 "Southern Girl," not "Country Girl." That is important.
17 Words matter. By his own numbers, that would be \$7,000
18 split six ways. I got a sixth of \$7,000. That is on a
19 number one song in the United States on Tim McGraw.

20 Senator Tillis. Ms. Griffin?

21 Ms. Griffin. On the issue of a database, I agree
22 that moving forward, I am trying to figure out what that
23 would look like and how to get as much information as
24 possible is important. There are a lot of details that a
25 lot of actors have been talking about there, including

1 the Copyright Office who has looked into this issue.

2 I would say I do not think that the market is
3 handling that right now. Right now, if you look at the
4 biggest licensors, you may be able to, at most, download
5 a list of all of the songwriters or all the songs in the
6 catalog, but there is not a guarantee that that is what
7 they currently control.

8 It is more of at some point this was our catalog, but
9 we will not promise you that that is what is in it on the
10 day that you license, which brings up huge liability
11 concerns for somebody who is trying to enter the market.

12 Senator Tillis. Mr. Pincus?

13 Mr. Pincus. Well, with respect to my business, that
14 is actually not the case. We are approximating open data
15 on as close to a real-time basis as practical. And my
16 understanding is that at least one of the majors has
17 disclosed all the information, including shares.

18 Senator Tillis. Thank you all for testifying.
19 Thank you, Mr. Chair.

20 Chairman Lee. Thank you, Senator Tillis.

21 Senator Blumenthal?

22 Senator Blumenthal. I do not have any additional
23 questions. Thank you.

24 Chairman Lee. Great. Mr. Harrison, we have got two
25 different types of royalties that end up getting paid in

1 some circumstances, one established under the consent
2 decrees and another established under the CRB, under the
3 Copyright Royalty Board.

4 Those established under the latter, a I understand
5 them, are substantially higher than those established
6 under the former. So you have got one set of royalties
7 that go to those who wrote the song, another set of
8 royalties that go to those who recorded the song.

9 Why should there be a substantial difference between
10 these two rates?

11 Mr. Harrison. Well, Senator, I think as I mentioned
12 earlier, I do not believe Pandora is in the best position
13 to value the relative contributions of the song versus
14 the recording. I think that is probably better left to
15 publishers and songwriters and artists and labels.

16 Having said that, if you go back to the early Royalty
17 Board proceedings, what you had was executives of
18 companies that owned both record labels and music
19 publishers who argued that the rates that should be paid
20 to perform a sound recording should be higher than the
21 rate that was paid to a music publisher, because
22 according to these executives, the record labels invest
23 significantly more in bringing new music to market.

24 As I said, I am not in a good position to make those
25 relative value judgments. At the end of the day, the

1 copyright owners themselves have made those arguments.

2 Chairman Lee. Now, if the Department of Justice
3 decides to allow partial withdrawal, it will likely
4 impose other requirements on the PROs, including
5 increased transparency, changes to board membership, some
6 of these things that have been mentioned earlier in the
7 hearing.

8 In your opinion, will additional safeguards be
9 sufficient to ensure a competitive market if publishers
10 can partially withdraw?

11 Mr. Harrison. Well, without seeing the details of
12 all of -- not just of what the suggestions are, but
13 actually the language that is intended to be used, it is
14 hard to judge prospectively. But I remain confident that
15 the department is not going to do things that result in
16 less competition in the market.

17 Chairman Lee. I certainly hope they would not do
18 that. But do you think those things would be sufficient?

19 Mr. Harrison. As I said, without seeing a full list
20 of what the department would propose and then actually
21 read what language is used to implement them, it is tough
22 to have an informed opinion.

23 Chairman Lee. Mr. Dowdle, whenever we consider the
24 potential increase in prices in one market, it is
25 important to consider its potential effect on related

1 markets. In this case, related markets might include not
2 only other music licenses, but such as performance rights
3 for sound recordings, but also prices at restaurants and
4 bars and at stores that play music.

5 What effect might increased rates have on prices for
6 other music licenses or for goods associated with music?

7 Mr. Dowdle. I think as we take a look at what is
8 really happening, in those fairly rare instances where
9 actors in the market are negotiating with each other, and
10 there are a couple of those that have been reported in
11 the last couple of years. You have at least on major
12 label who has entered in to an agreement that -- where
13 prices have been at play for many of those things.

14 We do not know all of them because they are not
15 particularly transparent with all that information. But
16 if the reports that have been received are true, there
17 has been an equalizing in those deals of different prices
18 for different rights throughout that deal, and I think
19 that is very instructive.

20 The market itself, as Mr. Harrison has alluded to,
21 the market itself, when allowed to operate, in those rare
22 instances, is able to equalize those rates. There will
23 be an effect, but I just do not know -- I cannot foresee
24 in the future what that effect will be. There clearly
25 will be an effect.

1 If you unpeg one rate, there will be an effect on
2 other rates. It is ironic that the provision in the
3 Copyright Act that ASCAP has complained about at this
4 point was actually placed in that regime at their
5 request. Now they want to unpeg it because they do not
6 like the way that it is operating presently.

7 But I think if you do unpeg it, be careful what you
8 wish for.

9 Chairman Lee. I understand you are a songwriter.
10 You had a long career in music before your time in
11 broadcasting. In that respect, you come with a unique
12 set of perspectives to this panel.

13 Let me just ask you, do you think the consent
14 decrees, as written, are necessary to preserve the
15 benefits of our system or do you think they could be
16 achieved outside of the decrees?

17 Mr. Dowdle. What I can say is I believe that the
18 system has worked. Now, all the parties have taken their
19 turn in various scenarios coming to the tribunals as they
20 are set up now and taking advantage of those forums and
21 arguing whatever issues they had on the consent decrees.

22 Those consent decrees have been proven, more or less,
23 to work over a period that now spans more than 70 years.
24 Playing with taking those systems down or fundamentally
25 changing them we ought to be looking at very carefully,

1 very cautiously. It is a system that has been working.
2 I do not know what we would be looking at. It is hard to
3 say hypothetically whether something that would be
4 replacing them would be better or not.

5 All I can say is they are working and I hesitate to
6 change something that has historically been working.

7 Chairman Lee. It is not just unknown, it is
8 unknowable whether that could be achieved outside the
9 decrees until we know what the "it" is, what the other
10 "it" is.

11 Mr. Dowdle. Exactly right, Senator.

12 Chairman Lee. Thank you. I am going to keep the
13 record for this hearing open for 1 week and that will
14 include keeping it open for written questions.

15 I want to thank all of our witnesses for coming
16 today. This has been a very helpful hearing and you
17 testimony has brought a lot of insight to the table on
18 this important and pretty complex issue.

19 I thank Senator Klobuchar, also, for her help in
20 putting this together.

21 This hearing stands adjourned. Thank you.

22 [Whereupon, at 12:07 p.m., the hearing was
23 concluded.]

24

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