Mike Dowdle, Bonneville

I understand that you are a songwriter yourself and had a long career in music before your time in broadcasting. Your background gives you a particularly helpful perspective on these issues.

- In what ways do the PROs and their blanket licenses benefit both songwriters and broadcasters?

  The PROs serve an essential purpose in today's music licensing market to the benefit of both songwriters and licensees, including broadcasters. The consent decrees preserve the licensing efficiencies afforded by these PROs, while providing necessary protection against anti-competitive conduct and effects inherent in the collective licensing of public performance rights. The PROs' collective and blanket licensing of performance rights remains essential to the functioning of the market because it creates numerous efficiencies in licensing, enforcement, and administration of rights. These efficiencies benefit both songwriters and music licensees. Without collective licensing, the sheer difficulty to both individual rights owners and licensees of identifying, negotiating with and paying and collecting from each other, and the transaction costs associated with all of these functions, would grind the market to a standstill.

  At the same time, the blanket licensing of performance rights is inherently anti-competitive because the very nature of PROs' collective licensing involves the fixing of a single price for all music, irrespective of which songs are actually used. This aggregation of rights gives the PROs tremendous market power, which in the absence of the consent decrees would allow the PROs to extract supra-competitive prices for their licenses. Absent the consent decrees, radio and television broadcasters are particularly susceptible to an abuse of this market power, since they lack editorial control over a significant percentage of the musical works that they publicly perform on their platforms. Thus, in the event that a broadcast station fails to successfully clear the rights to perform a given work, it can't reasonably ensure that it won't play that work on its station. Because each of the PROs has been allowed to aggregate such a large repertory, there is often no practical way to avoid playing music licensed by a given PRO, even in programming that broadcasters themselves create.

- Do you believe the consent decrees as written are necessary to preserve those benefits, or can they be achieved outside the decrees?

  The consent decrees are essential to preserve the benefits of collective licensing while protecting broadcasters and other music users from antitrust harm. ASCAP and BMI possess sufficient market power to extract supra-competitive rates, terms, and conditions

from licensees, absent the protections afforded by the consent decrees. This is particularly the case for broadcasters, who lack editorial control over many of the works they publicly perform, and would be subject to devastating penalties for infringement under Federal law should they fail to obtain performance rights licenses from each of the PROs.

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

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

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

Senator Hatch, I appreciate the question and your concern for ensuring that songwriters receive the significant royalties paid by broadcasters and other music licensees for the performance of musical works. Today, the vast majority of broadcast licensing of public performance rights of musical works happens through the Performance Rights Organizations (PROs). The market power possessed by these PROs, as well as the large music publishers, lends itself to potential anticompetitive conduct to the detriment of both licensees and songwriters. The efficiency and fairness of this licensing process could be vastly improved to the benefit of not only licensees, but the songwriters of the underlying works, if enhanced requirements were placed on the PROs to increase transparency as to the works in its repertories and its functions.

Broadcasters strongly support ASCAP and BMI consent decree modifications that would enhance the efficiency of this marketplace and thereby inject more competitive forces by: (i) requiring ASCAP and BMI to provide up-to-date *(i.e.,* "real time"), computer-readable databases of the works in their repertories containing complete and accurate information identifying all ownership interests and their respective shares of ownership in works; (ii) requiring ASCAP and BMI to provide up-to-date contact information for each of their affiliated rightsholders for users who wish to make direct licensing inquiries; and (iii) prohibiting ASCAP members and BMI affiliates from enforcing copyrights against users who reasonably relied on the ownership information in the databases. Such transparency would benefit both licensees and the songwriters of the works licensed by the PROs.

Television broadcasters also support decree modifications that would require ASCAP and BMI to share in computer-readable form the databases each maintains of music cue sheet information, *i.e.,* the databases of information they maintain about the music content of the programs broadcast on television. The secrecy with which ASCAP and BMI shroud the information they collect and maintain about the music in television programs (which they obtain and maintain in order to distribute the hundreds of millions of dollars that television broadcasters and cable networks pay to them each year) frustrates both further inroads to direct licensing and negotiations for licenses, at least as to local television broadcasters.

Questions of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing on
"How Much For a Song?: The Antitrust Decrees That Govern the Market for Music"
March 10, 2015

Question for the Record for All Witnesses

The ASCAP and BMI consent decrees with the Department of Justice exist in the context of a larger and complicated music licensing ecosystem that many say is in need of reform. I believe strongly that any comprehensive music licensing improvements must ensure: that all music creators are fairly compensated for all of their works; that innovative, legitimate delivery methods can continue to benefit consumers and marginalize illegitimate alternatives; and that technology can bring increased transparency to the data that is essential to an efficient licensing system.

Q: Please share your thoughts on what elements are critical to any efforts to improve the music marketplace.

Last year, NAB provided comprehensive recommendations to the Copyright Office in response to its music licensing study. Those comments and reply comments can be found here http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/National_Association_of_Broadcasters_MLS_2014.pdf and here http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/National_Association_Broadcasters_NAB.pdf (referencing NAB's joint CRB notice and record keeping comments), respectively. Two of the most critical improvements needed to ensure a fair music licensing framework to the benefit of consumers are increased transparency in copyright ownership, and decreased barriers to entry for music streaming services.

Transparency. *Today, there is no accurate and complete source of copyright ownership information for musical compositions and sound recordings. Lack of access to such information has increased transaction costs and hindered licensing activities – both direct and collective. The terms of any statutory music license should require that copyright owners provide sufficient identifying data to any licensing collective authorized pursuant to the license, as a condition of receiving royalty distributions, and that any authorized collective make that information available to licensees in a usable electronic form, as a condition of receiving royalty payments. With respect to musical composition performance rights, which are not subject to any statutory license, the government should facilitate the creation of a database of copyright ownership information, including the identification of any PROs authorized to collectively license each musical composition.*

Streaming. *The cost and administrative burdens resulting from the current legal framework governing streaming have suppressed the adoption of streaming by terrestrial broadcasters. Today's extraordinarily inflated sound recording rates prevent broadcasters from making any profit from streaming. This neither maximizes revenues for recording companies and artists, nor benefits listeners.*

Indeed, lower, fair, and reasonable rates could actually increase revenues to those parties. Under the current state of affairs, nobody wins. And the most regrettable part is that a moderate sound recording royalty would allow broadcasters to increase their simulcasting (and webcasting) activities and "grow the pie," resulting in substantially higher overall payments to record companies and recording artists, as well as increased promotional effects for their other revenue streams. This would truly be a win for all: broadcasters, record companies, recording artists, even songwriters and music publishers, and the listening public.

The history of broadcasting comprises over one hundred years of innovation. If the sound recording royalty rates were lowered to fair and reasonable rates, instead of the supra-competitive rates currently in place, broadcasters would be encouraged to enter the market in greater numbers and would have both the incentive and ability to increase their innovation in that market. As noted above, the result of such increased activity and innovation would be a vibrant and sustainable digital music market and a significant net increase in revenues paid to record companies and recording artists. Everybody would gain from such a result.