Questions of Senator Orrin G. Hatch,
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

Responses of Jodie Griffin[1]
Senior Staff Attorney
Public Knowledge

1. *Question for all panel members:*

   With respect to transparency of license agreements negotiated directly by publishers, I am concerned about one situation in particular: a publisher striking a deal to license its works under which a licensee pays an upfront fee to the publisher—not disclosed to or shared with the songwriters affiliated with the publisher—in exchange for the licensee paying to the publisher directly a lower royalty rate.

   How can we make certain that all payments by licensees for musical works pursuant to agreements negotiated directly by publishers are fully disclosed to songwriters and shared with them?

   Additionally, how could such requirements be enforced?

Structural, revenue, and repertoire transparency is an important part of any fair and efficient licensing system.[2] Existing structures, such as the ASCAP and BMI consent decrees and the Copyright Act's statutory licensing system, are designed to provide transparency in an otherwise opaque marketplace.

However, direct deals struck outside of these frameworks are substantially less transparent for all parties. This lack of information extends to the artists themselves, who, although ostensibly represented by publishers or labels, often find themselves entitled to only a

[1] I would like to thank Meredith Rose for her help preparing these responses.
[2] *See* Casey Rae, *Transparency: Why it Matters to Songwriters and Fans*, Future of Music Coalition (Jan. 14, 2015), https://futureofmusic.org/blog/2015/01/14/transparency-why-it-matters-songwriters-and-fans.

small fraction of the revenue paid out by streaming services.[3] The problems caused by non-transparent negotiations are widely acknowledged within the music industry. For example, the Songwriters Guild of America (SGA) and other songwriters' groups have recently pointed out the legal and policy problems with allowing publishers to partially withdraw their rights from ASCAP and BMI and license digital performance rights directly.[4] As the SGA pointed out, partially withdrawals would risk making the licensing process more opaque, and thus more vulnerable to abuse by major publishers.[5] In non-transparent direct deals, we could very well see major publishers strike agreements with streaming companies that include the kinds of provisions we already see major record labels obtain in their direct deals, particularly for uses, like interactive streaming, that do not qualify for statutory licenses. Major record labels have reportedly been able to use their copyright catalogs as leverage to receive non-cash compensation like advertising time, promotional plays, and equity in the service itself, in addition to cash revenue that could be structured as a lump sum that may not be attributable to individual artist's contracts. These kinds of compensation can allow publishers to extract value in return for licensing their copyrights without passing that value on to the songwriters who actually created the works being licensed.

And for streaming services, a lack of transparency in licensing can mean that a service is negotiating with a publisher without even knowing exactly what is in that publisher's catalog. A market cannot function if buyers cannot know what they are buying, especially when that buyer faces infringement penalties up to $150,000 per work. When a lack of catalog transparency puts new upstart streaming services at a disadvantage, the result is a less robust, competitive market.

Policymakers can take steps to ensure transparency by establishing robust options, like statutory licenses, with built-in transparency protections, and also ensure that antitrust actions, like the settlements in the ASCAP and BMI cases, provide sufficient protections in markets where the largest rightsholders have the incentive and ability to use their leverage to raise costs for consumers, stymie new market entrants, and pass less revenue on to artists.

One method to ensure transparency would be to implement a system for licensing sound recording rights and setting rates that is similar to the consent decrees currently in place for

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[3] *See*, *e.g.,* Tim Ingham, *Major Labels Keep 73% of Spotify Premium Payouts – Report,* Music Business Worldwide (Feb. 3, 2015), http://www.musicbusinessworldwide.com/artists-get-7-of-streaming-cash-labels-take-46/.

[4] *Open Letter from Songwriters: Dear American Music Publishing Community, Let's Talk*, Billboard (Mar. 26, 2015), http://www.billboard.com/articles/business/6516486/open-letter-from-songwriters-to-american-music-publishing-community.

[5] Songwriters Guild of America, Inc., *Response of the Songwriters Guild of America, Inc. to the Solicitation of Public Comments by the United States Department of Justice Regarding the Question of the Continued Efficacy of the Consent Decrees to which the Performing Rights Societies Known as American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") Remain Subject* (Aug. 6, 2014).

PROs. The PRO decrees provide crucial, systemic safeguards to protect transparency. Although they are by no means perfect in their implementation, the decrees ensure rate transparency; provide for open, public rate-making proceedings; provide guidelines for negotiated deals; and require that rightsholders publicly disclose the contents of their catalogs, so prospective licensees have full information about what they are paying for.

Another method to promote transparent licensing is a robust and sustainable statutory licensing system. However, as a practical matter, it would be ill-advised to dismantle the transparency protections in the consent decrees before a replacement system like a statutory license has actually been implemented.

2. *Question to Ms. Jodie Griffin, Public Knowledge:*

   Ms. Griffin, in your prepared testimony, you note "[w]ith technologically neutral competition policies, new music distribution platforms will have a fair shot at thriving in a sustainable way…"

   How do you reconcile this statement with the fact that there is not a performance right for terrestrial radio?

Public Knowledge supports the principle that competition will benefit if the law treats like uses alike, regardless of the underlying technologies companies use to deliver their services. Consistent with this, we support the implementation of a sound recording public performance right for terrestrial radio.[6] As we recommend for cable, satellite, and digital services, Public Knowledge recommends that public performance rights for AM/FM broadcast should have a statutory licensing option, with a rate set under the standard established in § 801(b) of the Copyright Act.

[6] *See* Comments of Public Knowledge and the Consumer Federation of America, Copyright Office Docket No. RM-2014-3, at 23-24 (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Public_Knowledge_and_Consumer_Federation_of_America_MLS_2014.pdf.

Questions of Senator Patrick Leahy (D-Vt.),
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Question for the Record for All Witnesses

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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.

Public Knowledge agrees that music licensing structures should result in a music distribution system that offers competitive, innovative choices to consumers and fair payment for artists. The ASCAP and BMI antitrust consent decrees have been and continue to be an important tool to ensure new services can obtain reasonable licenses efficiently, pay artists, and compete against established companies. In addition to the consumer benefits antitrust law has provided, copyright law's statutory licenses, while not perfect, have similarly helped licensees pay reasonable fees while limiting the ability of the largest rightsholders to use their catalogs as leverage to limit consumers' options or gain control over new distributors. In addition to consent decrees that continue to protect consumers and competition, stronger statutory licensing structures would level the playing field for smaller rightsholders and digital music services while helping artists get paid directly.

Currently, the music licensing marketplace is dominated by a handful of corporate rightsholders, which each control large shares of the market. Together, the three largest performing rights organizations (PROs) control almost all of the market for public performance rights, and ASCAP alone has a market share of 45-47%.[1] Among music publishers, Sony/ATV Music Publishing alone controls over 29.4% of the market, making it 30% larger than its nearest publishing competitor, Universal Music Publishing Group, and more than twice the size of

[1] *See In re Petition of Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395 (S.D.N.Y. Mar. 18, 2014).

Warner/Chappell Music.[2] Together, these three companies hold a combined three-firm market share of more than 65%. In recorded music, the market is dominated by three major labels—Universal Music Group (UMG), Sony Music Entertainment, and Warner Music Group—which control a combined 75% of the market, with UMG alone controlling 36.7% of the market.[3] Concentration among rightsholders is particularly threatening to emerging competing distributors, because ownership of a huge catalog of copyrights makes it impossible for new distributors to launch without a license from those rightsholders. Bottlenecks among rightsholders can also create market concentration among distributors, because it becomes that much more difficult for a new service to launch and compete for listeners.

In today's music marketplace, some legal structures—like the consent decrees—can counter the threat of market concentration by promoting efficient and reasonable licensing, but the music licensing marketplace is still plagued with existing or potential bottlenecks that allow dominant companies to stifle competition and entrench their own gatekeeper positions without adding new value for musicians or their fans. When one company, like a major label, major publisher, or performing rights organization, controls up to 25-45% of the relevant market, that company has the power to leverage its copyright holdings to prevent digital music services from launching or gain control over them through equity shares.[4] In other cases, the largest rightsholders might demand large cash advances or disproportionate royalty shares, which disadvantage independent rightsholders and artists. But, legal protections like a statutory license or an antitrust settlement that requires reasonable licensing can ensure that services can obtain fair licenses on a level playing field even in the face of a heavily concentrated content industry.

A music licensing system that counters the harms of market consolidation, promotes efficient licensing, and treats like uses alike, will help create a robust and competitive market for

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[2] *UMG and WMG See Gains in Recorded-Music Market Share in 2013, While Sony/ATV Dominates Music Publishing,* MUSIC & COPYRIGHT, INFORMA TELECOMS & MEDIA (May 6, 2014), https://musicandcopyright.wordpress.com/2014/05/06/umg-and-wmg-see-gains-in-recorded-music-market-share-in-2013-while-sonyatv-dominates-music-publishing/#more-1166.

[3] *Id*. These numbers do not, however, include sound recordings owned by independent labels or musicians but distributed through one of the major labels. To the extent that the major labels' distribution contracts with smaller labels allow them to set (or refuse to set) prices and rates with digital distributors for those labels' recordings, those contracts increase the majors' leverage over digital distributors. During the last major record label merger, members of this committee expressed concern over the impact that greater consolidation would have on competition. *See* Letter from Herb Kohl and Mike Lee, Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to Jonathan Leibowitz, Chairman, FTC (Aug. 3, 2012), https://www.publicknowledge.org/files/UniversalEMILettertoFTC20120803.pdf.

[4] The extraordinarily high statutory damages available under copyright law only exacerbate this problem. For music services that offer consumers the broadest possible choice of songs to listen to—which have proven very popular among listeners—being found out of compliance with a license could subject that a service to damages of $150,000 per work infringed, even for songs that were only actually played a handful of times. *See* 17 U.S.C. § 504. Even just the threat of damages so disproportionate to the actual harm caused by infringement is enough to give the largest rightsholders enormous bargaining power.

music services that give consumers choices while paying artists. For these reasons, Public Knowledge has recommended a number of changes to existing licensing structures to level the playing field and encourage new market entrants. AM/FM radio should pay for publicly performing sound recordings, just as cable, satellite, and webcasting services do. Interactive services should be able to pay rightsholders and artists directly under a statutory license, as non-interactive services do.

The specific rates an interactive service should pay may be different than what a non-interactive service pays, but the rates should all be set under the standard established in § 801(b) of the Copyright Act.[5] The § 801(b) standard emphasizes making works available to the public and giving both copyright owners and licensees a fair return on their investments—exactly what the goals of our music licensing system should be. In contrast, the "willing buyer/willing seller" has proven unworkable in an industry that is so concentrated licensees do not actually have the option of foregoing licenses from the largest rightsholders and still staying in business. That is not to say that statutory licensing under the § 801(b) standard cannot be improved. Specifically, Public Knowledge urges Congress to consider adjusting the § 801(b) factors to include a fair return for *artists*, not just copyright owners, and increasing the artist's share of the statutory royalty splits between copyright owners and performers. By creating statutory licenses that put everyone on a level playing field, Congress would promote more innovative choices for consumers while ensuring artists are paid for their work.

Additionally, Congress can use other copyright mechanisms to counter extraordinary market concentration that harms listeners and artists alike. For example, provisions in copyright law that empower artists to reclaim their rights after a certain number of years allow artists to regain control over their life's work with actual information about how their work has performed in the market. Artists may choose to negotiate better contracts with existing business partners or may choose to control their rights themselves or move them to new intermediaries. Either way, the copyright reversion and termination provisions have the potential to empower artists to make the largest rightsholders accountable—major labels and major publishers will have to prove the value of their services to retain artists. Public Knowledge urges Congress to ensure artists are not deprived of this benefit, and to consider ways to make the termination process easier for artists, like providing a form for notifying rightsholders when an artist wants to terminate a transfer.

For these reasons, Public Knowledge recommends that policymakers protect the benefits that flow from the ASCAP and BMI consent decrees, while also promoting a robust and competitive online music market through antitrust law, statutory licenses set under Section 801(b) of the Copyright Act, and laws that empower artists to reclaim their copyrights and renegotiate their contracts after an appropriate period of time.[6] Each of these pieces is critical to ensuring competition and innovation at every link in the distribution chain between artists and their fans.

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[5] 17 U.S.C. § 801(b).

[6] *See* 17 U.S.C. §§ 203, 304.