Questions Posed by Senator Orrin G. Hatch

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?

   LEE THOMAS MILLER --- Witness, Broadcast Music Incorporated.
   President, Nashville Songwriters Association

   Answer:
   The answer to this question must begin with complete and full disclosure/transparency of the terms of any deal directly negotiated by a music publisher. The U.S. Register of Copyrights in her 2015 report on "Copyright and the Music Marketplace" states as one of four key principles: "Usage and payment information should be transparent and accessible to rightsowners."

   In today's difficult market environment for songwriters—with only a fraction of the music publishing deals available compared to the pre-digital market—-a scenario could emerge where a music publisher could demand that a songwriter give up any rights to a portion of advance or bonus payments. This could even become the industry standard. In order to avoid such a scenario, there should be a requirement, that cannot be superseded by contracts, that the songwriter receive a pro-rata share of any advances or bonuses resulting from a deal directly negotiated by a music publisher.

   Songwriters should receive 100% of their "writer's share" and any "publisher's share" as identified in the exclusive songwriter-publisher agreement in effect at the time royalties are earned. Such payments should be based on a songwriter's song activity on a particular service during the time period of the deal directly negotiated by the music publisher.

Working songwriters, would prefer that any royalties due them from direct-licensing deals be paid directly to the songwriter instead of "passing through" the music publisher---whether this be in the form of an advance, bonus or normal royalties earned. This direct payment could be paid to the songwriter from a performing rights society who is administering a direct-licensing deal for a music publisher, or the songwriter could elect to have their performing rights society collect and distribute their share of advances, bonuses or normal royalties -- even if the music publisher has not contracted with a performing rights society for administration on a specific direct licensing/distribution deal.

While songwriters and music publishers believe they should be able to set rates according to a willing-buyer, willing-seller standard in a free market environment, some government oversight could still be required, including monitoring full disclosure requirements resulting from direct-licensing deals by music publishers. The U.S. Copyright Office could determine how this disclosure requirements are overseen and enforced. Performing rights societies could also potentially play an oversight role in such deals.

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?

###

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.

A: We need to move toward marketplace solutions, rather than have the government set songwriter royalty rates under rules from 1909 and 1941. Songwriter royalty rates are determined under unfair standards that do not reflect a "willing-buyer, willing-seller" standard. This has resulted in nominal increases in mechanical royalties that have grown from two cents in 1909 to only 9.1 cents in 2015. Similarly, songwriters receive streaming royalties up to 14 times lower than artists and record labels under antiquated standards.

Absent a totally free market for songwriters, ASCAP and BMI consent decrees should be amended to allow for blanket licensing of all royalties, performance, mechanical and synchronization. Arbitration would work much more efficiently than rate courts when it comes to setting rates and having start-up companies in the digital music distribution business pay fairly for my songs when they commence distributing them.

During the recent Senate subcommittee hearing where I testified on behalf of Broadcast Music Incorporated, the digital streaming service Pandora said ASCAP and BMI should remain under consent decrees because each of the performing rights societies controlled about 45% of the licensing/collection of performance royalties in the United States. I find this ironic since Pandora controls more than 70% of the digital streaming market."

Lee Thomas Miller