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In the Matter of	)	
Section 302 Report to Congress Regarding Cable and Satellite Statutory Licenses	)	**Docket No. 2010-10**

COMMENTS OF THE TELEVISION MUSIC LICENSE COMMITTEE

The Television Music License Committee (the "TMLC" or the "Committee") submits these comments in response to the Notice of Inquiry (the "Notice") released by the Copyright Office on March 3, 2011 in the above-referenced proceeding.

INTRODUCTION

The TMLC is a not-for-profit association that represents approximately 1200 full-power, commercial broadcast television stations in the United States and its territories in connection with negotiations for, and litigation concerning, music performance rights licenses from two of the three United States performing rights organizations ("PROs"), the American Society of Composers and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). From 1996 until 2007, the TMLC also represented stations in connection with their license dealings with SESAC, the third PRO.[1]

[1] For the 1996-2004 period, stations operated pursuant to industry-wide licenses negotiated by the TMLC and SESAC. For the 2005-2007 period, stations' SESAC license fees were set by an arbitration between the TMLC and SESAC. For the period commencing in 2008, SESAC elected not to continue negotiating through the Committee and negotiates with station owners individually. As the Notice recognizes, SESAC's licensing practices for the period commencing January 1, 2008 have prompted a lawsuit

As described in greater detail below, the rights to perform the music in programming broadcast by local television stations are typically licensed separately from all other rights the stations need. The rights to *perform* most of the music in broadcast television are not acquired in competitive-market transactions between local broadcasters and copyright owners, but rather in the form of repertory-wide licenses from PROs. The unique and inherently anticompetitive nature of the music performance rights marketplace has important implications for the various alternatives to the statutory licenses set forth in Sections 111, 119, and 122 of the Copyright Act for which the Copyright Office has requested comment. In Section I below, we describe the use of music in television and how performance rights are typically acquired. In Section II, we explain why the various alternatives to the statutory licenses are unlikely to lead to competitive-market license transactions without other significant changes in longstanding industry practices (as a result of legislation or otherwise). In Section III, we explain that if Congress were to phase out the statutory licenses, additional legislative action would be appropriate to promote a competitive market for music performance rights.

I. THE USE OF MUSIC IN BROADCAST TELEVISION AND THE MUSIC PERFORMANCE RIGHTS MARKETPLACE

A typical television show embodies multiple creative or artistic inputs, such as the underlying story, script, visual images, acting and direction. Many of these artistic elements involve copyright rights, and hence, diverse permissions are necessary to broadcast a television program. Generally, the producer of a television program obtains,

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brought on behalf of a class of local television broadcasters alleging that SESAC has violated Sections 1 and 2 of the Sherman Act. *See Meredith Corp. v. SESAC, LLC*, 2010 WL 856266 (S.D.N.Y. Mar. 9, 2011).

at the time of production, all of the rights needed for a local station to broadcast the program and conveys those rights to the station. The sole exception to this practice is the right to perform publicly the music in the program. Even though the music performance rights are not typically included with the rest of the rights necessary to broadcast the program, stations are contractually precluded from substituting or eliminating the music content and thus must obtain music performance rights separately to avoid potential copyright infringement liability.

Music is used in broadcast television in a variety of ways. Most program series contain theme and "bumper" music that is played at the beginning and end of every episode and often before or after commercial breaks. In addition, comedy and drama series, and movies, often have background music that is heard during part of the program content. Occasionally, the video action of the program may focus on singers or instrumentalists playing music. This kind of use, in which the music performance is the video image, is referred to as a "feature" performance.

The station's control over music performances contained within its programming varies based on the kind of program. Some programs, particularly local news programs, are produced by the station for its own use ("locally produced"), and the station therefore determines what music will be used in the programs, and how it will be used. Other kinds of programming, including network programming, syndicated series, movies, and paid programming or "infomercials," are produced elsewhere by third parties. For these kinds of programming, decisions about program content – including the quantity and identity of music incorporated in the program – are made by a third party when the program is first produced. The program comes to the local broadcast station already "in

the can," sometimes months or years after it was originally produced. Obviously, in these situations the station does not control what music is embedded in the programs it broadcasts. Indeed, for most of this programming, the station often does not even know what music is in these programs or which parties control the right to perform that music publicly.

The situation is even more difficult for programs that have not yet been produced at the time stations obtain the rights to air them – entertainment or sports programs airing on networks such as Fox, CW, MyNetwork TV and Telemundo,[2] "first run" syndicated programs,[3] or certain other programs produced by third parties such as religious programs, infomercials or telethons. In none of these cases is the station – let alone the cable or satellite provider retransmitting its signal – in a position to know the music content of a program at the time the station becomes obligated to air it.

In addition to the musical performances present in broadcast programs, other music performances occur in commercial, promotional, and public service announcements, and in producer "logos" (the music contained in the few-second announcement identifying a program's producer, generally at the end of a program). These "incidental" music performances also must be licensed. As with the music that is in programs not produced by the station, the station typically does not control or even

[2] The ABC, CBS, NBC and Univision television networks obtain "through to the broadcast viewer" music performance rights licenses from the PROs that convey the right for their local station affiliates to broadcast the programs without further liability to the owners of the music compositions in the network programming.

[3] A few "first run" syndicated programs are conveyed to some stations with the performance rights to recurring music uses available in exchange for an additional fee.

possess information regarding performances of incidental music. Finally, stations occasionally will broadcast "ambient" musical performances that occur during or in the background of public events, such as the music played by the marching band at a football game, or sung at a public rally covered in a news program. Some of these uses may constitute "fair use" under Section 107, but PROs traditionally have taken the position that these performances require licenses and unlicensed performances of ambient music pose at least the threat of infringement claims for stations.

In a competitive market, music performing rights for all of this ubiquitous and varied music content, like all other rights needed to air a program, would be obtained by the producer at the time of production and passed on to the station with other licensed broadcast rights. If the producer wished to incorporate music into the program, she would contact the copyright owner, and together they would negotiate the terms and conditions (including the compensation to be paid) under which that owner would permit the desired performance. This is how the rights to all other creative elements in television programming are negotiated and acquired. The producer could then consider whether to incorporate the music under the offered terms and conditions, try to negotiate better terms, obtain music from another source on more favorable terms, or not use music at all.

In this hypothetical competitive market, even though the copyright owner has an absolute monopoly on the right of performance in *her* work, the terms and conditions that are specified for the license of that right are subject to the forces of competition, at least to some degree. If the copyright owner sets the price too high, then the producer can choose to substitute a different work available on more favorable terms and conditions,

hire a composer to create a new musical work for the contemplated program, or forego the use of music for that particular circumstance. Of course, if the producer is making a documentary about the Beatles, then she is unlikely to want to do so without using any Beatles music. If the producer is making a documentary about rock-and-roll in the 1960s, there are many different songs, available from a wide range of copyright holders, that she could use. For broadcasting the local news, there may be hundreds of composers available to write a station's news theme. Thus, competitive market forces would determine the market price for the right to broadcast each particular performance.

Unfortunately, with respect to music performance rights, the current circumstances surrounding the production and broadcast of most television programming bear little resemblance to the hypothetical competitive market described above. Traditionally, to obtain the performance rights to music in the programs that they broadcast, local television stations have been required to obtain licenses from ASCAP, BMI, and SESAC, rather than relying upon such rights having been secured on their behalf by program producers. In turn, the PROs' historic preference and practice has been to offer television stations blanket licenses that afford licensees access to their respective repertories at fees that neither reflect the user's actual need for, or use of, that repertory nor vary to the extent the user may be able to secure performance rights to the music it uses directly from copyright owners.[4] While administratively straightforward, the blanket license comes with a significant drawback: because there is no competition in

[4] *See Music Choice*, 426 F.3d at 93; *United States v. ASCAP (In re Application of THP Capstar Acquisition Corp.)* 2010 WL 4878878, at *19 (S.D.N.Y. Dec. 1, 2010) ("*ASCAP/DMX*").

the market to provide blanket licenses covering the respective repertories, the stations – absent legal constraint – would have to pay whatever fee the licensor demands.[5]

ASCAP has some 400,000 members and issues public performance licenses to local television stations and other music users authorizing the performances of any of the more than 8 million music works amassed in its repertory. BMI has a comparable number of affiliated publishers and composers and licenses a repertory of some 6.5 million musical works. SESAC is considerably smaller than its sister PROs but still aggregates performance rights to thousands of works from a large number of affiliated copyright holders.

The market power the PROs have amassed by aggregating and jointly pricing rights from hundreds of thousands of copyright owners raises significant competitive concerns. As the Notice recognizes, ASCAP and BMI have long been regulated by consent decrees negotiated with the U.S. Department of Justice ("DOJ"). Notice at 11819. The decrees are the result of multiple Sherman Act challenges by DOJ dating back to the early years of both organizations. *See generally United States v. ASCAP (In re Application of MobiTV, Inc.)*, 2010 WL 1875706, at *3, *18 (S.D.N.Y. May 11, 2010); *United States v. ASCAP (In re Application of Turner Broad. Sys., Inc.)*, 782 F. Supp. 778, 782-84 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 21 (2d Cir. 1992).

[5] Blanket licensing is only a useful solution to the station's lack of information about the music content of the third-party programming it broadcasts if a station obtains the rights to *all* of the music that it might broadcast. Accordingly, the segmentation of music rights holders into three different blanket-licensing organizations, each with its own unique repertory, does not create competition between PROs to provide blanket licenses to stations. Rather than diminish the inherent monopoly power associated with the blanket license, the segmentation of rights holders into three different PROs may exacerbate it. Virtually every – if not every – station takes a license from each PRO.

The Notice describes some of the important ways that the ASCAP and BMI consent decrees regulate their offering of performance rights licenses. *See* Notice at 11819. For purposes of comment on the Notice, four aspects bear particular emphasis. First, the decrees require ASCAP and BMI to offer licenses to users who request them and enable users to make performances of works in their respective repertories while license fees are being negotiated or litigated without fear of copyright infringement liability. Second, they enable music users such as local broadcast stations to seek a judicial determination of reasonable fees when faced with fee demands from ASCAP or BMI they perceive as unreasonably high. Third, they preclude exclusive licensing arrangements between those PROs and their affiliated publishers and composers – *i.e.*, music users are free to deal directly with music copyright owners. Fourth, they require ASCAP and BMI to offer "per program" licenses that also grant the licensee rights to broadcast any and all works in the PRO's repertory, and to do so as many times as desired, at a fee that varies depending on how many programs containing the PRO's music not otherwise licensed for public performance are broadcast by the licensee.[6] For those television stations that operate under per program licenses from ASCAP and BMI, some music performance rights are acquired though the PROs (including all of their performances of SESAC music). The other rights are acquired by means of either a (i) "direct" license in which the local station acquires the broadcast rights directly from the copyright owner, or (ii) "source" license in which the producer of the program acquires a

[6] For the period from April 1, 2005 through December 31, 2007, SESAC briefly offered television stations a per program license that some 250 stations were able to utilize to save on their SESAC license fees. As of January 1, 2008, SESAC ceased to offer stations an economically viable per program alternative to its "all or nothing" blanket license.

"through-to-the-broadcast-viewer" license from the copyright owner and then conveys to the station the right to the broadcast the source-licensed music in addition to the right to broadcast the program. Stations have requested adjustable-fee blanket licenses from ASCAP and BMI pursuant to which they would receive a fee credit for performances licensed directly from ASCAP and BMI affiliates. By facilitating direct- and source-license transactions that currently are uneconomic for stations under the current structure of the per program licenses, such licenses would inject another dose of sorely needed competition into the performance rights marketplace, but the PROs have refused to offer a blanket license with this fee structure to stations.[7]

Although the ASCAP and BMI consent decrees provide some constraint on their pricing practices, there remains no doubt that "the market for licensing music rights is not freely competitive" insofar as, under traditional blanket licensing practices, "songs do not compete against each other on the basis of price." *Showtime,* 912 F.2d at 570. Rate courts attempt "to define a rate or range of rates that approximates the rates that would be set in a competitive market," but historically have had to rely on "very imperfect

[7] ASCAP and BMI are obligated by their antitrust consent decrees to offer adjustable-fee blanket licenses. *See, e.g., United States v. BMI (In re Application of AEI Music Network, Inc.)*, 275 F.3d 168 (2d Cir. 2001); *ASCAP/DMX*, 2010 WL 4878878; *BMI v. DMX, Inc.*, 726 F. Supp. 2d. 355 (S.D.N.Y. 2010) ("*BM/DMX"*); *United States v. ASCAP (In re Application of Muzak, LLC)*, 309 F. Supp.2d 566 (S.D.N.Y. Mar. 17, 2004). BMI no longer contests that background/foreground music services are entitled to adjustable-fee blanket licenses, but it takes the position that broadcasters are not entitled to the same type of fee structure. That issue is *sub judice* as to BMI on a fully briefed motion in the BMI Rate Court. *See WPIX, Inc. et al. v. BMI*, No. 09-CV-10366 (LLS). ASCAP did not appeal the *Muzak* decision but is appealing DMX's entitlement to a blanket license with a fee structure that takes account of direct licensing. We understand ASCAP's position to be that it is not obligated to offer an adjustable-fee blanket license to any music user.

surrogates" given the traditional lack of a competitive market in music rights. *Id.* at 576-77; *see also United States v. ASCAP (In re Application of Buffalo Broad. Co.)*, 1993 WL 60687, *18 (S.D.N.Y. Mar. 1, 1993) ("*Buffalo Broad.*") (noting "absence of competitive market"). Rate courts have recognized that voluntarily negotiated agreements with PROs are *not* reflections of competitive-market prices. *See Buffalo Broad.*, 1993 WL 60687 at *28 (observation that rate courts are designed to protect against excessive fee demands does not "translate into the conclusion that the availability of the rate court ensures that any negotiated settlement is a reflection of competitive market rates"); *see also ASCAP/DMX* 2010 WL 4878878; *BMI/DMX* 726 F. Supp. 2d. 355. Accordingly, while the recent development of competitive-market data in the background/foreground music services industry and its use as a benchmark in PRO rate-setting for a service in that industry (*see ASCAP/DMX* 2010 WL 4878878; *BMI/DMX* 726 F. Supp. 2d. 355) is a most encouraging development, the acquisition of music performance rights for television broadcasting can hardly be described as "market-based." To the contrary, it is a marketplace marked by decades of antitrust litigation, government regulation, and judicial rate-making in multi-year, often-appealed proceedings that can cost the parties to them millions of dollars to prosecute.

The Notice observes that SESAC is not regulated by an antitrust consent decree but has been sued by a class of local television broadcasters alleging price fixing, monopolization, and conspiracy to monopolize. *See* Notice at 11819; Amended Complaint, *Meredith Corp. v. SESAC*, No. 09-9177 (S.D.N.Y. Mar. 18, 2010). SESAC's motion to dismiss the antitrust class action commenced against it was recently denied. *See Meredith Corp.*, 2010 WL 856266 at 15.

II. THE IDENTIFIED ALTERNATIVES TO THE STATUTORY LICENSES ARE UNLIKELY BY THEMSELVES TO LEAD TO COMPETITIVE-MARKET TRANSACTIONS FOR THE RIGHT TO PERFORM THE MUSIC VIA RETRANSMISSIONS OF LOCAL TELEVISION STATION BROADCASTS

The Notice requests comment on three potential alternatives to the statutory licenses contained in Sections 111, 119, and 122: private licensing transactions, sublicensing by local stations, and licensing through a new collective. With respect to performances of music made by cable operators and satellite carriers in connection with the retransmission of local television station broadcasts, none of these alternatives, by itself, is likely to lead to competitive-market transactions for music performance rights.

A. Private Licensing

While cable operators and satellite carriers as a theoretical matter could obtain performance rights in private transactions with individual rights holders, it is not a realistic alternative. As the Copyright Office recognizes, "cable operators and satellite carriers must be able to identify the rights holders to the programs carried by broadcast stations" before private negotiations can commence. Notice at 11819. This "daunting task" (*id.*) is far more daunting with respect to the copyrighted music embedded in each of the programs as demonstrated above. Cable operators and satellite carriers do not have ready access to information about the music content of the programming they retransmit, let alone who owns the rights to such music.[8] Local stations could not reliably convey such information because for many types of programming, and for incidental music, they do not have it. Because the cable operators and satellite carriers do not know what rights

[8] PROs do not make the information they collect about the music content of television programs publicly available.

to license, or from whom they could be licensed, it seems unlikely that private licensing provides a viable alternative to the statutory licenses that permit them to perform the music in broadcast retransmissions.[9] Even if cable operators and satellite providers could identify and license the music content of some of the programs they wish to retransmit, they might still be unable to retransmit others for lack of necessary music performance rights, leaving gaps in a station signal they may be obligated to carry by contract or government regulation. Such gaps would be contrary to the interests of the viewing public, stations, and multichannel video program distributors ("MVPDs") alike.

B. Sublicensing

As discussed above, the local television stations already face daunting obstacles in obtaining music performance rights for their own broadcasts of copyrighted musical works embedded in most programming provided by third parties. When broadcasters have attempted to negotiate directly with program suppliers (other than licensed networks, *see* n. 2 *supra*) for broadcast music performing rights, they are typically rebuffed. There is no reason to believe it is more likely that these program suppliers would entertain requests to negotiate cable or satellite music performing rights for the same programs.

With the possible exception of locally produced programming for which stations control the music content, the sublicensing alternative is unlikely to lead to competitive-market transactions for the music performance rights that cable operators and satellite

[9] It does not appear that the Entertainment Identifier Registry discussed in the Notice would track the music content of television shows, let alone the catalog the rights ownership information that cable operators and satellite systems would need for private licensing.

carriers would need in the absence of the current statutory licenses without reform of the licensing practices of the PROs as described in section III. In a world in which such practices remain unchanged, the sublicensing alternative would simply shift the burden and cost of obtaining such rights to local stations. In addition, we note that the National Association of Broadcasters has indicated in its comments that, for distant signal carriage, stations would have little or no economic incentive to undertake the cost and burden of clearing rights for cable operators and satellite carriers.

C. Collective Licensing

The final alternative, collective licensing, is hardly a panacea for whatever concerns are raised by the current statutory license regime. As described in the Notice, collective licensing would involve copyright owners voluntarily empowering "one or more third party organizations to negotiate licenses with cable operators and satellite carriers for the public performance rights for their works transmitted by a television broadcast station." Notice at 11819. As the Notice points out, there is currently no collective licensing body that performs this function, though the PROs do administer public performance rights on behalf of their affiliated musical work copyright owners. For the reasons described above, collective licensing of the public performance right to cable operators and satellite carriers for musical works in broadcast television programming, whether through the creation of a new collective not limited to music rights or through the existing PROs, would not eliminate the inherently anticompetitive nature of the market for music performance rights. The result would likely be no more effective than the status quo in stimulating competitive-market pricing for music performing rights in MVPD retransmissions of television broadcast signals.

III. LEGISLATIVE ACTION TO PROMOTE A COMPETITIVE MARKET FOR MUSIC PERFORMANCE RIGHTS WOULD BE APPROPRIATE IF THE STATUTORY LICENSES WERE PHASED OUT

If Congress were to phase out the statutory licenses under Sections 111, 119, and 122, additional legislative action would be needed to create a competitive marketplace for the right to retransmit the music embedded in programming broadcast by local television stations. The most effective step toward a competitive marketplace would be to prohibit owners of copyrighted musical works from withholding public performance rights when they license the right to synchronize their compositions with the visual images of programs. *See, e.g., Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948) (enjoining ASCAP from licensing theater exhibitors because copyright holders could negotiate directly for performance rights when licensing synchronization rights to movie producers). If through-to-the-viewer performance rights were acquired at the time of production in individual negotiations between copyright owners and program producers, much like performance rights for theaters are acquired by movie producers in the post-*Alden-Rochelle* environment, the prices for music performance rights for retransmissions of station broadcasts would be market-based.

Any statutorily-implemented phase-out of the statutory licenses would also need to take into account the "must carry" rules promulgated under the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") and the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"). Such legislation would need to ensure that cable operators and satellite providers would not be forced to acquire music performance rights to avoid infringement liability in a case in which they are required to

carry the programming to comply with their regulatory obligations.[10] It would similarly need to be made clear that a station invoking its statutory right to "must carry" or "retransmission consent" does not risk secondary copyright infringement liability when a cable operator or satellite carrier refuses to take licenses for music performance rights.

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Respectfully submitted,

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[10] Moreover, an MVPD is prohibited from accepting or requesting payment from a local television station in exchange for carriage under the must-carry rules. See 47 C.F.R. §76.60 (cable); 47 U.S.C. §338(e) (satellite).