Hearing on
“How Much For a Song?: The Antitrust Decrees that Govern the Market for Music”

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Committee on the Judiciary

Subcommittee on Antitrust, Competition Policy and Consumer Rights

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On behalf of the National Association of Broadcasters

I. Introduction

Good morning, Chairman Lee, Ranking Member Klobuchar, and members of the Subcommittee. My name is Mike Dowdle and I am the Vice President of Business Affairs and General Counsel at Bonneville International Corporation. As a constituent of both Chairman Lee and Senator Hatch, I am pleased to testify today on behalf of the National Association of Broadcasters (NAB) and its members, the thousands of free and local radio and television stations across the nation.

Founded in 1964, Bonneville traces its early roots to KSL Radio, which first went on the air in May of 1922 (originally as KZN) in Salt Lake City, and to KSL-TV, an NBC affiliate which had its on-air debut in 1949. We continue to own KSL Radio and TV, as well as KRSP and KSFI radio in Salt Lake City, where our corporate headquarters resides. In addition, Bonneville owns and operates radio stations in Los Angeles, Seattle, and Phoenix.

My testimony today will focus on the continued importance of the Department of Justice (DOJ) consent decrees governing ASCAP and BMI to radio and television broadcasters, and their audiences in your communities. Simply put, without the legal protections afforded by these consent decrees, our stations' radio listeners and television viewers would not receive our unmatched breadth of programming as they do today – whether free over-the-air, over the Internet, or through a cable or satellite provider. Neither would the customers of the countless businesses that publicly perform music every day, including restaurants, bars, retailers, sports venues or streaming services.

In spite of technological advances in how music is publicly performed, the ASCAP and BMI consent decrees necessarily ensure and maintain a fair and efficient music licensing marketplace for the benefit of consumers. This Subcommittee need look no further than the recent antitrust actions brought against the third major Performing Rights Organization (PRO), SESAC – which is unregulated – to glimpse the anticompetitive practices undertaken by entities licensing outside of the consent decrees' framework.

II. The Consent Decrees Are Necessary Because The Performance Rights Organizations And The Marketplace For Musical Works Are Inherently Anticompetitive And Have A History Of Antitrust Abuses

ASCAP and BMI control more than 90 percent of the public performance rights to musical works in the United States. They aggregate those rights into blanket licenses, and then fix a single price for all music within that license, irrespective of the whether the song is actually used. In any other industry, this conduct would be considered *per se* violations of the antitrust laws. The consent decrees entered into between DOJ and both organizations more than 80 years ago serve as antitrust lifelines, enabling ASCAP and BMI to continue to operate, subject to certain conditions.

The very grant of exclusive rights to copyright owners of musical works carries with it the inherent potential of anticompetitive activity. Aggregating works from many owners into a PRO exponentially compounds this potential, as does the fundamental character of the licensing marketplace for musical works, wherein even the right to a single musical work gives the owner unfettered market power. Many music licensees either lack the capacity to identify and license rights in the thousands of musical works needed to operate their business, have no editorial control over which works they perform, or are businesses that – by definition – require public performance rights in certain specific works in order to successfully operate.

Given the ever-present, overlaying threat of substantial penalties under Federal law for unauthorized performances of musical works, absent the consent decrees, broadcasters would be at the mercy of the PROs in any negotiation for public performance rights of those works. A licensing framework able to bring together owners of most or all musical works and potential licensees, on relatively equal ground, with transparency of licensing and use information, and mechanisms for setting, paying and distributing fees, is critical to the function of the music licensing marketplace.

Recognizing this reality, and following complaints of and investigations into anti-competitive activity, the DOJ entered into consent decrees with both ASCAP and BMI in 1941. These consent decrees both facilitated the smooth operation of the marketplace and erected barriers to anticompetitive activity. The DOJ has periodically reviewed and amended these consent decrees, but their fundamental protections remain in place for good reason: there is simply no market-based substitute for the consent decrees' ability to facilitate operation of the market, while constraining supra-competitive pricing and other anticompetitive activity.

III. Broadcasters Could Not Operate Lawfully Absent Licenses From The PROs – Compounding Their Exposure To Anticompetitive Harm

Most radio stations, including Utah's Classic KRSP 103.5 FM The Arrow and L.A.'s KSWD 100.3 The Sound, play music as their primary programming. Our stations and DJs control the selection of this music and tailor it to the interests of our listening audience. But in addition to that primary programming, KRSP and KSWD (and every other station format, including news and talk, like Washington's own WTOP) also publicly perform the music contained within their commercials, coverage of live events, or broadcasts of syndicated programming. Even though they do not and can not choose the music in this programming, they remain responsible under the copyright laws for the content they perform publically and must clear rights for those important musical works. Broadcasters would cease operations without the ability to clear these rights. Thus, absent the protections afforded by the consent decrees, ASCAP and BMI (or the owners of the underlying musical works) would have unfettered ability to extract supra-competitive prices and terms for the rights in those works should they choose.

The same rules apply for television. Stations like KSL-TV play music as part of their audio-visual programming. These musical performances may be part of a feature presentation, such as a concert, in the background of movies or television shows, as part of their local news, as a transition between programs, or as part of the broadcast of live events. Television stations

are even less able to control the music they broadcast, as music in all of their syndicated programming, non-locally produced commercials, and live events are not under a station's control. Often, it is not even possible to know what music is contained in a particular television program. Nevertheless, the television broadcaster must clear the rights to publicly perform all the music that is included in its programs.

Because of this lack of full editorial control over all of the music in the programming they broadcast, and the resulting inability to avoid any individual repertory, radio and television broadcasters – like Bonneville – must obtain licenses from each of the three PROs – ASCAP, BMI, and the currently unregulated SESAC or face the potential consequence of significant statutory damages.

To avoid these risks, television broadcasters currently avail themselves of industry-wide licenses negotiated with ASCAP, BMI, and SESAC by the Television Music Licensing Committee (TMLC), and the National Religious Broadcasters Music license Committee (NRBMLC) under the framework of the consent decrees. Radio broadcasters avail themselves of similar industry-wide licenses negotiated with ASCAP and BMI by the Radio Music Licensing Committee (RMLC).

The PROs, and even some inside the DOJ, have suggested that the consent decrees should be "sunsetted", or allowed to expire. In support, they have pointed to similar sunsetting provisions in other consent decrees. Sunsetting the decrees may make sense in cases where decrees are intended to stop current and prevent future anticompetitive activity. Once the activity is stopped, and future activity deterred, sunsetting makes sense. In the case of the ASCAP and BMI consent decrees, however, the decrees themselves enable anticompetitive activity within a carefully controlled framework. They actually promote efficient function of the music licensing marketplace. Without such a construct, the marketplace could well grind to a halt.

IV. Broadcasters' Experience With SESAC – A Third Unregulated PRO – Further Validates The Need For The Consent Decrees

The blanket licensing of performance rights is inherently anticompetitive. Left unchecked, PROs have the power and motive to withhold licenses to extract supra-competitive rates, terms and conditions from licensees. That is why the broadcast music license committees have spent years, and millions of dollars, litigating in the rate courts against ASCAP and BMI to secure reasonable rates, the rights to "per program" licenses, and to validate the right granted in the consent decrees to directly license public performance rights from songwriters and music publishers.

Despite the fact that it is significantly smaller than either ASCAP or BMI, SESAC has engaged in negotiating behavior akin to the activities that prompted the government to sue ASCAP and BMI decades ago. These activities include: (i) extracting supra-competitive rates for its blanket license; (ii) refusing to offer viable alternatives to its all-or-nothing blanket license; (iii) eliminating opportunities to secure performance rights through direct negotiations with rights holders; and (iv) refusing to provide up to date information on works in its repertory. In spite of substantial increases in SESAC's rates, broadcasters were forced to take SESAC's licenses.

Recent antitrust cases brought by the RMLC and TMLC against SESAC, detail these allegations and illustrate how unregulated PROs can and do abuse market power.

- 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., et. Al. v. SESAC, LLC*, 09 CIV. 9177 (PAE), 2014 WL 812795, at *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, the judge concluded that "the challenged conduct has produced anticompetitive effects in the relevant market," and that "SESAC

> has engaged in exclusionary conduct by failing to disclose its repertory and ensuring that users have no real alternatives but to purchase their licenses . . . ." [*Radio Music Licensing Committee, Inc. v. SESAC Inc.*, No. 12-cv-5087, at *29, *33 (E.D. Pa. Dec. 20, 2013).]

The TMLC case was recently settled and requires SESAC to pay broadcasters $58 million and agree to negotiate present and future licenses subject to many conditions similar to those contained in the ASCAP and BMI consent decrees. This result was only achieved after five years of expensive litigation, including over fifty depositions, and the production of over a million documents.

As a result of the ongoing RMLC litigation, there is currently no industry-wide license available to local broadcasters. Bonneville, like many of its fellow radio broadcasters, is currently in discussions with SESAC over terms of a license of its repertory. These terms are dictated by SESAC. The negotiating dynamic is extremely one-sided, and can hardly even be called a negotiation.

V. Amending The Consent Decrees To Allow Music Publishers To Selectively Withdraw Their Catalogs From The PROs With Respect To Some Licensees But Not Others Would Invite Antitrust Abuses

In an attempt to circumvent the consent decrees, large music publishers have sought to selectively withdraw parts of their catalogs from the ASCAP and BMI repertories, affecting only certain licensees but not others. Both the ASCAP and BMI rate courts interpreted the consent decrees to prohibit such partial withdrawals. The consent decrees should not be amended to allow them.

Allowing the PROs to facilitate discrimination against licensees would undermine not only the principle of nondiscrimination – a hallmark of the consent decrees, but also the very purpose of the consent decrees: to prevent anticompetitive conduct. Such an amendment to the consent decrees would actually enable anticompetitive activity. Any music publishers with

sufficient size and scale to consider direct negotiations for selected rights, such as digital rights, would have essentially the same market power as the PROs. By their nature, music publishers' catalogs do not compete with one another. Each large publisher has aggregated a large enough number of songs from individual songwriters so as to make the licensing of their catalogs indispensable to broadcasters.

Music publishers who have catalogs of a sufficient size and scope to make partial withdrawals attractive to negotiate licenses outside of the consent decree framework pose the same potential antitrust harm that the consent decrees were created to prevent. Left unfettered, even in select rights, publishers would engage in the same behavior condemned by the courts in the SESAC cases, and that prompted the consent decrees in the first place.

To illustrate the point, when Sony and Universal Music Publishing Group (UMPG) attempted to partially withdraw their digital rights from ASCAP, the rate court found that:

> The evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying the AFJ2 … Because their [ASCAP, Sony, and UMPG's] interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified. [*In re Petition of Pandora Media, Inc*, 12 CIV. 8035 DLC, 2014 WL 1088101, at *35 (S.D.N.Y. March 18, 2014).]

This decision provides ample evidence that, unrestrained by the consent decrees, large music publishers will abuse their market power to extract supra-competitive rates, terms, and conditions from broadcasters, who will have no choice but to accept them.

VI. <u>If The Consent Decrees Are Amended At All, They Should Require Greater Transparency With Respect To The PROs' Repertories</u>

The ASCAP and BMI consent decrees could be improved by requiring the PROs to provide licensees more accurate and comprehensive information about their repertories. Lack of meaningful access to this information has increased transaction costs and hindered licensing activities – both direct and collective. While far from a panacea, repertory transparency would allow licensors, licensees, and the rate courts to better understand the rights that are being

licensed, and their value. This information will aid development of real alternatives to the blanket licenses, and help lessen their anti-competitive effects.

VII. Conclusion

This Subcommittee has long recognized the important role that the antitrust laws play in ensuring free and competitive markets for the benefit of consumers. To that end, the ASCAP and BMI consent decrees remain vital to radio and television broadcasters to fairly, efficiently, and transparently license musical works to the benefit of their audiences.

While new digital technologies and the growth of the Internet may change the nature of music performances requiring licensing, they do not change the underlying reality that unconstrained collective licensing of musical works runs afoul of the antitrust laws, and would lead to supra-competitive pricing and terms. As broadcasters' experience with SESAC and music publishers' own recent actions illustrate, if publishers fully withdraw or if the consent decrees are amended to permit partial withdrawal of digital rights, alternative antitrust or Congressional action will still be required to ensure a competitive and functioning music licensing marketplace.