Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

In the Matter of	)	
	)	**Docket No. RM 2010-10**
Section 302 Report	)	

REPLY COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS AND BROADCAST MUSIC, INC.

The American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") (collectively referred to as "performing rights organizations" or "PROs")[1] hereby submit these reply comments pursuant to the Notice of Inquiry ("Notice") issued February 25, 2011 by the Copyright Office ("Office"), 76 Fed. Reg. 11816 (March 3, 2011).

Despite the expected mixed reactions articulated in the comments regarding the continued need for the Section 111, 119 and 122 statutory licenses, a number of points seem to be uncontested. First, the statutory licenses were at one time necessary, as Congress intended, to permit the growth of a reliable and viable multichannel video programming distributor ("MVPD") industry. Second, the MVPD industry has consequently grown successfully, competing in all respects as a mature and thriving industry. Third, the remuneration to copyright owners for the retransmission of their works contained in distant broadcast signals are below-market, effectively forcing copyright owners to subsidize a mature industry. Fourth, the different

[1] There exists a much smaller third U.S. performing right organization, SESAC, Inc.

types of MVPDs should pay fees for such retransmissions at the same, or similar, rates. Fifth, requiring MVPDs to clear directly the millions of copyrighted works retransmitted in the marketplace, on an individual work-by-work basis, is for practical purposes impossible. Finally, given the reluctance of the broadcasters to undertake sublicensing responsibilities, the most viable of the three proposed solutions to facilitate market licensing is through the use of collective licensing.

While the comments differ regarding how true market-priced fees should be set, clearly current circumstances justify replacing the statutory license schemes with marketplace alternatives. And, as we discuss below, at least in the case of the retransmission of musical works contained in distant signals, collective licensing regimes are already in place, providing an efficient and effective way to set such fees.

I. Collective Licensing is a Viable Alternative to the Statutory Licenses.

The Notice identified three possible market-based licensing alternatives to the statutory licenses. Two of those alternatives – direct licensing by the MVPDs and sublicensing through the broadcasters – were rejected by practically every commentator as being impossible. Indeed, the PROs and their members and affiliates – and all types of licensees – are well aware of the inherent difficulties involved in the direct licensing of millions of works. The third option, bulk collective licensing, however, received support. Bulk licensing is the PROs' *raison d'être* and benefits both their copyright owner members and their licensees in all industries across all media. The U.S. Supreme Court, in upholding the legality of the blanket licenses offered by ASCAP and BMI, recognized the utility of collective licensing:

> ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants and it was in that milieu that the blanket license arose.
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> A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner.

Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20 (1979) (citation omitted).

As we stated in our initial comments, the PROs' blanket licenses are the best and most efficient method by which to license large repertories of copyrighted work – many millions in the case of musical works – to a large number of users. The problems asserted with regard to direct licensing on a work-by-work basis – such as need for advance knowledge of broadcast schedules, the identification of copyright owners, the expense of (and inherent delay in) multiple negotiations with thousands of copyright owners, and the transaction costs associated with all of the above – are obviated through collective licensing. Users have no need to track performances or monitor usage in order to benefit from bulk licensing; the blanket license affords them unfettered access to and usage of all works in the repertory for a single fee. Again, and it deserves repetition, the PROs' licenses have been recognized as a workable model for the industry to emulate. *See* Comments of PROs at 3, 11.

The users' comments nevertheless reject the notion of collective licensing as a workable alternative for various reasons. *See, e.g.*, Comments of Nat'l Cable & Telecomms. Ass'n ("Comments of NCTA") at 15. They argue that numerous copyright owners could "hold out for

higher prices," thereby nullifying the benefit of the collective. *See, e.g.*, Comments of DIRECTV, Inc. ("Comments of DIRECTV") at 13. They argue that collective licensing creates cartels and results in uncompetitive behavior necessitating antitrust regulation. Comments of the Nat'l Ass'n of Broadcasters ("Comments of NAB") at 29; Comments of NCTA at 15; Comments of DIRECTV at 15. Indeed, several comments contend the PROs' collective licensing operations are administratively complex and would not be an improvement on the existing system of statutory licenses. *See, e.g.*, Comments of NAB at 28, Comments of NCTA at 15, Comments of Dish Network L.L.C. at 8. Of course, what the comments fail to point out is that the PROs have been successfully licensing music in all of these various industries for decades on that very same collective blanket basis, and it has hardly proven unworkable. On the contrary, the PROs took the steps necessary for a successful collective licensing regime, and achieved one. It may be that the creation and oversight of such *new* collectives, for instance in the case of audiovisual programming, would be difficult. What is clear, however, and what has not been contested, is that in the realm of licensing music public performing rights of all types, effective collectives – the U.S. PROs – already exist. The PROs represent all music – both U.S. and foreign – contained in broadcast television programming; there would be no music copyright owner holdouts. Regulatory safeguards are in place, and consent decrees and rate courts exist. And most importantly, the PROs actively and currently negotiate for public performing rights with these very industries.

The PROs have negotiated licenses with broadcasters for decades and were able to negotiate licenses when new outlets for their programming became available. For example, when broadcast radio stations began simulcast streaming their radio transmissions over the Internet, the PROs and broadcasters were able to license those additional performances. With the

advent of cable network programming being offered on a video-on-demand basis, the PROs were able to license such additional performances with those same parties. Similarly, extending already existing negotiations to include the value of these retransmissions is a simple matter and consistent with PRO licensing practices for decades. Contrary to some comments, these negotiations are not extraordinarily time intensive and difficult. NCTA Comments at 13-15. The PROs negotiate license fees with the NCTA and the Television Music License Committee ("TMLC") once *every five years*. Despite the arguments that litigation would be inevitable, Comments of Verizon at 14, the fact remains that the PROs enter into thousands of licenses every year and rate court litigation is a relatively rare occurrence. Of course, rate court litigation is available to the extent that such negotiations fail. When rate court litigation does occur, it is simply the equivalent to statutory Copyright Royalty Board proceedings, which are no more or less likely to occur, and at a similar expense.

In short, the PROs exist and have proven to be an efficient and effective licensing regime for copyright owners and users alike. They already license collectively all the music in broadcast programming being retransmitted over-the-air, which ultimately is retransmitted by the MVPDs. ASCAP's and BMI's consent decrees prohibit them from refusing to license and require them to provide automatic licenses upon request. The elimination of the compulsory license would, in the case of music, be a non-event from an administrative burden standpoint. The MVPDs would be able to continue to perform music as before without restraint, subject to negotiating a reasonable rate or having one set by the existing rate courts. The continued existence of a statutory license that unnecessarily subsidizes mature industries is senseless and only harms the hundreds of thousands of songwriters, composers and copyright owners who create and provide that music.

II. The Rates Attainable in the Free Market for the Performance of Music Represent Fair and Reasonable Rates.

In an apparent attempt to malign the PROs, certain user groups complain that the rates set for the public performing rights of copyrighted music on a collective blanket basis through the PROs are anticompetitive and injurious to music users. *See* Comments of TMLC at 9, Comments of Verizon at 13-14, and Comments of AT&T Servs., Inc. at 12-13. The most ironic aspect of these commentators' misplaced arguments against the PROs' blanket licensing is the users' preference for the retention of the statutory licenses that apply to MVPDs. In other words, they are asking the Office to favor a compulsory license scheme – a scheme that provides MVPD users with the very same benefit of blanket licenses that they bemoan as being "anticompetitive" when applied to them. The Supreme Court, again, recognized this very point in upholding the PROs' blanket licenses:

> Finally, we note that Congress itself, in the new Copyright Act, has chosen to employ the blanket license and similar practices. Congress created a compulsory blanket license for secondary transmissions by cable television systems, and provided that, "[notwithstanding] any provisions of the antitrust laws, . . . any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf."

Broad. Music, Inc., 441 U.S. at 15 (quoting 17 U.S.C. § 111(d)(5)(A)). The current Section 111-119-122 system grants MVPD users blanket access, on a collective basis, to all the music and other copyrighted programming performed on retransmitted broadcast signals. Indeed, it is often said that ASCAP and BMI, by virtue of their consent decrees, in essence similarly grant compulsory licenses to the music they represent.

The users' arguments are without merit. The overarching theme in these comments seems to be that collective licensing is inherently anti-competitive and that the PROs are automatically guilty of that behavior. Comments of TMLC at 2, 9-10; Comments of Verizon at 13. The users fail to acknowledge that ASCAP and BMI operate legally, under carefully negotiated consent decrees. In ASCAP's case, its consent decree was recently amended with the comments of these very users taken into consideration. It is unsurprising, then, that every antitrust challenge to ASCAP's and BMI's collective blanket licenses has ultimately failed. *Broad. Music, Inc.*, 441 U.S. 1 at 23-25 (rejecting per se antitrust challenge to blanket licenses); *Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 936-39 (2d Cir. 1980) (rejecting challenge under rule of reason); *Buffalo Broad. Co. v. Am. Soc'y of Composers, Authors & Publishers*, 744 F.2d 917, 925-33 (2d Cir. 1984) (same); *Nat'l Cable Television Ass'n v. Broad. Music, Inc.*, 772 F. Supp. 614 (D.D.C. 1991).[2]

Essentially, what the users seek is a system that permits them to perform all the music they want at little or no cost, and without the need to negotiate thousands of direct licenses. In their ideal world, television broadcasters would shirk their responsibility as performers of copyrighted works and place it upon the program producer, an entity that has no such duty under copyright law to license performing rights because they do not perform the works. Comments of TMLC at 6-7, 14. This approach, of course, has been rejected time and again, including by Congress. And, correctly so. The exclusive rights enjoyed by individual authors and copyright owners are sacrosanct. The benefit of a copyright regime comprising multiple rights affords

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[2] It is worth noting that although it denied SESAC's motion to dismiss the pending antitrust action brought by the television broadcasters, the court stated that "the core of the dispute between the parties could be resolved with relatively minor adjustments" in SESAC's licensing. *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(NRB), 2011 U.S. Dist. LEXIS 24517, at *44 n.15 (S.D.N.Y. Mar. 8, 2011).

creators the ability to develop workable industry business practices. The business practices for clearing music for television programming have developed over many decades, particularly in the case of composers hired to compose music for television programming. For these creators, smaller up-front fees are paid for the reproduction of music, permitting producers actually to produce programming on time and within a strict budget. The parties to these transactions rely on the potential back-end performing right royalties, which are collected generally by the PROs on behalf of their members and affiliates and paid directly to them in the form of royalties if and when the television program (and music contained therein) is broadcast or otherwise performed. These license fees are paid by the broadcast entity making the actual performance (and similarly paid by an Internet service, wireless service or any other user).

The reliance of program producers and composers on back-end royalties from the PROs is sensible and typical. It is a risk sharing approach on the part of the two sides that reflects the inherent uncertainties in the success or failure of television programs on air. The TMLC's contention that all other creative content is purchased "up front" by the program producer is wrong. Screen actors receive residual royalties through their union. Similarly, screenwriters receive residuals when programs they have written are shown on television by various different kinds of media. It would be contrary to common sense and good business practice to require the program producer to buy performing rights to music when the producer (and the music creator) do not know what the economic prospects for those programs will be. Performing right royalties are not different in this regard from any other creative inputs.[3]

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[3] Indeed, the TMLC sought mandatory "source licensing" legislation in the 1980s but Congress rejected it.

Of course, the broadcasters, who actually publicly perform music and who are consequently responsible for obtaining such licenses under the copyright law, care little about fair remuneration to music creators.

The broadcasters, in order to clear the thousands of individual works contained in the programs they broadcast, therefore need, and request, a blanket license, with all the efficiencies and benefits it affords. These blanket licenses obviate the need for thousands of individual clearances and that permits stations to perform unidentified, ambient and live music. Nevertheless, broadcasters often decry that such a license cannot result in a competitive, fair, reasonable price. The TMLC contends that blanket licenses reflect neither broadcasters' need for music, nor their usage of music. Comments of TMLC at 6. That is false. Blanket license fees established over a period of decades – whether through negotiation or rate court litigation – by definition bear relationship to the value and usage of music by these licensed users. Indeed, that is the basis for the very rate setting on which those fees are based. *United States v. Am. Soc'y of Composers, Authors & Publishers (In re Application of Capital Cities/ABC, Inc.)*, 831 F. Supp. 137, 157 (S.D.N.Y. 1993). The very consent decrees that they rely on for protection of automatic, non-exclusive licenses place in the hands of rate courts the duty to set those reasonable fair market rates and serve as a backdrop for negotiating impasses. The users' criticisms of PRO blanket license rates are therefore meritless. The market for blanket licenses necessarily reflects the nature of rights to perform copyrighted musical compositions and the enormous efficiencies that blanket licensing achieves. *Id.* at 144. Attempting to divine what price would actually prevail in the absence of a consent decree is thus "perplexing in theory,

impractical in practice, and dubious in outcome given the efficiencies obtained due to the aggregating nature of the service rendered." *Id.* That is precisely why the rate court exists.[4]

Nor does the TMLC fully recognize the fact that BMI and ASCAP offer "per program" licenses that permit broadcasters to obtain credits for music that they have directly licensed or that is licensed at the source by the program producer. Comments of TMLC at 8. There is literally no obstacle to the "competitive" market of direct licensing they envision, unless it is the plain fact that PRO blanket licenses are so modestly priced compared to the value they afford to broadcasters that they are the preferred licensing product in most cases.

Conclusion

In sum, the PROs have been licensing the television and cable industries on a collective, blanket basis for decades. Upon elimination of the statutory licenses, the PROs' blanket licenses would not only permit the continued legal performance of copyrighted music contained in retransmitted broadcast programming, but would finally permit fair remuneration to copyright owners for such performances.

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[4] Of course, the rate courts frequently rely on negotiated PRO blanket license agreements as benchmarks when they were "voluntarily entered between the parties, or those similarly situated, as the starting point of its analysis." *Capital Cities*, 831 F. Supp. at 144.

Respectfully submitted,

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