Questions for SESAC

A. What percentage of SESAC's contracts with artists requires exclusive representation?

ANSWER:

As Stephen Swid, Chairman and CEO of SESAC, stated in his oral testimony before this Subcommittee on May 11, 2005, SESAC has not entered into any exclusive licensing arrangements with composers and music publishers. In one single instance, SESAC did enter into an agreement for exclusive representation of a composer's interest in his works only – thus allowing any music user to license directly with the music publisher for performing rights.

B. Would SESAC object to statutory language that required all PROs to offer only non-exclusive contracts?

ANSWER:

Yes. There is nothing per se improper or illegal about exclusive contracts. Indeed, the very agreements into which TMLC local television station members enter with program producers call for exclusivity in a given market. SESAC believes that the requirement of non-exclusive contracts imposed upon ASCAP and BMI by the Department of Justice under their respective Consent Decrees are punitive remedies in response to their anticompetitive conduct and monopolistic market power. These remedies include provisions that "fence in" the conduct of ASCAP and BMI, that is, they prohibit these PROs from engaging in certain kinds of conduct that would otherwise be lawful if the firms had not restrained competition. To impose such remedies on SESAC, a small business concern that is not being charged with conduct in violation of the Sherman Anti-Trust Act, would be punitive. Antitrust courts have long recognized that exclusive contracts, especially when used by firms with small market shares, have significant benefits for all parties in reducing transaction costs and creating incentives to exploit fully the copyright owners' works. Because ASCAP and BMI already are subject to the nonexclusivity requirement, any such statutory language addressed to "all PROs" would effectively single out SESAC for punitive treatment. Drawing an analogy from recent news headlines, to the same extent that Martha Stewart's competitors should not be expected to wear electronic monitoring bracelets and suffer home confinement like Ms. Stewart during her probation, SESAC should not be asked or compelled to undertake the punitive remedies imposed upon ASCAP and BMI by the Department of Justice. SESAC should not be made to "pay the price" for other parties' misbehavior.

C. Would SESAC be willing to negotiate in advance with syndicators of television shows a formula for the royalties that would be due from the use of background music in television shows?

ANSWER:

If music publishers chose to license their music directly, such a license would encompass all music contained in the program, including background, theme, and feature music. In any

event, negotiating with syndicators of television shows would be of no use to them or to SESAC; to the best of SESAC's knowledge, the syndicators do not own or control the rights to license the music contained in the television programs. In almost all instances, the musical compositions created for television shows are "works for hire." The copyrights in the music and the corresponding right to license it are owned or controlled by the music publisher, who in many instances is an entity related to either the program producer or the local television station owner. Despite these interlocking relationships, each of the entities apparently seeks to justify its existence and maximize its profits on a "stand alone" basis. Among them, the music publisher desires to get paid fairly and reasonably for the music contained in the program; that music is a creative work and an integral part of the program which adds substantial value to it. The local television stations choose not to negotiate for and obtain public performance rights in the music "up front," during either the "pilot" airings or first season network run, but choose instead to pay for the music rights on the "back end" when they know which programs have been successful and will be offered in syndication. Even at this point the television stations can negotiate directly with the producer/publisher, often a related entity, or the composer who created the "work for hire" to obtain the public performance rights.

For example, ABC/Disney currently produces "Grey's Anatomy," a new 2005 hour-long drama appearing on the ABC television network during prime time on Sunday evenings. The music publishing rights to the music in that series are owned by South Song/ABC/Disney. Perhaps the question should be posed to the TMLC: "Has any local television station approached the music publisher with a formula to acquire the publishing rights in the event that program is placed in syndication, or has any local television station offered a fee to directly license the public performance rights to the music in the event that "Grey's Anatomy" is syndicated five years from today?" The same question could be asked concerning other currently popular network programs, such as "Desperate Housewives," where the music is published by Buena Vista, a Disney/ABC subsidiary.

The TMLC, the Radio Music License Committee, and other large industry negotiating groups ironically complain that SESAC has market power over certain types of music. But there is no question that, even assuming their incorrect arguments for the moment, their members use many musical works from SESAC that do not fall in this category of supposed "monopoly power." It is textbook antitrust analysis that, where a seller competes in a market with some products in which it may have some element of market power and others where it does not, buyers can "punish" the seller for trying to act anticompetitively with respect to the former products by exercising their negotiating strength with respect to the latter products. Of course, SESAC does not, and cannot, have market or monopoly power over any particular type of music, and these licensee groups have not offered any evidence to the contrary. The negotiating committees have not shown that SESAC has a dominant share of a type of music, or that there are no composers who are currently working or could enter the business to write a certain type of music for television shows, commercials, or other programs.

D. Would SESAC be willing to accept an automatic licensing provision similar to the ASCAP/BMI automatic licensing provision that grants a license once an application is filed?

ANSWER:

No. The "automatic licensing" requirement, which grants a license once an application is filed, is a remedial measure imposed by the Department of Justice upon ASCAP and BMI to offset those entities' monopolistic market power and anticompetitive practices that gave rise to the Consent Decrees. It would be unfair to expect SESAC, a small business that is neither a monopolist nor a copyright abuser, to willingly accept the punitive remedies that the Department of Justice has deemed appropriate for ASCAP and BMI. To impose this "automatic licensing" requirement upon SESAC would encourage potential licensees to "nickel and dime" SESAC indefinitely and effectively discourage a resolution of licensing discussions, because the potential licensee would know that there was no "downside." Taken to its logical extreme, this mechanism would permit music users to obtain SESAC licenses without ever coming to terms on a fee amount. For example, the average SESAC license fee per day for health clubs is $.24. Under an "automatic licensing" requirement, if any health club contended that this fee was excessive and sought instead to pay, for example, $.23 per day, the club would know that any dispute resolution would be exponentially more expensive for SESAC than the amount in dispute; all the while the club would be permitted to use SESAC music indefinitely without paying any fees.

Although SESAC is not a litigious company and does not have a history of suing music users who seek licenses, the knowledge by those music users that they must obtain authorization and agree to pay for their music use is a factor that permits the marketplace to operate properly for a small player among giants. To impose upon SESAC burdensome remedies reserved for antitrust law violators without a determination of wrongdoing by the Department of Justice or any court would turn the judicial system upside down. On the other hand, to the extent that music users have incentives to avoid taking a SESAC license, which would be the result if SESAC misjudged the level of license fees that competition would allow, the threat of copyright infringement is itself a competitive constraint on SESAC. Ironically, a system of automatic licensing would undermine this constraint.

E. Would SESAC agree to refrain from suing any user for infringing a work that was not included in its database?

ANSWER:

Yes, SESAC would agree to refrain from suing any user for infringing a work that had not yet been listed in its database, notwithstanding the fact that there are writers whose SESAC affiliation is so well known that music users should not be excused from either a presumption or actual knowledge that their works – whether newly written or released from another PRO – are in the SESAC repertory. However, once a song is included in the database, there should be no further "safe haven." It should always be the obligation of the music user, in the first instance, to determine the identity of and obtain authorization either directly from the copyright owner or through the appropriate PRO before publicly performing the song; this is a fundamental concept of property law generally, and of copyright law specifically. The Supreme Court, in rejecting challenges to the lawfulness of blanket licenses, noted that one of the benefits to competition that is made possible through the use of blanket licenses is the greatly improved ability of copyright owners to enforce their copyrights. A violation of copyright can be redressed far more

efficiently when the copyright is one of thousands represented by a PRO who can enforce the copyrights more efficiently than an owner of a single copyright.

SESAC undertakes to maintain the accuracy of its database by updating it in a timely fashion. However, given the fact that compositions are constantly added to the database, any "snapshot" of current information would, as a practicable matter, be quickly rendered out-of-date. The better analogy would be to view the database as an ever-changing movie as opposed to a snapshot. Accuracy of databases, in fact, has been a continuing bone of contention between SESAC and ASCAP. Despite numerous requests from SESAC, ASCAP in the past continued to list songwriters and repertory that had moved from ASCAP to SESAC, thus misleading music users who relied to their detriment on ASCAP's database in attempting to discern – and pay – the correct PRO for the music that they intended to use. This misrepresentation was willful, as proven by the fact that, at one point ASCAP removed the misinformation, only to reinstate it at a later date in its database.

F. Has SESAC ever offered per-program licenses or does it intend to at some point in the future? Would SESAC support a requirement that all PROs offer per-program licenses?

ANSWER:

The Radio Music License Committee complains of its members' "lack of free choice" to license "one or several" copyrighted works, and other large industry organizations make similar complaints. There is no legal requirement to offer a "per program" license in order to make the offer of a blanket license lawful. The efforts by the rate court judge to encourage ASCAP and BMI to offer "per program" licenses must be understood in the context of the continuing concern by the court and by the Department of Justice over those PROs' market power. An essential element of the lawfulness of blanket licenses, as noted by the Supreme Court, is the enormous efficiency that is obtained when many thousands of copyrighted works are combined in a license that is available to many types of users. To the extent that "per program" licenses comprise smaller sectors of copyrighted works, or types of users, or both, the efficiencies of such licenses diminish. Nevertheless, SESAC has offered an appropriate "per program" license to respond to the requirements of its customers, thus demonstrating that SESAC's business model does not restrain competition and, indeed, fosters it.

SESAC has developed what amounts to a second generation "per program" license for the local television industry. As a result of arms length negotiations with the TMLC approximately ten years ago, SESAC agreed in 1996 to offer a form of "per program" license to local television stations. The license that SESAC continues to offer to TMLC members is a departure from - and a significant improvement upon - the Consent Decree form of "per program" license. The ASCAP and BMI "per program" licenses require stations to furnish the amounts of program revenues to ASCAP and BMI; permit audits by ASCAP and BMI; and permit ASCAP and BMI each to "claim" 100% of the same program's revenue for fee calculation purposes if any percentage of ASCAP or BMI music is contained in a program.

SESAC examined the ostensible purpose of the "per program" license – to permit a music user to pay only for the actual music contained in a program – and crafted a license that effectively sought payment solely for SESAC's actual share of music in programs broadcast by

each respective television station. SESAC's license would not cost millions of dollars to create or millions of dollars to administer; it would not require the television stations to share their revenue figures with SESAC and would not permit SESAC to audit the television stations' program revenues. Unlike the ASCAP and BMI "per program" licensing systems, which impose enormous expense in time and money (the rate court awarded ASCAP over $4.6 million for the associated costs related to "per program" license administration), SESAC's approach to the valuation of its music simply asks for an allocable share of fees for its affiliates' music in programs s reflected in the cue sheets and avoids the imposition of millions of dollars in associated "per program" license costs on the TMLC's members.

The transaction costs attributable to SESAC's alternative system are negligible for all parties. By contrast, the TMLC's desired imposition upon SESAC of a mirror image of the ASCAP and BMI "per program" licenses would be administratively impracticable. SESAC has developed an equitable model that properly weighs local television programs in relation to the value that those programs contribute to the "bottom line" revenue of individual station licensees; the ease of its application is what makes this model so truly innovative. Indeed, the former executive director of the TMLC frankly admitted to SESAC that, "if SESAC's approach to broadcast licensing were employed by ASCAP and BMI, it would lead to the most equitable and efficient system for the broadcasters."

Unfortunately, instead of permitting this allocation of local television license fees on a simple, cost effective, and equitable "pay for what you use" basis, the TMLC rejected SESAC's method of "per program" licensing. Instead, the TMLC determined to allocate the SESAC total industry fees through its own arcane methods; during the course of negotiations, the TMLC insisted that it alone would retain the right to allocate SESAC license fees among its members (whereas, SESAC had undertaken the allocation process under the prior agreement with the TMLC). SESAC believes that it is the TMLC's fee allocation process and methodology that is anticompetitive, serving to favor certain music users over others and seeking to address the competing interests of its members by disregarding their respective actual music use. In this respect, the TMLC acts as a classic cartel to regulate its members' license fees and, thus, collectively determine the incentives that each member has to use SESAC's music. This is the essence of anticompetitive behavior. The TMLC's allocation does a disservice to many of its constituent stations; because it is not transparent and not consistent with SESAC's calculation of actual music use. It also creates ill will on the part of those stations, who could not be blamed for assuming that the fees set forth in their SESAC bill were calculated and allocated by SESAC and not by the TMLC. (Perhaps the unhappiness with SESAC about which the TMLC purports to complain on behalf of its local station members is rooted in the TMLC's inequitable allocation of SESAC license fees upon its less influential members.)

SESAC does not – and is not required to – offer a "cookie cutter" version of the "per program" license imposed by the Department of Justice in the ASCAP and BMI Consent Decrees. Again, SESAC would not agree to the imposition of such a punitive remedy. The basis for the "per program" license requirement is the Department of Justice's determination that ASCAP and BMI, by reason of their size and the entrenched power that they exercise to this day, should continue to be "fenced in" with regulations that would be not required of other entities. The Supreme Court's decision upholding the legality of blanket licensing was not conditioned

upon a PRO's offer of alternative licenses (other than, arguably, the option of direct licensing by ASCAP and BMI affiliates). In a competitive marketplace where no entity was trying to monopolize the business, no PRO would be required to offer licenses that, as a matter of business judgment, it did not wish to offer.

In any event, SESAC routinely offers licenses crafted for the unique needs of its music user customers, to the mutual satisfaction of those customers and SESAC's songwriter and music publisher affiliates.

G. How does SESAC's presence impact the music performing rights marketplace in the United States?

ANSWER:

SESAC has competed through technological innovation, better service to songwriter and music publisher affiliates, and efficiency in licensing. SESAC is a small business which has a market share of approximately 5% of performing rights revenues and which competes against two dominant and monopolistic organizations. Despite – or perhaps because of – SESAC's position, it has brought several significant innovations to the marketplace for music users. SESAC has enhanced competition, resulting in songwriters and music publishers being given a choice and freedom of movement between PROs. As a for-profit company, SESAC is not tethered to the past or guided by the status quo. (By contrast, SESAC's two competitors have an entrenched way of doing business that has barely changed in decades.)

For example, SESAC was the first PRO to adopt digital fingerprinting as a means of identifying and tracking broadcast music use. It did so after both ASCAP and BMI had refused to adopt this technology. Today, digital fingerprinting is a universally recognized music recognition tool used by all three PROs, as well as broadcasters and advertising agencies. Additionally, SESAC pays its songwriter and music publisher affiliates more quickly than either ASCAP or BMI, who choose to pay from six to nine months in arrears. By contract, SESAC pays 90 days after each corresponding quarter. Moreover, when one of SESAC's affiliates chooses to leave, SESAC – unlike ASCAP – will pay for every day that his or her musical compositions were represented by SESAC, and the affiliate is entitled to immediately take the entire musical catalog to the other PRO. SESAC's policy permitting free and unfettered movement of affiliates among the PROs enhances the competitive landscape for all songwriters, publishers, and music licensees, including TMLC members. Also, by increasing competition for the business of songwriters and music publishers, SESAC creates greater incentives for those individuals to increase their creation of new works.

As a for-profit company, SESAC recognizes that it must also seek to serve the needs of its music users; its licensees are customers, not adversaries. SESAC has attempted to listen to its customers and has introduced several innovative music licenses to meet their requests. The first was SESAC's "mini" blanket license offered to Hispanic broadcasters, who had complained that they did not need or want to pay for access to a large catalog of ASCAP and BMI English-language music that they did not and could not use. The SESAC license allows them to pay only for their actual use of SESAC music. Similarly, when the TMLC requested a license that charged only for the actual percentage of SESAC music use in a television program (a type of

license that is not offered by either ASCAP or BMI), SESAC created and offered such a license. Unfortunately, the TMLC demanded that it, not SESAC, determine the fee allocation among its member stations and refused to allocate the license fees in accordance with actual station music use. (Rather, the TMLC insisted on an arcane method that allocated a portion of the SESAC license fee to its member stations based upon their average station size, regardless of whether their use of SESAC music was large, small, or nonexistent. This illogical method breeds ill will with the TMLC's membership and flies in the face of the TMLC's purported goal to pay only for the music its members use.)

SESAC has created unique, "one of a kind" licenses for business operators in the airline industry, the restaurant industry, the hospitality industry, the broadcast and cable television industries, and many other industries to which it supplies licensing services. SESAC's success, in fact, depends upon its ability to deliver the licensing services required by the music user at a cost that is mutually agreed upon through the give and take of the negotiation process. SESAC is the quintessential model of an innovative American small business operating successfully, and providing needed competition, in a challenging industry.

H. SESAC testified, and SESAC's website states, that SESAC uses monitoring by BDS to determine the extent to which music in the SESAC repertory is performed on radio stations. Based upon this information,

1. What percentage of total feature performances identified by BDS on radio stations are performances of compositions in the SESAC repertory? Please provide data for 2004, 2002, 2000 and 1998. (Feature performances refer to performances where the primary focus of the audience's attention is on the musical performance).

ANSWER:

SESAC lacks sufficient data to respond accurately concerning 1998. For 2000, 2002, and 2004, SESAC's percentage of BDS-tracked performances on English-language formatted radio stations ranged from approximately 2% in 2000 to approximately 4% in 2004.

2. What percentage of total feature performances identified by BDS on radio stations are performances of compositions in the SESAC repertory that are not "split works" that also appear in the ASCAP or BMI repertory? Please provide data for 2004, 2002, 2000 and 1998.

ANSWER:

All PROs represent "split works." A split work is a copyrighted musical composition created by more than one songwriter/composer, which is represented by more than one PRO by virtue of the chosen affiliations of those songwriter/composers who created it. Split works have become the norm in many popular genres of music. For example, in Country Music, R&B, Top 40, and Rock, it has become standard fare that copyrighted compositions have more than

one composer and often more than one music publisher with interests in the copyrights. SESAC (like ASCAP and BMI) does not require its composer and music publisher affiliates to collaborate only with other SESAC affiliates when creating or publishing music.

Songwriters have the ability to switch affiliations among PROs and may bring their catalogs of music to a new PRO. Accordingly, it is difficult to determine the percentage of songs that are split works when the royalties are actually paid. However, SESAC has no reason to believe that its proportionate share of split works is any different than the proportionate share of split works administered by ASCAP or BMI. In any event, all parties having an ownership interest in a copyrighted composition are entitled – and deservedly so - to be paid for their proportionate ownership share.

I. How much did SESAC collect from commercial radio stations in 2004, 2003, 2002, 2000 and 1998?

ANSWER:

In 2004, SESAC collected approximately 4% of the music performance rights fees paid by the English-language formatted radio industry. For each of the other years in question, SESAC collected license fees in approximate proportion to its share of music use in the English-language formatted radio industry.

J. Considering only radio stations with a classical music format, what percentage of total feature performances of musical compositions on such radio stations were performances of compositions in the SESAC repertory? What percentage of total feature performances of musical compositions on such radio stations were performances of compositions in the SESAC repertory that are not "split works" that also appear in the ASCAP or BMI repertory? Please provide data for 2004, 2002, 2000 and 1998.

ANSWER:

SESAC does not have such data; BDS, the technology by which SESAC tracks performances, does not conduct surveys of classical music stations. Out of more than twelve thousand radio stations in the United States, there are only 143 classical music stations; 117 are operated as non-commercial non-profit stations, 102 of which are affiliates of National Public Radio. National Public Radio stations enjoy "special treatment"; their license fees are negotiated in a bloc by representatives of National Public Radio, the Public Broadcasting System and the Corporation for Public Broadcasting, resulting in negotiated "flat sum" fees paid for five-year license terms. Of the remaining 26 commercial classical music radio stations, 10 stations are eligible for license fee discounts as a result of negotiations concluded on their behalf between SESAC and the National Religious Broadcast Music License Committee. SESAC does not have any information regarding split works in the classical music genre. (SESAC would note, however, that many classical music works performed on the radio are actually fully protected copyrighted arrangements of compositions that might or might not have entered into the public domain.) SESAC has no reason to believe that its proportionate share of split works in the

classical genre is any different than the proportionate share of split works administered by ASCAP or BMI.

K. The TMLC testified that SESAC is "the only organization that operates with a profit motive." Can SESAC tell me how much profit it made in comparison to the other parties testifying?

ANSWER:

SESAC does not know how much profit it made "in comparison to the other parties testifying." Stephen Swid, SESAC's Chairman and CEO, stated in his oral testimony before this Subcommittee on May 11, 2005, that SESAC is a for-profit company as are 99.9% of its licensees. In fact, the broadcasters, including CBS, NBC, ABC, Fox, The Tribune Company, Newsweek, etc., reported, in their 2003 annual reports, multiple billions of dollars in profits from their local television stations. Moreover, ASCAP and BMI recently reported that they each had retained approximately $100 million of revenue after distributions to song writers and music publishers.

SESAC hopes that these responses will be helpful in providing additional information to Subcommittee, and would be willing to meet with the Chairman and/or other members of the Subcommittee to discuss these responses in more detail. SESAC would request that it be permitted to submit under seal any information sought by the Subcommittee that is confidential and proprietary information concerning its internal business operations.