EXHIBIT 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREDITH CORPORATION, THE E.W. SCRIPPS COMPANY, SCRIPPS MEDIA, INC., HOAK MEDIA, LLC, HOAK MEDIA OF NEBRASKA LLC, and HOAK MEDIA OF DAKOTA, LLC individually and on behalf of all others similarly situated, Plaintiffs, v. SESAC LLC and JOHN DOES 1-50, Defendants.	Civ. No. 09 Civ. 9177 (PAE)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SESAC LLC'S
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

SESAC, the defendant in this case, is one of three "performing rights organizations" – or PROs for short – that sell musical performance rights licenses on behalf of copyright owners. The plaintiffs are owners of television stations that air programs containing music in SESAC's repertory, and they have long been unhappy with the prices that SESAC charges for licenses. Before this Court, they claim that SESAC's "blanket license," which bundles together rights to the musical works of SESAC's 20,000-plus affiliates, thereby eliminates competition among copyright owners to sell performance rights to their respective works. According to the plaintiffs, SESAC's licensing practices violate Sections 1 and 2 of the Sherman Act.

But the undisputed dynamics of the market, together with the plaintiffs' own assertions about their plight, make clear that competition has not been harmed. The plaintiffs claim that, by virtue of "longstanding industry practice," stations must separately acquire performance rights to the music in the programming that they purchase for broadcast. They also claim stations are locked into needing the rights to whatever musical works happen to be embedded in that programming. Yet it is undisputed that, if the plaintiffs are locked into needing the rights to particular works, those works *cannot* compete against each other. SESAC's packaging of the works into a single license therefore cannot harm any competition that otherwise would exist. It is also undisputed that stations can make their own choices as to music in their locally produced programming – and can choose works affiliated with *any* PRO. There is no evidence that SESAC has aggregated enough composers to adversely affect competition to sell performance rights to this music.

The plaintiffs' claims fail for other reasons, too. While they claim a conspiracy among SESAC and its affiliates, there is no evidence that SESAC's affiliates agree to any of the conduct

that the plaintiffs criticize, including the issuance of blanket licenses. And the plaintiffs' claims of "monopolization" make no more sense than their claims of competitive harm: it is undisputed that the only entities that *could* theoretically compete in the supposed "SESAC Repertory Performance Rights Market" are SESAC's own affiliates – who, far from being SESAC's excluded rivals, are actually its suppliers and, according to plaintiffs, the beneficiaries of the supposed anticompetitive scheme.

In the end, the plaintiffs' complaint is a simple one: SESAC, in their view, charges too much for a high-quality product that they claim to need. The plaintiffs therefore want to turn SESAC into the equivalent of a regulated utility. That is a misuse of the antitrust laws. All counts of the complaint should be dismissed.

STATEMENT OF FACTS

A. Performance Rights, Performing Rights Organizations, and Blanket Licensing

Under the Copyright Act, owners of copyright in musical compositions have the exclusive right to publicly perform those compositions. 17 U.S.C. § 106(4). Thus, if someone other than the copyright holder wishes to publicly perform a work – for instance, by playing it at a bar, piping it through the loudspeakers at a roller skating rink, or broadcasting it on radio or television – that person must obtain authorization. *See, e.g.*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156-58 (1975). A copyright holder, in turn, generally may authorize the proposed public performance for a price it deems fit, or may choose to withhold authorization altogether. *See generally Stewart v. Abend*, 495 U.S. 207, 228-29 (1990); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

It would be extraordinarily time-consuming and expensive, of course, if each music user had to negotiate separately with the holder of the copyright in each work the user wished to

perform. Long ago, these impracticalities led to the formation of "performing rights organizations," which license rights on behalf of songwriters and music publishers. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4-5 (1979) ("*BMI*"); *id.* at 20 (noting "the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions"). Virtually all songwriters and publishers are members or affiliates of one of the three PROs identified in the Copyright Act, 17 U.S.C. § 114(d)(3)(E)(ii): the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC. March 4, 2013 Expert Report of Adam B. Jaffe 17 [hereinafter "Jaffe Report"; attached as SJK Decl. Ex. 1].[1]

B. Music on Television

Virtually all programming on local television stations includes music. SUF ¶ 1. To broadcast that programming – and thus to "perform" whatever copyrighted music is included – the local station must have a license for the performance rights to the music. SUF ¶¶ 2-4.

Programming on local television falls into two broad categories: programming that stations produce themselves ("locally produced programming"), and programming that other entities produce and provide to stations for broadcast ("third-party programming"). SUF ¶¶ 5-6, 9. For locally produced programming, stations can select the music they use. SUF ¶¶ 7-8. For third-party programming, according to the plaintiffs, local stations do not select and cannot control the music included; indeed, they often cannot even determine what music is in a program. SUF ¶¶ 10-12. It is "longstanding industry practice" (according to the complaint) that, when acquiring the rights to broadcast programming produced by third parties, stations do not

[1] References to "SJK Decl." are to the Declaration of Susan J. Kohlmann in Support of SESAC LLC's Motion for Summary Judgment. References to "SUF" are to Defendant SESAC LLC's Statement of Undisputed Facts Pursuant to Local Rule 56.1.

acquire the rights to perform whatever music may be embedded in that programming. SUF ¶¶ 14,16. Stations therefore must (according to the complaint) separately acquire the performance rights.[2] SUF ¶ 16.

To obtain performance rights to music in locally produced and third-party programming, stations often obtain "blanket licenses" from the PROs. SUF ¶ 31. A blanket license allows a licensee to pay a fixed fee for the right to perform publicly any of the works in the PRO's repertory, as many times as it wants, for a given period. SUF ¶ 29. A blanket license thus frees myriad licensees and copyright holders from the need to negotiate separately for rights to each and every performance. *BMI*, 441 U.S. at 20. In addition, holding a blanket license from each of the three PROs eliminates the need for a music user – such as a television station – to laboriously account for the specific music that it plays. *See generally BMI*, 441 U.S. at 4-5, 20-22. Ultimately, having a blanket license from each of the three PROs allows a station to perform any work from any PRO's repertory without fear of copyright infringement. SUF ¶ 33.

C. <u>SESAC and the TMLC</u>

SESAC, by far the smallest of the three PROs, SUF ¶ 23, is the defendant here. Rightsholders affiliate with SESAC and grant SESAC the right to license copyrighted works on their behalf. SUF ¶ 41. SESAC licenses those works to users (including television stations), primarily through blanket licenses, in return for license fees. SUF ¶¶ 21, 30-31. SESAC pays royalties to affiliates, typically based on the extent to which licensees perform their works. SUF ¶ 43.

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[2] There is one major exception: Stations affiliated with a network (such as CBS or NBC) broadcast the so-called "network feed" – programming selected by the network and transmitted to the local station – for a significant part of the broadcast day. For affiliates of the ABC, CBS, NBC, Univision, and TeleFutura networks, the corresponding network obtains the performance rights necessary for the station to broadcast the network feed. SUF ¶ 17. The rights to perform music in the feeds of these five networks are not at issue in this litigation. SUF ¶ 17.

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Prior to 1996, SESAC negotiated the terms of performance rights licenses directly with local television stations and station groups. SUF ¶ 89. Beginning in 1995, SESAC negotiated blanket license fees on an industry-wide basis with the Television Music License Committee ("TMLC"), an organization representing the vast majority of local television stations in efforts to obtain lower fees from the three PROs. SUF ¶¶ 26, 90. The TMLC and SESAC negotiated industry-wide license fees for the 1995-2000 and 2001-2004 periods, with those fees allocated among local television stations. SUF ¶¶ 91-92.

For the 2005 to 2007 licensing period, industry-wide fees were set in binding arbitration between SESAC and the TMLC. SUF ¶¶ 94-95. Although the TMLC sought annual SESAC license fees of $1.8 million in the arbitration, the arbitrators awarded annual fees ranging from $16 million in 2005 to $19.3 million in 2007. SUF ¶ 95. As required by a prior agreement with the TMLC, SESAC also began to offer a "per-program license" – a form of license that allows a licensee to perform any work in a PRO's repertory but pay only for programs that actually contain that PRO's music. SUF ¶¶ 37-40, 93. The arbitrators set some of the per-program license's key terms, while SESAC and the TMLC agreed on others. SUF ¶ 96.

Midway through 2007, SESAC and the TMLC began negotiations for licenses covering 2008 to 2012. SUF ¶ 97. Despite four months of negotiations, the parties were unable to reach agreement. SUF ¶ 98. Accordingly, in late November 2007, SESAC sent proposed licenses directly to local stations and station groups. SUF ¶ 99. SESAC offered stations the opportunity to choose between a blanket license and a per-program license.[3] SUF ¶ 99.

Negotiations with some stations dragged on for many months: plaintiff Scripps, for instance, did not sign a final license with SESAC until June 30, 2009, more than a year and a half

[3] SESAC also offered stations separate blanket licenses covering their digital multicast channels and their websites. SUF ¶ 100.

after SESAC sent its proposed licenses to stations. SUF ¶¶ 104, 106, 109, 111. While negotiations continued, numerous stations – including those owned by all three plaintiffs – received interim licenses from SESAC. SUF ¶¶ 102, 105, 107, 110. SESAC did not sue any station for copyright infringement, even if it was performing SESAC-affiliated music without a license. SUF ¶ 103.

During the lengthy period of negotiations, representatives of stations and station groups – including the plaintiffs and other members of the TMLC board – shared information with each other regarding their experiences negotiating with SESAC. SUF ¶ 115. In addition, representatives of individual stations or station groups updated and consulted with attorneys at Weil Gotshal & Manges – the TMLC's longtime counsel, and counsel for the plaintiffs here. SUF ¶ 116.

Ultimately, SESAC signed licenses with stations and station groups – generally for the period from 2008 to 2012 – that reflected discounts from the fees stated in SESAC's first offers. SESAC offered, and many station groups accepted, "group discounts" whose magnitude depended on the size of the station group. SUF ¶ 112. Stations were also able to negotiate "programming discounts" if they had recently reduced their broadcasts of programming containing frequent SESAC music. SUF ¶ 113. In a similar vein, stations that had recently dropped SESAC music from their local news bargained for "news music adjustment" discounts that further reduced their fees. SUF ¶ 114.

D. ASCAP and BMI

ASCAP and BMI are by far the largest two PROs. SUF ¶ 23. ASCAP is an unincorporated membership organization whose members are composers and publishers. *See Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917, 920 (2d Cir. 1984); Complaint at 1-2, *United*

States v. ASCAP, No. 13-95 (S.D.N.Y. Feb. 26, 1941) [hereinafter "ASCAP Complaint"; attached as SJK Decl. Ex. 153]. BMI is, and always has been, controlled by broadcasters. *See Buffalo Broadcasting*, 744 F.2d at 920; Complaint at 4, *United States v. Broadcast Music, Inc.*, No. 64-3787 (S.D.N.Y. Dec. 10, 1964) [hereinafter "BMI Complaint"; attached as SJK Decl. Ex. 156]. Since the middle of the last century, BMI and ASCAP have been subject to antitrust consent decrees, as set forth below.

1. Complaints Against ASCAP and BMI

The current consent decrees flow from antitrust complaints filed by the Department of Justice ("DOJ") against ASCAP in 1941 and BMI in 1964. ASCAP's Board of Directors, consisting of ASCAP members, was sued on the ground that it "[had] exclusive and absolute control" of ASCAP activities. ASCAP Complaint at 3, 12. The 1964 complaint against BMI, in turn (which followed a 1941 complaint and consent decree in another court), charged that BMI was owned and operated by broadcasters, and that "[t]he defendant BMI, the defendant broadcasters . . .together with other broadcasters unknown, constitute a combination to restrain and to monopolize." BMI Complaint at 4-5.

Both the ASCAP and BMI complaints charged harm to competition in the market for composers' music. The ASCAP complaint alleged that ASCAP eliminated competition among its members, ASCAP Complaint at 10, 19-20, fixed prices for members' music, *id.* at 3, and eliminated incentives for broadcasters to play non-ASCAP music, *id.* at 8. In the case of BMI, the complaint alleged that the broadcasters had operated BMI as a tool to artificially "depress and control . . . license rates"; broadcasters had, according to the complaint, coerced composers to join BMI by threatening not to play their music otherwise, and thus had denied composers "access to a free and competitive market." BMI Complaint at 6-7. Finally, both the ASCAP

complaint and the BMI complaint expressed concern about the PROs' size and market dominance. In 1941, ASCAP included "more than 75 percent" of copyrighted compositions. ASCAP Complaint at 2. Similarly, by 1964, BMI had "attained a position of dominance" in popular music used by broadcasters. BMI Complaint at 5; *see also id.* at 7.

2. ASCAP Consent Decree

ASCAP agreed to a consent decree in March 1941, just days after the complaint was filed. *United States v. ASCAP*, 1941 Trade Cas. (CCH) ¶56,104 (S.D.N.Y. Mar. 4, 1941) [hereinafter "ASCAP 1941 Consent Decree"; attached as SJK Decl. Ex. 154]. The 1941 consent decree – which did not result from any finding of antitrust liability – established the core restrictions governing ASCAP today. These requirements include that ASCAP must offer a per-program license. ASCAP 1941 Consent Decree § II(I)(3), (7). More generally, ASCAP must also license broadcasters on request. *Id.* § II(I)(6). ASCAP cannot require members to license exclusively via ASCAP, *id.* § II(I)(1), and membership must remain open to any composer of one or more compositions, *id.* § II(II).

In 1950, ASCAP's consent decree was superseded by the Amended Final Judgment ("AFJ"). *See United States of America v. ASCAP*, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. Mar. 14, 1950) [attached as SJK Decl. Ex. 155]. The AFJ expanded the consent decree's protections to reach television broadcasters. *See, e.g.*, *id.* §§ V(A)-(C), VII. The AFJ also created a rate court tasked with determining "a reasonable fee" if a music user could not reach agreement with ASCAP regarding fees. *Id.* § IX.[4]

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[4] In 2001, the Second Amended Final Judgment ("AFJ2") superseded the AFJ. Among other things, the AFJ2 requires that the per-program license fee approximate the blanket license fee for a "representative music user" in a particular class. *United States v. ASCAP*, 2001-2 Trade Cas. (CCH) ¶ 73,474, § VIII(B) (S.D.N.Y. June 11, 2001) [attached as SJK Decl. Ex. 160].

3. *BMI Consent Decree*

In 1966, BMI reached agreement with DOJ on a consent decree (without any finding of antitrust liability). *United States v. BMI*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. Dec. 29, 1966) [attached as SJK Decl. Ex. 157]. Like ASCAP, BMI may not forbid composers from licensing directly to users, *id.* art. IV(A), and must admit any writer with at least one published work, *id.* art. V(A). BMI must grant per-program licenses on request. *Id.* art. VIII(B). At BMI's request, *see* Brief for the United States at 20-21, *United States v. BMI*, 275 F.3d 168 (2d Cir. 2001) (No. 00-6123) [attached as SJK Decl. Ex. 159], its Consent Decree was amended in 1994 to create a rate court. *See United States v. BMI*, 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. Nov. 18, 1994) [attached as SJK Decl. Ex. 158]. A music user or BMI may, under specific circumstances, ask the rate court to determine a "reasonable fee." *Id.* art. XIV(A).

4. *Subsequent Antitrust Challenges to ASCAP and BMI*

Despite their consent decrees, ASCAP and BMI have frequently been subject to private antitrust challenge focusing on the lawfulness of their television blanket licensing practices. These suits have concluded without findings of antitrust liability.

In *BMI*, a suit brought by the CBS network of television and radio stations, the Supreme Court considered whether the ASCAP and BMI blanket licenses constituted per se violations of Section 1 of the Sherman Act. 441 U.S. at 7-10, 16-24. The Court provided the following overview of blanket licensing:

> 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.

Id. at 20 (citations omitted); *see id.* (describing "thousands of individual negotiations" as "a virtual impossibility"). It then ruled that blanket licensing is not per se unlawful.

On remand from the Supreme Court, the Second Circuit considered whether CBS could nonetheless establish that ASCAP and BMI's blanket licenses were unlawful under the "rule of reason." *See Columbia Broad. Sys., Inc. v. ASCAP*, 620 F.2d 930, 934-35 (2d Cir. 1980) ("*CBS Remand*"). The Second Circuit held that CBS could not, and ruled in favor of the PROs. *See id.* at 938-39. The Court made clear that, at a minimum, a plaintiff seeking to demonstrate the illegality of blanket licensing must show that it had no "realistically available marketing alternatives" to the blanket license. *Id.* at 935. CBS, the Court held, could not make this showing and thus could not establish the existence of a "restraint" for purposes of Section 1. *Id.* at 935-38.

Subsequently, in *Buffalo Broadcasting Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984), the Second Circuit considered (after a full trial on the merits) a challenge to blanket licensing mounted by local television stations. As in *CBS*, the court held that – as a matter of law – the plaintiffs had not demonstrated the existence of a "restraint" because they had not shown the absence of realistically available alternatives to the blanket license. *See id.* at 926-32. In so ruling, the court ruled that the plaintiffs had not met their burden with respect to each of three specific alternatives: "source licensing," in which a "producer obtains the music performing right from the copyright proprietor and conveys it to the station," *id.* at 921-22; "direct licensing," in which a station "obtains the music performing right directly from the copyright proprietor," *id.* at 922; and "per program licensing," a modified form of the blanket license that "conveys to the station the music performing rights to all of the music in the [PRO's] repertory" but is priced

according to "a percent of the revenue derived by the station from the particular program [in which music from the PRO's repertory is used]," *id.*

Finally, in *National Cable Television Association v. Broadcast Music, Inc.*, 772 F. Supp. 614 (D.D.C. 1991), the district court for the District of Columbia addressed a cable television industry group's challenge to blanket licensing. As in *Buffalo Broadcasting*, the court held – after trial – that the plaintiffs could not establish that direct licensing, source licensing, and per program licensing were not realistically available alternatives. *Id.* at 634-36. The court therefore rejected their challenge. *Id.* at 650.

E. <u>Antitrust Proceedings Against SESAC</u>

In 2008, while stations' negotiations with SESAC were ongoing, the TMLC urged the United States Department of Justice ("DOJ") to commence an antitrust lawsuit against SESAC. SUF ¶ 117. As part of its effort, the TMLC took a delegation to Washington to press its case to DOJ personnel and even drafted a complaint for DOJ to file. SUF ¶¶ 118-120. DOJ, for its part, opened an investigation and interviewed SESAC representatives under oath. SUF ¶ 121. DOJ ultimately elected to take no action against SESAC. SUF ¶ 122.

The TMLC then turned to its next option: a private antitrust action against SESAC, which the TMLC had contemplated since at least November 2007. SUF ¶ 101. In 2009, the TMLC formally voted to authorize and fund this litigation. SUF ¶ 27. The suit was filed in November 2009 as a putative class action, with the Scripps, Meredith, and Hoak station groups as named plaintiffs.[5] Dkt. No. 1. The plaintiffs subsequently amended their complaint, and Judge Buchwald – to whom the case was then assigned – denied a motion to dismiss. Dkt Nos. 25, 33.

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[5] In its current form, the complaint names Meredith Corporation, the E.W. Scripps Company, Scripps Media, Inc., Hoak Media, LLC, Hoak Media of Nebraska, LLC, and Hoak Media of Dakota, LLC as plaintiffs. For convenience, this motion refers to the Meredith

At its core, the First Amended Complaint – to which this motion refers as "the amended complaint," or "the complaint" – is a challenge to SESAC's blanket licensing practices. *See, e.g.*, Am. Compl. ¶¶ 24-26. It charges that those practices constitute unlawful restraints of trade (under both per se and rule-of-reason theories) in violation of Section 1 of the Sherman Act. *Id.* ¶¶ 77-82. And it charges that they constitute unlawful monopolization, as well as conspiracy to monopolize, in violation of Section 2 of the Sherman Act.[6] *Id.* ¶¶ 83-97.

The complaint focuses largely on the predicament that stations face with respect to music in third-party programming. *Id.* ¶¶ 4-9. Stations, according to the complaint, do not select or control the music in such programming. *Id.* ¶¶ 6, 14-15. Due to "longstanding industry practice," moreover, when stations acquire the rights to broadcast such programming they do not simultaneously acquire the rights to perform whatever music it may include. *Id.* ¶¶ 7-8. Thus, stations must separately acquire performance rights to whatever specific works may be included in the programs that they have paid large sums of money to broadcast. *Id.* ¶¶ 7, 17.

Notably, the complaint does not charge that any of this is SESAC's doing. Still, the complaint laments that virtually every local television station has to take a SESAC blanket license. *Id.* ¶ 26. That allegedly is because (among other things) stations are unable to scrub their schedules of SESAC music, SESAC's per-program license is not viable, direct licenses from SESAC affiliates are not feasible, and source licenses covering SESAC-affiliated music are

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Corporation as "Meredith," refers to the two Scripps entities collectively as "Scripps," and refers to the three Hoak entities collectively as "Hoak."

The putative class encompasses all owners of local commercial television stations in the United States and its territories (other than those owned and operated by the ABC, NBC, and CBS networks) that have obtained performance rights licenses from SESAC during the period from January 1, 2008 and continuing (according to the complaint) "to date." Am. Compl. ¶ 68.

[6] The complaint names fifty John Doe defendants as SESAC's alleged co-conspirators, Am. Compl. ¶ 61; although it describes the John Does as SESAC affiliates, the plaintiffs have never identified them, much less sought to join them as defendants.

not feasible either. *Id.* ¶¶ 9, 14-16, 25-26, 28, 41, 45. Without identifying what might be a "competitive" price for copyrighted works that the plaintiffs supposedly have no choice but to perform, the complaint charges that SESAC's blanket license has been priced supracompetitively. *Id.* ¶¶ 34, 39. It seeks retrospective damages, as well as sweeping declaratory and injunctive relief. *Id.* pp. 35-37.

Discovery took place over a period of nearly two years, with the parties producing hundreds of thousands of documents, issuing upwards of 100 third-party subpoenas, and conducting nearly 50 depositions. SESAC now moves for summary judgment on all counts.

OVERVIEW AND SUMMARY OF ARGUMENT

Antitrust law does not prohibit firms from charging high prices, nor does it provide a remedy for all circumstances in which a purchaser claims that the prices it pays are too high. *See, e.g.*, *Pac. Bell Tel. Co. v. Linkline Commc'ns., Inc.*, 555 U.S. 438, 448 (2009); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Rather, the statutory provisions at issue in this case prohibit only certain conduct that causes or threatens harm to competition. Section 1 of the Sherman Act prohibits any "contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Section 1's reach is limited in two important respects. First, it is limited to concerted action, not unilateral conduct. *See, e.g.*, *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767 n.13 (1984); *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919). Second, despite its categorical language, Section 1 has been held to prohibit only those restraints that unreasonably harm competition, with some practices deemed per se unlawful and others evaluated under a "rule of reason." *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *State Oil v. Khan*, 522 U.S. 3, 10 (1997). Count 1 of the plaintiffs' complaint charges a violation of Section 1.

Section 2 of the Sherman Act, in turn, makes it unlawful to "monopolize . . . any part of the trade or commerce among the several States." 15 U.S.C. § 2. This provision – which, unlike Section 1, encompasses unilateral conduct, *see Copperweld*, 467 U.S. at 768 – requires that the defendant acquire or maintain monopoly power in a relevant antitrust market. *See Trinko*, 540 U.S. at 407; *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966). And Section 2 bars the acquisition or maintenance of monopoly power *only* if it results from conduct that is itself wrongful and exclusionary of competition. *See, e.g.*, *Trinko*, 540 U.S. at 407; *Grinnell*, 384 U.S. at 570-71. Count 2 of the plaintiffs' complaint charges monopolization in violation of Section 2.

Finally, in addition to the substantive offense of monopolization, Section 2 also prohibits conspiracy to monopolize. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 786 n.15 (1993); *Volvo No. Am. Corp. v. Men's Int'l. Prof'l Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988). The conspiracies prohibited are only those that have as their object the substantive conduct that Section 2 prohibits. *See AD/SAT v. Associated Press*, 181 F.3d 216, 233 (2d Cir. 1999); *Int'l Distribution Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 (2d Cir. 1987). Count 3 of the plaintiffs' complaint charges conspiracy to monopolize in violation of Section 2.

I. The plaintiffs cannot establish that the conduct of which they complain results from concerted action, as required for liability under counts 1 and 3. To be sure, each of SESAC's affiliates authorizes SESAC to license its works, collect licensing fees, and pay royalties. Yet the record contains no evidence that SESAC's affiliates agree (much less agree among themselves) for SESAC to engage in any of the conduct of which the plaintiffs complain. For example, there is no evidence that SESAC and its affiliates agree on (a) the form of licenses that SESAC will issue; (b) the entities to which SESAC will issue licenses; or (c) the prices that SESAC will charge. In light of this glaring evidentiary gap, it is unsurprising that, although the

complaint alleges that SESAC has conspired with fifty "John Doe" defendants, the plaintiffs have never amended their complaint to identify SESAC's supposed co-conspirators. Counts 1 and 3 should be dismissed in their entirety. *See infra* pp. 18-27

II. The plaintiffs seek to hold SESAC liable for Section 1 violations under a per se theory. But it has long been settled, as a matter of Supreme Court precedent, that blanket licensing is *not* per se unlawful. Although the plaintiffs may point to facts purportedly distinguishing this case, the very definition of per se liability is that a practice is unlawful *regardless* of its factual nuances. Any claim that SESAC's practices are per se illegal must fail. Count 1 should be dismissed to the extent that it claims per se liability. *See infra* pp. 27-33.

III. With per se liability flatly barred, the plaintiffs must establish that SESAC's practices have harmed competition. The plaintiffs cannot make this showing. As to music in third-party programming, the plaintiffs' own expert, Dr. Adam Jaffe, has testified that the performance rights to one embedded musical work are not substitutes for the performance rights to another such work. As such, the price charged for the rights to one work cannot possibly constrain the price charged for the rights to another work. SESAC's "pooling" or bundling of multiple embedded works therefore cannot harm competition, because there is no competition to be harmed. Meanwhile, it is undisputed that stations can make their own choices as to music in locally produced programming – and can choose works affiliated with *any* PRO. There is no evidence that SESAC has aggregated enough composers to adversely affect competition to sell performance rights to this music. Indeed, it is undisputed that stations have freely substituted away from SESAC music in their locally produced programming when they have found it advantageous to do so. Nor is there any basis to hold SESAC liable for supposedly harming "competition" between SESAC and its own supplier-affiliates. Among other things, each

copyrighted work in SESAC's repertory is, in the first instance, the subject of a lawful, government-conferred monopoly – and there is no basis to hold that the antitrust laws require *two* sellers of such a work, not one. All counts should be dismissed. *See infra* pp. 33-34.

IV. The plaintiffs cannot meet their burden of proving an alleged "SESAC Repertory Performance Rights Market," consisting of the performance rights to works in SESAC's repertory, however those rights are sold. As an initial matter, the plaintiffs' own expert's testimony flatly contradicts the existence of such a market. According to Dr. Jaffe, *nothing* is reasonably interchangeable with SESAC's blanket license – in which case the relevant market is just the market for the blanket license, and competition with SESAC is logically impossible. But even aside from this testimony, the plaintiffs' proposed "SESAC Repertory Performance Rights Market" is unsupportable. For music in locally produced programming, it is undisputed that stations can choose from music in the repertory of any PRO – in which case there is no basis for limiting the market to music in *SESAC's* repertory. As for third-party programming – the subject of the plaintiffs' "lock-in" theory – the upshot of that theory is actually that each embedded work competes in its *own* market. In neither event can the plaintiffs meet their burden of proving a single, undifferentiated market encompassing all performance rights to music in SESAC's repertory, and no other performance rights. All counts should be dismissed. *See infra* pp. 44-49.

V. The plaintiffs' Section 1 claim fails for an additional reason, too: they cannot establish that alternatives to SESAC's blanket license were not realistically available, as required by the Second Circuit's decision in *Buffalo Broadcasting*. Regardless of whether any stations actually *took* SESAC's per-program license for the period in question, the plaintiffs cannot show that – as an objective matter – that license was not realistically available. And as for direct and source licensing, the record overwhelmingly is one of local stations *not trying* to obtain such

licenses – in which case, as a matter of law, they cannot demonstrate that direct and source licenses were not realistically available. Count 1 should be dismissed. *See infra* pp. 49-56.

VI. Finally, the plaintiffs' monopolization claims must fail because there is no evidence supporting a conclusion that SESAC's monopoly power (if any) results from conduct that is wrongful or exclusionary. SESAC allegedly has monopolized the supposed "SESAC Repertory Performance Rights Market" – but that is a market of which SESAC inevitably will have an overwhelming share. Indeed, from Dr. Jaffe's testimony that *nothing* is reasonably interchangeable with SESAC's blanket license, it follows that SESAC will automatically have 100% of the market in which it sells its product. It cannot be wrongful to "monopolize" a market in which, by definition, nobody else can compete. Nor is SESAC's conduct in any way exclusionary, as required for liability under Section 2. The only possible rivals to SESAC are its own affiliates – who are SESAC's *suppliers*, and the beneficiaries of the supposed anticompetitive scheme. Counts 2 and 3 should be dismissed. *See infra* pp. 56-60.

LEGAL STANDARD

Summary judgment is appropriate when the record demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). Although the Court must resolve ambiguities and draw all inferences in the nonmoving party's favor, *Jeffreys v. City of New York,* 426 F.3d 549, 553 (2d Cir. 2005), the party opposing summary judgment must respond with "specific facts showing that there is a genuine issue for trial," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rule 56(e) "provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading." *Anderson*, 477 U.S. at 256; *see Gottlieb v. Cnty. of Orange,* 84 F.3d 511, 518 (2d Cir.1996). Nor may the nonmoving party rely on merely a "scintilla of evidence," *Anderson*,

477 U.S. at 252, or "some metaphysical doubt as to the material facts," *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

ARGUMENT

I. COUNTS 1 AND 3 MUST BE DISMISSED BECAUSE THE PLAINTIFFS CANNOT PROVE AN UNLAWFUL AGREEMENT.

The Amended Complaint alleges an agreement to restrain trade in violation of Section 1 of the Sherman Act (Count 1) and conspiracy to monopolize in violation of Section 2 of the Sherman Act (Count 3). Section 1 renders unlawful only certain *agreements*, not unilateral action. *See Copperweld*, 467 U.S. at 768; *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001); *Schwimmer v. Sony Corp. of Am.*, 677 F.2d 946, 952 (2d Cir. 1982). And of course, a plaintiff seeking to show conspiracy to monopolize must likewise show an agreement. *AD/SAT*, 181 F.3d at 232-33.

Importantly, the agreement in question must be proved with evidence. It cannot merely be presumed. *See Monsanto Co.*, 465 U.S. at 763-64; *Matsushita*, 475 U.S. at 588; *AD/SAT*, 181 F.3d at 232-33; *Walsh Trucking Co., Inc.*, 812 F.2d at 795-96. Consequently, an antitrust plaintiff opposing summary judgment on a Section 1 claim must present evidence of an anticompetitive agreement that is both economically plausible and "tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (internal quotation omitted). The plaintiffs here have no such evidence.

A. <u>Background</u>

The Amended Complaint charges, in Counts 1 and 3, that this case involves a conspiracy between SESAC and others. Am. Compl. ¶¶ 77-82, 88-97. The Amended Complaint does not

name SESAC's purported co-conspirators. Instead, it identifies them as "John Doe" defendants 1 through 50. *Id.* ¶ 61. According to the Amended Complaint:

> The DOE Defendants are co-conspirators with SESAC and have facilitated, adhered to, participated in, and/or communicated with others regarding the antitrust conspiracy alleged herein. The DOE Defendants include, among others, composers and music publishers whose identities are unknown at the present time because SESAC has refused to disclose the entirety of its current repertory.

Id.; *see id.* ¶ 78 (identifying Does as co-conspirators for Count 1); *id.* ¶ 96 (identifying Does as co-conspirators for Count 3). The Amended Complaint states that "Plaintiffs may seek leave to insert the names and capacities of these fictitiously named Defendants together with charging allegations, when obtained, if not already set forth herein." *Id.* ¶ 61. The plaintiffs have never amended their complaint to identify any of the Does, however. Indeed, despite subpoenaing 10 SESAC affiliates, the plaintiffs ultimately chose to take the depositions of only two.

Meanwhile, in sharp contrast with the plaintiffs' conspiracy allegations, discovery revealed no evidence that SESAC's affiliates actually have any say in – much less agree to – the SESAC business practices of which the plaintiffs complain. There is no evidence that SESAC's affiliates play a management role at SESAC. SUF ¶¶ 22,53. Indeed, SESAC's affiliate agreements say nothing at all about the terms on which SESAC will grant licenses for the works in its repertory – including whether SESAC will issue blanket licenses. SUF ¶ 50.

Ultimately, SESAC served contention interrogatories asking the plaintiffs to identify the basic facts about the agreement or conspiracy for which they claim SESAC is liable under Section 1or Section 2 of the Sherman Act. After being compelled to respond, Dkt. No. 88, the plaintiffs served a rambling, 17-page set of answers that included considerable legal argument but little direct response to SESAC's interrogatories. Pls.' Supp. Objections & Resps. to SESAC's First Set of Interrogs. [hereinafter "Contention Interrog. Resps."; attached as SJK Decl.

Ex. 152]. The plaintiffs' responses generally can be read to suggest three theories of unlawful agreement: a single overarching conspiracy among SESAC and its affiliates, a series of bilateral agreements between SESAC and its affiliates, and the blanket license itself. None of these allows the plaintiffs to withstand summary judgment on Counts 1 and 3.

B. The Plaintiffs Cannot Prove An Overarching Conspiracy.

The plaintiffs largely claim an overarching conspiracy among SESAC and its affiliates, whereby the affiliates pool their copyrights and share in the profits. Am. Compl. ¶¶ 77-81, 88-96; Contention Interrog. Resps. 5-6, 8-11. That claim fails for two principal reasons.

First, discovery revealed no evidence of affiliates' involvement in the conduct that the plaintiffs attack as anticompetitive – including the issuance of blanket licenses. Each SESAC affiliate agrees with SESAC that SESAC will issue licenses on the affiliate's behalf, and that SESAC will pay the affiliate royalties. SUF ¶¶ 41, 51-52. But there is no evidence that SESAC's affiliates control SESAC or participate in SESAC licensing decisions, including (a) whether SESAC will issue blanket licenses, and on what terms; (b) whether SESAC will issue per-program licenses, and on what terms; and (c) what fees SESAC will charge.[7] SUF ¶ 54.

The plaintiffs cannot escape this absence of evidence by accusing SESAC of "copyright pooling," as they have in the past. Contention Interrog. Resps. 3, 6, 8. We are unaware of any case holding that the label "copyright pool" excuses a plaintiff from proving that challenged conduct actually results from a conspiracy, rather than unilateral action. In any event, the term "copyright pool" is far from a term of art – but the plaintiffs appear to use it to imply that

[7] SESAC's standard affiliate agreement does provide that SESAC has "the right . . . to collect performing rights licensing income" and "to allocate and to distribute royalties or other monies collected on [the affiliate's] behalf, and that SESAC "shall make payments . . . in an amount equal to [the affiliate's] share of the monies allocated by SESAC for distribution to its . . . affiliates." SUF ¶¶ 51-52. But these provisions say absolutely nothing about the manner in which SESAC will license the affiliate's works.

SESAC's affiliates collude with each other and agree that the blanket license will be issued. Contention Interrog. Resps. 8-11. No evidence of such collusion exists. The only evidence of a link among the affiliates is that they all choose to affiliate with SESAC.

Second, and relatedly, a series of bilateral agreements with a single entity (here, SESAC) cannot constitute a single potentially actionable antitrust conspiracy unless there is an agreement *among* the parties entering into the bilateral agreements with that entity. In other words, there must be a "rim" connecting the "spokes" in the claimed hub-and-spoke conspiracy. *See Howard Hess Dental Labs, Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255-56 (3d Cir. 2010) (making clear that, for purposes of both Section 1 and Section 2, "a 'rimless' conspiracy" is not a single conspiracy but actually "several unconnected, bilateral, vertical conspiracies between [the hub] and each [spoke]"); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (4th Cir. 2002) (similar); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110-11 (2d Cir. 2002) (affirming grant of summary judgment on the ground that the plaintiff had put forward "insufficient evidence of a horizontal agreement");[8] *see also Kotteakos v. United States*, 328 U.S. 750, 768-69 (1946). Thus, the plaintiffs here must prove an agreement *among* SESAC's affiliates, not just agreements between SESAC and those affiliates.

The plaintiffs can prove no such agreement among SESAC's affiliates. To be sure, each of SESAC's affiliates enters into an affiliation agreement, to which it and SESAC are parties. SUF ¶ 49. But the record contains no evidence of SESAC's affiliates agreeing among themselves about any of the practices of which the plaintiffs complain. News music composer

[8] Although the court in *PepsiCo* made this point in addressing the plaintiff's claim of a per se violation and went on to dismiss their rule-of-reason claim on other grounds, the court made no suggestion that a single rimless conspiracy is in fact cognizable under the rule of reason. The court's silence on this matter is unsurprising, for the parties in *PepsiCo* do not appear to have addressed the question at all.

Stephen Arnold, one of the two SESAC affiliates whom the plaintiffs deposed, testified that he is not even aware of what other affiliates' arrangements with SESAC might be. SUF ¶ 55; SJK Decl. Ex. 4, at 190:22-191:3. The other SESAC affiliate whom the plaintiffs deposed, David Catalano, testified that (aside from composers who worked for him) he had never spoken with other affiliates about the terms of his agreement with SESAC, about the blanket license that SESAC issues to television stations, or about the terms of that license – and had never reached any kind of agreement with other SESAC affiliates. SUF ¶ 55; SJK Decl. Ex. 6, at 158:13-22.

In spite of this, the plaintiffs have suggested that a jury could *infer* an agreement among SESAC's affiliates. Contention Interrog. Resps. 8-11. As a matter of law, a jury could make no such inference. For one thing, SESAC has more than 20,000 affiliates, SUF ¶ 41 – a number high enough to make it far-fetched to suppose they have agreed about anything. *Compare Toys "R" Us v. FTC*, 221 F.3d 928 (7th Cir. 2000) (inferring agreement among eight parties); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (same).

For another thing, hub-and-spoke cases where courts have permitted an inference of horizontal agreement are ones where similar actions by each spoke cannot otherwise be explained. *See Toys "R" Us*, 221 F.3d at 930 ("The agreements took the form of a network of vertical agreements between [Toys "R" Us] and the individual manufacturers, in each of which the manufacturer promised to restrict the distribution of its products to low priced warehouse club stores, *on the condition that other manufacturers would do the same*." (emphasis added)); *Interstate Circuit*, 306 U.S. at 223 (permitting inference of agreement on the ground that "[i]t taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods *without some understanding that all were to join*" (emphasis added)).

Here, by contrast, SESAC's affiliates each have a strong interest in affiliating with SESAC, independent of any of agreement among themselves. Licensing through a PRO makes sense for a rightsholder because of the obvious burdens associated with negotiating licenses, monitoring performances of copyrighted works, and collecting and accounting for fees. *BMI*, 441 U.S. at 19 n.32. And SESAC touts its ability to provide affiliates with more personalized service, better tracking of performances of their works, and faster payment of royalties than ASCAP or BMI. SUF ¶¶ 46-48. A jury would have no basis to infer that, in fact, SESAC's affiliates each have chosen to affiliate with SESAC because of an agreement among the affiliates. *See Mayor of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 138 (2d Cir. 2013) (parallel actions that make independent business sense do not give rise to inference of agreement).

Nor is there any reason to think that SESAC's affiliates have agreed among themselves that their music will be licensed exclusively through SESAC. As an initial matter, SESAC's standard affiliate agreement places no restriction on the affiliate's ability to issue licenses directly to users. SUF ¶¶ 70-71. And while a small number of SESAC affiliates do have some restrictions on their ability to issue direct licenses – contained in so-called "supplemental agreements," SUF ¶¶ 72-74 – there is no evidence that SESAC's affiliates agree with each other to enter into these restrictions with SESAC. There is not even evidence that SESAC's affiliates *discuss* these provisions with each other. Quite the contrary: supplemental agreements containing direct license restrictions require that the affiliate maintain confidentiality as to the agreement's terms. SUF ¶ 56. And both of the affiliates whom the plaintiffs deposed confirmed that they have not communicated with other SESAC affiliates about the terms of their agreements with SESAC. SUF ¶ 55.

C. SESAC's Bilateral Agreements With Its Affiliates Cannot Support Liability.

Still, the plaintiffs may argue that even if there is no overarching conspiracy among SESAC and its affiliates, antitrust liability is appropriate solely on the basis of the bilateral agreements between SESAC and its affiliates. Contention Interrog. Resps. 8-16. That argument should be rejected.

First, and most fundamentally, the complaint alleges a single far-flung antitrust conspiracy, encompassing SESAC and at least fifty affiliates (whom the plaintiffs still have not named). *See* Am. Compl. ¶¶ 61, 96. It cannot fairly be read to allege that what is unlawful is actually a series of bilateral agreements. Having pleaded a single antitrust conspiracy, the plaintiffs cannot now seek to attach liability on a different basis. *See Dentsply*, 602 F.3d at 256. (refusing to consider series of bilateral agreements as basis for antitrust liability because plaintiff had pleaded a single overarching conspiracy); *cf. In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 533 F.3d 1, 4-5 (1st Cir. 2008) (plaintiffs may not argue vertical conspiracy when complaint pled horizontal conspiracy).

Second, there is – once again – no evidence that SESAC's bilateral agreements with its affiliates are agreements for SESAC to undertake the conduct that the complaint attacks. For instance, the agreements make no mention of blanket licensing, per-program licensing, the prices that SESAC will charge for licenses, or the parties to whom SESAC will issue licenses. SUF ¶ 50. Without a nexus between SESAC's affiliate agreements and the purportedly anticompetitive conduct of which the plaintiffs complain, the affiliate agreements cannot sensibly form the basis for antitrust liability. A contrary holding would have absurd consequences: it would expose a firm to Section 1 liability for a wide manner of permissible

unilateral business conduct simply because the firm receives its inputs through "agreements" with its suppliers.

Third, the presence of direct license restrictions in certain SESAC affiliate agreements does not warrant a different conclusion, for the plaintiffs cannot establish that each of these restrictions harms competition throughout the market that they have pleaded – namely, the supposed "SESAC Repertory Performance Rights Market." Am. Compl. ¶ 64. Even if Stephen Arnold's affiliate agreement (for instance) were construed as a complete prohibition on Mr. Arnold's issuance of direct licenses, the only sort of "competition" that might conceivably be harmed relates to the licensing of Mr. Arnold's works, not the entire SESAC repertory. And in any event, the Second Circuit has made clear that, as a matter of law, an agreement between the holder of a lawful monopoly (here, a copyright holder affiliated with SESAC) and its exclusive distributor cannot harm competition. *See E & L Consulting v. Doman Indus. Ltd.*, 472 F.3d 23, 29-30 (2d Cir. 2006).

D. <u>The Blanket License Itself Cannot Be The Agreement Supporting Liability.</u>

Grasping at straws, the plaintiffs have suggested that *the blanket license itself* is the agreement supporting liability on Count 1 and Count 3. Pls.' Interrog. Resps. 3-8. That argument lacks merit. The blanket license is an agreement between SESAC *and local television stations*, including the plaintiffs. SUF ¶¶ 24, 29-30. It makes no sense to charge that SESAC has "conspired" with local stations – which have come to this Court complaining about SESAC's license offerings – to restrain trade, or to monopolize the supposed "SESAC Repertory Performance Rights Market." Am. Compl. ¶¶ 77-82, 88-97. Unsurprisingly, the complaint maintains that SESAC's co-conspirators are its affiliates – not stations. *See, e.g.*, Am. Compl. ¶ 78 (alleging for Count 1 that "SESAC, its affiliated composers, authors and music publishers,

including the DOE Defendants, have continuously engaged in an unlawful contract, combination or conspiracy to unreasonably restrain interstate trade and commerce"); *id.* ¶ 96 (alleging for Count 3 that "SESAC, its affiliated composers, authors and music publishers, including the DOE Defendants, have conspired to monopolize the SESAC Repertory Performance Rights Market"). The plaintiffs should not now be permitted to adopt an entirely different theory – especially one that nonsensically suggests that they themselves are SESAC's co-conspirators.

E. <u>Past Judicial Treatment Of ASCAP And BMI Does Not Resolve The Question Of Agreement In This Case.</u>

In spite of the foregoing, the plaintiffs may claim that the issue of agreement is controlled by previous judicial decisions addressing ASCAP and BMI. That is not so.

First, cases addressing the antitrust liability of ASCAP and BMI have not purported to eliminate the requirement that an antitrust plaintiff prove that the challenged conduct results from an agreement. If anything, courts have become more rigorous in recent years when it comes to Section 1's requirement that the challenged conduct be proven to flow from agreement, not unilateral conduct. *See Copperweld*, 467 U.S. at 770-77 (abolishing notion that intra-enterprise conspiracy is cognizable under Section 1); *Matsushita*, 475 U.S. at 588-95 (stressing that "courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter precompetitive conduct" (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984))); *Mayor of Baltimore*, 709 F.3d at 137-40; *cf. Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007) ("Because § 1 . . . does not prohibit [all] unreasonable restraints of trade but only restraints effected by a contract, combination or conspiracy, [t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement." (internal quotation marks omitted; alterations in original)).

Second, it is far from clear that courts have actually considered and decided that ASCAP's and BMI's blanket licensing practices constitute concerted action (or reflect horizontal agreement) for purposes of Section 1. But even assuming that the courts have reached this conclusion, their holdings do not control as to SESAC. That is because there is no evidence that SESAC's structure resembles that of ASCAP or BMI. ASCAP, as noted above, is a membership organization controlled by its rightsholder members; BMI, meanwhile, was formed and is still controlled by broadcasters otherwise in horizontal competition with each other. *See Buffalo Broadcasting*, 744 F.2d at 920; *supra* pp. 6-7. SESAC stands in sharp contrast to both ASCAP and BMI: it is undisputed that SESAC is a for-profit company owned and controlled by investors. SUF ¶¶ 21-22. Nor is there any evidence that its affiliates play any role in the company's management.[9] SUF ¶ 53.

II. SUMMARY JUDGMENT SHOULD BE GRANTED AS TO PLAINTIFFS' PER SE SECTION 1 CLAIM.

Under Section 1 of the Sherman Act, an agreement restraining trade generally is illegal only if it violates the "rule of reason," *Dagher*, 547 U.S. at 5 (2006), which entails a case-by-case analysis of whether the agreement's anticompetitive effects outweigh its procompetitive ones, *see Leegin Creative Leather Products., Inc. v. PSKS, Inc.*, 551 U.S. at 885-86 (2007); *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Certain kinds of agreements, however, are treated as per se unlawful without need for case-by-case inquiry. Per se condemnation – a narrow exception to the rule of reason – applies only to restraints "that would always or almost always tend to restrict competition and decrease output." *Leegin*, 551

[9] Nor does the district court's 1959 decision in *Affiliated Music Enterprises, Inc. v. SESAC, Inc.*, 160 F. Supp. 865 (S.D.N.Y. 1958), control here. The district court *dismissed* the plaintiffs' complaint – and in affirming, the Second Circuit disclaimed any view on the legality of the business practices and arrangements then employed by SESAC. *See infra* pp. 30-31.

U.S. at 886 (quotation marks omitted); *see also, e.g.*, *State Oil*, 522 U.S. at 10 ("*Per se* treatment is appropriate [o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." (internal quotation marks omitted; alteration in original)). As the Second Circuit has warned, "[e]xpansion of the per se rule should be approached with great caution." *Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 663 F.2d 405, 411 (2d Cir. 1981) (internal quotation marks omitted). Indeed, the Supreme Court's seminal decision addressing the legality of blanket licensing cautioned against undue application of the per se prohibition because "easy labels do not always supply ready answers," and stressed that per se condemnation is appropriate only when the challenged practice is "plainly anticompetitive" and "lack[s] any redeeming virtue." *BMI*, 441 U.S. at 8 (internal quotation marks omitted). Especially in light of controlling Supreme Court precedent, the plaintiffs' effort to subject SESAC to per se liability falls woefully short.

A. The Plaintiffs' Per Se Claim Is Barred By *BMI v. CBS*

The plaintiffs allege that SESAC's issuance of the blanket license constitutes per se unlawful price fixing in violation of Section 1 of the Sherman Act. Am. Compl. ¶ 81. But the Supreme Court has already held in *BMI* that blanket licensing is *not* per se unlawful. That decision completely precludes the plaintiffs' per se claim.

BMI involved a challenge by the CBS radio and television network to the ASCAP and BMI blanket licenses. *BMI*, 441 U.S. at 4. The Second Circuit ruled that blanket licensing was per se unlawful under Section 1. *Id.* at 6. The Supreme Court reversed, holding that blanket licensing does not constitute a per se violation of the antitrust laws. *See id.* at 20; *see also CBS Remand*, 620 F.2d at 939 ("Since the blanket license is not a per se unlawful arrangement, its restraining effect must be proved before § 1 liability can be found."). Observing that a rule of

per se illegality "would appear to be quite difficult to contain," the Court pronounced itself "quite sure" that blanket licensing was not "unlawful across the board." *BMI*, 441 U.S. at 16-18. Among other things, the Court stressed the obvious efficiencies of blanket licensing for both copyright owners and copyright users. *Id.* at 20-23.

The Supreme Court's holding in *BMI* firmly dispenses with the plaintiffs' claim of per se illegality. This case, like *BMI*, is a challenge to blanket licensing practices. *See, e.g.*, Am. Compl. ¶¶ 12, 21, 24-25, 33, 49; Jaffe Report [SJK Decl. Ex. 1] 9, 17-23, 33-34, 53-57, 65-67. There is no basis for this Court to break with the Supreme Court and deem blanket licensing per se unlawful.

Still, the plaintiffs have suggested that, notwithstanding the Supreme Court's decision in *BMI*, the blanket licensing practices of *SESAC* are per se unlawful given the particular circumstances of *this* case – for instance, the fact that SESAC is not subject to a consent decree. That argument has no merit. To be sure, the Supreme Court in *BMI* did treat the ASCAP and BMI consent decrees as one factor in its ruling. But the point of deeming a practice per se unlawful is that it is unlawful *regardless of* its factual circumstances – as *BMI* itself recognized. *See BMI*, 441 U.S. at 17 (reasoning that "[a]lthough the Court of Appeals apparently thought the blanket license could be saved in some or even many applications, it seems to us that the per se rule does not accommodate itself to such flexibility"); *see also Leegin*, 551 U.S. at 886-87; *Arizona Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 350-51 (1982). To say that a case's factual nuances give rise to per se liability is, in effect, to say that the basis for liability is not a per se rule in the first place.

Indeed, the Supreme Court has explained that courts deem a practice per se unlawful "only after considerable experience" with the business relationships at issue. *BMI*, 441 U.S. at 9

(quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607 (1972)). With respect to blanket licensing, the courts' "considerable experience" reveals – if anything – that blanket licensing is lawful. The ASCAP and BMI consent decrees did not result from any finding of antitrust liability. *See supra* pp. 8-9. And separate from the suits giving rise to the consent decrees, we are aware of no fewer than four antitrust lawsuits against PROs that have concluded *without* any finding of liability. *See National Cable Television Ass'n.*, 772 F. Supp 614; *Buffalo Broadcasting*, 744 F.2d 917; *CBS Remand*, 620 F. 2d 930; *Affiliated Music Enters., Inc. v. SESAC*, 268 F.2d 13 (2d Cir. 1959). *But see Alden-Rochelle v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948) (treating blanket licensing to movie theaters as unlawful price-fixing); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 847-50 (D. Minn. 1948) (in copyright infringement case, criticizing ASCAP's blanket licensing to movie theaters where ASCAP controlled "some 80% of all of the music recorded in motion picture films"). Thus, far from revealing the inherent vices of blanket licensing, the courts' experience has been that blanket licensing is *not* unlawful.

Finally, the district court's holding in *Affiliated Music Enterprises, Inc. v. SESAC, Inc.*, which the plaintiffs have previously cited, does not warrant a finding of per se liability. The district court in that case – which was decided more than half a century ago and financed by BMI – stated that "pooling agreements are per se violations of the antitrust laws." 160 F. Supp. 865, 875 (S.D.N.Y. 1958). But that is exactly what the Supreme Court rejected in *BMI* two decades later. There is no reason why a district court's position on whatever SESAC's practices may have been half a century ago – a position that the Supreme Court effectively overruled in *BMI* –

should bear at all on this Court's assessment of the theories that these plaintiffs are now putting forward.[10]

B. <u>The Plaintiffs Cannot Invoke A Per Se Theory On The Basis Of Direct Licensing Restrictions In SESAC's Agreements With Certain Affiliates</u>.

Alternatively, the plaintiffs have also suggested that per se liability is appropriate here because of provisions in certain agreements between SESAC and its affiliates that could be construed as restricting the prices that its affiliates may charge for licenses issued directly to stations. *See* Letter from Bruce A. Colbath to Judge Paul A. Engelmayer, at 2-3 (May 25, 2012) [attached as SJK Decl. Ex. 161]. Those provisions provide no basis for per se liability, for two reasons.

First, this theory is flatly contrary to the complaint. The complaint is, at its essence, a challenge to SESAC's blanket licensing practices. It makes no claim that restrictions in certain of SESAC's affiliate agreements, standing alone, are per se violations of Section 1. *See* Am. Compl. ¶ 28 ("SESAC has *enhanced the competition-foreclosing power of its blanket license* by serving, de facto or de jure, as the exclusive licensing agent for its Rightsholders for many compositions in its repertory." (emphasis added)). The plaintiffs cannot now claim that direct licensing restrictions in SESAC's affiliate agreements, standing alone, are per se unlawful.

Second, the Supreme Court has made clear that vertical restraints, even those that fix maximum or minimum prices, are *not* per se unlawful. *See Leegin*, 551 U.S. at 907 (rejecting per se liability for vertical agreement as to minimum resale price, overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and holding that "[v]ertical price

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[10] In any event, the court in *Affiliated Music Enterprises* actually *dismissed* the claims that SESAC had violated Sections 1 and 2 of the Sherman Act. *Id.* at 876-77. And on appeal, the Second Circuit disclaimed any view on the legality of SESAC's practices. *See Affiliated Music Enters.*, 268 F.2d at 15-16.

restraints are to be judged according to the rule of reason"); *State Oil*, 522 U.S. at 22 (rejecting per se liability for vertical agreement as to maximum price, and overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)). And here, SESAC is obviously in a vertical relationship with its affiliates. SESAC would have no ability to sell performance rights were it not for the fact that its affiliates grant it the ability to do so. In other words, SESAC's affiliates are its suppliers. Having been granted the ability to license performance rights to its affiliates' works, SESAC then packages those rights into licenses that it sells to television stations and other licensees. SUF ¶¶ 19, 41. Notably, one of the only two SESAC affiliates whom the plaintiffs elected to depose testified that he did not view himself as a competitor of SESAC, and the other dismissed the notion that he might want to issue direct licenses. SUF ¶¶ 75, 78. Because the relationship between SESAC and its affiliates is plainly vertical, any restraints included in the agreements between SESAC and its affiliates cannot be per se unlawful. The Supreme Court's holdings in *Leegin* and *State Oil* firmly control.

The plaintiffs likely will claim that the relationship between SESAC and its affiliates is properly characterized as horizontal. But there is no merit to that contention: The Second Circuit has made clear that the relationship between an upstream supplier (here, a SESAC affiliate) and a downstream distributor (here, SESAC) is treated as vertical even if the supplier also makes some sales at the same level as the distributor. *See Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 241-44 (2d Cir. 1997) (explaining that rule of reason applies to manufacturer-distributor agreements "even if the distributor and manufacturer also compete at the distribution level, where, as here, the manufacturer distributes its products through a distributor and independently (so-called 'dual distribution' arrangements)," and upholding dismissal for failure to state a claim); *Copy-Data Sys., Inc.*, 663 F.2d at 408-410. A fortiori, that

relationship must be treated as vertical if the supplier merely has the *potential* to make some sales at the same level as the distributor. And the Second Circuit has likewise made clear that a dispute over whether a relationship is horizontal or vertical is a question of law that can be resolved even at the motion-to-dismiss stage. *See Elecs. Commc'ns Corp.*, 129 F.3d at 243-44.[11]

III. ALL COUNTS MUST BE DISMISSED BECAUSE THE PLAINTIFFS CANNOT PROVE HARM TO COMPETITION.

With per se liability barred by *BMI v. CBS*, the plaintiffs cannot prevail on their Section 1 claim unless they prove harm to competition. *See Leegin*, 551 U.S. at 885-86; *E & L Consulting*, 472 F.3d at 31; *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96-97 (2d Cir. 1998); *Westchester Radiological Assocs. P.C. v. Empire Blue Cross & Blue Shield, Inc.*, 707 F. Supp. 708, 713-4 (S.D.N.Y. 1989) (granting summary judgment). The same is true of their Section 2 claims, for Section 2 liability likewise requires competitive harm. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 139 (1998); *E & L Consulting*, 472 F.3d at 31; *AD/SAT*, 181 F.3d at 230-32 (upholding grant of summary judgment); *Westchester Radiological Assocs. P.C.*, 707 F. Supp. at 714-17 (granting summary judgment); *see also Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1363-64 (Fed. Cir. 1999) (vacating injunction arising from conspiracy claims under Section 1 and Section 2 on the ground that the agreements did not harm competition). The plaintiffs cannot make this showing.

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[11] In addition, even if the restrictions at issue somehow fall outside the controlling precedent of *Leegin* and *State Oil*, they still are not per se unlawful because they are not *naked* price restraints but, rather, are ancillary to the agreements by which rightsholders affiliate with SESAC in the first instance. SUF ¶¶ 73-74; *see, e.g.*, *Polk Bros, Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) (Easterbrook, J.).

A. <u>The Plaintiffs Cannot Demonstrate That SESAC's Practices Have Harmed Competition To License Performance Rights.</u>

The plaintiffs have identified no reduction in output resulting from SESAC's supposedly anticompetitive activities. They are unable to point to any reduction in the amount or quality of music that stations perform, the amount or quality of programming that they air, or the amount or quality of music licensed. Without an output reduction, any supposed harm to competition is dubious at best; indeed, the absence of an output reduction highlights that plaintiffs' true complaint is just that SESAC's prices are too high. *See Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) ("The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act.").

The testimony of the plaintiffs' own economic expert, Dr. Jaffe, likewise forecloses any conclusion that SESAC has harmed competition. The plaintiffs' complaint, as noted above, alleges that the relevant product market is for the performance rights to works in SESAC's repertory – whether or not those rights are procured from SESAC. Am. Compl. ¶¶ 62-64. But Dr. Jaffe has testified – in sharp contrast with the complaint – that (a) SESAC's product is the blanket license; and (b) *nothing* is "reasonably interchangeable" with SESAC's product. Jaffe Dep. [SJK Decl. Ex. 17] 127:15-128:2. The necessary implication of Dr. Jaffe's testimony is that the market in which SESAC sells its blanket license includes *no other product* – such as direct licenses or source licenses. *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (relevant product market includes only "products that have reasonable interchangeability for the purposes for which they are produced-price, use and qualities considered"); *City of N.Y. v. Grp. Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011); *PepsiCo, Inc.*, 315 F.3d at 105. If the product market in which SESAC operates includes only the SESAC

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blanket license, it follows that *nobody else could possibly compete with SESAC*. The plaintiffs cannot show that SESAC has harmed competition if, by definition, nobody else could possibly compete. *See Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1291-92 (2d Cir. 1974) (no harm to competition because "there were neither actual nor potential competitors" in relevant market); *Moccio v. Cablevision Sys. Corp.*, 208 F. Supp. 2d 361, 374 (E.D.N.Y. 2002) (tying arrangement does not harm competition if there is no original demand – and thus no competition in the market – for the tied product); *see also Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1199 (9th Cir. 2012) (tying arrangement does not harm competition if defendant has "lawful monopoly in the market for the tied product"), *cert. denied*, 133 S. Ct. 573 (2012).

Even if one were to disregard Dr. Jaffe's testimony on this point, however, an examination of the two broad categories of local television programming – namely, third-party programming and locally produced programming – makes clear the plaintiffs still would not be able to establish harm to competition. With respect to third-party programming, the core of the plaintiffs' complaint is that, having committed themselves to broadcasting such programming, they must separately acquire the performance rights to whatever copyrighted music is embedded. Am. Compl. ¶¶ 5-9. The plaintiffs further allege (and Dr. Jaffe has asserted) that they do not control that music. SUF ¶¶ 10-11. Thus, they need the rights to *specific* embedded works. Indeed, to the extent that a station is truly locked into broadcasting third-party programming in which the station does not control the music, the station needs the rights to *all* of the copyrighted works that the programming includes. And as Dr. Jaffe admitted, the performance rights to two copyrighted musical works embedded in third-party programming are, from the perspective of a locked-in station, not substitutable for each other. SUF ¶ 13; Jaffe Dep. [SJK Decl. Ex. 17] 227:14-228:11; Jaffe Report [SJK Decl. Ex. 1] 54.

It follows that, for music in third-party programming, SESAC's "pooling" of embedded copyrighted works cannot possibly harm competition among the holders of rights in those works. *See, e.g.*, *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (Section 1 plaintiff must establish that challenged behavior "had an *actual* adverse effect on competition as a whole in the relevant market"); *Virgin Atlantic Airways Ltd,* 257 F.3d at 264 (same); *Elecs. Commc'ns Corp.*, 129 F.3d at 244-46 (Section 2 claim must fail if defendant's allegedly wrongful acts "cannot harm competition"). If these rightsholders each separately sold the rights to the works in question, the plaintiffs would *still* be in a position of needing the rights to *all* of the works. The price charged by one seller logically could not constrain the price charged by another seller, and the sellers thus would not compete. Indeed, each of them could exercise the sort of "holdup" power of which the plaintiffs complain.

The Second Circuit has made clear, moreover, that a station's exposure to holdup power for the rights to embedded music is not something for which the PRO can be legally faulted. As the court explained in *CBS Remand*:

> [Hold-up power] is not a consequence of the blanket license. If CBS would be vulnerable to a "hold-up" when it tries to acquire performance rights for music on a feature film it wishes to rerun, *that is a consequence of CBS's failure to acquire rerun performance rights at the time it acquired the film*. At that time CBS accepted the risk that it would one day have to purchase performance rights for reruns, either as part of the purchase price for a blanket license or at a separate price for a license obtained directly from the copyright owner.

620 F.2d at 938-39 (emphasis added). That reasoning applies with equal force here.

Nor is there any reason to conclude that SESAC's "pooling" of performance rights has harmed competition with respect to music in locally-produced programming. It is undisputed that stations can choose the music for programs that they produce themselves – and it is likewise undisputed that, in choosing that music, stations can opt for works in the repertory of *any* of the

three PROs. SUF ¶¶ 7-8. Indeed, over 100 stations informed SESAC affiliate Stephen Arnold in 2006 that they had dropped (or would be dropping) his music from their local news. SUF ¶¶ 85-86. There is no evidence that SESAC has "pooled" enough composers of music for locally produced programming to affect competition for placement in such programming. Stations can always simply opt for composers outside SESAC's repertory.

B. <u>Dr. Jaffe's "Hypothetical Competitive World" Cannot Establish Harm To Competition.</u>

The plaintiffs do have a response to the point that, as to music in third-party programming, their supposed lock-in predicament means that there can be no competition for SESAC's blanket license to harm. According to Dr. Jaffe, blanket licensing is actually the *cause* of the plaintiffs' lock-in predicament. Jaffe Report [SJK Decl. Ex. 1] 13-23. In this view, blanket licensing stands as an obstacle to a world where rightsholders compete against each other to sell musical performance rights to producers, so that producers can then include those rights when they sell the right to broadcast their programs. *Id.*

This theory of competitive harm is fatally flawed. Dr. Jaffe has admitted that the world in which performance rights are sold together with broadcast rights is merely a "hypothetical competitive world." Jaffe Dep. [SJK Decl. Ex. 17] 62:11-25. And the mere conjecture of such a world cannot establish that SESAC's blanket licensing practices harm competition.

First, the plaintiffs' own complaint admits that it is "longstanding industry practice" for producers and syndicators to sell broadcast rights without conveying the performance rights to embedded musical works. Am. Compl. ¶¶ 7-8. The fact that this is "longstanding industry practice" belies the notion that it is actually SESAC's fault. Indeed, Dr. Jaffe himself describes SESAC as having played a relatively minor role in performance rights licensing until the 1990s. Jaffe Report [SJK Decl. Ex. 1] 41-42.

Second, the idea that SESAC's practices are preventing Dr. Jaffe's "hypothetical competitive world" from emerging ignores that SESAC is just one of three PROs – and the smallest, at that. SUF ¶ 23. There is no reason to suppose that a change in *SESAC's* licensing practices would upend the manner in which the entire industry does business. Even as to ASCAP and BMI, the Second Circuit has properly declined to assume that cessation of blanket licensing would spawn competition among rightsholders. As the court explained in *CBS Remand*:

> If CBS forgoes its blanket license, we cannot predict indeed, the record gives us no adequate basis for making a prediction as to how performance rights for [music selected by production companies, or "packagers"] will be purchased. Perhaps CBS will inform the packagers that it will buy programs only when performance rights have been acquired by the production company. . . . But the packagers might decline to buy performance rights, preferring to sell their programs to other networks that continue to hold blanket licenses. To the extent that happened, CBS, if it wanted a program for which performance rights had not been purchased, would have to purchase the rights for music already selected and recorded, in which event no meaningful price competition among copyright owners would occur.

620 F.2d at 938.

Third, even Dr. Jaffe himself has declined to offer an opinion that, if SESAC were to change its practices, performance rights would suddenly be sold to local stations at the source. Jaffe Dep. [SJK Decl. Ex. 17] 64:5-15 ("Q. And do you believe that [the hypothetical competitive world] would come about if SESAC were to cease the anticompetitive practices that you believe harm competition? A. I don't know."); *id.* at 61:19-62:10; 81:2-7, 82:5-25; 86:12-87:15; 93:12-94:17. Dr. Jaffe would not even offer an opinion that, if *all three PROs* were to cease blanket licensing, the "longstanding industry practice" discussed above would change. *Id.* at 83:2-6. In short, the notion that SESAC's blanket license is responsible for the plaintiffs'

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lock-in predicament, and any consequent lack of competition among rightsholders to sell performance rights, cannot withstand scrutiny.

C. SESAC's "Pooling" Of Copyrights Is Not Inherently Anticompetitive.

The plaintiffs previously have suggested that SESAC's practices are unlawful because they constitute pooling of copyrights. Contention Interrog. Resps. 5-6. But there is no reason to deduce harm to competition from the mere fact that SESAC bundles or "pools" multiple rights into a single package. As an initial matter, there is a well-developed antitrust doctrine designed to evaluate claims (like the one that the plaintiffs make) that a seller improperly allows plaintiffs to buy one offering only when it is packaged with another. Such claims are analyzed under the framework of "tying." *See, e.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), *abrogated on unrelated grounds by Illinois Tool Works, Inc. v. Independent Ink., Inc.*, 547 U.S. 28 (2006). But the plaintiffs here have expressly disavowed any tying claim. *See* Pls.' Opp. to Mtn. to Dismiss at 15, Dkt. No. 29. Nor could they plausibly mount such a claim: For one thing, a tying claim requires the seller to have linked together multiple distinct products sold in multiple markets. *Jefferson Parish*, 466 U.S. at 20-21. Here, the plaintiffs contend that performance rights to all works in the SESAC repertory are all sold in the *same* market. Am. Compl. ¶ 64. For another thing, a tying claim entails that the defendant have somehow *forced* purchasers to buy the tied product when they otherwise would not. *Jefferson Parish*, 466 U.S. at 26. Here, the plaintiffs all but concede that they *need* the rights to *all* works in the SESAC repertory, because they supposedly do not control (or even know the identity of) all of the music in third-party programming. SUF ¶¶ 10-12.

In any event, bundling is obviously commonplace in the economy. For instance, multiple sections of a newspaper typically are sold together, and multiple cable channels are available

only as a single package. And bundling harms competition – if at all – in only limited circumstances.

The Ninth Circuit's decision in *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192 , is illustrative. In *Brantley*, the plaintiff alleged that the practice of "bundling" cable channels, rather than offering them a la carte, was an antitrust violation. *Id.* at 1195-96, 1201. The plaintiff's essential complaint was that this practice forced him to purchase "low-demand" channels in order to purchase certain "must-have" channels. *Id.* at 1195. But the plaintiff did not allege that cable programmers' "practice of selling 'must-have' and low-demand channels in packages excludes other sellers of low-demand channels from the market" or that the challenged arrangement forced distributors or consumers "to forgo the purchase of alternative low-demand channels." *Id.* at 1201. The court affirmed the dismissal of the complaint, observing that "allegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers do not sufficiently allege an injury to competition." *Id.* at 1201-04.

Brantley's reasoning is equally applicable here. The plaintiffs complain that SESAC will sell them the rights only to a package of works, rather than to individual works. But the plaintiffs cannot show that SESAC's practices have caused them to forgo purchasing rights to alternative works, or that sellers of such works have been foreclosed from the market. Indeed, the necessary implication of the plaintiffs' complaint is that, because they do not control the music in third-party programming and supposedly cannot even determine the musical contents of such programming, Am. Compl. ¶¶ 4-8, 14-17, they need rights to *all* works in SESAC's repertory – and need rights to all works in the ASCAP and BMI repertories as well.

The fact that ASCAP and BMI are obligated to offer per-program licenses, as an alternative to their blanket licenses, does not undermine the foregoing analysis. ASCAP and

BMI's obligation to offer per-program licenses is an obligation that those PROs voluntarily assumed as part of their consent decrees. *See supra* pp. 8-9. SESAC has no consent decree, of course. Nor is SESAC subject to the requirements imposed on ASCAP and BMI by those organizations' respective consent decrees. *See Ass'n for Retarded Citizens of Conn., Inc. v. Thorne*, 30 F.3d 367, 370 (2d Cir. 1994) (consent decree may not be extended to or bind a non-party who did not bargain for the terms of the decree, particularly absent any determination the defendant violated the law). It is a non sequitur to suggest that SESAC has harmed competition by failing to comply with *remedial* measures voluntarily assumed by *other* PROs. *Cf. United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 233-376 (1975) ("[C]onsent decrees are normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation" and "should be construed basically as contracts, without reference to . . . legislation"); *United States v. Broad. Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001) (similar); *United States v. Microsoft Corp.*, 147 F.3d 935, 946 (D.C. Cir. 1998) (noting that "an antitrust consent decree cannot be read as though its animating spirit were solely the antitrust laws").

Setting the ASCAP and BMI consent decrees aside, SESAC has no independent antitrust obligation to offer a per-program license – or, for that matter, *any* alternative to the blanket license. That is because "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Linkline*, 555 U.S. at 448; *see also Brantley*, 675 F.3d at 1202 n.10 (rejecting antitrust theory that "could cast doubt on whether musicians would be free to sell their hit singles only as a part of a full album, or writers to sell a collection of short stories"); *Kingray, Inc. v. NBA, Inc.*, 188 F. Supp. 2d 1177, 1196 (S.D. Cal. 2002) (plaintiff claiming that seller did not offer product "in a nonbundled format" cannot "allege a Section 1 violation on the basis the product is not being offered in the manner

the plaintiffs would prefer"). At an absolute minimum, SESAC could not possibly have an obligation to offer a per-program license of any sort unless there were something anticompetitive about SESAC's issuance of the blanket license. As explained above, there is not.

Finally, even if courts have suggested that ASCAP's or BMI's "pooling" of copyrights harms competition, it does not follow that the same is true for SESAC, the smallest of the three PROs. And in any event, antitrust law has evolved overwhelmingly towards closer judicial scrutiny of any claim that particular practices are anticompetitive. *See, e.g.*, *Linkline*, 555 U.S. at 453-56 & n.3 (rejecting Section 2 liability for "price squeeze" claims despite courts of appeals' prior recognition of such claims); *Leegin*, 551 U.S. at 889-899 (overruling precedent to reject per se Section 1 liability for vertical minimum price restraint); *Trinko*, 540 U.S. at 405-16 (rejecting Section 2 liability for breach of duty to deal imposed by regulatory scheme); *State Oil*, 522 U.S. at 15-19 (overruling precedent to reject per se Section 1 liability for vertical maximum price restraint, and explaining that "we find it difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their per se invalidation"); *GTE Sylvania*, 433 U.S. 47-58 (overruling precedent to reject per se Section 1 liability for vertical nonprice restrictions). Whatever the courts may have thought about ASCAP and BMI in the past, one cannot presume that they would reach the same conclusions today.

D. Harm To "Competition" Between SESAC And Its Affiliates Does Not Suffice.

Perhaps aware that their contentions as to harm to competition among rightsholders cannot withstand scrutiny, the plaintiffs have argued that the vice of SESAC's practices is actually that they harm competition *between rightsholders and SESAC* to sell performance rights to particular works. *See* Letter from Steven A. Reiss to Judge Paul A. Engelmayer, at 2-3

(March 6, 2013) [SJK Decl. Ex. 162]. That sort of supposed competitive harm cannot save the plaintiffs' claims.[12]

First, the works in question are copyrighted. Each one is therefore the subject of a monopoly granted by the Copyright Act. *See* 17 U.S.C. § 106(4). In other words, Congress has decreed that, in the first instance, there shall be only one seller of performance rights: the holder of the copyright. *See id.* It makes little sense to say that antitrust law requires that there actually be *two* sellers, rather than one. But that is the upshot of the plaintiffs' contention that SESAC has an antitrust obligation to compete against its own supplier-affiliates.[13]

Indeed, a ruling in the plaintiffs' favor would call into question the legality of a wide array of plainly lawful practices in the distribution of intellectual property. Under the plaintiffs' theory, a book publisher offering a significant advance to an author could not bar the writer from then undercutting the publisher's efforts by self-publishing the very same book. To similar effect, a record label releasing a band's album could not bar the band from self-releasing the very same album. These results are self-evidently absurd, but they follow naturally from the plaintiffs' position here.

Second, and relatedly, "the primary concern of antitrust law" is with *interbrand* competition – *i.e.*, competition "among the manufacturers of the same generic product." *GTE Sylvania*, 433 U.S. at 51 n.19; *see id.* ("In contrast, intrabrand competition is the competition

[12] Indeed, court decisions addressing ASCAP and BMI have repeatedly made clear that the antitrust concern – if any – relates to the supposed absence of price competition *among rightsholders* – not between rightsholders and PROs. *See, e.g.*, *CBS Remand*, 620 F.2d at 935 (discussing cause of "the lack of price competition among songs"); *id.* at 937 ("[W]e agree that the issue is whether competition among copyright owners is realistically feasible.").

[13] It is no answer to suggest that a duty to compete against its own affiliates arises because SESAC bundles together the works of those affiliates. For that to be true, there must be something anticompetitive about SESAC's bundling of those works. As explained above, the plaintiffs can make no such showing. *See supra* pp. 33-42.

between the distributors [–] wholesale or retail [–] of the product of a particular manufacturer.”). “Competition” between SESAC and an affiliate to license a work cannot plausibly be characterized as interbrand: the work licensed by SESAC is *exactly the same distinctive work* as the one licensed by the affiliate. Indeed, SESAC would have no ability to license the work at all without the affiliate’s authorization to do so. SESAC is merely one step down the distribution chain from the affiliate. And it is clear that “competition” between a distributor and its supplier is not interbrand. *See Elecs. Commc’ns Corp.*, 129 F.3d at 244-45; *Copy-Data Sys., Inc.*, 663 F.2d at 409-11; *see also Beyer Farms, Inc. v. Elmhurst Dairy, Inc.*, 142 F. Supp. 2d 296, 304-05 (E.D.N.Y. 2001), *aff’d* 35 F. App’x 29 (2d Cir. 2002).

Third, even if competition between SESAC and its affiliates were the sort of competition that the antitrust laws seek to facilitate, the record cannot support a conclusion that SESAC has harmed such competition. As noted above, Dr. Jaffe has testified that *nothing* is reasonably interchangeable with the product that SESAC sells, namely, the blanket license – and the necessary consequence of that proposition is that *nobody* could compete against SESAC, including SESAC affiliates who license their own works. *See supra* pp. 34-35. What is more, Dr. Jaffe has made clear that, even for ASCAP and BMI music, it is uncommon for stations to license music in third-party programming from anyone other than the PRO. Jaffe Report [SJK Decl. Ex. 1] 36. There is no reason to believe that *SESAC’s* practices are preventing any substantial amount of source licensing with respect to *SESAC* music.

IV. ALL COUNTS MUST BE DISMISSED BECAUSE THE PLAINTIFFS CANNOT PROVE THEIR PROPOSED RELEVANT ANTITRUST MARKET.

Aside from the plaintiffs’ effort to impose Section 1 liability on a per se basis, all counts of the complaint place the burden on the plaintiffs to prove a relevant antitrust product market in which competition has been harmed. *See, e.g.*, *Group Health, Inc.*, 649 F.3d at 155-56

(dismissing Section 1 and Section 2 claims at summary judgment); *Mahmud v. Kaufmann*, 607 F. Supp. 2d 541, 555 (S.D.N.Y. 2009) ("The plaintiff bears the burden of establishing and proving the relevant market."), *aff'd*, 358 F. App'x 229 (2d Cir. 2009); *Global Discount Travel Services, LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 704-06 (S.D.N.Y. 1997).[14] A proposed relevant market must include all "products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered." *PepsiCo*, 315 F.3d at 105 (quotation marks omitted). For purposes of defining a market, "[p]roducts will be considered to be reasonably interchangeable if consumers treat them as acceptable substitutes." *Id.* (internal quotation marks omitted).

Here, as noted above, the plaintiffs' complaint alleges that SESAC has harmed competition in the "SESAC Repertory Performance Rights Market," defined as the market for "the performance rights to the copyrighted material in the SESAC repertory, which repertory

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[14] Although there is Second Circuit authority suggesting that a conspiracy-to-monopolize claim does not require rigorous proof of a relevant market, SESAC logically cannot have conspired to monopolize the "SESAC Repertory Performance Rights Market" if that market does not exist. *See Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP,* 612 F. Supp. 2d 330, 363 (S.D.N.Y. 2009) ("There quite plainly is no admissible evidence supporting the existence of the alleged [relevant market], so the very notion of a conspiracy to monopolize it is an oxymoron – one cannot monopolize something that does not exist."). In any event, the complaint itself alleges that SESAC and others "have conspired to monopolize the SESAC Repertory Performance Rights Market," Am. Compl. ¶ 96, so the plaintiffs cannot now support their conspiracy claims on some other basis.

In addition, the plaintiffs have previously contended that the Second Circuit's decision in *PepsiCo*, 315 F.3d 101, renders proof of a relevant market unnecessary under Section 2 where there is direct proof of monopoly power through a firm's control of prices or exclusion of competition. But *PepsiCo*'s statement regarding the necessity of establishing of a relevant market was merely dicta, and the court ultimately concluded that the plaintiffs had *not* established direct proof of monopoly power. *Id.* at 107-09. Indeed, the Second Circuit has subsequently recognized that it makes no sense to assert that a defendant has the power to control prices or exclude competition without some reference to the market in which the alleged harm was felt – and, consistent with this recognition, has explained that a "plaintiff *cannot escape proving her claims with reference to a particular market* even if she intends to proffer direct evidence of controlling prices or excluding competition." *Heerwagen v. Clear Channel Commc'ns.*, 435 F.3d 219, 229 (2d Cir. 2006) (emphasis added).

changes throughout the Class Period." Am. Compl. ¶ 64. In other words, the market has been defined to include (a) licenses issued by SESAC, as well as (b) direct or source licenses covering works in SESAC's repertory; but not (c) licenses for performance rights to works outside SESAC repertory, whether those licenses are issued by ASCAP, BMI, or a copyright owner. *See id.*; *compare Nat'l Cable Television Ass'n*, 772 F. Supp. at 642 (relevant market is for performance licenses); *CBS Remand*, 620 F.2d at 934 (relevant market is "licensing of performing rights to the television networks"); *Broad. Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 762 (D. Del. 1981) (relevant market is performance rights sold to "GLA licensees"), *aff'd*, 691 F.2d 490 (3d Cir. 1982) (unpublished table decision); *Affiliated Music Enters.*, 268 F.2d at 15 (relevant market is "the performance rights in gospel music").

The plaintiffs ground their proposed relevant market in the notion that stations are locked into needing the rights to perform musical compositions embedded in third-party programming and, thus, that performance rights to works outside the SESAC repertory are not substitutes for SESAC's product. Am. Compl. ¶ 62. But the plaintiffs cannot prove their proposed relevant market, for two reasons. First, it is contradicted by the testimony of the plaintiffs' own economic expert that *nothing* is interchangeable with SESAC's product – testimony that forecloses a conclusion that the market includes anything other than the SESAC blanket license itself. Jaffe Dep. [SJK Decl. Ex. 17] 127:20-128:2. Second, the plaintiffs' proposed market is unsupported by the facts: their lock-in theory makes no sense with respect to music in locally produced programming, and proves too much with respect to music in third-party programming.

A. The Testimony Of The Plaintiffs' Own Economic Expert Contradicts The Complaint's Proposed Market Definition.

As noted above, the plaintiffs' proposed relevant market encompasses licenses of any sort – blanket, per-program, direct, or source – for performance rights to the works in SESAC's

repertory. That market can be supported only if SESAC's blanket license is "reasonably interchangeable" with all of these. *See, e.g.*, *Grp. Health*, 649 F.3d at 155 ("[W]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient." (quotation marks omitted; bracket in original)); *PepsiCo*, 315 F.3d at 109 (upholding grant of summary judgment on ground that the plaintiffs' proposed relevant market was defective).

Dr. Jaffe claimed in his report that, as alleged in the complaint, there is a distinct market for "performance rights of music in the SESAC repertory on local television." Jaffe Report [SJK Decl. Ex. 1] 55. At his deposition, however, Dr. Jaffe testified that SESAC's blanket license is not interchangeable with *anything* – including any other licenses to perform works in the SESAC repertory. Jaffe Dep. [SJK Decl. Ex. 17] 127:20-128:2. Thus, under Dr. Jaffe's view of music licensing, the relevant market actually is just the market for SESAC's blanket license. That is a "market" in which SESAC cannot logically harm competition, because – by definition – the only entity that can sell the SESAC blanket license is SESAC itself. *See supra* pp. 34-35. But it is also a market different from the one alleged in the plaintiffs' complaint. In other words, the necessary implication of Dr. Jaffe's testimony is that the "market" in which the plaintiffs claim SESAC has harmed competition does not actually exist. The plaintiffs therefore cannot meet their burden of proving that market, so all counts must be dismissed. *See, e.g.*, *Monsanto v. Scruggs*, 342 F. Supp. 2d 568, 581-82 (N.D. Miss. 2004) (granting summary judgment on monopolization claim in part because relevant markets offered by counter-plaintiffs' experts conflicted with the complaint), *aff'd*, 459 F.3d 1328 (Fed. Cir. 2006).

B. The Complaint's Proposed Market Definition Is Unsupported By The Facts.

Even taking the complaint at face value, the plaintiffs' market definition cannot be sustained. As alleged in the complaint, the proposed relevant market encompasses "the performance rights to the copyrighted material in the SESAC repertory." Am. Compl. ¶ 64. Thus, if a particular work is in the SESAC repertory, the performance rights to that work allegedly are part of the proposed market, regardless of how those rights are sold. And if a particular work is *not* in the SESAC repertory, the performance rights to that work allegedly are *not* part of the proposed market.

With respect to music in locally produced programming, the proposed market is too narrow. It is undisputed that stations can choose the music in locally produced programming. SUF ¶¶ 7-8. It is likewise undisputed that, in doing so, they can choose among rightsholders affiliated with *any* of the three PROs. SUF ¶ 8. The plaintiffs' own expert has conceded as much, as have representatives from the plaintiffs and other station groups. SUF ¶ 8. And the record is replete with evidence of stations using music affiliated with ASCAP or BMI for their local news – not to mention evidence of stations switching from a SESAC composer to an ASCAP or BMI composer. SUF ¶¶ 85-88. The record conclusively demonstrates, in short, that performance rights for SESAC-affiliated music in locally produced programming are reasonably interchangeable with performance rights for ASCAP- and BMI-affiliated music used in such programming – and, thus, that the proposed market is too narrow.

With respect to music in third-party programming, the plaintiffs' problem is that their lock-in theory proves too much. The plaintiffs contend that they cannot control the music in third-party programming, and are locked into needing the rights to whatever works happen to be embedded in the programs they have agreed to broadcast. Am. Compl. ¶¶ 4-9, 14-17. For that

reason, the plaintiffs contend, the performance rights to a particular work in the SESAC repertory are not reasonably interchangeable with the performance rights to works in the ASCAP and BMI repertories. Am. Compl. ¶ 13.

But even if such a lock-in theory is legally cognizable as a basis for a relevant antitrust market, the plaintiffs' lock-in theory does not yield the conclusion that (as alleged in the complaint) there is a single market for performance rights to all works in the SESAC repertory. If the performance rights for the *Seinfeld* theme (to take one example of a SESAC-affiliated work) are not interchangeable with the performance rights to ASCAP or BMI works, that is not because there is something special about SESAC-affiliated works in general. Rather, it is because there is something special about the *Seinfeld* theme in particular – namely, that the *Seinfeld* theme has been embedded in *Seinfeld*. Under the plaintiffs' lock-in theory, the performance rights to the *Seinfeld* theme are no more interchangeable with the performance rights to any other SESAC-affiliated work – no matter how much it may sound like the *Seinfeld* theme – than they are with ASCAP- or BMI-affiliated works. Accordingly, the plaintiffs' lock-in theory does not actually support the "SESAC repertory" relevant market alleged in the complaint. Instead, it suggests that there are as many relevant markets as there are SESAC-affiliated works embedded in third-party programming – and, thus, that the notion of a single "SESAC Repertory Performance Rights Market" is too broad. All counts must be dismissed.

V. COUNT 1 MUST BE DISMISSED BECAUSE THE PLAINTIFFS CANNOT DEMONSTRATE THAT THERE ARE NO REALISTICALLY AVAILABLE ALTERNATIVES TO SESAC'S BLANKET LICENSE.

There is a further reason why the plaintiffs' Section 1 claim must be dismissed: they cannot show that an alternative to the blanket license was not "realistically available," as required by Second Circuit precedent. In *Buffalo Broadcasting*, the Second Circuit – relying on

its earlier decision in *CBS Remand* – made clear that, as a matter of law, a plaintiff cannot demonstrate that blanket licensing constitutes a "restraint" within the meaning of Section 1 if the plaintiff cannot demonstrate the absence of realistically available licensing alternatives to the blanket license. *See* 744 F.2d at 925; *id.* at 932 (inquiry is whether blanket license "is functioning to restrain willing buyers and sellers from negotiating for the licensing of performing rights to individual compositions at reasonable prices"). The Second Circuit then proceeded to consider whether the plaintiffs had shown that direct licensing, source licensing, and per-programming licensing were not "realistically available." *Id.* 926-31. In each instance, the court held, as a matter of law, that the plaintiffs had not made the requisite showing. *See id.* at 926-29, 931. This Court should reach the same conclusion here.[15]

A. <u>The Plaintiffs Cannot Show That SESAC's Per-Program License Has Not Been Realistically Available.</u>

Like the plaintiffs in *Buffalo Broadcasting*, the plaintiffs here cannot show that SESAC's per-program license – a form of license allowing a station to perform any work from SESAC's repertory, but pay for only those programs that use SESAC music – has not been realistically available during the proposed class period. *First*, for the plaintiffs to make this showing, they must show that the per-program license's price, "in an objective sense," is "higher than the value of the rights received." *Buffalo Broadcasting*, 744 F.2d at 926; *see id.* at 926-27 (plaintiffs cannot merely show that the per-program license was more expensive than the blanket license). The plaintiffs cannot do so. In particular, they can point to no evidence of the value of the rights conveyed by the per-program license – namely, the right (a) to perform any work in the SESAC

[15] To be clear, the Second Circuit did not hold in *Buffalo Broadcasting* that a plaintiff who shows the unavailability of alternatives to the blanket license is excused from showing harm to competition, or that such a plaintiff has necessarily demonstrated the existence of a restraint. Rather, the court merely held that, without showing that alternatives are unavailable, a plaintiff *cannot* demonstrate the existence of a restraint. *See Buffalo Broadcasting*, 744 F.2d at 925, 933.

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repertory without fear of copyright infringement; but (b) to pay on a per-program basis. Because the plaintiffs can point to no evidence of the value of the rights conveyed, they necessarily cannot show (as *Buffalo Broadcasting* demands) that the price of the per-program license is objectively higher than that value.[16]

Second, the plaintiffs will likely stress that no stations ultimately elected the per-program license for 2008 to 2012. Am. Compl. ¶ 45. But that fact does not demonstrate that SESAC's per-program license was not realistically available, for these circumstances are materially identical to those in *Buffalo Broadcasting*. In *Buffalo Broadcasting*, none of 750 stations had elected the ASCAP per-program license, and only two of 750 had elected the BMI per-program license. *See Buffalo Broadcasting Co. v. ASCAP*, 546 F. Supp. 274, 282 (S.D.N.Y. 1982). Notwithstanding this fact, the Second Circuit held – as a matter of law – that the plaintiffs had not established that the per-program license was not realistically available. *See Buffalo Broadcasting*, 744 F.2d at 926-28.

Finally, the plaintiffs will likely point to evidence that SESAC wanted to reduce the savings available to stations under the per-program license, and that the terms of the proposed 2008-2012 per-program license were less favorable to stations than the terms of the 2005-2007 per-program license. *See* Jaffe Report [SJK Decl. Ex. 1] 73-83. But none of this evidence establishes that the SESAC per-program license was not "realistically available" to stations. Evidence that SESAC wanted to reduce the magnitude of savings from the per-program license is not evidence that the per-program license was rendered no longer realistically available. As for comparisons between SESAC's proposed 2008-2012 per-program license and its 2005-2007 per-program license, such comparisons logically could suggest a lack of realistic availability

[16] As explained above, SESAC has no antitrust obligation to offer per-program licenses in the first place. *See supra* pp. 40-42.

only if the 2005-2007 SESAC per-program license represented the absolute floor of realistic availability. The record contains no evidence that it did.

B. <u>The Plaintiffs Cannot Show That Direct and Source Licensing Have Not Been Realistically Available.</u>

Even if the plaintiffs were able to establish that the per-program license was not "realistically available," their claims would nonetheless fail because they cannot meet their burden of proving that neither source nor direct licenses were available during the class period.

There is no genuine issue of material fact as to whether source licensing is a realistically available alternative to the blanket license. That is because, as in *Buffalo Broadcasting*, the plaintiffs cannot demonstrate that they have actually *tried* – and failed – to negotiate for source licenses with program producers. *Buffalo Broadcasting*, 744 F.2d at 928, 930-31. *First*, it is not disputed that the plaintiffs (like local station groups in general) have not attempted on their own to obtain source licenses covering SESAC music. SUF ¶ 58. One station representative after another testified that they have never sought source licenses on their own. SUF ¶ 58. In the words of one plaintiff station manager, it simply "doesn't come up in the process of negotiations. . . . It's not something I ask." SUF ¶ 82; SJK Decl. Ex. 5, at 106:14-22.

Second, the record does contain evidence of a failed campaign by MRI in 2009 to secure source licenses on stations' behalf. SUF ¶¶ 65-66. Yet that campaign, as a matter of law, does not permit a conclusion that source licensing is not a realistically available alternative. For one thing, MRI's effort to obtain source licenses was underwritten by the TMLC, was coordinated with counsel for the TMLC (and for the plaintiffs in this case), and took place well after the TMLC began planning for this litigation. SUF ¶¶ 59, 61-63, 101. MRI's effort therefore is directly akin to the plaintiffs' "transparent effort" in *Buffalo Broadcasting* "to assemble in the midst of litigation evidence that they had seriously tried to obtain source licensing." 744 F.2d at

931; *see id.* (affirming decision not to give "any probative weight" to an effort that was "darkened by the shadow of the approaching trial"); *see also Nat'l Cable Tel. Ass'n.*, 772 F. Supp. at 633 (rejecting reliance on direct license attempts that "did not begin . . . until after BMI had filed the infringement suit against it, which calls into question the results obtained").[17]

For another thing, there is no evidence that MRI's effort included any discussion of what producers would be paid for source licenses. SUF ¶ 65. In *Buffalo Broadcasting*, the Second Circuit deemed the plaintiffs' source licensing efforts legally insufficient because they did not include "the customary indicator of a buyer's seriousness in attempting to make a purchase – an offer of a sum of money." 744 F.2d at 931. That same failing dooms MRI's efforts here. MRI's overtures to producers included suggestions of administrative convenience and transparent accounting – but glaringly omitted any offer of a price. In the absence of "an offer of a sum of money," *id.*, it is no surprise that program producers were resistant to departing from the "longstanding industry practice," Am. Compl. ¶ 8, of expecting broadcasters to obtain performance rights from a PRO. As a matter of law, the plaintiffs are therefore unable to point to any evidence supporting the conclusion that source licenses were not realistically available.

Nor can the plaintiffs meet their burden of proving that direct licenses – that is, licenses secured directly from SESAC affiliates – were unavailable during the class period. *Buffalo Broadcasting* made clear that, to show that direct licensing is not realistically available, a plaintiff must present evidence that it has tried to secure direct licenses – and that it has failed. *See Buffalo Broadcasting*, 744 F.3d at 928; *see also Nat'l Cable Tel. Ass'n*, 772 F. Supp. at 633 (finding that no attempts to direct license by plaintiffs, and few by cable industry overall,

[17] The record also contains some evidence that, outside the context of the campaign discussed above, MRI *succeeded* in obtaining source licenses for the music in certain shows. SUF ¶ 58. Such evidence, of course, cannot establish that source licenses have not been realistically available for stations; rather, it suggests just the opposite.

foreclosed conclusion that direct licensing was unavailable). Here, the record generally is one of the stations *not trying* to obtain direct licenses – just like the plaintiffs in *CBS Remand*, *Buffalo Broadcasting*, and *National Cable Television Association*. SUF ¶¶ 81-83.

Still, the plaintiffs likely will claim that direct licensing should be deemed unavailable because of restrictions contained in SESAC's agreements with certain high-earning affiliates receiving significant advances or guarantees. Jaffe Report [SJK Decl. Ex. 1] Appendix E. But again, there is no more than a scintilla of evidence that the plaintiffs – or any station, for that matter – ever attempted to obtain direct licenses from any of these affiliates during the class period. One cannot know whether stations would have succeeded in direct licensing had they tried, so the mere presence of restrictions cannot be said to have rendered direct licensing unavailable.

The sole possible exception to the absence of unsuccessful direct licensing efforts relates to Stephen Arnold, a SESAC-affiliated composer of music for locally produced programming – especially local news – who, until the end of 2011, was subject to certain restrictions on his ability to issue direct licenses. SUF ¶¶ 79-80. During the class period, a handful of stations arguably made some effort, but failed, to obtain direct licenses from Mr. Arnold. Yet Stephen Arnold is just one of SESAC's more than 20,000 affiliates. SUF ¶ 41. Even if direct licenses for Mr. Arnold's music were deemed not realistically available, there is no basis to conclude that direct licensing *in general* is not a realistic alternative to a blanket license from SESAC. That is particularly true because it is undisputed that, as a composer of music for local news, Stephen Arnold is a composer whose music stations can readily choose not to perform. SUF ¶¶ 7-8, 85-88.

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The plaintiffs may also point to evidence of failed attempts by station groups to obtain direct licenses from Mr. Arnold in 2006 or 2007. These efforts, however, took place *before* the proposed class period. In the absence of comparable efforts *during* the class period, earlier unsuccessful efforts cannot establish the unavailability of direct licensing during that period. And again, it is undisputed that stations can choose what music to incorporate in their locally produced programming, including local news – and have numerous options other than Stephen Arnold. SUF ¶ 7-8, 86. If Mr. Arnold declined to issue a direct license to a station, the station could simply switch news music composers – as more than one hundred stations advised Mr. Arnold they were doing in 2006. SUF ¶ 85.

Alternatively, the plaintiffs may assert that source and direct licenses for SESAC music were not realistically available *because* SESAC's per-program license was not available, in that any direct or source license would therefore have resulted in double-paying for the same music. But as set forth above, the evidence is insufficient to permit a conclusion that SESAC's per-program license was not realistically available.

Even if the per-program license was unavailable, moreover, the prospect of double-payment under SESAC's blanket license – as a matter of law – would not make direct or source licensing unavailable. In *CBS Remand*, for example, CBS argued that direct licensing was not realistically available because "any money spent to acquire performance rights from individual copyright owners would be wasted once CBS had already paid ASCAP and BMI for performance rights to all music." 620 F.2d at 937. The Second Circuit disagreed, reasoning that "nothing prevented CBS from attempting to obtain from the copyright owners performance rights for some interval following expiration of the term of the blanket license." *Id.*; *see also Nat'l Cable Tel. Ass'n*, 772 F. Supp. at 633 (noting HBO's failed argument that "so long as the

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blanket license exists, direct licensing will not be economically feasible"). There is no reason for a different conclusion here.

VI. COUNTS 2 AND 3 MUST BE DISMISSED BECAUSE THE PLAINTIFFS CANNOT SHOW THAT SESAC'S SUPPOSED "MONOPOLIZATION" HAS RESULTED FROM ANTICOMPETITIVE OR EXCLUSIONARY CONDUCT.

Section 2 of the Sherman Act, by its terms, makes it unlawful to "monopolize" any part of interstate commerce, or to conspire to do the same. But Section 2 does not actually bar all monopolization, only "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Linkline*, 555 U.S. at 447-48 (quotation marks omitted); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 201 n.14 (2d Cir. 2006) (same). Because Section 2 claims do not require a showing of concerted activity, the standard for proving a Section 2 violation is more stringent than the standard under Section 1. *See, e.g.*, *American Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2209 & n.2 (2010). Among other things, a Section 2 plaintiff must prove not only harm to competition, but also conduct that is itself wrongful or exclusionary on the monopolist's part. *See, e.g.*, *Trinko*, 540 U.S. at 407 (explaining that "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*"); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (noting that such conduct "comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way" (quoting 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* 78 (1978))); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007); *Virgin Atlantic Airways Ltd.*, 257 F.3d at 265-73; *A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 249 (S.D.N.Y. 2004).

Here, the plaintiffs claim that SESAC has unlawfully monopolized (and conspired with its affiliates to monopolize) the supposed "SESAC Repertory Performance Rights Market."[18] Am. Compl. ¶¶ 83-97. The crux of the plaintiffs' monopolization claims is that SESAC has ensured that only it – and not its affiliates – will sell performance rights to the works in SESAC's repertory. *Id.* ¶¶ 85-86. According to the plaintiffs, SESAC has excluded the affiliates as competitors by offering the blanket license, failing to offer a "viable" per-program license,[19] and preventing certain affiliates from issuing direct licenses. *Id.* ¶ 86. But even assuming the proposed market is valid, the plaintiffs cannot show that SESAC's monopoly power (if any) in that market results from conduct that is wrongful or exclusionary. The Section 2 claims must therefore be dismissed.[20]

First, and most fundamentally, the plaintiffs cannot show that anyone has actually been "excluded" from competing. As noted above, the plaintiffs claim essentially that SESAC has prevented its affiliates from selling performance rights to the works in SESAC's repertory. But the complaint makes clear that, in the plaintiffs' view, SESAC's affiliates are actually the *beneficiaries* of the supposed monopolization scheme. *See, e.g.*, Am. Compl. ¶ 34 (alleging that SESAC's affiliates have affiliated with SESAC with the expectation of supracompetitive profits). It likewise makes clear that SESAC's affiliates *are* participating in the supposed "SESAC Repertory Performance Rights Market" – as suppliers of SESAC. *See, e.g.*, *id.* ¶ 60. And the

[18] The plaintiffs' conspiracy-to-monopolize claim appears to rest on the same theory as their monopolization claim. The arguments set forth in this Part apply equally to both claims.

[19] As discussed above, SESAC has no obligation to offer a per-program license because it has no obligation to price or bundle its product in any particular manner. Thus, even assuming SESAC did not offer a "viable" per-program license, its conduct still would not be wrongful because it had no obligation to offer a per-program license in the first place. *See supra* pp. 40-42.

[20] Dismissal of both Section 2 claims is also appropriate because the plaintiffs cannot show harm to competition, as set forth in Part III above, and because they cannot prove their proposed relevant market, as set forth in Part IV above.

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record does not contain more than a scintilla of evidence that any SESAC affiliate – with the possible exception of Stephen Arnold – even *wanted* to issue direct or source licenses during the proposed class period and was prevented from doing so. *See supra* pp. 32, 54-55. SESAC's affiliates, in short, have not been "excluded" from the market in any meaningful way.

Because SESAC's affiliates have not actually been excluded from the market, the monopolization claims must be dismissed. Paradigmatically, successful monopolization claims are ones in which a seller forces out rivals that wish to compete but are prevented from doing so. *See, e.g.*, *Aspen Skiing*, 472 U.S. at 600-11; *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 795-802, 814-16, 828 (2d Cir. 1983); *see also Kelco Disposal, Inc. v. Browning-Ferris Industries of Vt., Inc.*, 845 F.2d 404, 406-09 (2d Cir. 1988) (attempt to monopolize), *aff'd*, 492 U.S. 257 (1989). This case is entirely different from those: SESAC's rivals, ASCAP and BMI, have not been foreclosed from competing. To the contrary, Dr. Jaffe has stressed that substantially every station takes a blanket or per-program license from *all three* PROs. Jaffe Report [SJK Decl. Ex. 1] 22, 85. We are aware of no case in which a firm has been held to have unlawfully monopolized a market by "excluding" entities that serve as its own suppliers, or that are actually the beneficiaries of the supposed monopolization. Such a theory is even less plausible where, as here, each supplier has a lawful monopoly in the first instance. *See supra* pp. 43-44.

Second, the plaintiffs have defined the relevant market in such a manner that SESAC inevitably will have overwhelming market share. If (as Dr. Jaffe has testified) *nothing* is reasonably interchangeable with SESAC's blanket license, SUF ¶ 34, then the market consists solely of the SESAC blanket license, and SESAC will automatically have a market share of 100%. *See supra* pp. 34-35. As a matter of logic, SESAC's "monopoly" over its own product – a product that, by definition, nobody else can sell – cannot have resulted from conduct that is

wrongful. To the contrary, that "monopoly" is inevitable. It therefore cannot support a Section 2 claim. *See TV Commc'ns Network, Inc. v. Turner Network Television, Inc.,* 964 F.2d 1022, 1025 (10th Cir. 1992) (firm cannot be held to have unlawfully monopolized a market in which, by definition, nobody else can compete); *see also E & L Consulting Ltd. v. Doman Indus. Ltd.*, 360 F. Supp. 2d 465, 475 (E.D.N.Y. 2005) (natural monopoly in a party's own product does not violate the antitrust laws), *aff'd*, 472 F.3d 23 (2d Cir. 2006); *Disenos Artisticos E Industriales, S.A. v. Work*, 714 F. Supp. 46, 47-48 (W.D.N.Y. 2000) (firm does not unlawfully monopolize a market defined as containing only its product); *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 775 F. Supp. 536, 544 (N.D.N.Y. 1991) (supplier may maintain and enforce its natural monopoly in the distribution of its own product); *cf. E.I. du Pont de Nemours & Co.*, 351 U.S. at 392-93 ("A retail seller may have in one sense a monopoly on certain trade because of location . . . or because no one else makes a product of just the quality or attractiveness of his product . . . . Thus one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." (citation omitted)).

Even if the relevant market includes non-SESAC sources of performance rights for music in the SESAC repertory, moreover, that market still is one in which SESAC inevitably will have overwhelming market share (even if not 100%). Even with respect to ASCAP and BMI music, Dr. Jaffe has conceded that there is relatively little licensing of music in third-party programming through sources other than ASCAP and BMI, SUF ¶ 67 – and that is true even though ASCAP and BMI have been subject to consent decrees for decades. Especially against this background,

there is no reason to conclude that *SESAC's* licensing practices have foreclosed any substantial amount of source licensing of *SESAC*-affiliated music in third-party programming. *Cf.* Jaffe Dep. [SJK Decl. Ex. 17] 64:5-15 ("Q. And do you believe that [the hypothetical competitive world] would come about if SESAC were to cease the anticompetitive practices that you believe harm competition? A. I don't know.").

CONCLUSION

For the foregoing reasons, SESAC's motion for summary judgment should be granted.

Dated: New York, New York
June 14, 2013

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