EXHIBIT 12

HIGHLY CONFIDENTIAL
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IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

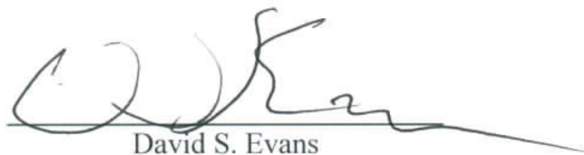
SESAC, LLC and JOHN DOES 1-50,

Defendants.

Case No. 09 Civ. 9177 (PAE)

AMENDED EXPERT REPORT OF DAVID S. EVANS

April 19, 2013



David S. Evans

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I. Introduction

A. Qualifications

1. My name is Dr. David S. Evans. I am the Chairman of Global Economics Group, LLC and based in its Boston office. I also hold two academic appointments. I am the Executive Director of the Jevons Institute for Competition Law and Economics and Visiting Professor at the University College London and Lecturer at the University of Chicago Law School. In addition, I am the founder and publisher of Competition Policy International (CPI), a media property that publishes journals, provides instructional courses, and provides information for the global antitrust profession. I have BA, MA, and Ph.D. degrees in economics all from the University of Chicago. My curriculum vitae is attached as Appendix A.

2. As an economist, I specialize in the field of industrial organization, which concerns the behavior of firms and their interactions, and in antitrust economics, which is the portion of industrial organization that concerns the analysis of business practices that could limit competition and harm consumers. I have a particular expertise in the study of multi-sided platforms that serve as intermediaries between several groups of customers.

3. I have written five major books and more than 100 scholarly articles, many of which concern industrial organization and antitrust. My work has been widely read and cited. I am ranked among the top 3 percent of economists by IDEAS/Repec which tracks publications and citations by economists worldwide.[1] Like many social scientists, I post much of my work on the Social Science Research Network (SSRN).[2] As of March 1, 2013, based on quality-weighted citations, I ranked 187 out of the top 30,000 social scientists globally that SSRN

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[1] Many of my publications and citation rankings are available at http://ideas.repec.org/e/pev9.html.

[2] My SSRN publications are available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=268756.

reports citation data for, 159 out of the top 8000 economics professors globally that SSRN reports citation data for, and 5 out of the top 3000 law professors globally that SSRN reports citation data for.[3]

4. Over the last 25 years, I have taught classes on antitrust economics at Fordham University Law School, University College London Faculty of Laws, and the University of Chicago Law School. Currently, in addition to my Spring 2013 class at the University of Chicago, I am teaching an online course, sponsored by Competition Policy International, for several hundred antitrust officials and practitioners from around the world. In addition, I have served on the faculty for the American Bar Association Annual Antitrust Meetings on three occasions. In April 2013, I will be a member of panel that is presenting on the antitrust analysis of multi-sided platforms at the Spring Meetings of the ABA Antitrust Section. I have also been invited to teach various aspects of antitrust economics to judges. In 2009-2010, I taught classes for judges, including basic economic principles and intellectual property, in the European Union for a program sponsored jointly by the University College London and the Toulouse School of Economics. In February 2013, I was asked by the Chinese State Ministry of Industry and Information Technology (MIIT) to teach certain aspects of antitrust economics, including market definition and bundling and tying, to judges from the Chinese Supreme Court and provincial appeals courts.

5. I have been retained by several governmental entities to provide consulting on antitrust matters. The Organization for Economic Cooperation and Development (OECD) asked me to direct the drafting of its report on the antitrust analysis of multi-sided platforms. This was a

[3] Rankings are based on a quality-weighted citation index called the Author-Level Eigenfactor Score. These rankings as well as rankings by downloads are available at http://www.ssrn.com/institutes/top_authors_transfer_files/top_authors_transfer_files.html.

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joint effort involving many of the world's competition authorities.[4] The OECD has also asked me to participate in two other meetings of competition officials concerning the drafting of reports on antitrust topics. I was also retained by the Mexican Federal Competition Commission to draft, with co-authors, reference documents for handling market definition and market power.[5] I am a regular invited speaker at antitrust conferences and at competition authorities around the world.

6. I have participated in the preparation of two amicus briefs before the US Supreme Court by economists on antitrust issues. I was the lead author of and signatory to amicus briefs signed by economists before the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), regarding certiorari, which was granted, and then on the merits.[6] I was a contributing author of, and signatory to, briefs signed by economists concerning certiorari, which was granted, and then on the merits in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).[7] That amicus brief summarized the theoretical and empirical economic learning on vertical restraints and was cited as part of the basis for the Court's

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[4] Organization for Economic Co-operation and Development (2009), "Two Sided Markets," *Publications: OECD Policy Roundtable Reports*, *available at* http://www.oecd.org/daf/competition/44445730.pdf.

[5] Howard H. Chang, David S. Evans and Richard Schmalensee (2011), "Assessment of the Relevant Market in Competition Matters," *available at* http://www.cfc.gob.mx/images/stories/Noticias/DocsDiadelaCompetencia2011/1mercadorelevante.pdf (prepared for the Federal Competition Commission of Mexico); Howard H. Chang, David S. Evans and Richard Schmalensee (2011) "Assessment of Market Power in Competition Matters," *available at* http://www.cfc.gob.mx/images/stories/Noticias/DocsDiadelaCompetencia2011/3podersustancialdemercado.pdf (prepared for the Federal Competition Commission of Mexico).

[6] Brief of Amici Curiae Economists in Support of Petitioners, *Bell Atlantic Corporation, et al. v. William Twombly, et al*, 550 U.S. 544 (2007) (No. 05-1126).

[7] Brief for Economists in Support of Petitioner as Amicus Curiae, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480); Brief for Economists as Amicus Curiae in Support of the Petition for Writ of Certiorari, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (No. 06-480).

decision in that matter which involved a particular vertical restraint known as resale price maintenance.[8]

7. I have provided expert consulting on antitrust and related regulatory matters since 1975 beginning with *US v. IBM* on behalf of IBM. Since 2000, I have developed an international practice. I have testified or submitted testimony, to courts and regulatory authorities, in Australia, Brazil, China, the European Union as well as the United States. In addition, I have been asked to testify before several committees of the U.S. Congress on financial regulatory issues including the Senate Banking Committee, the House Financial Services Committee, and the House Oversight Committee. I have also testified in U.S. federal and state courts on a variety of non-antitrust matters principally involving the application of statistics to the analysis of discrimination.

B. Assignment

8. I have been asked by counsel for SESAC to examine and respond to, from the standpoint of antitrust economics and industrial organization, the plaintiffs' claims and the expert report submitted by Professor Adam Jaffe.

9. SESAC is paying Global Economics Group for my time, which is being billed at a rate of $675 an hour, and the time of the research staff working on this matter. Global Economics Group, of which I am an owner, will in turn compensate me. Neither its compensation nor mine depends on the outcome of this matter.

[8] *Leegin Creative Leather Products, Inc v. PSKS, Inc.*, 551 U.S. 877, 889 (2007) ("In the theoretical literature, it is essentially undisputed that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects.").

C. Overview of My Research

10. In reading the plaintiffs' complaint and their expert's report, I was struck by the absence of any basic economic analysis or factual foundation concerning the elements of how music makes its way into local television programming. I concluded that to evaluate the claims they were putting forward it was necessary to investigate and take into account how composers are hired by producers of television programming; how television programs are licensed by local television stations; how performance rights are assigned to composers, producers, or local television stations; how performance rights organizations (PROs) compete with each other; and how PROs license performance rights.

11. In addition to conducting the economic research necessary to understand the relationships between the composer, producer, station, and PROs, working with my staff, I conducted research into the specific claims in this matter and reviewed a substantial part of the evidentiary record produced in this case. To facilitate that effort, I was given access to the document productions made in this case by SESAC, the plaintiffs, and third parties. I also spoke with representatives of SESAC and with Keith Zajic, whom SESAC has retained as an expert in this matter, and reviewed the expert report that I understand Mr. Zajic will be submitting.

12. Finally, although I am extensively familiar with the literature from my work on antitrust economics I consulted and reviewed the economic literature concerning bundling, tying, and vertical restraints.

Appendix C lists all documents that I considered in forming my opinions relating to this matter. I also relied on my general knowledge of economics, industrial organization, antitrust economics and media markets. The opinions expressed in this report are based on the

information available to me at this time. My work in this matter is ongoing, and I reserve the right to revise or supplement my opinion if any additional information makes it appropriate.

D. Summary of Opinions

13. Based on my analysis I have reached four key conclusions.

14. First, the plaintiffs and their economic expert have largely ignored the business realities of how producers hire composers and how local stations license television programming. They ignore the fact that producers normally negotiate "work-for-hire" contracts with composers in which the producer obtains all rights, including the performance rights, for original compositions; the demand and supply of composers for selection by producers; the fact that television station groups and individual stations negotiate contracts with producers or syndicators and can factor the absence of performance rights into the price they pay; and the demand and supply of television programming. As a result, the plaintiffs and their economic expert have essentially ignored most of the real details of the business of providing music in local television programming that necessarily are relevant to a proper economic analysis.

15. Second, the plaintiffs and their economic expert have produced no economic theory or evidence that shows that SESAC has harmed competition (or caused antitrust injury) or reduced output in any relevant antitrust market. In particular, there is no evidence—including supporting economic theory and facts—that SESAC has:

a. harmed competition for hiring composers, licensing television shows, or licensing performance rights and in so doing,

b. reduced the output of music in television programming, television programming, or performance rights for music.

16. Third, the plaintiffs and their economic expert have proposed a relevant antitrust market that makes no economic sense given their claims. They argue that SESAC's repertory, which accounts for only about 12 percent of all undiscounted local television blanket license fees, is the relevant antitrust product market. Assuming that the plaintiffs' lock-in theory can support an antitrust product market, the market that plaintiffs and their expert have proposed makes no economic sense with respect to embedded music in third-party programming because none of the performance rights in SESAC's repertory are substitutes for each other—a necessary economic condition for the inclusion of products in the same relevant market. That market also makes no economic sense with respect to locally-produced programming because SESAC has affiliate agreements with only a few of the composers that usually write for locally-produced shows and because stations can choose any composer they want, regardless of PRO affiliation.

17. Fourth, modern antitrust economics has found that the types of practices that the plaintiffs and their economic expert complain about are usually procompetitive. Plaintiffs and their economic expert have provided no basis in economic theory or empirical evidence that SESAC's practices are anticompetitive in this instance. Blanket licenses are a form of pure bundling. Restrictions on affiliates are a type of vertical restraint. Modern antitrust economics has found that pure bundling and vertical restraints are usually efficient practices that can harm competition only in limited circumstances. The plaintiffs and their economic expert have not shown or attempted to show that those limited circumstances apply to the facts here and in fact it is apparent that they do not.

E. Organization of Report

18. This report has six sections including this introduction and three appendices. Section II presents background on the use of music in programming that is broadcast by local television

stations. It describes the hiring of composers by producers, the licensing of programming by local television stations, and the role of performance rights. Section III provides a brief overview of the economic analysis of the plaintiffs' claims to motivate the organization of the remaining sections. Section IV examines the plaintiffs' analysis of market definition and market power and examines whether they have shown harm to competition or a reduction of output in a relevant antitrust market. Section V analyzes the plaintiffs' specific allegations concerning anticompetitive conduct. It also includes an examination of the plaintiffs' claim that the per-program license (PPL) offered by SESAC for the 2008-2012 contract "was not viable." In Sections II to V, I consider certain aspects of Professor Jaffe's analysis that are relevant to the plaintiffs' claims. In Section VI, I present a separate detailed analysis of Professor Jaffe's report. Appendix A contains my curriculum vitae. Appendix B provides supporting detail for my analysis of the PPL. Appendix C lists the documents that I have considered in forming my opinions in this matter.

II. Background

19. This section presents a summary of the industrial organization of the interconnected businesses of local station broadcasting, television show production, composing for television shows, and operating a PRO.

A. The Business of Music for Local Television Stations

1. Local television stations

20. I understand that local television stations make money principally by selling advertising slots to appear in programming they broadcast. Four basic categories of programming are aired by local television stations in order to attract audiences: (1) reruns of television series that originally ran on a network ("episodic reruns"); (2) programs produced originally for local

stations by third parties, such as game shows and talk shows ("first-run syndicated programs"); (3) movies released elsewhere or for television; and (4) local news shows that local stations produce themselves as well as some other locally produced programming. In addition, producers create commercials, which local stations broadcast between segments of shows and between shows. Local stations also broadcast infomercials, which are essentially long commercials during particular time slots.

21. I understand that if the station is affiliated with a television network, it will also carry the programming provided by the network, such as television series, news programs and sporting events (the so-called "network feed").[9] In the case of ABC, CBS, NBC, and Univision, the networks acquire performance rights for their respective network feeds on behalf of their respective affiliates, so that the performance rights for those network feeds are not relevant to the performance licenses for the local stations.[10] Other networks, such as Fox and the CW, do not acquire performance rights for their respective network feeds on behalf of their respective affiliates, so that the affiliates need to acquire performance rights themselves.

22. Episodic reruns, first-run syndicated programs, movies, infomercials, commercials, and network programming for the Fox and CW affiliates are referred to in this report as "third-party programming" since they are not produced by the local station that airs them. Virtually all third-party programming contains music.

23. Many local stations are part of groups that own multiple stations. Of the approximately 1,180 local stations in the United States, about 65 percent are part of groups and about 35

[9] Expert Report of Adam B. Jaffe, filed March 4, 2013, at 9 [hereinafter "Jaffe Report"].

[10] Jaffe Report, at 9.

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percent operate on their own.[11] The stations that belong to groups account for approximately 85 percent of SESAC's revenues from local stations and the stations that do not belong to groups account for about 15 percent.[12] Together, 8 groups account for 50 percent of SESAC's local television revenues.[13] These television station groups, including some of the named plaintiffs, are sometimes themselves owned by major media conglomerates.

24. As noted above, local television stations commonly produce some of their own programs.[14] Often, the producer of a show created by the local television station hires one or more composers for that show.[15] Within the category of locally produced programming, local news accounts for most of the viewership and advertising revenues and is therefore the category that I focus on.

25. The majority of the audience for local television stations, other than network programming for network affiliates, comes from reruns of episodic network television shows and from first-run television shows produced especially for local television stations.[16] The next section considers these syndicated television shows in detail.

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[11] These calculations are based on JAFFE_SESAC00001052. There were approximately 1,180 local stations during 2008-2012. These stations include the ones owned and operated by the ABC, CBS and NBC networks, which are not part of the putative class in this case.

[12] These calculations are based on JAFFE_SESAC00001052.

[13] These calculations are based on JAFFE_SESAC00001052.

[14] First Amended Complaint in Meredith Corporation, The E.W. Scripps Company, Scripps Media, Inc., Hoak Media, LLC, Hoak Media of Nebraska, LLC, and Hoak Media of Dakota, LLC v. SESAC, LLC and John Does, ¶ 3 [hereinafter, "First Am. Complaint"]; Jaffe Report at 11.

[15] Deposition of Richard D. Adams, November 6, 2012, 60: 22-25; Deposition of Douglas Lowe, November 14, 2012, 158:13-17 [hereinafter "Lowe Deposition"]; Deposition of Richard Heidt, November 21, 2012, 49:2-51:25.

[16] First Am. Compl., ¶¶ 4-5.

2. Production of syndicated television shows

26. Production companies produce programs for sale and licensing to networks and other broadcasters. I understand that generally a production company will pitch a program idea to various networks in hopes they will commission a pilot.[17] Some production companies are owned by or affiliated with a network.

27. Networks then pick the programs for which to commission pilot episodes. Most pilots do not end up being broadcast on any network;[18] for those shows that do get picked up, the network will usually purchase a specific number of episodes. The network can cancel the broadcast of the show, however, and can decide not to license episodes for subsequent seasons. Many shows that have been picked up end up being cancelled every season; relatively few shows last more than three seasons.[19]

28. I understand that at some point in the lifespan of the original production, producers put the show on the "syndication market," which refers to the process by which previously broadcast episodes of the shows are offered to local stations, or groups of local stations, for broadcast, usually on an exclusive basis, in the local markets of those stations.[20] The production company (or a syndicator acting on its behalf) enters into a contract with the local station or with the group owner of stations.[21]

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[17] Richard E. Caves (2005), *Switching Channels: Organization and Change in TV Broadcasting*, at 31-32 [hereinafter "Caves"].

[18] Harold L.Vogel (2011), *Entertainment Industry Economics: A Guide for Financial Analysis* (8th ed.), at 211 [hereinafter "Vogel (2011)"]; *see* Allen Scott (2004), "The other Hollywood: the organizational and geographic bases of television-program production," *Media, Culture & Society*, Vol. 26, No. 2, at 186.

[19] Vogel (2011), at 211-212; Caves, at 32.

[20] Vogel (2011), at 212-213.

[21] Vogel (2011), at 212-213.

29. The stations then rerun the original episodes usually daily, and look for shows that have many episodes.[22] Most syndicated television shows have run as original shows for more than 100 episodes.

30. My understanding is that the fees from networks usually do not cover the full cost of production so that shows that do not reach syndication end up losing money. [23] Only a small fraction yield high returns as a result of syndication fees.[24]

31. I understand that television producers also create shows that are not shown on network television in the first instance but instead are sold only to local stations.[25] The most popular shows in this category are talk shows and game shows.

32. I understand that television shows typically use theme music, music that transitions in and out of commercial breaks, and background music. This music is typically written specifically for each episode, and is customized to fit the episode's timing or content. A television show may also include music that was not written specifically for the show in question (sometimes as a feature performance); that is called "sourced" music in contrast with "original" music.

33. Producers hire composers to write original music. I understand that the contract typically involves the payment of a fixed fee and the assignment of some portion of the performance rights income in return for composing the music and producing and delivering recorded music for incorporation into the soundtrack for the show. The fee for the music

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[22] Alison Alexander, James Owers, Rod Carveth, C. Ann Hollifiled, and Alibert N. Greco (2004), *Media Economics: Theory and Practice* (3rd ed.).

[23] Vogel (2011), at 211.

[24] Vogel (2011), at 212.

[25] Vogel (2011), at 213; Jeffrey Ulin (2013), *The Business of Media Distribution: Monetizing Film, TV and Video Content in an Online World,* at 240.

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becomes part of the cost of producing the show while the producer's share of performance rights income could generate future revenues for the producer.

34. I understand that under U.S. copyright law, where a "work for hire" is created by the composer for the producer, the producer owns the music copyright.[26] This includes the right to include the music in soundtracks (what is known as a "synchronization right" or "synch right") and the right to publicly perform the composer's music, including via over-the-air broadcast (what is known as a "performance right").[27] However, my understanding is that, as with any intellectual property, the owner can sell or assign these rights, in whole or in part, to someone else. I understand that it is common for the producer of third party programming to retain the publisher's share of performance rights income (typically 50 percent) and for the composer to receive the writer's share of performance rights income (typically 50 percent).

3. Composers

35. Musicians compete to write music for television productions including commercials. Many operate a small business for this purpose, and some specialize in this activity and make their living from it.[28] I understand that producers can choose among many musicians who write for television programming as well as many other musicians who are vying for the opportunity to do so. The quality of composers varies, as is common in creative fields, so some composers are more successful than others in getting work. With that said, there are low barriers to entry for musicians seeking to compose for television.

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[26] James A. Johnson (2012), "Media Publishing: What the Songwriter and Practitioner Need to Know," *Entertainment, Arts & Sports Law Journal*, Vol. 22, No. 3, at 114 [hereinafter "Johnson (2012)"].

[27] Johnson (2012), at 114.

[28] David Baskerville and Tim Baskerville (2006), *Music Business Handbook and Career Guide*, (8th ed.), at chapter 26.

36. I understand that producers normally pay work-for-hire composers a combination of fixed fees (which are substantial) and a share of performance rights income.[29] As noted above, producers of third-party programming usually grant composers the writer's share of performance rights income. My understanding is that, for locally produced programming, suppliers of music commonly retain ownership of the copyright.

B. Performing Rights Organizations

37. I understand that performing rights organizations (PROs) were established in the early part of the 20th century to solve a significant market failure involving music.[30] Copyright holders had the exclusive right to perform their music publicly. However, it was difficult for them to protect this property right directly. Like any written work, it is easy to copy and distribute a score to people who have not paid for access to it. That music can then be played anywhere and at any time. It is essentially impossible for an individual composer to monitor where the music is played. Performers of the music, for their part, may have difficulty in meeting their legal obligations not to perform music without permission of the composer and, in most cases, to compensate the composer. At least in earlier, less connected, times it was very difficult to locate and negotiate with the composer. Even today, a broadcast station, for example, that uses music from multiple sources would encounter significant administrative burdens in fulfilling its obligations. If a composition is performed without permission, the performer is subject to significant penalties.

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[29] Film Music Magazine (2011), *Film Magazine 2011-2012 Film & TV Music Salary and Rate Survey,* at 5; Berklee College of Music, "Music Careers in Dollars and Cents 2012 Edition," at 3, *available at* http://www.berklee.edu/pdf/pdf/studentlife/Music_Salary_Guide.pdf.

[30] David Moser and Cheryl Slay (2012), *Music Copyright Law,* at 109-110.

38. PROs helped solve this market failure by becoming intermediaries—what economists call two-sided platforms[31]—between rights-holders (composers and publishers) and rights-users (anyone who performs or broadcasts a performance). The rights-holders join a PRO and give the PRO the right to represent them. The PRO then negotiates license fees with rights-users, monitors performances to make sure copyrights are not being violated, collects the fees, and compensates the composers.[32] Like many intermediaries, PROs receive compensation by taking what amounts to a commission on the royalties.

39. PROs provide a valuable service to rights-holders. The rights-holders do not have to engage in costly negotiation, collection, and monitoring activities. PROs thus increase the expected compensation that rights-holders can obtain from the time they spend composing. PROs provide a valuable service to rights-users as well. Rights-users can obtain the necessary permissions from a single entity rather than having to locate, negotiate, and transact with many individual rights-holders. They can make music decisions quickly rather than having to plan for the necessary time to negotiate with the rights-holders.

40. In the United States, the three PROs that license performance rights to musical compositions are ASCAP, BMI, and SESAC. Table 1 reports the three PROs' shares for 2010. SESAC is the smallest, accounting for about 6 percent of overall performance rights revenues and about 12 percent of undiscounted local television blanket license fees.

[31] For surveys of the literature, see David S. Evans and Richard Schmalensee, "The Antitrust Analysis of Multi-Sided Platform Businesses", in Roger Blair and Daniel Sokol, eds, *Oxford Handbook on International Antitrust Economics* (forthcoming; currently available on SSRN); Thomas. R., Eisenmann, Geoffrey Parker, and Marshall W. Van Alstyne (2006), "Strategies for Two-Sided Markets," *Harvard Business Review*, Vol. 84, No. 10; Marc Rysman (2009), "The Economics of Two-Sided Markets," *Journal of Economic Perspectives*, Vol.23, No. 3, at 125-144. In Sections V.I, VI.B.3 and VI.C, I discuss in greater detail the implications of the economic treatment of two-sided platforms for a proper analysis of the claims of the plaintiffs and their economic expert.

[32] Johnson (2012), at 114.

Table 1: Performing Rights Organizations' 2010 Revenue Shares[33]

PRO	*Share of Total Revenue*	*Share of Local Television Licensing Undiscounted Blanket License Fees*
ASCAP	47%	46%
BMI	47%	42%
SESAC	6%	12%

Sources: SESAC-0799264; JAFFE_SESAC00000782; Data from SESAC on blanket fees; ASCAP 2010 Annual Report; BMI 2010 Annual Report.

41. The PROs compete with each other for composers and publishers. I understand that composers often sign up with a PRO on an exclusive basis,[34] although they can leave existing music with a PRO with which they were previously affiliated. Composers also usually retain the right to negotiate directly with rights-users, although as I discuss below, this right may be limited if they are receiving significant guaranteed payments or advances. To secure leading composers, PROs may compete with each other by offering financial terms that give the composer a more stable or predictable income.

42. PROs also compete in the licensing of performance rights. I understand that rights-users typically want to use music from many different composers and therefore, potentially, from each of the PROs.[35] As is well known in the economics of two-sided platforms, there are

[33] The estimate of SESAC's share of local television blanket license fees in this table is based on its 2010 blanket fees before the discounts that were provided to many station groups and to stations that had recently dropped programs with SESAC music at the time of negotiations for 2008-2012 licenses. SESAC's share of local blanket license fees would be lower if those discounts were taken into account. The figures for ASCAP and BMI's blanket license fees are based on the publicly reported figures before any PPL discounts.

[34] Economists refer to this exclusive use of one platform as "single-homing." *See* Jean-Charles Rochet and Jean Tirole (2003), "Platform Competition in Two-Sided Markets," *Journal of the European Economic Association*, Vol. 1, No. 4, at 1001-1004, 1007-1010, 1023-1025. It is very common among intermediaries, or two-sided platforms, for one side to single-home. Competition is often intense to obtain platform participants that single-home since the intermediary can then provide the other side of the platform with access to these participants that other intermediaries cannot provide.

[35] Economists refer to this use of multiple platforms as "multi-homing." *See id.*

positive feedbacks between the two sides.[36] If fewer rights-users use a PRO, that PRO is potentially less valuable to the composers and publishers who will forfeit income. And if a local television station complains to producers that a PRO is charging too much, composers may be concerned that those complaints will affect their ability to get selected for new programs. I discuss this competitive dynamic and the positive feedback effects associated with it in more detail below.[37]

43. I understand that ASCAP and BMI have been the subject of a number of antitrust lawsuits over the last century and as a result of the settlement of those lawsuits are subject to consent decrees. I am not taking any position in this report on the merits of those lawsuits or the settlements. I note, however, that these PROs were in a very different position with regard to those lawsuits, from the standpoint of antitrust economics, than SESAC is in this matter. When ASCAP was challenged under the antitrust laws in 1941 its membership included the substantial majority of music rights-holders.[38] More recent antitrust lawsuits against ASCAP and BMI have occurred during times when each of them accounted for much larger shares of rights-holders and music than SESAC has now. It is my understanding that no court has required ASCAP or BMI to cease blanket licensing.

44. I understand that under the consent decrees currently in effect for ASCAP and BMI it is possible for rights-users to have the court administering the consent decree serve as a "rate

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[36] Jean Charles Rochet and Jean Tirole (2006), "Two-Sided Markets: A Progress Report," *RAND Journal of Economics*, Vol. 37, No.3, at 645-652.

[37] I understand that virtually all significant rights-users enter into licenses with all three PROs. That is a common competitive equilibrium for multi-sided platforms in which one group of customers wants to get access to another group of customers. For example, virtually all significant retail businesses accept credit and debit cards for the payment card platforms that facilitate payment between consumers and businesses and virtually all significant websites work with all of the major browser platforms.

[38] Complaint at 2, *United States of America v. American Society of Composers, Authors and Publishers, et al.*, (S.D.N.Y. 1941) (No. 13-95).

court"—i.e., determine performance rights fees if the rights-users and PROs cannot reach agreement. There is no basis in economics to conclude that performance rights fees determined by rate courts, or negotiated in the shadow of rate courts, are identical to the performing rights fees that would emerge in a competitive market. In fact, it is well known and widely accepted in economics that centralized bodies are not well suited for determining competitive prices.[39]

C. SESAC Licensing History

45. SESAC was formed in 1930. For its first 40 years it only represented publishers. In 1970 it started representing composers. Over time it also expanded the types of music it represented.

46. In 1992, under new ownership, SESAC started competing with ASCAP and BMI for major composers. For example, SESAC signed Bob Dylan and Neil Diamond in the 1990s. In the 2000s, SESAC started competing to affiliate major composers of music for local television programming. For example, it signed on Jonathan Wolff (*Seinfeld*, *Will & Grace*), Danny Lux (*Boston Legal*, *The Bachelor*), and Stephen Arnold (news music for local stations).[40]

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[39] Centrally planned economies have generally been supplanted by market-driven economies, which have proved superior because market prices determined under competition have generally proved superior to centralized price-setting in optimally allocating resources. *See* N. Gregory Mankiw (2008), *Principles of Economics* (5th ed.) at 8-10, 150; F. A. Hayek (1945), "The Use of Knowledge in Society," *The American Economic Review*, Vol. 35, No. 4, at 519, 524-525, 526; Wei Li and Dennis Tao Yang (2005), "The Great Leap Forward: Anatomy of a Central Planning Disaster," *Journal of Polical Economy*, Vol 113, No. 4, at 840; Anthony Gar-On Yeh and Fulong Wu (1999), "The transformation of the urban planning system in China from a centrally-planned to transitional economy," *Progress in Planning* Vol. 51, No. 3,at. 169. In the United States, there has also been a general trend toward deregulation, in part reflecting a recognition of the difficulties encountered by centralized regulatory bodies in regulating industries. *See* Alfred E. Kahn (1990), "Deregulation: Looking Backward and Looking Forward," *Yale Journal on Regulation*, Vol. 7, at 353-354 ("In short, the lesson I take from recent history is that the evolution of regulatory policy will never come to an end. The path it takes--and we should make every effort to see that it takes-however, is the path not of a full circle or pendulum, which would take us back to where we started, but of a spiral, which has a direction. This is in a sense only an expression of a preference for seeking consistently to move in the direction of the first-best functioning of a market economy, rather than the second- or third best world of centralized command and control."); W. Kip Viscusi, Joseph E. Harrington, Jr., and John M. Vernon (2005), *Economics of Regulation and Antitrust* (4th ed.), at 40, 568-570, 610.

[40] SESAC, "History," http://www.sesac.com/About/History.aspx (last visited Mar. 26, 2013).

47. SESAC has attempted to distinguish itself from the other PROs in terms of the service provided to its affiliates, including faster payment of royalties.[41] SESAC also attempts to provide exposure for its composers to entities seeking their services.[42]

48. SESAC negotiates performance rights fees with local television stations. It negotiated performance rights licenses with local television stations or their group owners until the license period beginning in 1995, for which it negotiated with the Television Music License Committee (TMLC).[43] The TMLC is an entity that negotiates with the PROs on behalf of the overwhelming majority of full-power commercial local television stations and thereby aggregates the buyer-side market power of those stations.

49. This lawsuit results from the inability of SESAC and the TMLC to reach an agreement for the period following the expiration of an industry-wide agreement for 2005-2007. For the license period beginning in 2008, SESAC returned to negotiating with the local stations and their group owners individually.

50. It is useful to review the history of the negotiations between SESAC and the local stations. Among other things this history demonstrates that SESAC and the TMLC entered into blanket licensing arrangements before SESAC had signed significant numbers of major television composers and when it had a much smaller share of performance rights revenues from local television stations than it does now. This fact supports the argument that I present

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[41] Deposition of Dennis Lord, July 27, 2012, at 242:19-244:6 [hereinafter "Lord July 27 Deposition"];SESAC-0344513 at 514; SESAC-0377743; SESAC-0628900 at 901.

[42] For instance, in November 2010, SESAC collaborated with the Society of Composers and Lyricists highlighting film and television composers. *See* SESAC, "SCL Film & TV Songwriter Showcase Announced," http://www.sesac.com/News/News_Details.aspx?id=1407 (last visited Mar. 26, 2013).

[43] The Television Music License Committee, "The History of Television Music Performance Rights," http://www.televisionmusic.com/Joomla_1.5.15/index.php?option=com_content&view=article&id=4 (last visited Mar. 26, 2013). . SESAC and the TMLC reached agreement on terms for the 1995 license in 1996.

later in this report that bundling—which is what the blanket license accomplishes—is a common arrangement in competitive markets because it provides efficiencies to buyers and sellers.

1. 1995-2000

51. For 1995 to 2000, SESAC and the TMLC agreed on a fee amount to be paid by the stations in aggregate for blanket licenses for each station, and on a schedule that allocated the fees across the individual stations.[44] The schedule allocated fees to each local station based on the station's average audience for all programs, regardless of whether those programs included SESAC music or not. Thus, before SESAC signed significant numbers of major television music affiliates, SESAC and TMLC had agreed on a blanket license and had agreed on station fees that did not vary with their use of SESAC music.

2. 2001-2004

52. SESAC and the TMLC reached an agreement in April 2002 for the license fees for 2001-2004.[45] The parties agreed to an overall fee for all stations and an allocation formula. One portion of the fees (Part I) was allocated among the local stations on a schedule that was based on the same average viewing audience measure as applied previously.[46] The Part II fees were first allocated among different network groups and then allocated within a network group by station.[47]

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[44] SESAC-0303611.

[45] "SESAC and Television Music License Committee Announce Agreement," *Business Wire*, April 11, 2002.

[46] The industry-wide Part I fees were fixed at $4.75 million for 2001 to 2004. The remaining portion (Part II) was set at $4.75 million for 2001, $6.75 million for 2002, and $8.75 million for 2003 and 2004. So total fees for Part I and Part II combined were $9.5 million for 2001, $11.5 million for 2002, and $13.5 million for 2003 and for 2004. *See* SESAC-0676807 at 809.

[47] The network groups were: ABC/CBS/NBC/Univision (as one group); Fox; PAX; UPN; WB; independent stations with Nielsen ratings; and stations with no Nielsen ratings. *See* SESAC-0676807 at 812. The stations

53. The fees paid by an individual station were independent of the station's use of SESAC music. The Part I fees were based on the same methodology as the 1997-2000 fee schedule, so that an individual station's use of SESAC music had no effect on its Part I fees. While the Part II fees were allocated among the network groups based on each network group's use of SESAC music, an *individual* station's usage had no direct effect on its own Part II fee. In addition, the allocation of Part II fees across the network groups was made in 2002 based on the network groups' *past* SESAC music usage in 2001, and was fixed for the contract. Therefore, changes in the amount of SESAC music used by a station during the contract would have no effect on the allocation to the network group during the term of that contract, and the allocation of the network group's fees to individual stations was not based on SESAC music usage.

54. Thus, for 2001-2004, SESAC and TMLC again agreed on a blanket license that did not vary with the individual stations' usage of SESAC music and SESAC did not offer a PPL option.

3. 2005-2007

55. Following the 2001-2004 contract, SESAC and the TMLC could not come to agreement on terms for a subsequent contract. As permitted by prior agreement between the parties, SESAC elected to go to binding arbitration.[48] As a result, arbitrators set the terms of a blanket

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with no Nielsen ratings paid nothing under this second part of the allocation. The other network groups were allocated their respective shares of the Part II fees based on the ratings-weighted percentage of total industry-wide performances of SESAC music usage in 2001, for fees in 2001 as well as fees in 2002-2004. *See* SESAC-0676812. The allocation for a given network group was then allocated among the individual local stations in percentages corresponding to each station's respective share of the Part I fees paid by all stations in the network group.

[48] If it had not chosen to go to arbitration, my understanding is that the terms of the prior contract specified that the 2004 fees would apply, without adjustment, for 2005. *See* SESAC-0677622 at 623, 628; SESAC-0677638 at 640.

license for all stations for 2005-2007. This included a total industry-wide fee and an allocation methodology.[49]

56. As a result of the arbitrators' decision, there were a number of significant differences from the earlier SESAC-TMLC agreements in the way the TMLC allocated these fees among stations.

57. First, the portion of the fees allocated based on the average viewing audience, which did not depend at all on SESAC music usage, decreased from 35 percent to 21 percent for 2005.[50] The remaining 79 percent of total fees, in turn, was allocated among individual stations based on each station's individual share of the recurring use of SESAC music across all stations.[51] This change in the allocation formula meant that if an individual station increased or decreased the recurring use of SESAC music in its programming, relative to the recurring use of SESAC music among stations overall, there would be a corresponding increase or decrease in the station's allocated percentage of the industry-wide recurring use fees. There would not, however, be an overall reduction in the total fees paid by all stations. Although the recurring-use component of the industry-wide fee was 79 percent at the outset, it was lower later in the license period.

[49] The arbitrators set the industry-wide fees at $16.0 million for 2005, $17.6 million for 2006, and $19.3 million for 2007. *See* SESAC-0790665, at 3.

[50] There were some changes in the methodology for allocating this part of the total fees across stations. The arbitrators adopted the methodology that the rate court had specified in November 2004 for allocating blanket fees for ASCAP. *See* SESAC-0790665 at 669; Order at Exhibit B, *United States v. American Society of Composers, Authors and Publishers: Applications of Post-Newsweek Stations, Inc.*, et al., No. 41-cv-1395 (November 19, 2004). The most significant change was that for a station with a given viewing audience, there was a sliding scale under which stations in larger markets paid more than stations in smaller markets. As under the prior methodology, the estimated viewing audience for a station was based on its overall programming and not restricted to programs with SESAC music. *See* SESAC-0303611 at 631.

[51] Each station's SESAC share was based on its share of SESAC usage of recurring use programs. A program qualified as a "recurring use" program if 75 percent of the annual episodes of a program had at least one minute of SESAC music. Usage was measured based on the number of "public performances," which was the number of minutes of SESAC music played in a program times the number of viewers of the program. *See* SESAC-0790665 at 668-669.

58. In addition, under the 2005-2007 contract determined by the arbitrators, stations could elect to pay under a PPL formula. The PPL formula is described in more detail below (see Section V.H), but generally provided for a discount from the blanket fee for a station if its usage of SESAC music was sufficiently far below the average usage across all stations. Broadly speaking, the less SESAC music used by a station, the lower its PPL fee would have been. The PPL formula provided the station with a blanket license to use any of the music in SESAC's repertory, but at a lower price.

4. 2008-2012

59. For the license period beginning in 2008, SESAC and the TMLC were unable to agree on terms and this time did not go to arbitration. After the failure to reach an agreement with the TMLC, SESAC sent out proposed terms to each local station. For each station, SESAC proposed an increase in each station's 2007 fees, which had been set as described under the prior contract, of 10 percent for the first year, and of 6.95 percent in subsequent years.[52] The 10 percent increase for the first year was based on the annual rate of increase under the arbitrator's award for the prior contract.[53]

60. SESAC then engaged in individual negotiations with many of the stations and station groups. There were two main types of discounts that SESAC agreed to in these negotiations.

61. First, SESAC provided station "group discounts" of 2, 4 or 6 percent off the blanket fees of all stations in the group, depending on the size of the station group. About 60 percent of

[52] Deposition of Maxine Edwards, October 16, 2012, at 44:5-13 [hereinafter "Edwards Deposition"]; Deposition of Pat Collins, July 31, 2012, at 120:14-121:5 [hereinafter "Collins Deposition"].The allocation of the recurring use portion of blanket fees across stations for 2007 was set based on their usage of SESAC music on a single day, December 31, 2006. *See* ALL0004231; ALL0006836.

[53] Collins Deposition, at 93:14-94:10, 120:14-121:5.

the stations received a group discount in 2008.[54] In return for getting a group discount, the station group was required to forgo the ability to elect to pay based on a PPL fee for any of the stations in the group.

62. Second, stations that had recently dropped programs with SESAC music from their programming and engaged SESAC in direct negotiations received discounts of up to 10 percent off their blanket fees. About 30 percent of the stations received such discounts for 2008, with an average discount among those stations of about 4 percent.[55] Third, SESAC gave additional discounts to stations that had recently dropped SESAC news music and that engaged SESAC in direct negotiations.[56]

63. As noted, the 2008-2012 pre-discount fees were based on the 2007 fees, so that they reflected, to some extent, each station's past usage of SESAC music. My understanding is that for the second and third categories of discounts, these were the product of individual negotiations, rather than a specific formula used by SESAC.

64. SESAC continued to offer a PPL option for the 2008-2012 contract. As discussed below (see Section V.H), the formula changed in a number of ways to make the savings available under the PPL less than under the 2005-2007 PPL formula.[57]

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[54] These calculations are based on data in JAFFE_SESAC00001052.

[55] These calculations are based on data in JAFFE_SESAC00001052.

[56] Deposition of Katherine Whalen, February 5, 2013, at 64:3-10; SESAC-0348259; SESAC-0349270; MRI00007421.

[57] I understand that SESAC has offered local stations contracts for 2013 for blanket licenses at the same fees that they paid in 2012. SESAC has made one modification to the PPL formula, which makes the savings available under the PPL greater than under the 2008-2012 PPL formula. (The default multiplier for infomercials was decreased from 50 percent to 25 percent. I explain the role of the default multiplier in my discussion of SESAC's PPL in Section V.H below.)

III. An Overview of Antitrust Economic Analysis of Plaintiffs' Case

65. The plaintiffs challenge various aspects of SESAC's blanket licensing practices. The plaintiffs and their economic expert, however, have not identified harm to competition (or antitrust injury) resulting from those practices. As I show below, SESAC's practices:

a. have not restricted competition among composers to be hired by producers of locally-produced or third-party programming;

b. have not restricted competition among producers of third-party programming to be licensed by television stations; and

c. have not restricted competition for licensing of performance rights by local stations after they have licensed third-party programming, or when the stations themselves enter into agreements with composers.

66. Under the standard analysis conducted in antitrust economics, one ordinarily expects that a practice that is anticompetitive would reduce output of the relevant products. Yet, plaintiffs and their economic expert have not identified any reduction in:

a. the amount or quality of music produced or the number of composers hired;

b. the number or quality of television shows in which music is used; or

c. the airing of shows including music by local television stations.

Ordinarily, a reduction in output would need to be significant to cause concern. But in this case plaintiffs, and their economic expert, have not identified *any* reduction in output, much less a significant reduction.

67. Their failure to identify a reduction in output is the natural consequence of, and indeed a necessary conclusion from, their failure to identify harm to competition. A closer look at how their claims relate to third-party programming and locally-produced programming shows why it is not possible for the plaintiffs to identify how SESAC's practices have harmed competition or reduced output.

68. Let me first discuss the plaintiffs' claims concerning third-party programming.

69. For third-party programming local stations enter into contracts in which they pay license fees to producers or syndicators for airing those shows.[58] Stations typically do not obtain the performance rights from the producers or syndicators for the music included in those shows. They can then obtain those performance rights only from the rights-holders, who have a legal monopoly on that performance right. The plaintiffs and their economic expert have not shown, nor have they provided any reason to suppose, that the total amount that local stations pay for performance rights with the blanket license is higher than the amount the local stations would pay if they engaged in direct negotiations with the rights-holders, each of whom has monopoly power.

70. The plaintiffs allege that it is not possible to substitute music in shows after those shows have been produced, syndicated, and licensed by a local television station. The music rights held by rights-holders who belong to SESAC are therefore not substitutes for each other. Under basic principles of economics, it is not possible for SESAC to restrict competition among independent (that is, non-substitutable) products as a result of gaining control over those products, because those products did not compete with each other to begin with.[59] It is therefore not possible for SESAC to have any more market power than the individual rights-

[58] For commercials and infomercials, stations receive payment from advertisers or their representatives.

[59] This issue typically arises in merger analysis. An analysis of whether a merger would significantly restrict competition looks at whether the two firms have products that are significant substitutes for each other, such that allowing the joint pricing of the products from the two firms would significantly restrict competition. *See* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010), Section 2 [hereinafter "Merger Guidelines"]. The analysis commonly involves defining a relevant market, which would consist of products that are substitutes for each other. *See id.* at Section 4; Dennis W. Carlton and Jeffrey M. Perloff (2005), *Modern Industrial Organization* (4th ed.), at 646. If the two firms' products are in different markets—that is, if their products do not compete closely with each other—then the joint control of pricing of the products of the two companies will not eliminate competitive constraints that the products would otherwise place on each other.

holder has for embedded music. In fact, as I argue below SESAC likely provides benefits to the local stations because it reduces their costs of negotiating with individual rights-holders. Notably, SESAC has an interest in maintaining a long-term reputation with composers, publishers, producers, and television stations.

71. As I noted above, plaintiffs have not identified any way in which SESAC has restricted competition in the case of third-party programming with embedded music. The choice of the composer was made by the producer and the choice to license the show was made by the local station. Once those choices have been made there can be no further competition concerning the selection of music or the composer for that music.[60] The local station is "locked in," under the plaintiffs' theory, regardless of anything that SESAC does as a representative of the rights-holder.

72. Let me now turn to performance rights for music in locally produced programming. Local stations can choose any composer they want for locally produced programs.[61] Only a few of the composers (or music production companies) commonly used for locally produced programming, including local news, belong to SESAC.

73. In negotiating with these composers the local stations have the ability to negotiate the terms of the contract, including the compensation due the composers. If a composer belonged to a PRO that was charging excessive performing rights fees the local stations could address

[60] SESAC has entered into contracts with some affiliates in which it provides payments in advance of when these affiliates' royalty payments otherwise would be due and as a condition of that restricts the ability of these affiliates to enter into direct licensing arrangements with local television stations. As I discuss below this is a normal, reasonable, pro-competitive business practice and, contrary to the claims of the plaintiffs, does not restrict competition.

[61] Deposition of Richard D. Adams, November 6, 2012, at 61:12-63:8; Deposition of Robert Apfel, November 30, 2012, at 77:7-20; Deposition of Charley Johnson, November 30, 2012, at 115:24-116:6.

that by adjusting the compensation they provide the composer (not to mention switching composers).

74. As I mentioned above plaintiffs and their economic expert have not identified any way in which SESAC has restricted competition for composers for locally produced programs. Local stations can choose any composer they want.

75. The plaintiffs and their economic expert attempt to make an argument that there is an anticompetitive restriction regarding performance rights for third-party and locally produced programming by defining an artificial, and economically nonsensical, market that consists entirely of SESAC and its affiliated composers and publishers even though SESAC accounts for about 12 percent of local television blanket license fees and an even smaller fraction of affiliates. Even assuming that the plaintiffs' lock-in theory could support an antitrust product market, the artificial market proposed here makes no economic sense for the antitrust claims the plaintiffs and their economic expert have advanced.

a. For the claims regarding embedded music in third-party programming the plaintiffs' proposed SESAC-only market is too broad since there are no substitutes for the music that has already been embedded whether or not that music is in SESAC's repertory. The individual rights-holders have a monopoly under copyright law over each such piece of embedded music.

b. For the claims regarding locally produced programming the plaintiffs' SESAC-only market is too narrow because it excludes all of the non-SESAC-affiliated composers whose works local stations could use.

76. The next section explains in more detail why:

a. The analysis of market definition and market power put forward by the plaintiffs and their economic expert is, from the standpoint of antitrust economics, nonsensical when applied to the claims of anticompetitive conduct they have advanced.

b. The analysis put forward by the plaintiffs and their economic expert fails to show any restriction of competition (or antitrust injury) and consequent reduction of output.

IV. Market Definition, Market Power and Harm to Competition

77. Plaintiffs claim that the relevant antitrust product market for this case consists of "the performance rights to the copyrighted material in the SESAC repertory, which repertory changes throughout the Class Period ('SESAC Repertory Performance Rights Market')."[62] Plaintiffs argue that "local stations are locked into broadcasting programming for which they must obtain performance rights for embedded music" and that "[l]icenses from neither ASCAP nor BMI would provide such rights and as such, neither PRO is a substitute for SESAC."[63]

78. In analyzing market definition and market power, as I have noted above, it is useful to distinguish between music used in programs produced by third parties versus music used in programs produced by the local stations. The first two parts of this section address third-party programming. Part A examines the choice of composer and music by producers of third-party programs. Part B examines the choices faced by the local station after it has licensed third party programs without performance rigthts. Then Part C examines the choices of local stations to hire composers and choose music for their locally-produced programs.

A. Producers of Third-Party Programming

79. Producers of third-party programs have a choice of music, including whether to use existing music or to commission original music, whom to hire to write original music, and on what contract terms to hire these composers. My understanding is that the music in third-party programming largely consists of works-for-hire and I therefore focus on that. However, my

[62] First. Am. Compl., ¶ 64; *see also* Jaffe Report, at 55.

[63] First. Am. Compl., ¶ 62.

analysis is substantively the same for "sourced" music—that is, music that is included in a show for which it was not originally created—with the main difference being that the producer does not own the copyright in that music. Given the plaintiffs' claims concerning the decisions by producers of third-party programming it is useful to examine these decisions and their connection to the plaintiffs' proposed market definition.

80. Let me begin with the decision by producers to hire composers.

81. Producers hire composers to create musical works-for-hire. They can select these composers from the thousands of individuals who provide these services. Of course, as with any business, some of these suppliers are better than others and producers may have favorites. I am aware of no restrictions that would require producers to use composers affiliated with any particular PRO, or with any PRO at all. SESAC accounts for only about 2-3 percent of all PRO affiliates; its share of affiliates specializing in television music is likely under 12 percent.[64] It is therefore not plausible that SESAC has any market power over producers (who do not pay SESAC anything in any event) in their choices of what composers to hire to create music for third-party programming.

82. As mentioned earlier, producers own the copyright, including the performance rights, when they engage a composer for a work-for-hire. They have the option of granting a percentage of the performance rights royalties back to the composer. Whether they do so, and how this affects up-front fees paid by the producer for the works-for-hire, depends on the demand by producers for composers to write music and the supply of music written by

[64] This estimate is based on all affiliates and is not restricted to affiliates that specialize in television. *See* SESAC-0807537 at 554. SESAC had about a 12 percent share of local television blanket license fees in 2010. Its share of composers specializing in television is likely less than 12 percent, as it is not generally open to composers and because SESAC has sought out high value composers as affiliates.

composers. The compensation for composers is determined in a market that contains large numbers of composers and producers and in which there are no significant entry barriers.

83. It is my understanding that in this market the competitive equilibrium has generally resulted in producers:

a. paying work-for-hire composers an upfront fee that includes obtaining the musical composition and often recorded music for inclusion in the soundtrack and

b. giving composers the writer's share of 50 percent of the performance rights royalties.

It is my understanding that some of the terms may vary depending on the amount of music demanded, the quality of the composer, and various other individualized factors relating to the particular show and composer.

84. Basic economics indicates that if a composer used a PRO that paid an unusually high fee to the composer, the producer could reduce the compensation received by the composer in order to bring the total payment for the composer back down to the competitive level. In other words, composers do not have any ability to command a premium over their competitive compensation simply as a result of their affiliation with a PRO. Of course some composers write music that is more highly valued by producers and they can demand a premium for their work just as any supplier of a higher quality good or services can demand a premium.[65]

85. The artificial "SESAC-only" market proposed by the plaintiffs and their economic expert does not take account of the real marketplace in which composers are selected by

[65] As I discuss below, it is possible that the composer, the producer, or both could switch PROs and earn higher performance rights if the PRO they switch to offers higher compensation. As I also explain below, this change, while possibly unwelcome to the local television station that entered into a contract for the show including embedded music by the composer, does not restrict competition.

producers and in which their compensation is determined by the competitive forces of supply and demand.

86. Let me now turn the the relationship between producers of third-party programming and local television stations.

87. Each year producers attempt to syndicate television shows with local stations and local stations seek out television shows that can drive viewership and advertising revenues. There is extensive economic literature that relates to such a "syndication market" and I will only highlight several key aspects here that are relevant to this case.

a. The buyers and sellers in this market are usually substantial businesses. Some of the signficant television producers are owned by the major television networks and some of the local television station groups are significant businesses owned by large media conglomerates.

b. The local stations have been participating in the syndication market at least yearly for decades. The same is true for many of the producers. Therefore, the negotiations are what economists refer to as "repeated games."

c. Buyers and sellers have a great deal of information concerning competitive prices because they are negotiating contracts with many buyers and many sellers and because they have participated in many negotiations over time.

d. Local stations have been fully aware that producers typically do not include performance rights as part of the syndicated programming they are licensing. Local stations therefore know that in order to use the programming they are licensing they will also need to have a performance rights license.

e. Reputations are important because both parties are likely to negotiate contracts with each other in the future.

88. Under these circumstances I would expect, based on standard economic analysis, that the prices that local stations negotiate with the producers and syndicators take account of the anticipated cost of performance rights. There are two ways of thinking about this. On the one hand, producers have not actually conveyed to the local stations everything that the local

stations need to broadcast the shows and therefore earn revenue from them. The local stations know this. Therefore, the local stations will not pay as much as they would if performance rights were included. On the other hand, the local stations have to incur an additional cost in broadcasting the syndicated programs. They will therefore factor this additional cost into what they are willing to pay.[66]

89. The artificial "SESAC-only" market proposed by the plaintiffs and their economic expert does not take account of the real market in which local stations enter into contracts that result in their having to acquire performance rights. The failure of the plaintiffs to consider the "syndication market"[67] in their analysis is noteworthy for at least two reasons.

a. Without analyzing competition in the "syndication market" it is not possible to determine whether the total prices the local stations pay for the syndication and music performance rights are lower when the producer includes those performance rights than when the producer does not include those performance rights. The plaintiffs and their economic expert assume incorrectly that reductions in the cost of performance rights to them will have no effect on the fees for syndication rights. In fact, any reduction in SESAC fees reduces the costs to the local station, reduces the revenues to the producer (which typically owns the publishing rights), and reduces the revenues to the composers who at least in future contracts will need to be compensated.

b. Without analyzing competition in the "syndication market" it is not possible to determine whether SESAC's practices have harmed competition for third-party programming or reduced the amount of third-party programming broadcast by local television stations. Nor is it possible to determine whether SESAC's practices have harmed competition with respect to music in third-party programming or reduced the amount of music in third-party programming. As I have noted, the plaintiffs and their economic expert have not in fact identified any such harm to competition or reduction of output.

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[66] This is not the only competitive equilibrium that could arise in theory. It is of course possible that local stations could obtain the performance rights from producers as part of their syndication arrangements. It is also possible that the local stations could ask the producers to pay them an amount equivalent to what the producer and/or composer will receive in performance rights. But the competitive equilibrium that has arisen, in fact, is one in which local stations negotiate contracts in which they pay to syndicate the shows and then negotiate contracts to secure performance.

[67] Nothing in my analysis depends on whether the "syndication market" is a relevant antitrust market.

90. In largely ignoring the realities of the "syndication market" the plaintiffs and their economic expert have also failed to consider the ability of the local stations to object to, and to seek to change, any aspect of the deal they are negotiating with the producers. Large station groups in particular have some buyer-side market power to seek changes in the terms and conditions of the contract. One producer even appears to have agreed to reduce the use of SESAC music in response to complaints from a station group.[68] Whether stations can get terms changed, or, alternatively, whether they get monetary concessions, is determined by the overall competition in the "syndication market."

91. The "SESAC-only" market put forward by the plaintiffs and their economic expert is also wrong because it fails to consider how the the "syndication market," in combination with the other layers of competition I have describe above, imposes constraints on SESAC. If local stations have concerns about SESAC they can complain to the producers and discourage them from using SESAC music, as stations have done in the past. That could lead producers to encourage composers they use to withdraw from SESAC, or to require composers they hire not to belong to SESAC as a condition of being given a portion of the performance rights income (or of being hired at all). This chain of events could reduce SESAC's membership and as a result decrease its ability to seek license fees from stations. Alternatively, producers could make implicit or explicit financial concessions to the local stations to adjust for the perceived cost of using SESAC affiliates.

92. These constraints in fact provide the economic explanation for a fundamental inconsistency in the "hold-up"/"lock-in" theory advanced by the plaintiffs and their economic

[68] Warner Brothers responded to complaints from Gannett by committing to remove SESAC music from the music libraries it used and not to use SESAC theme music for the *Ellen* and *Extra* shows. *See* GAN00002481. The email noted that there could still be infrequent usage of SESAC music if a guest performed SESAC music or had a clip with SESAC music. *See* GAN00002481 at 482.

expert. A local television station that has paid to syndicate a third-party program with embedded music cannot broadcast that show—and earn any profits from the show—unless it obtains the performance rights to the music. Under the plaintiffs' theory, the owner of the performance rights can hold up the local station for all of the profits the station can earn on the program since without the performance rights the local station will have incurred the sunk cost for the syndication rights but have no ability to broadcast the show.

93. In fact, however, all performance rights fees constitute a small portion of syndication fees paid by stations and advertising revenues earned by local stations. Performance rights fees are likely around 1 percent, or less, of advertising revenue for local stations.[69] SESAC's share of that would only amount to about a tenth of a percent. The facts demonstrate that SESAC has not been able to extract from local stations monopoly profits, through higher fees, as predicted by the plaintiffs' "hold-up" theory. This provides further demonstration that the "SESAC-only" market put forward by the plaintiffs and their economic expert makes no economic sense.

B. Music in Third-Party Programs

94. For programs that the stations purchase or acquire from third parties, the stations do not select the music included.[70] Such programs include syndicated programs that were previously shown on network television; first-run syndicated programming such as talk shows or game

[69] Estimates of local television advertising revenue are around $20 billion a year. *See* Sam Schechner and Rebecca Dana, *Local TV Stations Face a Fuzzy Future*, The Wall Street Journal, Feb. 10, 2009, at A1; State of the Media, "Local TV: By the Numbers," http://stateofthemedia.org/2012/local-tv-audience-rise-after-years-of-decline/local-tv-by-the-numbers/ (last visited Mar. 26, 2013). The roughly $200 million in performance fees charged by ASCAP, BMI and SESAC to the local stations would be around 1 percent of that local advertising revenue.

[70] First Am. Compl., ¶ 6 ("Local stations do not control the selection of any of the creative elements contained in the third-party-produced programming or commercial announcements they broadcast").

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shows; movies; paid programming or "infomercials"; as well as commercials and public service announcements.[71]

95. The plaintiffs' view is that, as a result of the longstanding industry practice where the producers and syndicators of third-party programs do not provide local stations the performance rights for music in those programs, "securing [performance] licenses is a necessity for the stations to legally broadcast programming for which they often have invested millions of dollars to obtain."[72]

96. As I discussed above, I disagree with that characterization since the local stations, many of which belong to large groups, are sophisticated businesses which could negotiate contracts in which they receive source licenses or, equivalently, compensation for the incremental cost of having to secure performance rights—if, in fact, that result was dictated by the forces of demand and supply.

97. For the purpose of the analysis of the plaintiffs' market definition, however, I examine the situation, identified by the plaintiffs and their economic expert, in which the local stations have licensed third-party programs with embedded music and must obtain licenses to perform the music in those shows. That is, I am accepting, for the sake of argument, their claim that the local stations are in fact "locked in" and could not do anything to account for that beforehand. In particular, I am assuming that the significant constraints on SESAC discussed above do not exist.

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[71] First Am. Compl., ¶¶ 3, 5-6; Jaffe Report, at 12. Given that the stations do not select ambient music, such as that played in the background during the broadcast of a sporting event, my discussion of market definition for music in syndicated programs also applies to ambient music. Also, as noted above, ABC, CBS, NBC, and Univision license performance rights for their respective network feeds on behalf of their affilates. For network feeds from other networks, such as Fox and CW, the affiliates are responsible for acquiring performance licenses themselves.

[72] First Am. Compl., ¶¶ 7-8.

98. It is well known that the relevant product market for antitrust purposes consists of products that are substitutes for each other. The market is usually limited to products that are close enough substitutes that they impose competitive constraints on each other. The relevant product market *never* includes products that are complements for each other or are what economists call "independent goods," i.e., neither substitutes nor complements.[73]

99. Under the plaintiffs' view, a local station needs performance licenses for each of the compositions in its third-party programming. A performance license to only one of the compositions does not substitute for performance licenses to any other composition. Nor does a performance license to a different composition *not* included in the station's programming substitute for a performance license to the compositions that *are* included in its programming. The plaintiffs explicitly state that performance rights to music in the ASCAP and BMI repertories are not substitutes for performance rights to music in the SESAC repertory because the local stations are "locked into broadcasting programming for which they must obtain performance rights for embedded music."[74] But that reasoning, if valid, applies equally to compositions *within* the SESAC repertory. The performance rights to one work in the SESAC repertory are not substitutes for the performance rights to another work in the SESAC repertory.

100. Once the station has licensed episodes of *Seinfeld* (which has SESAC music as its theme) to broadcast, it would not be possible to substitute for the performance rights for the music in *Seinfeld* the performance rights for music in episodes of *House* (which generally have SESAC music) or the performance rights for music in episodes of *Everybody Loves Raymond*

[73] Merger Guidelines, Section 4.

[74] First Am. Compl., ¶ 62.

(which generally do not have SESAC music). There are no substitutes in demand or supply for the performance rights for the *Seinfeld* theme after the music has been embedded in the show and after the local station has paid for a license to air *Seinfeld*. None of these alternative performance rights to music could possibly constrain the price of the performance rights for the *Seinfeld* theme and none is a substitute in demand. The same is true for every other performance right for music in third-party programming that local stations have licensed. Assuming that stations are unable to alter or remove that music, there is a perfect monopoly held by the rights-holders under those circumstances for the performance rights for that music for that program.

101. Assuming that the plaintiffs' lock-in theory can support an antitrust product market, the market definition they have proposed here makes no economic sense because it combines products that, under the plaintiffs' view, are not demand or supply substitutes for each other. Within the supposed "SESAC-only" market, local stations cannot switch from the performance rights for one embedded musical work to the performance rights for another musical work, nor could other rights-holders provide alternatives to the performance rights for that embedded musical work.[75] From the standpoint of a local station that has already made a decision to license a program, the compositions embedded in different programs are independent goods. They are as different from each other, from the standpoint of substitution in demand or supply, as BMW cars and Budweiser beer.

102. This analysis has three key implications.

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[75] I understand that plaintiffs are also claiming that the restriction of "competition" between SESAC and a given affiliate for the licensing of performance rights is anticompetitive. As I discuss below at Section V.D, that claim is incorrect. In any event, that claim provides no justification for deeming the performance rights from *other* SESAC affiliates substitutable with respect to music embedded in third-party programming.

103. First, given the plaintiffs' claims, any market power over performance rights resides, in the first instance, with the individual rights-holders of music in the SESAC repertory. For example, rights-holders in *Seinfeld*'s theme music have monopoly power over stations that need to broadcast *Seinfeld*, and rights-holders in the music for *House* have monopoly power over stations that need to broadcast *House*. Under the plaintiffs' view that the local station is "locked in," rights-holders' market power over the local station is the result of the decision by the local station to license the program with embedded music without having the performance right for the music in the program.

104. Second, the aggregation of the rights to charge for the performance of this embedded copyrighted music does not result in any more increase in market power than would a conglomerate merger of BMW and Anheuser-Busch. It is well known in antitrust economics that market power can result from the control by a single decision maker of *substitute* products. That single decision maker can potentially restrict the output of these substitute products to drive up price. That is why merger analysis focuses on whether there are overlaps between merging parties that combine substitutes in demand or supply. By contrast, it is not possible to increase market power by combining products that are independent goods like cars and beers. That is why competition authorities routinely approve the mergers of companies that are not horizontal competitors.[76] Therefore, assuming that the plaintiffs really are "locked in" with respect to music in third-party programming, SESAC's aggregation of performance rights to that music does not (and cannot) result in any increase in market power.[77]

[76] Competition authorities sometimes examine whether there is a vertical relationship between products. There is no vertical relationship between one embedded work and another, and therefore this issue is not relevant here.

[77] First Am. Compl., ¶ 62 ("[L]ocal stations are locked into broadcasting programming for which they must obtain performance rights for embedded music."). As discussed above, beyond the flawed market definition, this is also a fundamental flaw in the claims of plaintiffs and their expert that SESAC is able to restrict competition among

105. Third, and critically from the standpoint of an antitrust analysis, for embedded music in third-party programming the plaintiffs and their economic expert have not identified any restriction on competition or reduction in output. With respect to any embedded work, it is not possible to substitute another composition written by a different composer. There is therefore no reduction in competition. Unless the local station decided not to air the show as planned—and the plaintiffs and their expert provide no evidence that such a situation has ever arisen—there is also no reduction of output.

C. Music in Locally Produced Programming

106. A portion of the programs shown by a local station are produced by the local station itself. Local news is the most prominent type of such programming.[78] For these programs, the local station can choose what music to include.[79] It can choose among different composers—including those who specialize in writing news music as well as others who could write news music—and other sources of music. It is not restricted to choosing only among SESAC composers for either new or previously written and copyrighted music.[80]

107. A local station can, if it wishes, hire a different composer and replace its news music. As part of this decision it can choose a composer affiliated with a different PRO. Alternatively, it could in theory require that the composer not affiliate with a particular PRO or pay a penalty for affiliation with a particular PRO.

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affiliates in the proposed SESAC Repertory Performance Rights Market. SESAC is not able to restrict competition among affiliates with respect to compositions embedded in third-party programming because the different compositions are not substitutes for each other and thus by definition cannot compete against each other regardless of anything that SESAC does.

[78] First Am. Compl., ¶ 3.

[79] *See* Jaffe Report at 11.

[80] *Cf.* Jaffe Report at 11.

108. As a general matter, the local station can also negotiate fees with any of these composers. In particular, if the local station believed that a composer was going to receive performance rights fees from their PRO which would result in their receiving total fees that exceed the competitively determined compensation for composers the local station could negotiate a different compensation agreement that eliminated that premium.

109. The plaintiffs' proposed market definition therefore also makes no sense for locally produced programs although for a different reason than was the case for third party programming. For locally produced programming, local stations can choose among composers regardless of PRO. The plaintiffs' economic expert agrees with this: "Some programs, particularly local news programs, are produced by the station for its own use, and the station therefore determines what music will be used in the programs (other than incidental and ambient music), and how it will be used."[81]

110. As I mentioned earlier, local news shows are the predominant source of viewership and revenue from locally produced programming. The only SESAC affiliate with a significant presence in news music is Stephen Arnold, and plaintiffs and their economic expert do not even attempt to argue otherwise.[82] My understanding from SESAC is that as of November 2011, Stephen Arnold's music was used by 129 stations, or about 17 percent of the approximately 745 local stations originating local news.[83] In addition, a company called GrooveWorx provided news music to 37 Univision owned and operated stations (about 5 percent of all

[81] Jaffe Report, at 11.

[82] The plaintiffs and their economic expert have not claimed that SESAC has restricted competition in the provision of news music among different SESAC affiliates.

[83] Data from SESAC on stations' use of Stephen Arnold music; Radio Television Digital News Association, "RTDNA / Hofstra Survey Finds More Jobs, Higher Profits in TV News," http://www.rtdna.org/uploads/files/v1.pdf (last visited, Apr. 1, 2013).

stations originating local news) and a company called Non-Stop Music provided news music to 3 stations (about 0.4 percent of all stations originating local news). Overall, SESAC affiliates accounted for news music at only about 23 percent of all local stations originating local news.[84] About 77 percent of local stations use composers that are not affiliated with SESAC and there are of course numerous composers to which any local station could turn to, not affiliated with SESAC, for composing news music.

111. This analysis has three implications.

112. First, the plaintiffs' proposed "SESAC-only" market does not make any economic sense for the selection of composers for locally produced programs. Local stations can use any composer they want regardless of whether they are SESAC-affiliated as the plaintiffs' economic expert acknowledges. They are not restricted to a "SESAC-only" market.

113. Second, Plaintiffs and their economic expert have not attempted to show (and would not be able to show) that SESAC affiliates have sufficient presence in composing for locally produced programs to reduce competition to supply music for those programs, or to create barriers to new entrants.[85]

114. Third, and critically from the standpoint of an antitrust analysis, for locally produced programming the plaintiffs and their economic expert have not identified any restriction on

[84] The figures for November 2008 are slightly lower. For local news music, there were 107 stations using Stephen Arnold (14 percent of all stations), 37 stations using GrooveWorx (5 percent of all stations), 3 stations using Non-Stop Music, and no other stations using SESAC affiliates for local news music. Overall, SESAC affiliates accounted for news music at only about 19 percent of all local stations originating local news broadcasts as of November 2008. The share estimates assume that the number of local stations originating local news broadcasts in 2008 was approximately the same as the reported 745 stations in 2011.

[85] In addition, I note that plaintiffs and their economic expert have not made any claims that SESAC has restricted the choice of any other type of music of relevance to locally produced programming. Moreover, SESAC has about a 12 percent share of local television blanket license fees, a level that is well below that which typically raises concerns of market power.

competition or reduction in output. In fact, no composer is excluded from competing for writing music for locally produced shows and no local station is prevented from using any composer they want for writing music for locally produced shows.

V. The Plaintiffs' Claims Concerning Allegedly Anticompetitive Practices

115. As I have shown in the previous section, given how the selection of composers and the syndication of television programming works in practice, SESAC's aggregation of performance rights, and the manner in which it licenses those rights, is unlikely to harm competition or reduce output. In any event, the plaintiffs and their economic expert have not identified any plausible harm to competition (or antitrust injury) in a relevant market or a reduction in output that has occurred as a result.

116. The plaintiffs' basic claim is that SESAC's blanket license is anticompetitive because local stations cannot pay less if they do not have SESAC's music in some shows. However, as I will show in this section, as a matter of economics, this is merely a claim that SESAC charges them higher prices than they would like to pay and they would prefer a pricing plan that is less expensive for some of them. It is not a claim that SESAC's practices harm competition.

117. In this section, I start with a discussion of the economics of bundling and the efficiencies that bundling commonly provides. I then go through each of the plaintiffs' claims of anticompetitive actions in this claim and explain why they are wrong. I conclude this section with a discussion of the efficiencies provided by PROs such as SESAC.

A. Blanket Licenses and Pure Bundling

118. Bundling refers to the situation in which a business sells several products together as a package or sells a product that includes multiple components, each of which in theory could be

sold as separate products. The purchaser of the bundle then has access to all of the separate products or separate components.

119. A blanket license is a bundle of individual licenses. The seller provides the buyer of the blanket with the right to use any the individual licenses.

120. The field of antitrust economics, and industrial organization more generally, has studied bundling for a number of years. Generally speaking, economists have found that bundling is a procompetitive practice that is widely used by firms because it results in better products for consumers and lower costs for firms. Economists have found that bundling can give rise to anticompetitive concerns only in particular circumstances. As I will discuss later, the plaintiffs' economic expert, on the one hand, has not considered the economics literature on the procompetitive benefits of bundling and, on the other hand, has not shown that the use of a blanket license by SESAC gives rise to any of the anticompetitive concerns that economists have identified. The plaintiffs and their economic expert appear to take the position that blanket licensing is presumptively anticompetitive. That is contrary to modern economic analysis, which has found that bundling is generally procompetitive and is anticompetitive only when firms (a) foreclose competition in a market (which they can do only under very specific market conditions such as when there are scale economies); and (b) do not provide offsetting efficiencies.

1. Bundling is commonly practiced by firms without market power.

121. Bundling is commonplace. Firms that operate in competitive industries, and do not have market power, engage in bundling. Bundling must provide efficiencies—either better products to offer consumers or lower costs that provide for lower prices—because otherwise firms could

not engage in the practice profitably in the face of competition. In many of these cases the bundle the firm provides includes elements that some buyers do not use and elements for which buyers would "double-pay," in some sense, if they purchased that element elsewhere.

122. The pervasiveness of bundling is obvious from common experience. For example, smartphones include cellular calling, text messaging, web browser access, a camera, GPS functionality, email, calendar, mapping, and many other functions. Automobiles commonly come with air conditioning, a specific brand and model of tires, a moonroof, leather seats, automatic transmission, and many other features.[86] A hotel room comes with various amentities in the bathroom, access to a health club, common areas, and access to a business center.[87] Many cereals come with combinations of different ingredients, such as fruits and nuts, that could be provided separately. Men's tie shoes come with laces. In all these cases, some consumers may not want elements of the package offered. It would be technically possible, moreover, for firms to provide some or all of these components separately or provide different products with subsets of these components.

123. Bundling is especially common for products for which the additional cost of including an additional feature or component is low, as is the case with intellectual property. For example, computer operating systems include thousands of features, newspapers have several

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[86] For instance, Chrysler's 300 sedan has many features that are included in all four of its models, such as an acoustic windshield, acoustic front door glass, Keyless Go, and Remote Proximity Keyless Entry. *See* Chrysler "Models: HIGHLIGHTS," http://www.chrysler.com/hostc/vsmc/vehicleSpecModels.do?modelYearCode=CUC201301 (last visited Mar. 26, 2013).

[87] For instance, all guest rooms at the Chicago Marriott Downtown Magnificent Mile hotel include access to cable television, a health club, and a swimming pool. *See* Marriott "Chicago Marriott Downtown Magnificent Mile," http://www.marriott.com/hotels/hotel-rooms/chidt-chicago-marriott-downtown-magnificent-mile (last visited Mar. 26, 2013)/; Marriott, "Chicago Marriott Downtown Magnificent Mile," http://www.marriott.com/hotels/hotel-information/fitness-center/chidt-chicago-marriott-downtown-magnificent-mile/ (last visited Mar. 26, 2013).

distinct sections not to mention hundreds of articles, web portals contain numerous different sections, digital music services provide access to thousands of songs, digital television services provide access to hundreds of movies and television shows, and magazines contain sometimes dozens of articles. Most consumers do not use all of the elements of these bundles and it is technically possible to provide alternative products with just the elements consumers do want. Digital music services such as Spotify could offer a premium subscription that only provided access to classical or jazz and there are consumers that would want that. Many consumers would have to "double-pay" for some elements – for instance, if they already owned digital copies of the Miles Davis discography.

2. There are significant efficiencies from bundling

124. The economics literature has identified a number of efficiencies from bundling. One of the main efficiencies is the cost savings from offering only one bundle, or a limited number of bundled offerings.[88] If all, or many, of the potential bundles, consisting of the different combinations of the component products or features, were offered, there would be substantial additional costs. Firms would need to incur the costs of configuring and selling each of the combinations to be sold, set prices or negotiate prices for each of the combinations, and either produce each of the combinations (for physical goods) or restrict access to the particular combination a customer had bought (for virtual goods). These cost savings are passed on to consumers in the form of lower prices.

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[88] *See* David S. Evans, and Michael Salinger (2005), "Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law," *Yale Journal on Regulation*, at 83-89; Barry Nalebuff (2003), "Bundling, Tying, and Portfolio Effects: Part I, Conceptual Issues," *U.K. Department of Trade & Industry, DTI Economics Paper* No. 1, at 18 [hereinafter "Nalebuff (2003)"]; Michael Salinger (1995), "A Graphical Analysis of Bundling," *Journal of Business*, Vol. 68, No. 1, at 85-98.

125. Customers also benefit directly from bundled offerings. In the absence of a bundle, a customer would need to assess each of the combinations made available for sale. That results in transactions costs. Bundling can reduce consumer confusion from having overwhelming number of options.[89] Consumers also benefit from not having to make multiple separate purchases of different components.[90]

3. Bundling has been viewed as potentially anticompetitive only in limited circumstances

126. Economists have identified specific, limited circumstances in which a particular form of bundling known as tying could harm competition. Tying refers to a specific case of bundling in which the firm, through a pure or mixed bundle, offers one product (the tying product) only if the consumer also takes another product (the tied product). Economists have found that a firm could have the incentive and ability to foreclose competition through tying if, among other conditions:[91]

a. It has significant market power in the tying product so that its consumers do not have readily available substitutes;

b. the tying and tied products are not used in fixed proportions;

c. the tying and tied products are complements; and

d. there are scale economies in the production of the tied product.

Under one theory, anticompetitive effects of tying can result from the firm with market power in the tying product market using the tie to foreclose competition in the tied product market and

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[89] Nalebuff (2003), at 31.

[90] Nalebuff (2003), at 31.

[91] Dennis Carlton and Michael Waldman (2002), "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries," The RAND Journal of Economics, Vol. 33, No. 2, at 195, 215; David S. Evans, and A. Jorge Padilla (2005), "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach," *The University of Chicago Law Review*, Vol. 72, No. 1, at 76, 78, 91; Michael D. Whinston (1990), "Tying Foreclosure, and Exclusion," *The American Economic Review*, Vol. 80, No. 4, at 855; .

thereby increase its market power there. Under another theory, anticompetitive effects can result from the possibility that a producer of a separate tied product could enter the tying market; the tie is used to destroy this separate producer and thereby preserve market power in the tying market. Under both theories there could be countervailing efficiencies which would make the tie procompetitive overall.

127. Modern economic thinking recognizes that pure bundling generally does not harm competition except possibly when it involves tying.[92] Modern economic thinking also shows that even if pure bundling helps firms obtain more revenues from consumers, that does not mean that it harms competition or reduces output, and in fact it may increase output.[93]

128. The blanket license offered by PROs is an example of pure bundling since the PRO makes available for license only the bundle of all of the compositions in its repertory. Despite its name the PPL is also a pure bundle. The PRO charges a lower price to customers who use fewer compositions in the PRO's repertory but the license permits those customers to use all the compositions in the PRO's repertory.

129. SESAC is not engaging in tying. The performance rights to works in SESAC's repertory are not complements and requiring buyers to take one performance right as a condition of taking another performance right could not foreclose competition in the market for the other performance right. As a result the blanket license does not involve tying as the term is

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[92] Some economists have identified other limited situations in which bundling could harm competition. *See* Nalebuff (2003), Section 4.4. I do not necessarily agree that the scenarios set out would harm competition, but these scenarios do not apply to this case. For example, Nalebuff's report posits that bundling could be used to create entry barriers, but this is not applicable in this case as plaintiffs do not claim that bundling prevents entry of competitors who would only offer certain compositions in competition with SESAC. His report also posits that bundling could be used to create conglomerate effects whereby competitors that do not sell the whole bundle cannot compete effectively, but this is not applicable in this case because plaintiffs do not claim that SESAC's compositions would compete with non-SESAC compositions.

[93] This can be characterized as a form of price discrimination. *See* Nalebuff (2003), Section 4.3.2.

used in the economic literature and, it is my understanding, as the term is applied by the courts. Also, not offering a cheaper blanket license through the PPL does not amount to tying either. In addition, under the plaintiffs' market definition SESAC cannot be engaging in tying since tying claims involve products that are in separate markets and are complements.

130. It is not a matter of controversy that this case does not, in fact, involve tying. The plaintiffs have explicitly stated that they are not alleging that SESAC has engaged in anticompetitive tying: "Nor do Plaintiffs allege that SESAC has engaged in unlawful tying in the sense of the allegations in [*Jefferson Parish*] and similar cases."[94] The plaintiffs' economic expert has also not argued that any of the economic theories of tying apply to this case and has not referenced any of the economic literature on anticompetitive tying. Therefore, economic theories of anticompetitive behavior involving tying are not relevant in this matter.

131. Plaintiffs and their economic expert have not identified any other recognized economic theory concerning how pure bundling could harm competition and have not applied any recognized economic theory of anticompetitive behavior concerning bundling to the facts of this matter.

4. The Plaintiffs' position on blanket licensing efficiencies

132. In fact, my reading of the plaintiffs' complaint and their economic expert's report is that they tacitly agree that blanket licenses are efficient. They have not asked for the elimination of blanket licenses but rather for an alternative blanket license—the PPL—that would result in lower prices for some of them. It is also my understanding that the rate court proceedings have resulted in ASCAP and BMI also offering separate blanket licenses at different prices.

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[94] Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 15, *Meredith Corp., et al v. SESAC, LLC, et al.*, Case No. 09 Civ. 9177 (NRB) (S.D.N.Y. June 28, 2010).

133. Based on my reading of the plaintiffs' complaint and their economic expert's report the plaintiffs' position appears to be that a single blanket license is anticompetitive but two different blanket licenses at different prices are not anticompetitive.[95] I know of no support in antitrust economics for this proposition and I note that the plaintiffs' economic expert does not cite any authorities in economics to support that proposition.

B. Plaintiffs' Claim that SESAC's Blanket License Forces Them to Pay for Music They Do Not Use

134. Plaintiffs claim that SESAC's blanket license structure "forces local stations to pay for music they do not want or use."[96] That is always the case when a firm offers a bundled offering and is commonplace in the economy. Consumers buy newspapers and have to pay for sections they do not read, buy word processing packages with features they never use, pay for hotel rooms that have amenities they do not want, and buy restaurant meals with bread that they could do without. The list of such pure bundles is virtually endless because they are so common.

135. Of course, consumers are always looking for the best price. Not surprisingly, some people do complain about being forced to purchase bundled goods because they think they

[95] I understand that the plaintiffs claim that the preferred outcome is that producers provide source licenses and the composers engage in direct licenses. *See* Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 7, *Meredith Corp., et al v. SESAC, LLC, et al.*, Case No. 09 Civ. 9177 (NRB) (S.D.N.Y. June 28, 2010). ("[SESAC has] refrained from offering meaningful alternative licenses to the all-or-nothing blanket license that would make it economically feasible for the local stations (or program producers on their behalf) to obtain performance rights in direct competitive dealings with the SESAC Rightsholders."). However, the widespread practice of producers not providing source licences cannot be attributed to SESAC given that it accounts for about 12 percent of local television blanket license fees. With respect to third-party programming, I have seen no evidence that (outside of locally produced news programs) a significant amount of direct licensing occurs for ASCAP and BMI affiliates even though ASCAP and BMI offer the lower priced PPLs. My reading of the plaintiffs' complaint and their economic expert's report is that they also recognize that source and direct licensing for third-party programming are not realistic alternatives. *See* First Am. Compl., ¶ 8; Jaffe Report, at 38 ("Unless and until [stations become willing to pay more for syndicated programs carrying source licenses], direct licensing for locally-produced programming will remain the primary competitive mechanism.").

[96] First Am. Compl., ¶ 24.

should be able to save money if they only buy a part of the bundle. And just as unsurprisingly, some people complain when goods are unbundled and they have to pay for components separately. For instance, some consumers complained when airlines started unbundling their services by charging for food on the flight and baggage handling charges.

136. Indeed, this inconsistent view of bundling is apparent in the plaintiffs' complaint in this matter. The plaintiffs and their economic expert claim that there is a market failure that results from the fact that producers do not include performance rights in the bundle of rights television stations receive when they license a show. At the same time, however, they complain about SESAC bundling performance rights together in a blanket license.

137. As I mentioned earlier the economic analysis has found that bundling can be anticompetitive only in particular, limited circumstances. A necessary but not sufficent condition for bundling to be anticompetitive is that providing only the bundle for sale forecloses competition from the market and thereby reduces output. In addition to failing to identify a recognized economic theory under which pure bundling could foreclose competition the plaintiffs and their economic expert have not identified any competition that has been excluded or any consequent reduction in output.[97]

[97] Plaintiffs have claimed that SESAC restricted its affiliates from engaging in direct licensing. As I discuss below, SESAC paid certain affiliates performance rights royalties in advance and placed certain restrictions on these affiliates licensing performance rights directly—a situation in which the affiliates would have been paid twice for the performance rights and SESAC would have paid money in advance to the affiliates with nothing in return. In any event, SESAC stands in a vertical relationship with each of its affiliates, who are in essence its suppliers. Reduction of "competition" between a firm and its own suppliers typically is not a matter of concern in antitrust economics.

C. Plaintiffs' Claim that SESAC's Blanket License Discourages Purchases from Alternative Sources of Performance Rights

138. Plaintiffs claim that SESAC's blanket license structure "discourages [stations] from seeking alternative sources of music performing rights (or from asking their program suppliers to acquire such rights on their behalf)" because if they were successful they would "pay twice for the same rights."[98] They claim that SESAC's blanket license and the failure according to plaintiffs to offer a viable PPL has discouraged the use of source licensing and/or direct licensing.

139. This claim is also true for all bundling and is really just the flip side of the previous claim. When consumers pay for a bundle they have lower incentives to purchase components of that bundle separately. The consumer would have to "pay twice." Why pay to go to a health club on your next trip – even a health club that you might prefer – when you've already paid for that as part of the hotel bill?

140. From the standpoint of antitrust economics, it is notable that the plaintiffs' claim that SESAC's blanket license restricted the use of source and direct licensing does not involve a restriction on horizontal competition. SESAC is acting as an intermediary between rights-holders and rights-users. It plainly has a vertical relationship with composers who could engage in direct licensing and producers who could engage in source licensing. As I discuss below, in Section V.D.1, in general antitrust economics has found that vertical restrictions are procompetitive and can harm competition only in limited circumstances.

141. In addition, the plaintiffs' claims concerning the impact of blanket licensing on the incentives to pursue other alternatives are wrong as a matter of antitrust economic theory and

[98] First Am. Compl.t, ¶ 24.

wrong as a matter of fact. The plaintiffs claim that blanket licensing deters them from pursuing source licenses and direct licenses.

1. Source licenses

142. With respect to works for hire, producers typically have chosen to provide a share of performance rights royalties to composers and to retain a share of these performance rights royalties for themselves. This result has emerged from the interaction of the demand and supply for music in third-party and locally produced programs. Producers and local stations have also entered into contracts in which producers do not include performance rights. This result has emerged from the interaction of the demand and supply for third-party programming. Plaintiffs and their economic expert have not provided any economic theory that demonstrates that offering a less expensive blanket license—the PPL—would induce producers to alter their economic deal with composers or induce producers to alter their economic deal with local stations and thereby provide source licenses. Moreover, they have not provided any evidence that even if producers did bundle source licenses with syndication rights, the total price that local stations pay for syndication plus performance rights would decrease. There is no economic reason why producers would offer something of value for nothing.

143. In any event, SESAC's practices have not been the cause of the widespread practice of producers not providing source licenses. As the plaintiffs' complaint acknowledges, the fact that local stations typically receive programs without performance rights for the music that is embedded in the programs is the result of "longstanding industry practice."[99] That is, the general lack of source licensing is a practice that long predates the growth of SESAC. It is implausible that the use of blanket licensing by SESAC, which accounts for about 12 percent of

[99] First Am. Compl., ¶¶ 7-8.

local television blanket license fees, could be the cause of this longstanding industry practice—or that the elimination by SESAC of blanket licensing could alter this longstanding industry practice.

2. Direct licenses

144. The plaintiffs and their economic expert have provided no evidence that local stations would be able to enter into contracts with rights-holders for performance rights for music embedded in third-party programming that would be less expensive for them than the fees they are paying SESAC for the blanket license.[100] To demonstrate that the local stations would save money the plaintiffs and their economic expert would need to consider the following factors:

a. The fact that the rights-holder has a monopoly over the performance right for that program and can "hold up" the station.

b. The costs of entering into direct negotiation with rights-holders.

c. The possibility that several rights-holders have performance rights for music embedded in a program and that the local station would need to negotiate with each of them and any one of those rights-holders could "hold up" the local station.

145. The most likely outcome is that local stations would pay higher prices with direct licensing than they would pay with a blanket license. In addition to higher transactions costs local stations would be faced with multiple rights-holders with monopolies over their performance rights attempting to hold up the stations for their profits. SESAC also faces reputational consequences from charging excessive fees for third-party programming, including the risk that producers will stop using SESAC composers or that stations will stop using shows with SESAC music.

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[100] *Cf.* Jaffe Report, p. 30 ("Stations typically are only able to secure direct-licenses for the music in the programming that they produce themselves….").

146. If SESAC's practices really were the cause of the relative infrequency of direct or source licensing of music in third-party programming we would expect that local stations would engage in such licensing for music by affiliates that belong to ASCAP and BMI, since these PROs apparently do not enage in the practices to which plaintiffs object. The plaintiffs and their economic expert have provided no evidence that this is the case for more than a few isolated shows, and my understanding is that direct or source licensing of the music of ASCAP and BMI affiliates for third-party programming is uncommon.[101]

D. Plaintiffs' Claim that SESAC's Affiliate Licensing Restrictions Limit the Utility and Availablity of Direct Licensing

147. Plaintiffs claim that SESAC acts as "the exclusive licensing agent for its Rights-holders for many compositions in its repertory" and that that limits "the utility and availability of direct licensing as a competitive alternative to SESAC's blanket license."[102]

148. The plaintiffs and their economic expert have not explained how any SESAC restriction limits horizontal competition among the composers and publishers that belong to SESAC. As that term is ordinarily used in antitrust economics, SESAC itself does not have a horizontal relationship with composers or publishers. As I noted above, SESAC is acting as an intermediary between the rights-holders and the rights-users and therefore has a vertical relationship with them. The fact that SESAC offers a bundle does not convert a vertical relationship into a horizontal one, nor does the fact that SESAC places some restrictions on direct licensing.[103]

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[101] Lowe Deposition, at 35:15-36:3.

[102] First Am. Compl., ¶ 28.

[103] Vertical restraints can restrict competition if they limit horizontal competition at one level or the other. For example, there could be anticompetitive effects if a distributor were facilitating a cartel of suppliers that would otherwise compete with each other. What is relevant is that *horizontal* competition among the suppliers is

149. Therefore, whatever restrictions SESAC imposes on direct licensing are vertical ones. Before discussing the plaintiffs' claims regarding these restraints in detail it is useful to summarize the economics of vertical restraints.

1. Antitrust economics of vertical restraints

150. A vertical restraint is a limitation that one firm in a supply chain, a manufacturer for example, imposes on another firm in a supply chain, the manufacturer's distributors for example. Economists have analyzed a number of vertical restraints including exclusivity restrictions, which are the particular type of restriction that the plaintiffs point to. As a general matter, modern antitrust economics recognizes that vertical restraints are generally procompetitive and cause concern only in special situations.[104]

151. Consider a manufacturer using a distributor to sell its product. The manufacturer could attempt to sell its product itself, but uses a distributor because it believes, for example, that the

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restricted, not *vertical* competition between a supplier and its distributor. In this case, however, the plaintiffs have stated that the SESAC affiliates do not compete with each other with respect to third-party programming. And SESAC's relatively small size prevents it from restricting competition for music for locally-produced programming.

[104] Carlton and Perloff note that "[f]ew argue that the antitrust laws should be used to control how a monopoly chooses quality or manufactures its product, yet there is usually no greater justification for interfering in the monopoly's choice of distribution than for interfering in its choice of quality or production." The examples they give of potentially anticompetitive vertical restraints involve the use of vertical restraints to restrict horizontal competition: "exclusive dealing can harm society if it prevents or impedes rivals from obtaining distribution of their product" and "exclusive territories could be part of an agreement among competing dealers on how to allocate territories." Dennis W. Carlton and Jeffrey M. Perloff (2005), *Modern Industrial Organization* (4th ed.),, at 668. Motta notes that "as long as intra-brand competition is concerned, the presumption is that such [vertical] restraints are welfare improving." Massimo Motta (2004), *Competition Policy: Theory and Practice*, at 305; *see* Brief for Economists in Support of Petitioner as Amicus Curiae at 5, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), (No. 06-480)("There is a consensus in the economic literature that minimum RPM can, in certain circumstances, remedy a free-riding problem and thereby increase competition and enhance consumer welfare."). Cooper et al. note, "[o]ur review of the empirical evidence – which informs our priors – suggests that vertical restraints are likely to be benign or welfare enhancing." James Cooper, et al.(2005), "Vertical Restrictions and Antitrust Policy: What About the Evidence?" *Competition Policy International*, Vol. 1, No. 2, at 63; *see also* Brief for the United States as Amicus Curiae at 4, *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., 551 U.S. 877 (2007) (No. 06-480) ("There is a widespread consensus of opinion that RPM, like non-price vertical restraints, can have a variety of procompetitive effects that enhance consumer welfare.").

distributor is more skilled at selling and realizes efficiencies from selling for multiple manufacturers at the same time, even though the manufacturer has to pay the distributor for its efforts and even though the distributor will profit from this arrangement. The manufacturer might agree not to sell its products itself or through other distributors, perhaps because the distributor is willing to offer a guaranteed level of sales or because the manufacturer wants to give the distributor incentives to invest effort into selling its product.

152. While in some purely literal sense such a manufacturer-distributor agreement restricts "competition" between the distributor and manufacturer in the selling of the product, the possibility of that "competition" came about *only as a result of the decision of the manufacturer to hire another company to sell its product*. The efficiencies afforded by such an agreement are widely recognized among antitrust economists and the courts have adopted much of this economic analysis in their decisions.[105] Absent special circumstances not applicable here, such agreements do not restrict competition or output. Rather they provide the manufacturer with the ability to sell its product more efficiently and are likely output enhancing.

153. Vertical restraints can raise the potential of anticompetitive effects but those anticompetitive effects come about when vertical restraints are used to restrict competition among horizontal competitors.[106] For example, if the distributor accounted for a majority share in the industry, such an exclusive agreement might limit the ability of other manufacturers—without access to the distribution network of the leading firm—to compete.[107]

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[105] *See*, *supra*, n. 104.

[106] *See*, *supra*, n. 104.

[107] I raise these only as potential concerns. Whether any such agreements are in fact anticompetitive would depend on an analysis of the case in question.

2. SESAC's agreements with affiliates

154. Plaintiffs' complaint relates to what they claim is their inability to obtain performance rights to a given affiliate's music directly from the affiliate rather than from the PRO that the affiliate has chosen to act as its representative. This restriction is similar to a manufacturer agreeing not to sell directly to customers. It has the same well-recognized efficiency justifications as the vertical restraint discussed above. The distributor has a greater incentive to expend effort on the manufacturer's behalf when it has a guarantee that the manufacturer is not going to take actions that would diminish the value of those efforts.

155. Importantly, the vertical restraints present in certain SESAC affiliate agreements do not involve any restrictions on horizontal competition and therefore do not raise any anticompetitive concern. And in fact SESAC's affiliates do compete with each other for assignments with producers for third-party programming and for locally-produced programming. They cannot compete with each other for performance rights for embedded third-party programming since as I have discussed above it is not possible for local stations to substitute one composer for another at that stage, but this is not a consequence of any action by SESAC.

156. As it turns out SESAC's vertical restraints are much weaker than those generally considered to be pro-competitive and have stronger efficiency justications than those generally considered to be pro-competitive. SESAC's standard affiliate agreement is non-exclusive.[108] Plaintiffs' expert identifies what he claims are direct licensing restrictions for affiliates accounting for only 44 percent of SESAC's local television revenue.

[108] SESAC-0822471; SESAC-0823046. My understanding is that these are representative of SESAC's standard affiliation agreements with writers and publishers.

157. SESAC does impose *some* limitations on the ability to engage in direct licensing for certain major affiliates to whom it has agreed to make minimum payments regardless of the actual use of the rights-holder's music during the terms of the agreement, or to whom it has paid sums in advance of when the affiliates would ordinarily be due to receive performance rights royalties. In the case of these arrangements, the terms of the agreement include requirements to first refer direct licensing inquiries to SESAC, restrictions on the length of direct licenses, requirements to charge specified rates for direct licenses, and payments to SESAC (or offsets against payments due to the affiliates) as a result of direct licenses.[109]

158. These guaranteed payments or advances are a significant form of competition by SESAC to attract affiliates who might otherwise try to license through ASCAP or BMI. They also provide significant benefits to the rights-holders. But they would be difficult, if not impossible, to offer as a practical economic and business matter if there were no restrictions on direct licensing.

159. Consider the case in which an affiliate has music in a hit television program. Suppose that SESAC projects that the affiliate would earn $1.5 million in royalties with SESAC and that adding the affiliate would allow SESAC to offer a higher quality product to local stations and thereby recoup the projected $1.5 million in royalties. In this case, SESAC might be willing to offer a signing bonus of $1 million to attract the affiliate, with the $1 million being offset over time by the royalties the affiliate would earn. If there were no restrictions on direct licensing, then after signing the contract, the affiliate could turn around and direct license its music to all the stations that broadcast the show. If it did so for a price of $1.25 million, for example, the

[109] Professor Jaffe cited a number of licensing agreements that he viewed as restrictive. *See* Jaffe Report, at 68-69. Professor Jaffe references SESAC-0618929 -32; SESAC-0618489 -95; SESAC-0261683-85; SESAC-0413601-08; SESAC-0618594-602; SESAC-0618698-705.

affiliate would benefit because it has received $2.25 million (the $1 million SESAC guarantee plus the $1.25 million in direct licenses), which is more than the its projected royalties of $1.5 million with SESAC. And SESAC would be out the $1 million, having guaranteed the bonus but received nothing in return. That is, the affiliate in effect gets paid twice and SESAC has lost the value of what it bargained for. This is a stark example but it illustrates the central point that in order to offer affiliates guaranteed bonuses, SESAC must itself have comfort that the music for which it is willing to offer the bonuses is not then sold out from under SESAC in the form of direct licenses. Restrictions on direct licensing are therefore reasonable provisions that facilitate increased competition among PROs for affiliates.

160. Plaintiffs and their economic expert argue that the restrictions on direct licensing associated with these contracts are anticompetitive. As explained above, it is well known that vertical restraints do not give rise to anticompetitive concerns unless they have a significant impact on horizontal competition that would otherwise occur. The plaintiffs and their economic expert have not shown any such impact. To do so they would have to show not only that a significant amount of affiliates were subjected to restrictions but also that absent those restrictions they would have engaged in direct licensing.[110] More importantly, they would have to show that the direct licensing would have increased competition among composers, or among PROs, as opposed to between a composer and the PRO it has chosen to sell its performance rights on the composer's behalf.

[110] Aside from Stephen Arnold, Professor Jaffe references other SESAC affiliates with agreements that allegedly restricted direct licensing, but he does not provide any evidence that stations unsuccessfully sought direct licenses with those affiliates. The other SESAC affiliates with allegedly restrictive contracts (Jeff Beal, Danny Lux, Jonathan Wolff, Michael Egizi, and Robert DeMarco) were not significant composers of music generally used in locally produced programming.

161. The plaintiffs' economic expert has noted that direct or source licensing is viable primarily when there is the potential of the composer losing performances if he or she does not offer a direct or source license, and that absent fundamental changes in the way the industry operates, "direct licensing for locally-produced programming will remain the primary competitive mechanism."[111] The plaintiffs' economic expert cites only the licensing restrictions for Stephen Arnold to support his conclusion that SESAC engaged in efforts to prevent direct licensing of music in locally produced programming.[112]

162. So let me turn to Stephen Arnold. The plaintiffs and their expert take particular issue with SESAC's 2004-2007 and 2008-2011 contracts with Stephen Arnold. For the 2004-2007 contract (which is outside the plaintiffs' proposed class period of 2008-2012), SESAC offered Mr. Arnold guaranteed annual payments of $2.25 million to $3.0 million, subject to reductions if the number of stations using his music fell below 200. For the 2008-2011 contract, SESAC offered Mr. Arnold guaranteed annual payments of $2.1 million, subject to reductions if the number of stations using his music fell below 100, or increases if the number of stations using his music exceeeded 250.

163. SESAC was therefore offering Mr. Arnold a proposition where it would effectively buy the rights to his performance royalties in return for an essentially flat fee, subject to adjustment for major changes in usage of his music. This was not a contract where Mr. Arnold was earning performance royalties with a guaranteed minimum; rather it was essentially a flat payment for his performance rights.[113]

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[111] Jaffe Report, at 38.

[112] Jaffe Report, at 71-73.

[113] The contract did provide for ongoing performance royalties for performance of any non-news music owned by Mr. Arnold.

164. The restrictions in question limited Mr. Arnold's ability to sell his performance rights. But that is what he had given the right to SESAC to do, in exchange for his multi-million dollar guarantees. Those restrictions did not restrict competition because they did not affect the ability of local stations to use other news music composers, as many stations that previously used Stephen Arnold in fact chose to do.

165. There is therefore no basis for concluding that SESAC's practices significantly restricted source or direct licensing. The only claim plaintiffs' expert makes of actual impact is with respect to Stephen Arnold, and in that case stations were able to switch to other news music composers.

E. Plaintiffs' Hold-Up Theory

166. The plaintiffs claim that the source of SESAC's market power is that after they have licensed third-party programming, the music is embedded and they cannot use the programming unless they get a license. The local stations could deal with this problem when they negotiate the contract with the producer. They could either request a source license or factor the fees they will incur as a result of having SESAC music into the price they pay to license the program. To address the problem of a composer switching PROs after stations have licensed the program, stations could enter into contingent contracts that, for instance, might change the fee if the composer or publisher decided to switch to SESAC.

167. The plaintiffs' hold-up theory is not particular to SESAC. As I discussed earlier, it applies equally to an individual rights-holder whose music is embedded in third-party programming that a local station has already paid for. That individual rights-holder could "hold up" the local station on their own.

F. Plaintiffs' Claim that SESAC has Threatened to Withhold Repertory

168. Plaintiffs claim that "unconstrained by any requirement that it issue music users licenses promptly upon request and at 'reasonable' fees subject to judicial review, SESAC has threatened to withhold access to its entire repertory as a means to extract supracompetitive fees from local stations."[114] The plaintiffs and their economic expert do not explain this claim in terms I am familiar with in antitrust economics. It is well known that it is not anticompetitive for firms to ask to be paid in return for providing a product and, in fact, it is not anticompetitive even for a monopolist to ask to be paid a monopoly price in return for providing a monopoly product.

G. Plaintiffs' Claim that SESAC's Efforts to Attract Affiliates Have Made it Impossible for Plaintiffs to Avoid SESAC Music

169. Plaintiffs claim that "membership in SESAC is by invitation only" and that SESAC "strategically raided ASCAP and BMI to entice (through the prospect of supracompetitive returns) composers whose compositions" are either (1) "embedded in syndicated and unlicensed network programming"; (2) "widely incorporated in Plaintiffs' locally produced programs"; or (3) "are included in enough commercials that, collectively, would be essentially impossible for Plaintiffs to avoid."[115] Plaintiffs also claim that "SESAC's aggregation of compositions from hundreds of different sources into a single repertory . . . presents a commercially unmanageable risk of inadvertent infringement for local stations."[116]

170. Again, plaintiffs appear to be complaining about normal business conduct by an intermediary. Their claim is essentially that SESAC should not work to sign up affiliates whose

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[114] First Am. Compl., ¶ 29.

[115] First Am. Compl., ¶¶ 30.

[116] First Am. Compl., ¶ 33.

compositions are widely used, and that SESAC should not increase the quality of the services that it offers rights-users. SESAC is not under a consent decree and is making business decisions for the benefit of its affiliates, who are one of the two groups of customers for this platform. That is normal pro-competitive behavior for an intermediary.

171. Plaintiffs take issue with the fact that SESAC membership is by invitation only. At the same time, however, they take issue with the fact that SESAC attracts affiliates with too many compositions embedded in existing popular programs, and with the fact that SESAC attracts affiliates whose compositions may be used in some commercials. If SESAC had open membership, its repertory presumably would have even *more* compositions and make it harder for local stations to avoid SESAC music. Notwithstanding SESAC's efforts to recruit affiliates, SESAC remains substantially smaller than either ASCAP or BMI.

172. With respect to the claim that SESAC has a sufficiently broad repertory that inadvertent infringement may take place, it is important to note that in the absence of PROs, stations would be unable to avoid that risk. In the absence of PROs, an individual station would need to acquire protection from infringement with tens (or hundreds) of thousands of rights-holders.

H. Plaintiffs's Claim That SESAC Does Not Offer a Viable PPL

173. Plaintiffs claim that SESAC refuses "to offer local stations economically viable alternatives to its all-or-nothing blanket license" and that the terms of the PPL "are so egregious that the offer is made in name only."[117]

174. As a preliminary matter, from the standpoint of antitrust economics I do not know of any presumption that a decision by SESAC not to offer a PPL, or not to offer one that meets

[117] First Am. Compl., ¶¶ 24-26.

whatever the plaintiffs' standard is for viability, could harm competition. As I discussed above, bundled pricing is commonplace in the economy. In those cases, the price a customer pays is for the entire bundle, regardless of how much he or she uses the invididual elements of the bundle. Consumers do not get a rebate if they would prefer to get the newspaper without the sports section. As I noted above, it appears that the plaintiffs want the blanket license, but they want to pay less for it. It is like a reader of the *New York Times* asking for a lower price because they do not read as much of it as a typical reader. There is no general basis in antitrust economics for requiring a firm to offer a cheaper price for a bundle to people who consume less of the bundle, or for insisting that a firm offering a bundled product also offer it in unbundled form. Moreover, it is also common for firms to charge a premium for a specialized or customized product that differs from the firms' standard product offerings.

1. Changes in SESAC PPL

175. As I discussed above, SESAC did not offer a PPL until it was required to do so as a result of choosing arbitration for the 2005-2007 contract.[118] That is, even when SESAC had a much lower share than it does now, there was no PPL option for SESAC. The PPL formula the arbitrators set was modeled in general terms after the PPL formulas for ASCAP and BMI.[119] The ASCAP and BMI formulas themselves came about as the result of those PROs' respective consent decrees. The existence of a PPL for the different PROs, and the applicable formulas,

[118] SESAC-0790665 at 669-670. The local stations had the right to a PPL option, with the terms set by arbitrators, if SESAC chose to go to arbitration.

[119] The PPL formula set by the arbitrators resembles the ASCAP PPL formula. *See* ASCAP Local Station Per Program Television License for the term commencing as of April 1, 1998 and ending December 31, 2009. The BMI PPL formula at the time provided for a separate 15 percent fee for ambient and incidental usage that did not vary based on amount of usage of BMI music. *See* BMI Local Television Station Music Performance Per Program License for the term ending December 31, 2004, at 5.

did not therefore arise from competitive forces. There is no basis from the historical evolution of the industry to suppose that PROs would offer a PPL as a result of competition.

176. The plaintiffs appear to take issue primarily with the change in SESAC's PPL formula from the 2005-2007 contract, set in arbitration, to the formula in 2008-2012 contract. Under the 2005-2007 formula, a station electing to pay under the PPL would pay a fee of: [120]

PPL Fee = *SESAC Share × (5.34+0.07) × Blanket Fee +*
[1–SESAC Share ×(5.34+0.07)] × (Blanket Fee × 15% Incidental/Ambient Use)

177. The first part of the expression, SESAC Share × 5.41 × Station Blanket Fee, is straightforward. *SESAC Share* is the share of revenue from programs with any SESAC music for the local station. The "5.34" figure was an estimate of the inverse of the industry SESAC share—that is, the share of revenue from programs with any SESAC music for the industry as a whole.[121] Thus, the (*SESAC Share* × 5.34) expression calculated a station's per-program fee by relating the local station's use of SESAC music to that of the overall industry—the lower the local station's use of SESAC music, the more its blanket fee would be reduced for PPL purposes. The 0.07 figure appears to be based on the same 0.07 increment in the ASCAP formula, but resulted in an administrative fee for SESAC that was much lower than for ASCAP.[122]

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[120] SESAC-0790665, at 669-670.

[121] To be more precise, this was an estimate of the industry SESAC share, as data for all stations was not available.

[122] *See United States v. Am. Soc'y of Composers, Authors and Publishers, et al.* (*Buffalo Broadcasting Co.*), No. 13-95, 1993 WL 60687, at *72, *153 (S.D.N.Y. Mar. 1, 1993); *United States v. Am. Soc'y of Composers, Authors and Publishers, et al.* (*Buffalo Broadcasting Co.*), No. 13-95, 1993 WL 246183, at *1 (S.D.N.Y. June 30, 1993) ("It was this percentage that yielded a 1.33:1 ratio for the per-program license fee ceiling, which was then increased to 1.4:1 to account for administrative expenses."). There were two reasons why SESAC's administration fee as calculated was much lower than ASCAP's. First, 0.07 is only about 1.3 percent of the 5.34 SESAC multiplier to which it is added, as compared to 5.3 percent of the analogous 1.33 multiplier for ASCAP. That is, the administrative fee component, as a percentage of the PPL fee, was much lower for SESAC than for ASCAP. Second, SESAC's PPL fees were also much lower than ASCAP's, because SESAC's blanket fee

178. The rest of the expression is a calculation of the ambient and incidental fee component. Roughly speaking, a fee of 15 percent of the blanket license would be assessed for a station that had no SESAC music in its programming, other than ambient and incidental usage, but that fee was offset by a proportion equal to [*SESAC Share* × (5.34+0.07)], so that the higher the station's usage of SESAC music, the lower the ambient and incidental fee would be.

179. The PPL, as formulated, thus served to provide the local stations with a discounted fee structure, electable at their discretion. Out of the approximately 1,180 local stations, 180 elected the PPL in 2005, 185 in 2006 and 248 in 2007 (an average across the three years of 204).[123]

180. For the 2008-2012 contract, the PPL formula changed in a number of respects. The new formula was as follows:[124]

PPL Fee = *SESAC Share × 5.34 × Blanket Fee +*
(Blanket Fee × 15% Incidental/Ambient Use) +
(Blanket Fee × 15% Administrative Fee)

181. There were three main changes. First, there was a change in the way that the station's share of revenue from programs with SESAC music was calculated. For programs for which there was no cue sheet to show the presence or absence of SESAC music, under the 2005-2007 contract, a "default multiplier" of 5 percent was applied. That is, 5 percent of the revenue from such programs was treated as attributable to programs with SESAC music. Under the 2008-

(which served as a base for the PPL calculation) was only about one fifth those of ASCAP's. So the dollar amount SESAC received in administration fees was yet lower.

[123] SESAC-0373761. I have reported the PPL station counts referenced by Professor Jaffe using this source document. *See* Jaffe Report, at 47. My counts differs slightly—183 rather than 185 in 2006 and 247 rather than 248 in 2007. This difference is not significant to the issues in this case. These counts include the stations that were owned and operated by ABC, CBS and NBC.

[124] SESAC Local Television Primary Channel Per Program License Agreement for the term commencing January 1, 2008 and ending December 31, 2012, at 6-7, *available at* http://www.sesac.com/pdf/Local_TV_08-12_Per_Program_Agreement_Standard_Form.pdf.

2012 contract, that default multiplier increased to 50 percent, so that 50 percent of the revenue from such programs was treated as attributable to programs with SESAC music.[125] SESAC's position is that the change in the default multiplier was intended to provide local stations and MRI, the main processor they used to submit PPL reports, with an incentive to submit cue sheets for programs they claimed had no SESAC music.[126]

182. Second, the administrative fee changed from the 0.07 additive factor in 2005-2007 to 15 percent and applied that percentage to the undiscounted blanket fee rather than the blanket fee after it had been reduced based on the station's SESAC usage, as had been the case in 2005-2007.[127] And third, the offset factor that was applied to the ambient and incidental fee under the 2005-2007 contract was removed.[128]

183. Plaintiffs argue that these changes eliminated the viability of the PPL and note that no stations took the PPL under the 2008-2012 contract.[129] As I will discuss next, in fact, based on my calculations a significant number of stations would have paid less under the PPL than under the blanket license during the 2008-2012 license period.

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[125] SESAC Local Television Primary Channel Per Program License Agreement for the term commencing January 1, 2008 and ending December 31, 2012, at 8-9, *available at* http://www.sesac.com/pdf/Local_TV_08-12_Per_Program_Agreement_Standard_Form.pdf.

[126] SESAC-0327564; Deposition of Hunter Williams, July 25, 2012, at 137:18-140:25 [hereinafter "Williams Deposition"]; Edwards Deposition, at 84:13-85:7.

[127] SESAC's position is that under the prior formula, SESAC was not covering its administrative costs. *See* Williams Deposition, at 110:10-111:9. Professor Jaffe does not appear to take issue with basing the administrative fee on the undiscounted blanket fee. *See* Jaffe Report, at 75 n. 148.

[128] This change matched the way ambient and incidental fees were treated under the BMI formula. *See* BMI Local Television Station Music Performance Per Program License for the term ending December 31, 2004, at 5. The 2005-2007 SESAC treatment of ambient and incidental fees matched the treatment under the ASCAP formula. Given that neither the ASCAP nor BMI PPL originated under competitive conditions, it is not obvious that one option is clearly better or worse than the other.

[129] First Am. Compl., ¶¶ 40-47; Jaffe Report, at 30.

2. Viablility of PPL in 2008-2012 contract

184. The plaintiffs' contention that the viability of the PPL—that is, an opportunity to save in license fees paid under the PPL rather than the full blanket fee—was eliminated in the 2008-2012 contract is incorrect. As noted above, there is no reason that I can see based on antitrust economics that a failure to offer a PPL harms competition or that a PRO should be obligated to offer a PPL that stations would choose to take. Nor is there any reason to believe that the PPL formula set in arbitration for the 2005-2007 contract, modeled after the ASCAP formula that resulted from a decision enforcing a consent decree, in any sense reflected what would be expected under competition. And there is also nothing anticompetitive about SESAC seeking to reduce the extent of the discounts offered under the PPL. Firms are not generally obligated to provide discounts, so there is no reason to bar them from reducing the applicability and size of their discounts.

185. Setting these important points aside, I consider the claim by the plaintiffs and their economic expert that the changes to the PPL for the 2008-2012 contract eliminated the PPL as a viable option for all stations. They have provided no empirical evidence for this claim. Professor Jaffe notes that no stations took the PPL during the 2008-2012 contract, but ignores (among other things) the fact that about 80 percent of the stations that had taken the PPL during the 2005-2007 contract had given up the option of electing the PPL in 2008-2012 in return for discounts given to station groups.

186. The evidence indicates that a significant number of stations would have likely have benefited from taking the PPL during the 2008-2012 contract if they had not given up the option of electing the PPL. I have reviewed calculations performed by MRI, the main company

processing PPL reports on behalf of local stations, as well as made my own estimates of the potential cost savings to stations under SESAC's 2008-2012 PPL.

187. It is important to note that the MRI calculations and my own calculations are conservative in the sense of assuming no change in behavior by the stations.[130] That is, one of the plaintiffs' stated rationales for wanting a PPL option is that it would provide local stations the ability to reduce their use of music from that PRO, or switch to programs with music from another PRO, thereby reducing their fees under the PPL.[131] Such reductions in music use and corresponding reductions in PPL fees would likely result in greater discounts under the PPL and therefore more stations electing a PPL.

a. MRI calculations

188. MRI advised its station clients against taking the SESAC PPL. Nonetheless, the "only major analysis" that MRI ran to assess the impact of the PPL in fact found that a significant number of stations would pay less under the PPL than the blanket license. Jason Walker of MRI described his analysis as follows:[132]

> Really the only major analysis that I ran, it was pretty straightforward. I took all of the per-program reports that we had submitted to SESAC in the 2007 license period and tried to get the most recent reports covering maybe a six-month time period and simply said what happens if we do nothing other than change the formula as SESAC has laid it out here, adding a 15 percent admin. fee, changing the multiplier that gets applied against the blanket, and then do nothing other

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[130] The MRI calculations are based on PPL projections for stations that were on the PPL during the 2005-2007 contract. Those stations may already have reduced their use of SESAC music as a result of being on the PPL, but could have made further reductions from 2008-2012. My calculations are based on the actual programming choices of stations in 2008 and 2011, so that they reflect choices of stations that had not elected the SESAC PPL for the corresponding periods.

[131] First Am. Compl., ¶ 25.

[132] In addition to MRI, Slantz served as a PPL processor for a much smaller number of local stations.

than change the default multiplier from 5 percent where it was used in 2007 or in which cases it was used to a 50 percent multiplier.[133]

189. From this analysis, Mr. Walker concluded that "for the period that I looked at in 2007, it showed savings in excess of a million dollars, but making the change to the formula and changing a 5 percent multiplier into a 50 percent multiplier, the savings, the per-program fee exceeded the blanket fee for those stations by several hundred thousand dollars."[134]

190. Based on my review of what appears to be the analysis Mr. Walker described, this description is roughly correct, but ignores one critical point. While it is true that according to his analysis, the 218 stations in his data set that took PPLs in 2007 would, *in aggregate*, have paid more under the PPL than the blanket fee under the 2008 PPL formula, many *individual* stations would have paid less under the PPL under his analysis—and that of course is what is relevant for whether the PPL was viable for many stations. In fact, 113 stations, more than half of the stations he considered, would have paid less under the PPL than the blanket license.[135] That is, to the extent this analysis is informative, it showed that while the 2008 PPL was less favorable to the local stations overall, it still provided discounts for many stations. Note, also, that Mr. Walker's analysis assumed that *any* program subject to the 5 percent default multiplier in 2005-2007 would be treated as 50 percent compensable to SESAC in 2008, and did not allow for the possibility that a station might secure zero percent treatment by submitting a cue sheet for the program in question.

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[133] Deposition of Jason Walker, December 6, 2012, at 245:14- 246:3 [hereinafter "Walker Deposition"].

[134] Walker Deposition, at 246:15-22.

[135] These calculations are based on MRI spreadsheet MRI00010741.There was an error in the MRI calculations. The expression in the spreadsheet for the fee under the revised PPL formula failed to adjust for the impact of the assumed 10 percent increase in blanket fees on the administration fee and ambient and incidental fee components of the PPL fee. (The formula was (Blanket_Fee×1.1×5.34×SESAC_Share) + (Blanket_Fee×0.3), but should have been (Blanket_Fee×1.1*5.34×SESAC_Share) + (Blanket_Fee×1.1×0.3).) This correction reduces the savings under the revised PPL formula. The numbers I report make this correction.

191. The fact that a station's PPL fee is less than its blanket fee does not necessarily mean the station would elect to pay under the PPL. In order to qualify for the PPL savings, a station would typically use MRI or another processor to submit reports and would have some costs of its own in sending information to MRI. The threshold savings level at which a station would elect the PPL will vary across stations, because the fees charged by MRI vary by station size and can vary depending on whether the station is using MRI to process PPL reports for ASCAP and/or BMI.[136] At the same time, with some variability in a given station's programming over time, some stations on the PPL may have little or no savings in a given month if that month's programming has atypically high usage of SESAC music.

192. As a guide, I have relied on data on monthly savings that stations that elected the PPL achieved on a monthly basis from 2005-2007 to determine the threshold for choosing the PPL. I considered the average monthly savings in each year for stations that elected the PPL in all or part of that year.[137] And I looked at the savings for a station at the 10th percentile of savings (that is, 10 percent of stations had savings below this level and 90 percent above).

193. For stations electing the PPL, the average monthly savings, prior to accounting for processing fees or other expenses, was $89 in 2005, $62 in 2006 and $147 in 2007.[138] I use the average of these figures, which is $99, as the savings threshold a station would need to elect the

[136] *See* Walker Deposition, at 114:20-115:3.

[137] If a station elected the PPL for only part of a given year, I calculated the average monthly savings for those months for which it had elected the PPL.

[138] These calculations are based on SESAC-0373761.

PPL.[139] Based on MRI's calculations, 83 stations would have had savings under the new PPL formula that exceeded the $99 threshold.[140]

194. MRI advised its station clients against taking SESAC's PPL. Mr. Walker explained that the analysis he performed "was very incomplete because what we left alone were all of those instances where we did not report a 5 percent, but instead reported a zero percent for that long list – well, not long – for that list of programs that we negotiated unique treatment for."[141] By this, Mr. Walker was referring to a number of programs that SESAC had agreed to count (in the absence of cue sheets) as not having SESAC music for the 2005-2007 period.[142] My own analysis generally assumes (contrary to Mr. Walker's stated concern) that SESAC would have continued to apply a zero percent multiplier where it did so for 2005-2007. That assumption is consistent with internal SESAC projections of the impact of the PPL formula for 2008, which assumed that programs would be treated the same in 2008 as they had been in 2007.[143]

195. Mr. Walker relayed to his station clients that, based on his reading of the terms of the proposed 2008-2012 contract, SESAC would not have to accept cue sheets or other information from MRI or the local stations that would establish that a program did not have SESAC music.[144] Instead, he stated that he expected SESAC to apply the new 50 percent default multiplier (so that half the revenue would have counted as a SESAC show in calculating the

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[139] Another plausible threshold would be the average monthly stations for stations at the 5th percentile of savings, which result in a greater number of stations exceeding the threshold. In Appendix B, I consider this in my sensitivity analyses.

[140] These calculations are based on MRI00010741.

[141] Walker Deposition, at 246:5-10.

[142] MRI00003545; SESAC-0974959; SESAC-0466490; SESAC-0460633.

[143] *See* SESAC-0679836; SESAC-0679835.

[144] *See* Walker Deposition, at 234:25-235:16.

station's SESAC share) as long as SESAC did not itself already have a cue sheet for the program.[145]

196. My own analysis, discussed below, assumes, contrary to Mr. Walker's statements, that SESAC would have accepted cue sheets submitted by stations or their PPL processor. That assumption is consistent with SESAC's stated position that the change to the percent default multiplier was intended to provide MRI and the local stations with incentives to provide cue sheets to SESAC.[146] It is also consistent with internal emails among SESAC staff indicating that they expected to receive cue sheets from MRI under the PPL to demonstrate that programs did not include SESAC music and should not be treated under the default multiplier of 50 percent. One email stated that "I would suggest they get a new per program consultant since the one they currently use is just going to sit by and let them pay 50% rather than providing cue sheets that support 0%."[147]

197. My assumption that SESAC would have accepted cue sheets from stations is also consistent with work performed by SESAC consultants to analyze the potential impact of the change in the PPL formula. The reported results indicate that SESAC expected that stations would continue to elect the PPL option under the 2008-2012 contract.[148] These results suggest that SESAC's consultants were working under the assumption that SESAC would continue to accept cue sheets under the 2008-2012 PPL.

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[145] *See* Walker Deposition, at 236:4-237:25.

[146] *See* SESAC-0327564; Williams Deposition, at 137:18-140:25; Edwards Deposition, at 84:13-19; SESAC-0483313.

[147] SESAC-0467041. Another email stated that "stations will (or should) demand that MRI get [cue sheets]." *See* SESAC-0467052.

[148] *See, e.g.*, SESAC-0926089; SESAC-0459231 at 232; SESAC-0326191.

b. Calculations based on 2008 and 2011 data

198. I have undertaken my own analysis of the likelihood that some stations would have benefited from electing the PPL during the 2008-2012 contract. The purpose of my analysis is not to calculate exactly what each station's savings under the PPL would have been, or to arrive at an exact count of the number of stations that would have saved under the PPL.[149] Rather, it is to provide a general assessment of whether a significant number of stations were likely to save on performance royalties by electing the PPL. My analysis shows that there were likely to be savings for a significant number of stations.

199. I present an overview of the results here. Appendix B contains additional details on the methodology and results. I used four main sources of data:

a. Nielsen data on ratings.

b. Tribune Media Service (TMS) data on program listings.

c. SQAD data on the value of advertising in different DMAs at different time period.

d. Cue sheet data from SESAC.

200. Data on ratings are available for most stations only during sweeps periods. I relied on data from November 2008 and November 2011. The first date is chosen to fall early in the 2008-2012 contract period. The second date is chosen to fall relatively late in the contract

[149] I do not have episode-level revenue data for each of the individual local stations, which would be used in an actual PPL calculation. The data that I use as proxies for such revenue data and the data I use to assess whether a given episode is likely to have SESAC music are, like almost all data, subject to some inconsistencies and imperfections. These data sources are, however, used in the normal course of business, including for analyses such as the PPL calculations I describe. Some of the data are also used by SESAC to calculate and pay royalties to affiliates. In any event, I have no reason to believe that these data, while imperfect, would result in an overstatement of the number of stations that would save under the PPL. As I discuss in Appendix B, which contains additional details on methodology and results, I also consider a number of sensitivity analyses to assess the impact of altering the assumptions underlying my analysis. The sensitivity analyses do not change the general conclusion that a significant number of stations would have saved money by electing the PPL.

period and to still be sufficiently long ago that the completeness of SESAC's cue sheet data would not be reduced by the recency of the episodes in question.

201. The license fee for a given station under the PPL formula depends on the share of its revenues coming from episodes with SESAC music relative to its revenue from all episodes shown.[150] I did not have access to such data from the stations. Instead, I used the Nielsen, TMS, and SQAD data to provide an estimate of the advertising value of each episode shown on each station.[151] Combining TMS schedule data with Nielsen ratings data provides an estimate of the audience for each episode. The SQAD data provide estimates of the value of the audience in different DMAs and are used to estimate the advertising value of the audience for each episode.

202. Given the estimates of the advertising value of each episode shown on a given station, we need to determine if the episode had SESAC music. This was based on the following:

a. Local news and local sports programs were counted as having SESAC music if and only if they were on stations that had a contract with a SESAC news music composer.

b. Infomercials, or paid programming, were treated as subject to the default multiplier of 50 percent.

c. All other episodes were matched to SESAC's episode-level cue sheet data to determine if the episode had any SESAC music.

d. In addition, for cue sheets that did not match, I used a series-specific multiplier when it was specified by SESAC, used an industry multiplier for episodes without episode level TMS data (that were unlikely to match to the episode level cue sheet data), and counted episodes that had been the subject of the zero multiplier agreement between SESAC and MRI as not having SESAC music.

e. About 15 percent of all episodes on a revenue weighted basis remained that were not addressed by these approaches. My understanding is that it is unlikely a

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[150] Episodes that were broadcast as part of the network feed from networks that cleared SESAC music on behalf of their affiliates (ABC, CBS, NBC, and Univision) were excluded, as they are not part of the PPL calculation.

[151] The MRI calculations were based on 2007 data on program revenues. The fact that their results generally align with mine suggest that the proxy I use is a reasonable one.

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significant fraction contained SESAC music given that SESAC has a strong incentive to accurately track the use of its affiliates' music and given that SESAC affiliates have strong incentives to ensure that SESAC has cue sheets for episodes with their music. In addition, SESAC is likely to have series-specific multipliers for shows with a significant likelihood of containing SESAC music. For purposes of this analysis, I therefore start with the base assumption that none (or a negligible percentage) of the episodes that did not match to a cue sheet and that did not have a series-specific multiplier contained SESAC music. To account for the possibility that certain of these episodes did contain SESAC music, however, I also consider sensitivity analyses, which find that my general result is not significantly affected even if as much as 25 percent of such episodes in fact contained SESAC music. [152]

203. Given this assignment of each episode as containing SESAC music or not, or being treated under the default multiplier, it is straightforward to calculate the *SESAC Share* of revenue from episodes with SESAC music relative to revenue from all episodes for each station and to use that to estimate the fee due under the PPL:

PPL FEE = *SESAC Share × 5.34 × Blanket Fee +*
(Blanket Fee × 15% Incidental/Ambient Use Fee) +
(Blanket Fee × 15% Administrative Fee)

204. Once we know the fee under the PPL for each station and its blanket fee, we know how much it would save under the PPL and can express this in both dollar and percentage terms. There were about 149 stations based on the 2008 data and 205 stations based on the 2011 data that would have had a lower PPL fee than the blanket fee (an average across the years of 177). As I noted above, we have to consider whether the savings under the PPL are sufficiently high as to be worth the processing and other costs associated with the PPL. I use the same $99 per month in savings as discussed above. I note, however, that given that stations can change their usage of SESAC music over time, the counts of 189 and 182 stations are also useful reference points.

[152] These sensitivity analyses are discussed in Appendix B.

205. Based on the analysis I have described, there were a significant number of stations that would have likely have had sufficient savings to make it worthwhile to elect the PPL, even assuming some administrative cost associated with electing the PPL. It is worth noting that one of the efficiencies of a blanket license for a television station is avoiding the need to closely monitor its use of music. There were 86 stations based on the November 2008 data and 123 based on the November 2011 data that had estimated PPL savings greater than the $99 monthly threshold level of savings. These results are broadly consistent with those from the MRI analysis.

3. Conclusions

206. The changes in the PPL formula from 2005-2007 to 2008-2012 by SESAC did have the effect of decreasing the savings from the PPL. This is neither surprising nor anticompetitive. It is not surprising that SESAC would seek to limit the discounts available under a license structure that it did not implement voluntarily. It is not anticompetitive for SESAC to have limited the size of PPL discounts as there is no evidence that its a failure to offer a PPL would harm competition.

207. Even so, assuming that SESAC would have accepted cue sheets submitted by MRI and the local stations, a significant number of stations would have saved money by electing the PPL. This is based on the MRI analysis and the analysis I have conducted. I also note that these savings exist even before any consideration of changes that the stations might have made in their programming to reduce their use of SESAC music.

208. One might ask why none of the stations did elect to take the SESAC PPL if it would have saved them money. There are at least two reasons apparent. First, MRI consistently advised stations that they could not save money by electing a PPL. And second, as I mentioned,

many stations elected to accept group discounts offered by SESAC in negotiations—about 80 percent of stations that took the PPL in 2007—which applied to all stations in the group. In return, they gave up the right to elect a PPL.

I. Efficiencies of PROs and the Use of Blanket Licenses

209. I conclude by addressing several efficiency issues. Before I get into these issues it is important to recognize that from the standpoint of economic efficiency there are two "consumer" interests we need to account for. PROs are intermediaries between rights-holders and rights-users. It is well known from the modern antitrust economics literature on these intermediaries (multi-sided platforms) that the analysis of consumer welfare should take into account the welfare of *all* consumers of the platform – here, rights-holders and rights-users – and that it is not possible to separate their welfare because they are interdependent.[153]

1. The efficiency of having PROs

210. The efficiency arguments for PROs are well developed and not controversial so I will be brief. Composers are generally individual sole proprietors or small businesses. They individually lack the resources to negotiate with multiple rights-users, to identify copyright violations, and to pursue claims against copyright infringers. They benefit from having an intermediary to do this. Rights-users, in turn, often want to have access to many rights-holders. Having access to an intermediary avoids their having to locate and negotiate contracts with these multiple users.

[153] Organization for Economic Cooperation and Development (2009), "Two Sided Markets," *Publications: OECD Policy Roundtable Reports*, at 12, *available at* http://www.oecd.org/daf/competition/44445730.pdf . ("The price level, i.e., the sum of all prices, rather than individual prices or the price structure, is the appropriate means of measuring the competitiveness of a market and should be the focus of policy analysis."); Julian Wright (2004), "One-Sided Logic in Two-Sided Markets," *Review of Network Economics*, Vol. 3, No. 1, at 61 ("Some general lessons for other two-sided markets follow. First, the paper highlights the importance of taking into account both sides of the market (and the interdependence between both sides of the market) in any analysis of two-sided markets.").

2. The efficiency of having a blanket license

211. The blanket license, like other forms of bundling generally, provides efficiencies to rights-holders and local stations. Rights-holders avoid having to engage in the negotiation of performance rights. If the alternative to licensing through PROs were for the stations to direct license, then in the absence of the SESAC blanket license, the thousands of SESAC rights-holders would need to negotiate individually with the over 1,100 local stations.[154]

212. From a given station's perspective, it would need to, at a minimum, negotiate with the rights-holders for the compositions used in its programming. To figure out which rights-holders it needed to negotiate with, the station would need to review all cue sheets on an ongoing basis (as different composers are used over time, even for the same program). The plaintiffs' economic expert in considering such an undertaking for six of the plaintiff stations for one month found it to be essentially unworkable.[155] In addition to the negotiations themselves, the rights-holders, or their representatives, would need to develop a system for ensuring that the stations paid the royalties.

213. In a world where not every station has a license to perform the compositions of every rights-holder, significant monitoring issues would arise. A rights-holder whose compositions were not licensed by a station would want to monitor that station for any unlicensed

[154] Plaintiffs' expert argues that SESAC's blanket license does not offer efficiencies because it does not offer any efficiencies over those already provided by the blanket licenses from ASCAP and BMI. See Jaffe Report, Section VI. Even if that were true, and Professor Jaffe does not demonstrate that it is, that is the wrong comparison. If we are considering the efficiency of a practice, then the alternative to be considered is a world in which no firm can engage in the practice. Professor Jaffe's approach would preclude any individual firm from claiming that their business practices provided efficiencies whenever other firms could provide a similar function.

[155] *See* Jaffe Report, at 60-61. Professor Jaffe argues that this demonstrates the impossibility of operating without a blanket license from SESAC. If that were true, it would be because it is much more efficient to get a blanket license from one known source than to identify and negotiate with all potential rights-holders from whom licenses would be needed.

performances of that rights-holder's music. In such a situation, that station would also need to monitor its own programming to make sure it did not perform any compositions that it had not licensed. In particular, the station could not perform unlicensed works even on an ambient or incidental basis, which is covered as part of the blanket licenses from the PROs. While stations could attempt to identify usage of incidental music (such as in commercials), that would be extremely time consuming, as with usage in scheduled programming. It is not clear how stations could obtain performance licenses for ambient usage other than through a blanket license or something similar.[156] Nor do plaintiffs or their expert explain how this can be done.

214. If the alternative to licensing through PROs were source licensing, then the local station would need to require that every program be provided together with a source license.[157] This result would have to be dictated by the forces of supply and demand for composers and producers. While Professor Jaffe discusses this as a hypothetical world, I do not believe even he claims it would necessarily take place, and in fact he discusses reasons why there are likely limits on incentives to source license.[158] In a world where source licensing cannot be taken for granted, PROs offer significant efficiencies in providing for performance licenses for those programs without source licenses.

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[156] In theory, a central organization could exist solely to license ambient and incidental usage. Such an organization would incur much of the cost of an existing PRO, as it would need to contract with stations and rights-holders and develop a mechanism for distributing royalties. A station could attempt to eliminate the existence of ambient music, assuming that were feasible, but at the cost of significantly degrading such programming or declining to broadcast programming that might contain ambient performances. I also understand that there may be some dispute about whether ambient performances might constitute fair use that would not require a performance license.

[157] If this were not the case, then local stations would still need to acquire licenses from PROs or through direct licensing for programs without source licenses.

[158] *See* Jaffe Report, at 13-16, 34-38. As Professor Jaffe notes, even in the presence of what he viewed as viable PPL programs offered by the PROs, the use of source licensing has been limited.

3. Efficiencies from performance rights royalties

215. Different forms of compensation could emerge from the forces of supply and demand for music compositions for television programming. I do not know of any economic reason to believe that the particular compensation arrangement that has emerged is inefficient. In fact it is similar to a company giving stock options as a form of compensation. For episodic and first-run television the writer's share of performance rights in syndication is an option that has value if the show becomes a hit and of less value otherwise. By providing this option the producer commissioning the work-for-hire accomplishes two goals that are similar to other companies that provide options. First, it aligns the incentives of the composer with its own. They both have a stake in the show becoming a hit. Second, it is able to reduce its fixed up-front costs in return for an option that has positive expected value. For startups, and other firms that face capital constraints, providing an option helps cash flow.

216. In the case of stock options the value of that option is determined by the equity markets which are thick and transparent. In the case of television programs the producer could provide a share of the future revenue. However, this may be problematic for both the producer and the composer. The producer may incur costs to administer paying shares of future syndication revenues to the composer. The composer may discount the value of the shares since the information concerning revenues, gross profits, or whatever other metric is used is controlled by the producer. In fact, the lack of transparency of television program accounting is well known as are the contract issues between stars and producers over their residuals. The advantage of having the performance rights determined by the PRO is that, like the stock market, it is an external arbiter.

217. The source licensing alternative still leaves the local stations with no protection for ambient and incidental usage.[159] Again, with respect to ambient performances in particular, the only way for local stations to receive protection from copyright infringement would be to essentially replicate what the PROs do. By contrast, blanket licenses are negotiated by each station, or collectively through the TMLC, with each PRO. The SESAC blanket license offers coverage for all performances of all compositions in the SESAC repertory, including ambient and incidental performances. This offers significant efficiencies to both rights-holders and local stations.

4. Competition among PROs

218. I would like to conclude by addressing the efficiency of having competition among the PROs. A widely accepted conclusion among economists is that competition generally increases economic efficiency. Competition tends to encourage firms to provide quality products and service to consumers.

219. Circumstances do exist where markets have fewer firms for efficiency reasons—for instance, because of scale economies or indirect network effects. Market competition in those cases leads to fewer firms and in some cases only a single firm. In merger cases, antitrust economics generally recommends balancing the possible effect of the merger on increasing prices through reduced competition against improved efficiencies. But where it is possible for several firms to efficiently provide a market, there is a consensus among economists that competition is good.

[159] Incidental usage could be covered under source licenses for programming, such as commercials, that includes music performances that fall into what is currently categorized as incidental usage. Entering into those source licenses would entail significant additional costs.

220. These principles apply just as much to intermediaries as they do to other firms. Intermediaries are a bit more complicated than other firms because they serve two different types of customers, or more. Competition among intermediaries does not necessarily benefit both groups. It can result in more competition for one group leading to lower prices and more of the costs then being passed on to the other group. But overall, competition among intermediaries tends to increase consumer and social welfare for the same reasons it does for other firms.

221. The basic economics of competition, especially as applied to intermediaries, suggest that competitive entry by PROs is a good thing for consumers and society. Rights-holders in particular benefit from having the choice of different PROs to represent them just as consumers benefit from having different insurance brokers, traders can use different exchanges, and men and women can use different online dating services. Competition authorities are naturally, and correctly, vigilant about mergers and possible anticompetitive practices among these intermediaries, on the premise that an increased number of market participants generally is a good thing.

222. By providing PRO services and competing for affiliates SESAC has intensified competition among PROs for affiliates. I would expect that competition to increase the services and compensation provided to affiliates – and, in turn, to increase affiliates' incentives to provide high-quality music.

223. The plaintiffs' economic expert concludes, remarkably, that it would be better if SESAC did not exist at all. He says that SESAC does not provide any efficiencies and it is just

another PRO for local stations to pay.[160] I believe this conclusion, which is anathema to modern economic thinking and competition policy practice, reflects a fundamental flaw in his analysis. He completely ignores the interest of rights-holders in receiving compensation and in effect treats higher compensation resulting from SESAC's practices as a bad thing.[161] That is similar to condemning auctioneers who get higher prices for their clients, or real-estate brokers who get higher sales prices for home owners.

VI. Response to Professor Jaffe's Report

224. This section presents my specific comments on the report submitted by Professor Jaffe on behalf of the plaintiffs. Given that much of what I have said in the previous sections already responds to his key arguments I will be relatively brief. My comments follow the organization of major sections of his report.

A. Main Conclusions[162]

225. There are several fundamental problems in my view with the analysis presented by the plaintiffs' economic expert:

226. Professor Jaffe's analysis does not meaningfully attempt to establish that the practices at issue harm competition (or cause antitrust injury) or reduce output.

227. Professor Jaffe's economic analysis is not grounded in the business realities of how composers, producers, local television stations, and PROs interact with each other; the actual

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[160] Jaffe Report, at 85 ("In effect, SESAC took a situation where the stations secured the performance rights they needed from two PROs (and rightsholders secured their share of royalties from one of those two), and transformed it into a situation where stations now had significant need for three blanket licenses.").

[161] For example, Professor Jaffe argues "Therefore, on both the users' side and the rightsholders' side, the creation of the SESAC blanket license in its current form has only increased transaction costs. Thus, rather than yielding a transaction-cost benefit, the SESAC blanket license actually generates only transaction-cost harm that only exacerbates the competitive harm." *See* Jaffe Report, at 85-86.

[162] Jaffe Report, Section I.D.

contract negotiations between the composers and producers and between producers and local stations; and the actual demand and supply forces that influence contract terms including prices and decisions involving performance rights. His analysis makes it seem as if local television programming without performance rights comes out of nowhere leaving the local stations in a predicament.

228. Professor Jaffe's analysis cannot show that SESAC's practices have resulted in supracompetitive prices or profits because he has not explained what prices or profits would prevail for rights-holders in the absence of those practices. That failure is inevitable since (a) he does not consider the economics of the contract determinations, or demand and supply, for composers and producers and for producers and local television stations; and (b) he does not consider the fact that rights-holders have monopoly rights over the performances embedded in programming.

229. Professor Jaffe assumes that the competitive contract terms and prices can be based on the contract terms and prices required by courts under the consent decrees entered into by ASCAP and BMI. The basic tenets of economics say just the opposite. It is almost impossible for central decision makers to replicate the results of a competitive market even if that is what they are trying to do.

230. For all intents and purposes, the plaintiffs' economic expert concludes that SESAC (which has a share of about 12 percent based on local television blanket license fees and has a smaller share of affiliates), violated the antitrust laws because it did not follow the same practices that BMI and ASCAP (which each account for more than 40 percent of blanket license fees) are required to follow under their respective antitrust consent decrees.

231. The plaintiffs' economic expert does not incorporate into his analysis, or cite to, any of the modern economic literature on bundling or vertical restraints that is relevant to a proper economic analysis of the blanket licenses offered by SESAC and the restrictions on its upstream affiliates. As a result, he ignores the economic literature on how bundling and vertical restraints provide procompetitive efficiencies. He also fails to relate his analysis to the economics literature that identifies the limited circumstances in which bundling and vertical restraints could harm competition.

B. Industry Background[163]

232. Professor Jaffe's discussion of the industry is incomplete or wrong in respects that are material for an economic analysis of the issues in this matter.

1. Negotiations between local television stations and producers

233. Professor Jaffe assumes incorrectly that in a competitive market involving producers and local stations—in which more than half of the local stations are parts of station groups, and in which some of the groups are owned by media conglomerates—local stations and their group and conglomerate owners cannot influence the decisions made by producers.[164] That is implausible based on basic economics and inconsistent with my experience. As a result Professor Jaffe does not consider the role of bargaining power in the outcome of these negotiations or, most importantly, how the lack of inclusion of performance rights in what the

[163] Jaffe Report, Section II.

[164] Jaffe Report, at 12 ("The program comes to the local television station already 'in the can,' sometimes months or years after it was originally produced. For programming of this type, music performances are within the stations's control only in a very crude sense. The only way the station could avoid performing music for which it does not have the performance rights would be to scrutinize the music content of every program delivered to it, and refuse to broadcast any program that contains music for which the station does not have the performance right.").

local station licenses affects the overall terms and conditions including prices that the parties enter into for the television programming.

234. In considering these contracts with the producers Professor Jaffe does not consider the fact that, for original music, producers ordinarily own the copyrights as works-for-hire and have chosen deliberately to give a stake in those performance rights to composers. Professor Jaffe also does not consider that producers, as copyright owners, could give a source license in connection with their negotiation with the local television station or the group owner.

235. As a result of failing to consider the business realities of the actual contract negotiation, or the bargaining power of the buyers and sellers, Professor Jaffe claims incorrectly that the only choice by the station is to refuse to take the programming and suffer the economic consequences of that.[165] He does not demonstrate why, in a competitive market for programming in which local stations and their group owners have significant bargaining power in many cases, local stations could not:

a. Ask whether there is SESAC music.

b. Seek a financial concession on the price of a license as a result of the inclusion of SESAC music.

c. Obtain a source license covering SESAC music.

d. Insist on compensation if the composer or the publisher (controlled by the producer) switched to SESAC.

236. Considering these factors is essential for analyzing whether SESAC's practices could harm competition or restrict output. It is also essential for analyzing antitrust injury and damages. Even if SESAC's practices harmed competition and increased the prices that local

[165] Jaffe Report, at 12 ("The only way the station could avoid performing music for which it does not have the performance rights would be to scrutinize the music content of every program delivered to it, and refuse to broadcast any program that contains music for which the station does not have the performance right.").

stations pay for performance rights, which I do not believe Professor Jaffe has shown, local stations could negate those losses – and indeed, may have already done so – by reducing the prices they pay producers for the incomplete bundle of rights.

237. This points to a general problem in Professor Jaffe's analysis. Performance rights are *one element* of the consideration involved in the contracts between composers and producers and between producers and local television stations. Any analysis of anticompetitive effects and antitrust injury has to be based on the *full price* paid by producers to composers and local television stations to producers.

2. Negotiations between producers and composers

238. Professor Jaffe also fails to consider how competition works for the selection of composers and the assignment of performance rights. In particular he apparently does not recognize that:

a. Most original compositions for third-party programming are works-for-hire.

b. The composers are paid significant fees for composing the music aside from any performance rights.

c. The producer can, but does not have to, assign an interest in the performance right royalties to the composer.

d. In fact producers ordinarily assign a 50 percent interest in the performance royalties for the work-for-hire to the composer.

e. The assignment of interests in the performance right is part of an overall contract negotiation, and exchange of value, between the producer and composer.

239. These omissions infect the entirety of Professor Jaffe's economic analysis of the licensing of performance rights. Instead of considering these business realities Professor Jaffe assumes that some institutional impediment—as opposed to the forces of a competitive market—has created the present equilibrium.

3. Competition among the PROs

240. As I noted earlier Professor Jaffe comes to the remarkable conclusion that having more PROs competing with each other is a bad thing. He claims that multiple PROs increase transaction costs but do not reduce anticompetitive effects.[166] He ignores the fact that the PROs are a classic example of a multisided platform. They serve as intermediaries between rights-holders and rights-users. There are many similar intermediaries including the traditional Hollywood agent firms, intermediaries for patent licensing, and brokers of all sorts. These intermediaries provide benefits to both sides that they serve. Professor Jaffe chooses to completely disregard the welfare of the rights-holders and how competition among PROs benefits them. There is no economic reason for doing so.

241. Of course, just because a firm is an intermediary does not mean that its actions could not raise anticompetitive concerns. For example, competition authorities would properly want to consider whether the merger of intermediaries could result in the combined entity obtaining a significant increase in market power. Likewise, intermediaries can engage in horizontal and vertical practices that could cause concerns. However, ordinarily none of these concerns would arise for an intermediary that is small relative to its rivals. In the cases of the PROs, as noted earlier, SESAC accounts for about 12 percent of local television blanket license fees.

242. Professor Jaffe's analysis leads him to conclude, in effect, that increased competition for representing rights-holders is a bad thing. That fundamental error in turn leads him to conclude, in effect, that if competition from SESAC cannot be eliminated altogether, SESAC, despite its small size, should be subject to the same consent decrees as the much larger PROs.

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[166] Jaffe Report, at 20 ("While the existence of multiple PROs diminishes the asserted transaction-cost-saving benefit of the blanket license, it does not diminish the monopolistic-price-elevating aspect inherent in the blanket license structure.").

This conclusion is inconsistent with a considerable body of economic work on industrial organization, regulation, multisided platforms, and the role of markets in operating economies efficiently.

243. Professor Jaffe claims that the same problems arise for any PRO that has "critical mass."[167] Thus, he necessarily would view entry of additional PROs to compete with SESAC, ASCAP and BMI as economically inefficient. His analysis seems to lead to the conclusion that even a single rights-holder—in effect a one-affiliate PRO—could have enough "critical mass" to cause the competitive harms he identifies. That rights-holder could "hold up" the local station that has licensed third-party programming with embedded music for which the rights-holder has the performance rights.

244. This point, as I have noted, points to another fundamental problem in Professor Jaffe's analysis: by and large the supposed competitive problems he identifies arise from producers not including performance rights in the third-party programming they license, and from a rights-holder having monopoly power over the performance rights for the music in the program the local station has paid for. Neither of those problems has anything to do with SESAC and neither has anything to do with SESAC offering a blanket license.

4. Direct and source licensing

245. Professor Jaffe's discussion of source licensing ignores the business realities that I have discussed above. He completely ignores the important details of the negotiations between producers and composers and the negotiations between producers and stations.

[167] Jaffe Report, at 23.

246. It is also important to note for the remainder of the analysis that Professor Jaffe concludes that it is unlikely producers would engage in source licensing and that the only likely direct licensing that would result would be for locally-produced programming.[168]

C. Analysis of Plaintiffs' Claim of SESAC's Market Power in the Relevant Market[169]

247. Professor Jaffe's fundamental mistake in analyzing market definition and market power is that he completely ignores how competition actually takes place for the hiring of composers by producers and the licensing of television programs by local stations. Having essentially ignored, or not investigated, most of the details of how these interrelated businesses work, he concludes that there are no competitive constraints on SESAC's offering of a blanket license and that it is therefore a market. As I discussed earlier it is apparent that this conclusion is nonsensical from the standpoint of antitrust economics since, with respect to embedded music in third-party programming, the "products" in the "SESAC-only" market are not substitutes for each other, and with respect to music in locally produced programming, local stations can freely choose "products" from outside SESAC's repertory.

248. It is not possible to save a market definition that makes no economic sense through using a SSNIP test, but for the sake of completeness, I will explain why Professor Jaffe's SSNIP test is wrong as a matter of antitrust economics.

249. First, Professor Jaffe starts with the wrong price. From the standpoint of analyzing the impact on the prices received by rights-holders and paid by local stations it is wrong as a matter

[168] Jaffe Report, at 38 ("[I]t is not surprising that source licenses have not been more frequent. Perhaps as experience with the per-program license accumulates (and the AFBL potentially increases the number of stations that would be willing to pay more for syndicated programs carrying source licenses) this number will grow. Unless and until that happens, direct licensing for locally-produced programming will remain the primary competitive mechanism.").

[169] Jaffe Report, Section IV.

of economics to examine the performance rights in isolation from all of the other monies paid and the overall terms and conditions of the contracts between these parties. It is like analyzing the determination of bonuses without looking at the determination of wages.

250. Second, in order to analyze the possibility of an increase in price over the competitive level Professor Jaffe would have to have an economically meaningful measure of the competitive price. That would require conducting an analysis of how composers and publishers (publishers are usually either the producer or composer) are compensated and therefore an analysis of the contracts they negotiate. There is no economic basis as I discussed above for assuming that a rate court decision pursuant to a consent decree is a proxy for the competitive price.

251. Professor Jaffe applies a traditional SSNIP to the rights-user side of the SESAC platform.[170] It is well known in the economic literature of intermediaries (multi-sided platforms) that the SSNIP test is wrong as a matter of basic economics when applied only to one side of a platform.[171] This is a continuation of his mistake in not considering the rights-holders in his analysis.

[170] Jaffe Report, at 55-57 ("Figure 1 attached to this Report shows the total fees collected in each year 2008-12 for a set of local television stations with SESAC licenses and the estimated total industry-wide public performances of SESAC music on local television for the same period.") (citation omitted).

[171] Eric Emch and T. Scott Thompson (2006), "Market Definition and Market Power in Payment Card Networks," *The Review of Network Economics*, at 53-55 ("In our view, the only reasonable candidate for application of a SSNIP test in our model is the total price s – the sum m i p + p of the two prices charged to the two sides of the market."); Evans, David S. and Michael D. Noel (2008). "The Analysis of Mergers that Involve Multi-Sided Platforms", *Journal of Competition Law and Economics*, at 675; Frank P. Maier-Rigaud and Ulrich Scwaibe (2012), "Market Definition," *OECD Best Practice Roundtables in Competition Policy*, at 35-39; ; Marc Rysman (2007), "Empirics of Antitrust in Two-Sided Markets," *Competition Policy International*, Vol. 3, No. 1, at 201 ("A third issue to keep in mind is that the link between prices and quantities is often more ambiguous in two-sided markets. For instance, it is often possible for consumers and sellers to rationally not utilize an intermediary if the other side does not, even if price is low. In that case, the traditional focus of the U.S. merger guidelines on price effects (in particular the SSNIP test) may be misguided."); Tommaso Valletti (2006), "Mobile Call Termination: A Tale of Two-Sided Markets," *Communications and Strategies*, No. 61, at 68-70.

252. To support his SSNIP test, Professor Jaffe argues that SESAC was able to increase fees during the 2008-2012 period while the amount of SESAC music was not increasing: "the fees increased over this period by 28% while there was no increase in the number of public performances of SESAC music over this period."[172] These "increases" were the result of negotiations around 2008, as a result of which the SESAC and the individual stations or station groups agreed on prices for 2008 and remaining years. These were not annual increases in price by SESAC; rather, they reflected agreement to a prospective schedule of pricing.

253. In any event, Professor Jaffe has not provided an economically meaningful way to interpret these price changes since he has not provided any economically relevant method of assessing the competitive price. His analysis ignores the determination of competitive prices inclusive of performance rights for composers and stations and ignores the two-sided nature of PROs as intermediaries.

254. Let me now turn to Professor Jaffe's analysis of market power.

255. Professor Jaffe claims to show the existence of market power from an analysis of the ability of local stations to identify SESAC music in their programs. He claims that it is difficult to identify the rights-holders for music and it is difficult to secure rights once they have been identified because of the need to negotiate with "12 to 39 distinct composers or 10 to 34 distinct music publishers."[173]

256. In fact, this empirical study actually shows the efficiency of SESAC's blanket license, in avoiding large numbers of negotiations and avoiding having to identify music in all programs. The fact that the more efficient blanket license may be costly for the stations

[172] Jaffe Report, at 56.

[173] Jaffe Report, at 60.

themselves to replicate is not proof of market power (other than that flowing from the benefits provided by SESAC's bundled product).

257. Professor Jaffe also relies on a number of statements as evidence of market power. I will comment briefly on why these do not provide relevant economic evidence in support of market power.

258. Statements from stations[174] (which are self interested and may be aware of the potential of litigation) are not particularly persuasive in general.[175] They also do nothing more than state the plaintiffs' claims that plaintiffs need licenses to the embedded music in third-party programming. As discussed, there is no coherent claim that SESAC has gained market power by aggregating compositions that would otherwise compete with each other in the absence of the blanket license.

259. Statements from the analyses by investment bankers[176] also do not provide an economic basis for concluding that there is market power.

a. one statement repeats the station's claims that they need licenses for the SESAC music that is embedded.

b. one statement talks about "leverage" that SESAC has because of the "importance of the music of SESAC affiliates", which is nothing more than a statement that SESAC's affiliates are of significant value to stations.

c. one statement is that SESAC is not bound by a consent decree and can charge higher fees than ASCAP and BMI, which may be true, but there is no reason to believe that fees set under the ASCAP and BMI consent decrees are competitive.

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[174] *See* Jaffe Report, at 61-62.

[175] At least some stations appear to have been aware of the implications of their actions for an antitrust suit, such as the current case. For example, Will Hoyt from the TMLC emailed a Meredith business person regarding the need to develop evidence for use in an antitrust case. *See* MERE00070896 ("My hope is that these charts start people thinking and that at least committee members use this information to seriously negotiate. We need meaningful negotiations to prove our antitrust case.").

[176] *See* Jaffe Report, at 63.

260. Finally, Professor Jaffe argues throughout his report that there are no pricing constraints on SESAC at all, and that SESAC can therefore "hold up" stations that have licensed third-party programming without obtaining the performance rights.[177] Yet SESAC's performance rights licensing fees for local television stations correspond to a small fraction of the overall revenues earned by local stations – almost none of which these stations could earn, under the plaintiffs' theory, without a SESAC license. Professor Jaffe also provides no explanation as to why, if SESAC could hold up local stations for this reason, individual rights-holders could not too, or why, if that is the case, SESAC has any more power from aggregating these individual monopoly rights than these individual monopolies have in the aggregate.

261. Professor Jaffe's economic analysis does not make any sense and that is largely because he has ignored how these businesses operate in fact.

D. Effect of SESAC's Behavior on Competition[178]

262. I will now turn to Professor Jaffe's analysis of the effect of SESAC's practices on competition.

1. Joint pricing and blanket licenses

263. Professor Jaffe asserts that the pooling of performance rights into a blanket license restricts competition among rights-holders to have their compositions played on local television.[179] He does not describe, however, how that restriction actually happens and how rights-holders would be competing in the absence of the blanket license. In fact, the blanket

[177] Jaffe Report, at 23, 24, 53-57, 58-61.

[178] *See* Jaffe Report, Section V.

[179] Jaffe Report, at 65 ("As noted above, despite the monopoly that the U.S. copyright law conveys on an individual rights-holder regarding the use of his or her own works, there remains the opportunity for these individual rights-holders to compete to have their music performed on local television. When a group of rights-holders instead *collectively* pools their copyrights into a repertory that prices such rights as a single package on a blanket basis, this potential competition is eliminated.").

license creates no restriction for the reasons I have already discussed: there cannot be competition among rights-holders for embedded music in third-party programming after the station has licensed that programming; there is no restriction on competition in the selection of composers by local television stations as a result of the blanket license; and Professor Jaffe's analysis completely ignores competition involving the selection of composers by producers and the selection of television programs by local stations.

264. Professor Jaffe claims that SESAC's relationship with its affiliates is horizontal because SESAC offers a blanket license to all compositions rather than simply acting as an agent for each rights-holder separately, and because SESAC seeks to restrict direct licensing by its affiliates.[180] Neither of these is a reason why SESAC's obviously vertical relationship with its affiliates is actually a horizontal one. In addition, Professor Jaffe does not explain how the blanket license restricts competition among these affiliates and as I just explained it does not.

265. Under certain circumstances, a business practice that results in a horizontal combination of a significant portion of substitute suppliers can cause competition concerns. SESAC has not engaged in any practice that results in a horizontal combination as is apparent from examining the industry's business realities. Producers hire composers and the fees they pay these composers are not subject to any horizontal constraint. They have full flexibility with regard to how much to pay composers in upfront fees and what share of the performance rights to give them. Local television stations license programming. They have full flexibility with regard to how much to pay producers or their syndicators including seeking compensation for not

[180] Jaffe Report, at 66 ("The evidence discussed below regarding SESAC's contractual restriction of its affiliates' direct licensing provides concrete evidence that the relationship between SESAC and its affiliates is not a purely vertical one. In a purely vertical relationship, a distributor or other intermediary (such as SESAC) between an upstream seller (such as one of its affiliates) and a downstream buyer (such as a local television station) would not have any legitimate incentive to restrict the sales between that upstream seller and potential downstream customers.").

receiving a source license. With respect to securing performance rights, local television stations do not have any flexibility after entering into a contract to license third-party programming, but then there is no possible competition among rights-holders to restrict.

266. As a result of incorrectly reclassifying SESAC's practices as horizontal rather than vertical Professor Jaffe conducts no economic analysis of whether, viewed as vertical restraints, SESAC's practices yield procompetitive efficiencies or involve the limited circumstances under which vertical restraints could be anticompetitive. In my view, he therefore does not consider the core issues from the standpoint of antitrust economics.

2. Allegedly restrictive affiliate agreements

267. With regard to Professor Jaffe's claims concerning the affiliate agreements I do not have anything to add to what I have said above but will briefly recap those points. First, these restrictions did not apply at all to affiliates accounting for more than half of SESAC's revenues and, in addition, could not really affect licensing for third-party programming since he claims that direct or source licensing is unlikely in that context. Second, SESAC did not impose any restrictions that would prevent horizontal competition among any affiliates. Third, SESAC's contracts with affiliates were perfectly normal procompetitive efforts to ensure that affiliates to whom it paid significant upfront fees would not destroy the value of what SESAC has paid for.

3. Changes to the PPL

268. Professor Jaffe argues that SESAC eliminated the viability of the PPL under the 2008-2012 contract.[181] I have covered this issue in Section V.H above. I summarize here why Professor Jaffe is wrong.

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[181] Jaffe Report, at 73-83.

269. First, there is no basis in antitrust economics for requiring firms to offer discounts, let alone ones that take the specific form of the PPL. Professor Jaffe argues that SESAC was obligated to offer a "viable" PPL based on his assumption that SESAC should be bound under the same consent decrees that govern ASCAP and BMI. This argument is circular, as Professor Jaffe would need to establish first that SESAC has engaged in anticompetitive behavior that would warrant remedies. There is no basis for assuming that SESAC with about a 12 percent share of local television blanket license fees should be subjected to a consent decree similar to those entered into decades ago by entities in far different economic positions.

270. Second, SESAC did offer discounts in negotiations. Those discounts were structured differently from the PPL discounts—they offered smaller discounts but to a broader group of stations. Professor Jaffe does not explain why a PPL addresses the competitive concerns he raises but negotiated discounts do not.

271. Third, under the 2008-2012 contract, significant numbers of stations would have paid lower prices by taking the PPL rather than the blanket license. Both the analysis from MRI and the analysis I have performed show this.

272. Fourth, Professor Jaffe does no analysis of his own with respect to the viability of the PPL. He adopts the same position that MRI did in assuming that SESAC would not take cue sheets from MRI to substantiate the lack of SESAC music in programs for which SESAC did not have cue sheets and does not appear to consider SESAC's statements that it would take cue sheets from MRI. Professor Jaffe does not analyze whether stations *could have* saved money. In

doing so, he ignores the fact that about 80 percent of stations gave up the right to a PPL by taking group discounts under the 2008-2012 contract.[182]

273. And, fifth, Professor Jaffe provides no basis in economics for assessing how many stations would have to find the PPL beneficial for the PPL to be a "viable" alternative to the blanket license in his view or, as I mentioned above, any basis in economics for concluding that individual negotiated discounts are not adequate substitutes for a "viable" PPL.

4. Analysis of efficiencies

274. Professor Jaffe acknowledges that courts have found significant efficiencies from the use of blanket licenses by PROs. But then he argues that SESAC "does not create the efficiency benefits that convinced the federal courts that ASCAP and BMI's Consent Decree constrained joint pricing is acceptable."[183] This statement amounts to a claim that the efficiencies created by SESAC are not so large as to offset the claimed anticompetitive effects in the absence of a consent decree. But this argument is circular. The purpose of Professor Jaffe's economic analysis should be to determine whether SESAC's business practices are anticompetitive and therefore should be subject to restrictions such as those found in the consent decrees. It makes no economic sense to use the analysis of courts examining consent decrees for one set of defendants to determine whether a remedy is appropriate for an entirely different defendant. That is particularly the case for consent decrees that were entered into a half century ago or more and for entities that had much larger shares of performance rights royalties than SESAC has today.

[182] Calculations based on data in SESAC-0373761; JAFFE_SESAC00001052.

[183] Jaffe Report, at 84.

275. Professor Jaffe then proceeds with an economic analysis that concludes that competition among PROs is harmful and essentially argues for a single rate-court-regulated performance rights organization.[184] I have explained earlier that this remarkable conclusion is inconsistent with much modern economic thinking. If adhered to it would result in the complete elimination of competition to act as intermediaries for composers. Although Professor Jaffe has not shown that SESAC has engaged in any business practices that harm competition he has suggested a remedy that surely would harm competition by creating a monopoly PRO and eliminating choice for thousands of composers.

E. Quantification of Alleged Antitrust Injury Suffered by Plaintiff Stations[185]

1. Damages due to alleged elevation of blanket fee

a. Professor Jaffe's assumption that 2005 arbitrator-set fee was at the competitive level is wrong.

276. Professor Jaffe estimates damages that he claims result from the alleged elevation of SESAC's blanket fees. He argues that the arbitrator-set blanket fees in 2005 should be viewed as "a reasonable starting point for a fee that is not below the competitive level."[186]

277. Professor Jaffe has made no attempt to define the competitive level of blanket fee. For example, does the competitive level mean the fees that would result from competitive PROs operating without consent decrees? Does it mean the fees that would result if rights-holders were not represented by PROs and engaged in direct negotiations? If the latter, does it mean the level where there are transactions costs and copyright violations, or the level where there no

[184] *See, e.g.*, Jaffe Report, at 85 ("The creation of this third PRO did not create any transaction cost efficiencies. On the contrary, the impact of this development on overall transaction costs could only be and has been to *increase* them.").

[185] Jaffe Report, Section VIII.

[186] Jaffe Report, at 90.

transactions costs and copyrights are complied with? Does the competitive level assume that stations are locked into needing the rights to particular works embedded in third-party programming? Instead of attempting to define the competitive level, Professor Jaffe simply takes the fees the arbitrators set for 2005 as the competitive level. He argues that they were using the "reasonable fee" standard applicable in rate court and he claims that standard has been interpreted to mean the fee that would be set in a competitive market.[187]

278. A central problem is that fees set by rate courts cannot be viewed as competitive fees. Professor Jaffe himself recognizes this, noting that "[t]hough the Rate Courts attempt to set fees at the reasonable level, they have not typically had available to them truly competitive benchmarks for the reasonable fee."[188] Professor Jaffe goes on to argue that the bilateral agreements that rate courts have relied on have been likely been above the competitive level because he argues that a PRO has a greater incentive to challenge fees in rate court, as it would benefit the PRO to get a better rate in its future negotiations with all stations. He ignores the fact that the stations have both challenged PRO rates collectively in rate court and negotiated collectively via the TMLC, so that there is no obvious asymmetry that would lead one to conclude that the rates disporportionately favor the PROs. He also ignores that, when negotiating with one PRO, the TMLC naturally focuses on the precedential effect that that negotiation will have on its dealings with other PROs.[189]

279. More fundamentally, all these bilateral agreements take place in the presence of consent decrees for ASCAP and BMI. There have been no ASCAP or BMI rates set in a truly

[187] *See* Jaffe Report, at 24, 90.

[188] Jaffe Report, at 25 n. 26.

[189] Deposition of James MacDermott, December 19, 2012, at 39:22-44:13.

competitive market for a half century or more. There is no reason to believe the rate courts are good at constructing a hypothetical competitive market that has not existed.

280. Professor Jaffe also presents no evidence that the arbitrator-set fees are likely to be sufficiently reliable for use in estimating damages. As Professor Jaffe noted, he himself testified in arbitration that the competitive fee level was less than the arbitrator award. In fact, he argued that the competitive fee for 2005 should have been $1.8 million rather than the $16 million awarded.[190]

281. That is, the fee the arbitrators awarded was nearly eight times the fee that Professor Jaffe believed and continues to believe was appropriate. Professor Jaffe is asking the court to rely on an arbitrator award as the benchmark for the competitive fee, when he himself believes that it is off by nearly an order of magnitude. I understand that Professor Jaffe argues that he is using it as an upper bound on the competitive fee, but that choice of a benchmark, given his stated views, is arbitrary and unreliable when he does not believe it is remotely close to the competitive fee. There is no reason for the court here to believe that the arbitration process reliably set the competitive fee, however it might be defined. If in Professor Jaffe's view it was unreliably high, it is difficult to rule out that it could have been unreliably low.

b. Professor Jaffe's approach to adjusting the 2005 fee to 2008-2012 is incorrect.

282. Professor Jaffe offers two approaches to estimating what he views as the competitive blanket fees for SESAC for 2008-2012.[191] In one alternative, he assumes that the 2008-2012

[190] Expert Report of Adam B. Jaffe at 3, *SESAC, Inc. v. Television Music Licence Committee*, No. 13 133 01583 05 (Dec. 2, 2005). .

[191] Jaffe Report, at 92-93.

blanket fees should have been the same as the 2005 fee in nominal terms. In the other alternative, he adjusts for changes in the number of "public performances" and for inflation.

283. Professor Jaffe has made no effort to even consider the changes in music being performed in 2005 versus 2008-2012. The programs shown in 2008-2012 obviously were different from those shown in 2005, used different music from the music used in 2005, and earned different amounts of revenue for stations. And there can also be changes in the importance of music to programming over time. Professor Jaffe does not even consider, let alone attempt to adjust for, any of these considerations.

284. Moreover, firms routinely adjust prices to reflect changes in their product, changes in the competitive dynamics of the industry, and changes in the firm's business strategy. Firms do not generally leave nominal prices completely unchanged for many years. Professor Jaffe assumes a single static "competitive" price that is either completely unadjusted or adjusted only for general inflation and the number of public performances. As I discuss next, his proposed methodology for adjusting by the number of public performances is flawed and unreliable.

c. Professor Jaffe's adjustment methodology is flawed

285. Professor Jaffe proposes an approach that adjusts SESAC's license fees in 2005 by the changes in the number of public performances on local television stations over time.[192] Professor Jaffe measures public performances by multiplying each minute of SESAC music played in a program aired on local television by the number of viewers, and adding that up across programs. Such an approach makes no attempt to control for differences in, for example,

[192] In addition, Professor Jaffe adjusts by a measure of inflation. In this section, I focus on the flaws in his adjustment in the number of public performances.

the importance to a program of a given musical composition or the quality of music used in the program. It treats all music as fungible.

286. In addition, there are major flaws that render Professor Jaffe's approach unreliable. First, even setting aside conceptual issues with the public performance measure, it has been applied inconsistently over time. In the 2005 SESAC-TMLC arbitration, Professor Jaffe relied on the estimates of SESAC public performances on local television that had been prepared by another economic expert for the TMLC. That analysis estimated the number of SESAC public performances in 2005 at 110.5 billion.[193] Professor Jaffe's analysis in this case estimates that the number of SESAC public performances in 2005 was 140.6 billion.[194]

287. That is, Professor Jaffe's current approach to estimating SESAC's public performances differs from the prior approach he relied on by about 27 percent. There is no reason to believe his approach in this case, or in the arbitration, results in reliable adjustments. I expect that Professor Jaffe will attempt to offer explanations for why the two estimates differ. The fact remains that he has offered an estimate of SESAC's 2005 public performances in this case that differs dramatically from the estimates he relied on during the arbitration.

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[193] Expert Report of Adam B. Jaffe at 29-30, *SESAC, Inc. v. Television Music License Committee*, No. 13 133 01583 05 (Dec. 2, 2005). Professor Jaffe specifically referenced a figure of 89 billion in SESAC public performances in recurring programs. (The definition of recurring programs is similar to that discussed in Section II.C.3 above.) Dr. Candell reported a figure of 89.9 billion for recurring programs and a figure of 7.1 billion for non-recurring programs in her first report, for a total of 97 billion. See Expert Report of Amy Bertin Candell at Figure 4, *SESAC, Inc. v. Television Music License Committee*, No. 13 133 01583 05 (Dec. 2, 2005).Dr. Candell submitted a second, revised report in the arbitration. In the body of the second report, Dr. Candell reported the same 97 billion total and the 89.9 billion for recurring programs. See Expert Report of Amy Bertin Candell at 20-21, *SESAC, Inc. v. Television Music License Committee*, No. 13 133 01583 05 (Jan. 22, 2006). In Figure 4 of the report, however, she reported a total of 110.5 billion public performances, comprised of 102.8 billion for recurring programs and 7.7 for non-recurring programs. I have referenced the 110.5 billion total in the discussion above as that corresponds to the figures that appear to have been presented during the arbitration. In comparison to the 97 billion figure, Professor Jaffe's estimate of 138 billion public performances in 2005 is over 40 percent higher.

[194] JAFFE_SESAC00000725.

d. Professor Jaffe has failed to consider changes that would likely result if there were an overcharge of more than 30 percent.

288. Finally, Professor's Jaffe's analysis is flawed because it fails to consider other changes that would take place in the industry. It is likely that if SESAC's fees were excessive, which has not been demonstrated, then the compensation of SESAC composers would adjust to reflect the change in performance license fees—they would either get a lower share of royalties and/or a lower upfront fee for payment. This would lower producer costs.

289. Producers of shows with SESAC music would be aware that they are receiving higher performance royalties (in the form of the publisher's share) on those shows. This would lower the effective costs of production for those producers on those shows.

290. The fees paid by local stations for new third-party programming would therefore be likely to decrease to reflect their higher costs of performance licenses and the producers' lower costs of production. Professor Jaffe has failed to consider these effects in his damages analysis and, as I mentioned earlier, has not considered any of the business realities of negotiations between composers and producers and producers and stations.

2. Damages due to changes in the PPL formula.

291. Professor Jaffe does not offer any analysis of why the PPL would exist in whatever competitive but-for world he is positing. Instead he asserts that, "In the but-for world, there would have been similar savings due to the availability of an economically appropriate per-program license."[195] An appropriate damage analysis would require showing that some discount scheme like the PPL would exist under the competition that is alleged to have been

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[195] Jaffe Report, at 94.

restricted in this case. It would also require assessing the likely terms of that PPL. Such an analysis is not possible because the PPL is not a mechanism that arose from competition. It is an artifact of consent decrees that do not apply to SESAC.

292. Moreover, even if we assume, for the sake of argument, that SESAC should have been obligated to offer a PPL, Professor Jaffe has failed to identify the smallest discount that SESAC could have offered under the PPL and satisfied his unstated requirements for offering a viable PPL. Instead, Professor Jaffe takes the discounts that were applicable under the 2005-2007 SESAC PPL and assumes they would continue to exist, or should have continued to exist, at the same level in 2008-2012.

293. Professor Jaffe also fails to consider whether stations that did not take the PPL in 2008-2012 would have benefitted from the existing PPL offered. As I discussed, many stations would likely have paid less under a PPL than they did under the blanket license. It is correct that the local stations did not take a PPL under the 2008-2012 contract, but that fact does not demonstrate that they would not have benefited from the PPL. To the extent the local stations made a poor business decision by not electing a PPL when they otherwise would have benefited from it, the PPL savings they failed to take advantage of would need to be considered as an offset against claimed PPL damages.

F. Remedy[196]

294. Professor Jaffe has a number of summary conclusions in his section on proposed remedies. I disagree with them generally for the reasons I have discussed above. I do want to comment on his proposal that SESAC should be subject to the same “core restrictions” that ASCAP and BMI are subject to under their respective consent decrees.

[196] Jaffe Report, Section IX.

295. Typically, antitrust remedies take the form of an explicit prohibition against engaging in the specific actions that have been found to be anticompetitive. The set of core restrictions proposed by Professor Jaffe are ones that arose out of a consent decree setting, but they are not generally appropriate for a court-ordered remedy. In particular, one of the restrictions is to require SESAC's fees to be subject to oversight by a "neutral third party."

296. Antitrust remedies should generally focus on encouraging greater competition than greater regulation. And there is little reason to believe that the courts can act effectively as rate setters. Several judges have stated that the judicial system is not well suited to determine rate regulations.[197] This issue is particularly acute in the context of rate setting for PROs as there is nothing in the way of competitive rates to use as benchmarks. The ASCAP and BMI rates have been set either by rate court or in negotiations subject to rate court oversight. There is no economic basis to believe that such rate setting is likely to result in competitive rates.

[197] *Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001) (describing rate setting as "a task [courts] are inherently unsuited to perform competently"); In *re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 445 (9th Cir. 1990) ("The federal courts generally are unsuited to act as rate-setting commissions."); *Berkey Photo, Inc. v. Eastman Kodak Co*., 603 F.2d 263, 294 (2d Cir. 1979) ("Indeed, as one commentator who might favor such a rule [rate setting] concedes, such judicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us.").

APPENDIX A

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Chairman

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CONTACT DETAILS

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OVERVIEW

David S. Evans is the Chairman of the Global Economics Group in the firm's Boston office and has broad experience in the economics of antitrust, intellectual property, and financial regulation. Dr. Evans has an international practice and has worked on matters in the United States, the European Union, China, Brazil, Australia, and other jurisdictions. He has provided economic advice on a wide range of industries but has special expertise in financial services, internet-based media, and information-technology based businesses. He is one of the world's leading authorities on multi-sided platforms (also known as two-sided markets).

Dr. Evans currently teaches economics at the University of Chicago Law School, where he is a Lecturer, and at the University College London, where he is a Visiting Professor. He is the Founder and Publisher of *Competition Policy International* and is on the editorial boards of *Concurrences* and *The Review of Network Economics*.

From 2004 to 2011, Dr. Evans was a Managing Director of LECG, where he was

the head of its global antitrust practice and Vice Chairman of LECG Europe. Previously, he was Senior Vice President at NERA (1989-2004) where he was also a member of the management committee and board of directors. He received his Ph.D. in Economics from the University of Chicago in 1983 and subsequently taught at the Department of Economics and the Law School at Fordham University in New York.

EDUCATION

1979-1983

University of Chicago

Ph.D. and MA in 1983

Specialized in econometrics, industrial organization, and labor economics

1972-1975

University of Chicago

BA in Economics in 1975

Completed first year of graduate program

EMPLOYMENT HISTORY

2011-

Global Economics Group

Chairman

2004-

Market Platform Dynamics

Founder and Managing Director

2004-

Competition Policy International

Founder and Publisher

2006-

University of Chicago Law School

Lecturer, teaching various advanced courses in antitrust

2004-

University College London

Visiting Professor in the Faculty of Laws, teaching economics of antitrust

Executive Director, Jevons Institute for Competition Law and Economics

2004-2011

LECG, LLC

Vice Chairman, LECG Europe

Head, Global Competition Policy Practice

Member of the boards of directors of various subsidiaries

1988-2004

NERA Economic Consulting

Senior Vice President

Member of the Management Committee

Member of the Board of Directors

1983-1995

Professor of Law, Fordham University Law School (1985-1995)

Associate Professor of Economics (1983-1989) (tenure as of 1988)

APPEARANCES AND TESTIMONY

Dr. Evans has testified before arbitrators and Federal courts in the United States, and the General Court of the European Union. He has made personal appearances before or presented written testimony to the Australian Competition and Consumer Commission,

European Commission, Federal Trade Commission, the U.S. Department of Justice, and the Securities and Exchange Commission. He has also testified before the House Financial Services Committee, the House Oversight Committee, and the Senate Banking Committee.

Examples of Dr. Evans's clients for whom he has made public submissions and appearances include Bloomberg, Google, Michael Tyson, Microsoft, Organization for Economic Co-operation and Development, and Visa.

REPRESENTATIVE MATTERS

Antitrust and Intellectual Property

Dr. Evans has worked on mergers, monopolization and abuse of dominance, and joint venture cases in multiple jurisdictions. A number of his matters have involved the intersection of antitrust and intellectual property and the antitrust of information technology/on-line businesses. Representative matters include:

- *United States v. Microsoft* on trial and remand regarding remedies and *Microsoft v. Commission of the European Communities* on tying and interoperability on behalf of Microsoft;
- Monster's acquisition of Yahoo! HotJobs before the Federal Trade Commission.
- WPP's acquisition of Taylor Nelson Sofres before the European Commission;
- Google's acquisition of DoubleClick for various third-party intervenors before the Federal Trade Commission, European Commission and Australian Competition and Consumer Commission;
- Investigation of VisaNet and Redecard by the Central Bank of Brazil and other regulatory authorities concerning certain exclusivity agreements and practices in the payment card industry;
- In *Twombly v. Bell Atlantic*, chief author of amicus brief by economists submitted to the United States Supreme Court in support of a grant of a writ of certiorari and in support of reversal; and
- In *Qihoo v. Tencent*, submitted a report to The High People's Court of Guangdong Province, People's Republic of China, regarding Qihoo's market definition and abuse of dominance claims against Tencent.

Financial Regulation

Dr. Evans has worked on regulatory matters involving payment systems, consumer financial protection, derivatives regulation, and the regulation of exchanges. Representative matters include:

- Analysis of Consumer Financial Protection Bureau regulations for various financial institutions;

- Debit card regulatory proceedings before the Federal Reserve Board on behalf of various financial institutions;
- Regulation of the OTC commodity derivatives for the Government of Singapore;
- Analysis of Security Exchange Commission orders concerning pricing of market data submitted reports and presentations to the SEC on behalf of Bloomberg; and
- Assistance in creating educational programs for House Financial Services Committee members concerning the recent financial crisis.

HONORS AND RANKINGS

- Winner of the Business, Management & Accounting category in the 2006 Professional/Scholarly Publishing Annual Awards presented by the Association of American Publishers, Inc. for *Invisible Engines: How Software Platforms Drive Innovation and Transform Industries*.
- The International Who's Who of Competition Lawyers & Economists 2011.
- Named among the "Top 25 Competition & Antitrust Practitioners" by Best of the Best USA, Legal Media Group.

PUBLICATIONS

Dr. Evans' publications since 2000 are largely available online at Evans' SSRN Page and his publications before 2000 are mostly available at Evans' IDEAS Page.

Books

Platform Economics: Essays on Multi-Sided Businesses, (Boston, Competition Policy International, 2011), with R. Schmalensee, M. Noel, H. Chang, and D. Garcia-Swartz.

Interchange Fees: The Economics and Regulation of What Merchants Pay for Cards, (Boston, Competition Policy International, 2011), with R. Schmalensee, R. Litan, D. Garcia-Swartz, H. Chang, M. Weichert, A. Mateus.

Trustbusters: Competition Authorities Speak Out (Boston: Competition Policy International, 2009), co-editor with F. Jenny.

Catalyst Code: The Strategies of the World's Most Dynamic Companies (Massachusetts: Harvard Business School Press, 2007), with R. Schmalensee.

Invisible Engines: How Software Platforms Drive Innovation and Transform Industries, (Massachusetts: MIT Press, 2006), with A. Hagiu and R. Schmalensee.

Paying with Plastic (Massachusetts: MIT Press, first edition 1999, second edition 2005), with R. Schmalensee.

Microsoft, Antitrust and the New Economy: Selected Essays (New York: Kluwer Academic Publishers, 2002), editor.

The Economics of Small Businesses: Their Role and Regulation in the U.S. Economy (New York: Holmes and Meier, 1986), with W. Brock.

Breaking Up Bell: Essays on Industrial Organization and Regulation (New York: North Holland, 1983), editor and co-author of eight of ten chapters.

Journal Articles and Book Chapters

"The Antitrust Analysis of Multi-Sided Platform Businesses," in *Oxford Handbook on International Antitrust Economics*, eds. R. Blair and D. Sokol, with R. Schmalensee (Oxford: Oxford University Press, forthcoming 2013).

"Attention Rivalry among Online Platforms and Its Implications for Antitrust Analysis," University of Chicago Institute for Law and Economics Olin Research Paper No. 627, 2013 (forthcoming in the *Journal of Competition Law and Economics*).

"Economics of Vertical Restraints for Multi-Sided Platforms," University of Chicago Institute for Law and Economics Olin Research Paper No. 626, 2013 (forthcoming in *Competition Policy International*, Spring 2013).

"Enhancing Financial Benchmarks: Comments on the OICU-IOSCO Consultation Report on Financial Benchmarks," Working Paper, 2013.

"The Role of Keyword Advertising in Competition among Rival Brands," *CPI Antitrust Chronicle*, Vol. 12, No. 1, with Elisa Mariscal, Winter 2012.

"Will the Wheatley Recommendations Fix LIBOR?" *CPI Antitrust Chronicle*, Vol. 11, No. 2, with R.M. Abrantes-Metz, Autumn 2012.

"Governing Bad Behavior by Users of Multi-Sided Platforms," *Berkeley Technology Law Journal*, Vol. 27, No. 2, Fall 2012.

"Replacing the LIBOR with a Transparent and Reliable Index of Interbank Borrowing: Comments on the Wheatley Review of LIBOR Initial Discussion Paper," University of Chicago Institute for Law and Economics Olin Research Paper No. 620, with R.M. Abrantes-Metz, 2012.

"Two-Sided Market Definition," in *Market Definition in Antitrust: Theory and Case Studies*, 2012.

"Excessive Litigation by Business Users of Free Internet Platform Services," University of Chicago Institute for Law and Economics Olin Research Paper No. 603, 2012.

"Payments Innovation and Interchange Fees Regulation: How Inverting the Merchant-Pays Business Model Would Affect the Extent and Direction of Innovation," Working Paper (University of Chicago Law School), 2011.

"How Changes in Payment Card Interchange Fees Affect Consumers Fees and Merchant Prices: An Economic Analysis with Applications to the European Union," with A.M. Mateus, Working Paper (University of Chicago Law School and New University of Lisbon), 2011.

"Economic Analysis of Claims in Support of the 'Durbin Amendment' to Regulation Debit Card Interchange Fees," with H.H. Chang and M.M. Weichert, Working Paper (University of Chicago Law School, Global Economics Group, and Market Platform Dynamics), 2011.

"The Antitrust Economics of Free," *Competition Policy International*, Vol 7, No. 1, Spring 2011.

"Conversations with Jon Leibowitz and Joaquin Almunia," *Competition Policy International*, Vol. 7, with Jon Leibowitz and Joaquin Almunia 2011.

"The Economic Principles for Establishing Reasonable Regulation of Debit-Card Interchange Fees that Could Improve Consumer Welfare," with R.E. Litan and R. Schmalensee, Working Paper (University of Chicago Law School, AEI-Brookings Joint Center for Regulatory Studies, and MIT), 2011.

"AT&T/T-Mobile: Does Efficiency Really Count?," *CPI Antitrust Chronicle*, Vol. 10, with Howard Chang & Richard Schmalensee, 2011.

"A Presentation on Assessment of Market Power and Dominance," *CPI Antitrust Chronicle*, Vol. 6, 2011.

"Economic Analysis of the Effects of the Federal Reserve Board's Proposed Debit Card Interchange Fee Regulations on Consumers and Small Businesses," with R.E. Litan and R. Schmalensee, Working Paper (University of Chicago Law School, AEI-Brookings Joint Center for Regulatory Studies, and MIT), 2011.

"Net Neutrality Regulation and the Evolution of the Internet Economy," *CPI Antitrust Chronicle*, Vol. 8, 2011.

"The Regulation of Interchange Fees by the U.S. Federal Reserve Board: A Primer on Economic Principles, II," *CPI Antitrust Chronicle*, Vol. 12, 2011.

"Market Definition and Merger Analysis for Multi-Sided Platforms," with Richard Schmalensee, 2012, *available at* https://www.competitionpolicyinternational.com /assets/Uploads/MSP11-13-2012.pdf.

"Essays on the Economics of Two-Sided Markets: Economics, Antitrust and Strategy," Working Paper, 2010.

"Failure to Launch: Critical Mass in Platform Businesses," *Review of Network Economics*, Vol. 9, with Richard Schmalensee, 2010.

"Lightening Up on Market Definition," in *Research Handbook on the Economics of Antitrust Law*, ed. E. Elhauge (New York: Edward Elgar, 2012).

"The Effect of the Consumer Financial Protection Act of 2009 on Consumer Credit," *Loyola Consumer Law Review*, Vol. 22, No. 3, Winter 2010.

"The Web Economy, Two-Sided Markets, and Competition Policy," Working Paper (University of Chicago Law School), 2010.

"Why Now is Not the Time to Revamp Consumer Financial Protection," Working Paper (University of Chicago Law School), 2010.

"The U.S. Needs Real Financial Reform," *Forbes.com*, April 2010.

"A Response to Professor Levitin on the Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit," with J.D. Weight, George Mason Law and Economics Research Paper No. 09-56, 2009.

"The Middle Way on Applying Antitrust to Information Technology," *Competition Policy International*, Vol. 11, 2009.

"How the Consumer Financial Protection Agency Act of 2009 Would Change the Law and Regulation of Consumer Financial Products," *Bloomberg Law Reports: Risk and Compliance,* Vol. 2, No. 10, with J. Wright, October 2009.

"The Online Advertising Industry: Economics, Evolution, and Privacy," *Journal of Economic Perspectives*, Summer 2009.

"Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules," *Chicago Journal of International Law*, Fall 2009.

"Innovation in Payments," in *Moving Money: The Future of Consumer Payments*, with R. Schmalensee, eds. M. Baily and R. Litan, (DC: Brookings Institution Press, 2009).

"How Catalysts Ignite: The Economics of Platform-Based Start-Ups," in *Platforms, Markets and Innovation*, ed. A. Gawer, (Cheltenham, UK and Northampton, MA, US: Edward Elgar, 2009).

“The Microsoft Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe,” *Antitrust Law Journal,* Vol. 75, No. 3, with C. Ahlborn, 2009.

“The New Consensus on Class Certification: What it means for the Use of Economic and Statistical Evidence in Meeting the Requirements of Rule 23,” Working Paper (University of Chicago Law School), 2009.

Trustbusting Goes Global,” in *Trustbusters: Competition Policy Authorities Speak Out*, eds. David S. Evans and Frédéric Jenny (Boston: Competition Policy International, 2009).

“What You Need to Know About Twombly: The Use and Misuse of Economic and Statistical Evidence in Pleadings,” Working Paper (University of Chicago Law School), 2009.

“The Online Advertising Industry: Economics, Evolution, and Privacy,” *Journal of Economic Perspectives*, Vol. 23, No. 3, 2009.

“Errata to ‘The economics of market coordination for the pre-Fed check-clearing system: A peek into the Bloomington (IL) node,’” *Explorations in Economic History*, No. 45, No. 4, with Howard Chang, Marina Danilevsky, Daniel Garcia-Swartz, 2008.

“Markets with Two-Sided Platforms,” in *Issues in Competition Law and Policy*, Vol. 1, with R. Schmalensee (American Bar Association, August 2008).

“Antitrust Issues Raised by the Emerging Global Internet Economy,” *Northwestern University Law Review*, Vol. 102, No. 4, 2008.

“Competition and Regulatory Policy for Multi-sided Platforms with Applications to the Web Economy,” *Concurrences*, No. 16302, 2008.

“The Lawful Acquisition and Exercise of Monopoly Power and its Implications for the Objectives of Antitrust,” *Competition Policy International*, Vol. 4, No. 2, with K. Hylton, Fall 2008.

“The Analysis of Mergers that Involve Multisided Platform Businesses,” *Journal of Competition Law and Economics,* Vol. 4, Issue 3, with M. Noel, 2008.

“The Economics of the Online Advertising Industry,” *Review of Network Economics*, Vol. 7, No. 3, September 2008.

“The Economics of Market Coordination for the Pre-Fed Check-Clearing System: A Peek into the Bloomington (IL) Node,” *Explorations in Economic History*, Vol. 45, No. 4, with H. Chang, M. Danilevsky, and D. Garcia–Swartz, September 2008.

"The Economics of Market Coordination for the Check-Clearing System in the Late 19th Century United States," *Explorations in Economic History*, Vol. 45, with D. Garcia-Swartz and D. Evans, May 2008.

"The Role of Cost in Determining When Firms Offer Bundles and Ties," *Journal of Industrial Economics,* Vol. 56, No. 1, with M. Salinger, March 2008.

"Economics and the Design of Competition Law," in *Issues in Competition Law and Policy, ed. W Collins,* Vol. 1 (American Bar Association, August 2008).

"Has the Pendulum Swung Too Far?" *Regulation*, Vol. 30, No. 4, with H. Chang, Winter 2007-2008.

"Do Mobile Operators Have a Dominant Position in a Market for the Wholesale Termination of Calls from Fixed to Mobile?" *The Economics of Mobile Prices*, *Vodafone Policy Paper Series*, Vol. 7, No. 4, November 2007.

"Designing the Right Product Offerings," *Sloan Management Review*, with K. Webster, Fall 2007.

"Pick Your Pricing," *Chief Executive Magazine, Incorporated*, No. 227, with R. Schmalensee, Summer 2007.

"The Industrial Organization of Markets with Two-Sided Platforms," *Competition Policy International*, Vol. 3, No.1, with R. Schmalensee, Spring 2007.

"Defining Markets That Involve Multi-Sided Platform Businesses: An Empirical Framework With an Application to Google's Purchase of DoubleClick," with Michael D. Noel, Working Paper (Regulation2point0), 2007.

"A Pragmatic Approach to Identifying and Analyzing Legitimate Tying Cases," in *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* with A. Padilla and M. Salinger, (Oxford: Hart Publishing, 2006).

"The Optimal Prosecution of Corporate Fraud: An Error Cost Analysis," with H.H. Chang, Working Paper (LECG and eSapience), 2006.

"A Somber Anniversary: Terrorism Insurance Five Years after 9/11," with D.D. Garcia-Schwartz and A. Layne-Farrar, Barbon Discussion Paper No. 06-02, 2006.

"Untying the Knot: The Case for Overruling Jefferson Parish," Working Paper (LECG), 2006.

"An Empirical Analysis of Bundling and Tying: Over-the-Counter Pain Relief and Cold Medicines," in *Recent Developments in Antitrust: Theory and Evidence*, ed. J.Pil Choi, with M. Salinger, (Massachusetts: The MIT Press, 2006).

"The Economics of Software Platforms: An Application of Theory of Two-Sided Markets," *Industrial Organization and the Digital Economy*, eds. G. Illing and M. Peitz, with A. Hagiu and R. Schmalensee, (Massachusetts: The MIT Press, July 2006).

"Tying: The Poster Child for Antitrust Modernization" in *Antitrust Policy and Vertical Restraints,* ed. R. Hahn, (DC: Brookings Institution Press, 2006).

"The Architecture of Product Offerings," with Karen Webster, Working Paper, 2006.

"Testimony on Tying for the DOJ/FTC Hearings on Single-Firm Conduct," *Competition Policy International Antitrust Chronicle*, Vol. 11, 2006.

"The Law and Economics of Tying," *Competition Policy International Antitrust Chronicle*, Vol. 11, with Christian Ahlborn, Jorge Padilla, and Michael Salinger, 2006.

"Defining Antitrust Markets When Firms Operate Two-Sided Platforms," *Columbia Business Law Review*, No. 3, with M. Noel, 2005.

"U.S. v. Microsoft: Did Consumers Win?" *Journal of Competition Law and Economics*, Vol. 1, with R. Schmalensee and A. Nichols, 2005.

"The Effect of Regulatory Intervention in Two-Sided Markets: An Assessment of Interchange-Fee Capping in Australia," *Review of Network Economics*, Vol. 4, No. 4, with H. Chang and D. Garcia-Swartz, December 2005.

"Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach," *University of Chicago Law Review,"* with A. Padilla, Winter 2005.

"Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law," Y*ale Journal on Regulation*, Vol. 22, No. 1, with M. Salinger, Winter 2005.

"The Logic and Limits of the Exceptional Circumstances Test," *Magill and IMS Health*, *Fordham Journal of International Law*, with C. Ahlborn and A. Padilla, Fall 2005.

"Analyzing Market Definition and Power in Multi-sided Platforms Markets," with Michael D. Noel, Working Paper, 2005.

"The Economics of Interchange Fees and Their Regulation: An Overview," MIT Sloan Working Paper No. 4548-05, May 2005.

“How Economists Can Help Courts Design Competition Rules – An EU and US Perspective,” *World Competition: Law and Economics Review*, Vol. 28, No. 1, March 2005.

“2004: The Beginning of Change,” *American Banker-Bond Buyer*, Vol. 17, No. 12, March 2005.

“The Economics of Interchange Fees and Their Regulation: An Overview,” Working Paper (Massachusetts Institute of Technology), 2005.

“Tying Under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf,” *World Competition: Law and Economics Review*, with A. Padilla, Spring 2005.

“The Changing Role of Economics in Competition Policy Decisions by the European Commission during the Monti Years,” *Competition Policy International*, Vol. 1, No. 1, with C. Grave, Spring 2005.

“Excessive Prices: Using Economics to Define Administrable Legal Rules,” *Journal of Competition Law & Economics*, Vol. 1, No. 1, with A. Padilla, March 2005.

“Curing Sinus Headaches and Tying Law: An Empirical Analysis of Bundling Decongestants and Pain Relievers,” with Michael Salinger, Working Paper (CESifo) 2005.

“The Retailer Class Action Antitrust Case Against the Card Associations,” *The Payment Card Economics Review*, Vol. 2, with H. Chang and R. Schmalensee, Winter 2004.

“More Than Money: The Development of a Competitive Electronic Payments Industry in the United States,” *The Payment Economics Review*, Vol. 2, Winter 2004.

“The Growth and Diffusion of Credit Cards in Society,” *The Payment Economics Review*, Vol. 2, Winter 2004.

“The Role of Credit Cards in Providing Financing for Small Businesses,” *Payment Card Economics Review,* Vol. 2, with D. Blanchflower, Winter 2004.

“A Little Knowledge Can Be a Dangerous Thing: Price Controls in the Yellow Pages Industry,” *European Competition Law Review*, Vol. 25, No. 10, with A. Oldale and E. Wang, October 2004.

“A Survey of the Economic Role of Software Platforms in Computer-Based Industries,” with Richard Schmalensee and Andrei Hagiu, Working Paper (CESifo), 2004.

"Software Patents and Open Source: The Battle Over Intellectual Property Rights," *Virginia Journal of Law & Technology*, Vol. 9, No.10, with A. Layne-Farrar, Summer 2004.

"The Antitrust Economics of Tying: A Farewell to Per Se Illegality," *The Antitrust Bulletin*, with C. Ahlborn and A. Padilla, Spring-Summer 2004.

"Competition, Cooperation and Upheaval: So-called co-opetition in payment cards is a work in progress-one affected by rapidly changing business relationships and punctuated by court decisions. How will this dance play out?," *American Banker-Bond Buyer*, with Nera Economic Consulting, Vol. 17, No. 1, April 2004.

"What's Yours Is Mine," *The Wall Street Journal*, February 2004, at A7.

"Will Retailers Stampeded to Drop Signature Debit?," *The American Banker,* January 2004.

"Managing the Maze of Multisided Markets," *Strategy+Business*, Fall 2003.

"Regulators set bar high for foreign insurers," *South China Morning Post,* with M. Ross, November 2003.

"Some Empirical Aspects of Multi-Sided Platform Industries," *Review of Network Economics*, Vol. 2, No. 3, September 2003.

"Competing Theories," *The Wall Street Journal,* July 2003.

"Demand-Side Efficiencies in Merger Control," *World Competition Law and Economics Review*, Vol. 26, No. 2, with A. Padilla, Summer 2003.

"Has the Consumer Harm Standard Lost Its Teeth?" in *High-Stakes Antitrust - The Last Hurrah?* ed. R. Hahn, with H. Chang and R. Schmalensee, (Washington, DC: Brookings Institution Press, 2003).

"The Antitrust Economics of Multi-Sided Platform Markets," *Yale Journal on Regulation*, Vol. 20, No. 2, Summer 2003.

"Everything You Wanted to Know about Two-Sided Markets," *The Milken Institute Review*, with P. Passell, Second Quarter 2003.

"Government Preferences for Promoting Open-Source Software: A Solution in Search of a Problem," *Michigan Telecommunications and Technology Law Review,* Vol. 9, No. 2, with B. Reddy, Spring 2003.

"Open-source Software Poses Challenges for Legal and Public Policy," *Washington Legal Foundation*, Vol. 18, No. 4, January 2003.

"The Failure of E-Commerce Business: A Surprise or Not?," *European Business Organization Law Review*, Vol. 3, with D. Garcia-Swartz and B. Martin-Keating, 2002.

"Tying in Platform Software: Reasons for a *Rule-of-Reason* Standard in European Competition Law," *World Competition Law and Economics Review*, Vol. 25, No. 4, with A. Padilla and M. Polo, December 2002.

"Who Owns Ideas? The War Over Global Intellectual Property," *Foreign Affairs,* November/December 2002.

"The New Trustbusters—Brussels and Washington May Part Ways," *Foreign Affairs*, Vol. 81, No. 1, January/February 2002.

"Class Certification, the Merits, and Expert Evidence," George Mason Law Review, Vol. 11, No. 1, 2002.

"Class Certification and the Substantive Merits," *Duke Law Journal*, Vol. 51, No. 4,

with R. Bone, 2002.

"Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries," NBER Working Paper No. 8268, with R. Schmalensee, May 2001; also published in *Innovation Policy and the Economy,* Vol. 2, ed. A. Jaffe, J. Lerner and S. Stern (Massachusetts: The MIT Press, 2002).

"Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government Antitrust Cases," *St. John's Law Review*, Vol. 75, No. 3, 2001.

"Is Free Software the Wave of the Future?" *The Milken Institute Review*, Fourth Quarter 2001.

"Industry Regulation Through Antitrust: The Clinton Legacy and the Bush Future," *Regulation*, Fall 2001.

"Clinton's Brave New Business World," *Regulation,* Vol. 24, No. 3, Fall 2001.

"The Problem of Interchange Fee Analysis: Case Without a Cause?" *European Competition Law Review*, Vol. 22, Issue 8, with Christian Ahlborn and Howard H. Chang, August 2001.

"An Analysis of the Government's Economic Case in *U.S. v. Microsoft*," *The Antitrust Bulletin*, with Albert Nichols and Richard Schmalensee, Summer 2001.

"A Monopolist Would Still Charge More for Windows: A Comment on Werden," and "A Monopolist Would Still Charge More for Windows: A Comment on Werden's Reply," *Review of Industrial Organization*, Vol. 18, No. 3, with B. Reddy, A. Nichols and R. Schmalensee, May 2001.

"Competition Policy in the New Economy: Is European Competition Law Up to the Challenge?" *European Competition Law Review*, No. 5, with C. Ahlborn and A. Padilla, May 2001.

"The Rise and Fall of Leaders in Personal Computer Software," in *Microsoft, Antitrust and the New Economy: Selected Essays,* ed. D. Evans, with A. Nichols and B. Reddy, (Norwell, MA: Kluwer Academic Publishers, 2002).

"Why Does Microsoft Charge So Little for Windows," in *Microsoft, Antitrust and the New Economy: Selected Essays*, ed. D. Evans, with A. Nichols and B. Reddy, (Norwell, MA: Kluwer Academic Publishers, 2002).

"An Analysis of the Government's Economic Case in *U.S. v. Microsoft,*" in *Antitrust Bulletin*, with A. Nichols and R. Schmalensee, Summer 2001. Reprinted in *Microsoft, Antitrust and the New Economy: Selected Essays,* ed. D. Evans, (Norwell, MA: Kluwer Academic Publishers, 2002).

"*U.S. v. Microsoft, Remedy or Malady*?," in *George Mason Law Review*, Vol. 9, No. 3, with K. Elzinga and A. Nichols, Spring 2001. Reprinted in *Microsoft, Antitrust and the New Economy: Selected Essays,* ed. D. Evans, (Norwell, MA: Kluwer Academic Publishers, 2002).

"Antitrust and the New Economy," *Computer Industry Committee Newsletter*, Spring 2001.

"The Competitive Effects of the Collective Setting of Interchange Fees by Payment Card Systems," *The Antitrust Bulletin*, with H. Chang, Fall 2000.

"Be Nice To Your Rivals: How the Government Is Selling an Antitrust Case without Consumer Harm in *U.S. v. Microsoft*," in *Did Microsoft Harm Consumers?: Two Opposing Views, David S. Evans, Franklin M. Fisher, Daniel L. Rubinfeld, and Richard Schmalensee*, with R. Schmalensee, (AEI-Brookings Joint Center for Regulatory Studies: Washington DC, May 2000).

"Consumers Lose if Leading Firms are Smashed for Competing," in *Did Microsoft Harm Consumers? Two Opposing Views, David S. Evans, Franklin M. Fisher, Daniel L. Rubinfeld, and Richard Schmalensee*, with R. Schmalensee, (AEI-Brookings Joint Center for Regulatory Studies: Washington DC, May 2000).

"Economics for the Third Industrial Revolution," *Viewpoint, The Marsh & McLennan Companies Journal*, No. 1, with M. Leder, 1999.

"All the Facts That Fit: Square Pegs and Round Holes in *U.S. v. Microsoft*," *Regulation*, Vol. 22, No. 4, November 1999.

"Joint Ventures: *MountainWest,"* in *The Antitrust Revolution*, eds. J. Kwoka and L. White, with R. Schmalensee (3rd ed., New York: Oxford University Press, 1998).

"Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures," *Columbia Business Law Review,* Vol. 1998, No. 2, with H. Chang and R. Schmalensee.

"A Guide to the Antitrust Economics of Networks," *Antitrust*, with R. Schmalensee, Spring 1996.

"Some Economic Aspects of Standards in Network Industries and Their Relevance to Antitrust and Intellectual Property Law," *Intellectual Property Antitrust*, *Practicing Law Institute*, Vol. 1, with B. Reddy, July 1996.

"Defining Relevant Antitrust Markets with Special Application to Intellectual Property," *Intellectual Property Antitrust, Practicing Law Institute*, Vol. 1, July 1996.

"A Tailored Approach to Diversity Planning," *HR Magazine*, Vol. 41, No. 6, with M. Oh, June 1996.

"Market Definition in Antitrust and Patent-Infringement Litigation," *Practicing Law Institute*, Vol. 1, July 1995.

"Economic Aspects of Payment Card Systems and Antitrust Policy Toward Joint Ventures," *Antitrust Law Journal*, with R. Schmalensee, Spring 1995.

"Retrospective Bias in the Displaced Worker Surveys," *Journal of Human Resources*, with L. Leighton, Winter 1995.

"Industry Dynamics and Small Firms," in *Births and Start-up of Small Firms*, ed. F. Cicogna, (Amsterdam: Kluwer Publishing Co., 1995).

"Common Statistical Fallacies in Pattern-and-Practice Employment Discrimination Cases," *American Employment Law Council*, October 1995.

"Entrepreneurship and Small Business Growth: A Case Study," in *Advances in the Study of Entrepreneurship*, ed. G. Libecap, with Z. Acs, (Greenwich, Ct.: JAI Press, 1993).

"An Economic Approach to the Mitigation of Damages in Age Discrimination Cases," *Advanced Employment Law and Litigation: ALI-ABA Course of Study Materials*, Vol. 2, (Washington, DC: American Law Institute-American Bar Association Committee on Continuing Professional Education, 1992).

"Small Business Formation and Success by Unemployed Workers," *Small Business Economics*, with L. Leighton, 1990.

"Trade Associations and the Exchange of Price and Nonprice Information," in *1992 and EEC/U.S. Competition and Trade Law*, ed. B. Hawk, 1990.

"Estimates of a Model of Entrepreneurial Choice Under Liquidity Constraints," *Journal of Political Economy*, with B. Jovanovic, August 1989. Reprinted in *Small Firms and Economic Growth,* International Library of Critical Writings in Economics, ed. Z. Acs,, (Cheltensham, UK: Edward Elgar Publishing, Ltd., 1995).

"Some Empirical Aspects of Entrepreneurship," *American Economic Review*, with L. Leighton, June 1989. Reprinted in *Entrepreneurship*, International Library of Critical Writings in Economics, ed. M. Casson, (Hants, England: Edward Elgar Publishing Co., 1990).

"Why Do Smaller Firms Pay Less?" *Journal of Human Resources*, ed. Z. Acs, with L. Leighton, May 1989. Reprinted in *Small Firms and Economic Growth,* ed. Z. Acs, (Cheltensham, UK: Edward Elgar Publishing, Ltd., 1995).

"Small Business Economics," *Small Business Economics*, Vol. 1, No. 1, with W. Brock, January 1989. Reprinted in *Small Firms and Economic Growth,* ed. Z. Acs, (Cheltensham, UK: Edward Elgar Publishing, Ltd., 1995).

"Tests of Alternative Theories of Firm Growth," *Journal of Political Economy*, August 1987. Reprinted in *Small Firms and Economic Growth,* ed. Z. Acs, (Cheltensham, UK: Edward Elgar Publishing, Ltd., 1995).

"The Determinants of Changes in U.S. Self-Employment, 1968-1987," *Small Business Economics*, Vol. 1, No. 2, 1989.

"The Relationship Between Firm Growth, Size and Age: Estimates for 100 Manufacturing Industries," *Journal of Industrial Economics*, with T. Bresnahan and R. Schmalensee, June 1987. Reprinted in *The Empirical Renaissance in Industrial Economics*,(London: Basil Blackwell, 1988).

"Natural Monopoly and the Bell System: Response to Charnes, Cooper and Sueyoshi," *Management Science*, with J. Heckman, January 1988.

"Farm Growth and Farm Size: Discussion," *American Journal of Agricultural Economics*, May 1987.

"The Differential Effect of Regulation Across Plant Size: Comment on Pashigian," *Journal of Law and Economics*, Vol. 29, No. 1, April 1986.

"The Economics of Regulatory Tiering," *The RAND Journal of Economics*, with W. Brock, Fall 1985. Reprinted in *Small Firms and Economic Growth*, ed Z. Acs, (Cheltensham, UK: Edward Elgar Publishing, Ltd., 1995).

"A Test for Subadditivity of the Cost Function with an Application to the Bell System," *American Economic Review*, Vol. 76, No. 4, with J. Heckman, September 1984.

"The Audience Revenue Relationship for Local Broadcast Stations," *Bell Journal of Economics*, Vol. 11, No. 2, with F. Fisher and J. McGowan, Fall 1980.

"Cross Country Prediction of Consumption Patterns," *Economic Letters*, Vol. 3, No.1, September 1979.

TESTIMONY

Trial Testimony 2002-2013

Presidential Emergency Board No. 243, National Mediation Board, Case Nos. A-13569, A-13570, A-13572, A-13573, A-13574, A-13575, and A-13592. Testified in support of the National Railway Labor Conference concerning wages, benefits, and work rules for railroad workers. (October 2012).

Case T-201/04, *Microsoft v. Commission of the European Communities*. Testified in support of Microsoft before the Court of the First Instance of the European Union concerning the Commission's determination that Microsoft had abused its dominant position by refusing to license certain information regarding its operating system and by tying a media player to its Windows operating system. (April 2006).

Case T-201/04, *Microsoft v. Commission of the European Communities*. Testified before the Court of the First Instance of the European Union in support of Microsoft's application for a suspension of remedies during its appeal of a Commission decision. (October 2004).

In the Matter of the United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Education of the City School District of the City of New York, Case Nos. M201-203, M201-215. Testified for the defendant in an arbitration concerning teacher compensation. (December 2002).

Deposition Testimony 2002-2013

South Atlanta Motor Sales, Inc. v. Southeast Toyota Distributors, LLC, Case No. 30-114-Y-00229-07. Testified for the defendant in an arbitration concerning a racial discrimination claim. (November 2007).

Mitchell v. Metropolitan Life Insurance Company, No. 01-civ-2112 (S.D.N.Y.). Testified for the defendant concerning statistical analysis of wages and promotions by gender. (February 2003).

Rodolico et al. v. Unisys Corporation, CV-95-3653 (E.D.N.Y.). Testified for the defendant concerning statistical analysis of allegations of age discrimination in a layoff determination. (March 2002).

Delores Kaminsky, et al. v. First Union Corporation, No. 98-162 (E.D. Pa.). Testified for the defendant concerning the statistical evaluation of an age discrimination. (January 2002).

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APPENDIX B

ESTIMATION OF SAVINGS FROM PPL

1. As discussed in the main body of the report, I do not believe the plaintiffs and their economic expert have provided any sound explanation, grounded in antitrust economics, as to why competition would be harmed or output suppressed as a result of SESAC not offering a particular discounted form of blanket license such as the PPL. Nevertheless, their analysis rests largely on the claim that the PPL offered by SESAC was "not viable"—that is, that the PPL did not enable local stations to secure a lower price if they used less SESAC music. Therefore I have, as discussed in the body of the report, estimated the savings that were likely available to stations from electing the PPL option during the 2008-2012 contract. This Appendix describes my methodology for doing so.

2. As I noted in the report, the purpose of my analysis is not to calculate exactly what each station's savings under the PPL would have been, or to arrive at an exact count of the number of stations that would have saved under the PPL.[1] Rather, it is to provide a general assessment of whether a significant number of stations were likely to save on performance royalties by electing the PPL.[2] My analysis shows that there were likely to be savings for a significant number of stations.

[1] I do not have episode-level revenue data for each of the individual local stations, which would be used in an actual PPL calculation. The data that I use as proxies for such revenue data and the data I use to assess whether a given episode is likely to have SESAC music are, like almost all data, subject to some inconsistencies and imperfections. These data sources are, however, used in the normal course of business, including for analyses such as the PPL calculations I describe. Some of the data are also used by SESAC to calculate and pay royalties to affiliates. In any event, I have no reason to believe that these data, while imperfect, would result in an overstatement of the number of stations that would save under the PPL. This Appendix includes a number of sensitivity analyses to assess the impact of altering the assumptions underlying my analysis. The sensitivity analyses do not change the general conclusion that a significant number of stations would have saved money under the 2008-2012 PPL.

[2] The plaintiffs, as I have noted, provide no basis for assessing how many stations would need to take the PPL for it to be "viable." For the PPL for 2005-2007, which the plaintiffs apparently believe was "viable," 204 stations (about 17 percent of all stations) on average—a small minority of stations—decided to take the PPL.

3. I assume for purposes of this analysis that all local stations had the opportunity to elect the PPL.[3] About 80 percent of stations that took the PPL in 2007 belonged to station groups that, in fact, chose to take a group discount for the 2008-2012 license, which applied across all stations in the group regardless of SESAC music usage, in exchange for which they gave up the rights to elect the PPL for any of their stations.[4]

4. The savings in the fees paid by a station to SESAC equal the blanket fee for the station less the fee the station would have paid under the PPL, given its broadcast schedule. The blanket fee is what SESAC actually charged for the blanket license. The fee under the PPL, if a station elected it, would have been determined by the following formula:[5]

PPL Fee = *SESAC Share × 5.34 × Blanket Fee +*
(Blanket Fee × 15% Incidental/Ambient Use Fee) +
(Blanket Fee × 15% Administrative Fee)

5. If we have an estimate of each station's *SESAC Share*, we will be able to estimate the fee it would have owed under the PPL. The *SESAC Share* is defined as the station's revenue from programs with any SESAC music divided by its revenue from all programs.[6] For syndicated programs for which it is unknown whether the program contains any SESAC music, a default multiplier of 50 percent applies.[7] That is, 50 percent of the revenues from such

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[3] My analysis includes all local stations that took blanket licenses from SESAC. This includes stations that were owned and operated by ABC, CBS and NBC. Such stations are also included in the counts of stations taking the PPL in 2005-2007 reported by Professor Jaffe. *See* Expert Report of Adam B. Jaffe, filed March 4, 2013, at 47 [hereinafter "Jaffe Report"]; SESAC-0373761.

[4] Calculations based on SESAC-0373761; JAFFE_SESAC00001052.

[5] SESAC Local Television Primary Channel Per Program License Agreement for the term commencing January 1, 2008 and ending December 31, 2012, at 6-7, *available a*t http://www.sesac.com/pdf/Local_TV_08-12_Per_Program_Agreement_Standard_Form.pdf [hereinafter "SESAC Per Program License"].

[6] The programs under consideration are those covered by the license, so that network feeds from ABC, CBS, NBC and Univision are excluded, as are any programs covered by direct or source licenses.

[7] For certain series, SESAC may also specify a multiplier that is specific to a series based on the cue sheets SESAC has for that series, to be used when a cue sheet is not present. SESAC Per Program License at 7.

programs with unknown music is included in the numerator of the *SESAC Share* calculation. For locally produced programs for which it is unknown whether the program contains any SESAC music, a default multiplier of 100 percent applies.[8] That is, 100 percent of the revenues from such programs with unknown music is included in the numerator of the *SESAC Share* calculation.

A. Data Sources

6. For my analysis, I relied on four main sources of data:

a. Nielsen data on ratings. Each observation of the dataset includes the estimated number of households watching for a given quarter hour for a given station.

b. Tribune Media Service (TMS) data on program listings. Each observation of the dataset includes the scheduled program, episode, start and end times, source of program (such as network, syndicated, or local), and type of program (such as series, miniseries, special, or paid programming) for a given station.

c. SQAD data on the value of advertising in different Designated Market Areas (DMAs) at different time periods. Each observation of the dataset includes the estimated dollar value of a share point (percent of households in the DMA watching the program) for a given time slot during the day.

d. Cue sheet data from SESAC. Each observation of the dataset includes the program, episode, the cue played, and and the affiliate for that cue.[9]

7. The Nielsen, TMS, and SQAD datasets are standard sources of data used by industry participants and used in the normal course of business by SESAC and other industry participants. The SESAC dataset is used in the normal course of business by SESAC.

8. Nielsen ratings data are routinely used for, among other things, determining advertising rates, assessing the performance of different programs, and assessing the audience of different

[8] SESAC Per Program License at 7.

[9] More precisely, I used four datasets to classify cues. I used SESAC's Cue Sheet Database to identify individual cues played in each program. For each cue, I used SESAC's Song Database to identify the writers and publishers. For each writer and publisher, I used SESAC's Writer Database and Publisher Database to determine whether they are affiliated with SESAC.

stations. Nielsen ratings data have been used to determine performance license fees paid by the stations to the PROs. My understanding is that SESAC has, in the ordinary course of business, used Nielsen ratings data to determine usage of SESAC music.

9. TMS is a leading provider of television schedule data. My understanding is that SESAC has, in the ordinary course of business, used TMS schedule data to, among other things, determine royalty payments to its affiliates.

10. The SQAD advertising cost data are used by television stations and advertisers to assess advertising costs in different DMAs.[10] My understanding is that SESAC has, in the ordinary course of business, used SQAD advertising cost data to determine usage of SESAC music.

11. The cue sheet data from SESAC is used in the ordinary course of business by SESAC. My understanding is that it has been used for administering its PPL program in the past and is also used in determining royalties to be paid to SESAC's affiliates.[11]

12. Nielsen ratings are available for most stations only during sweeps periods. I relied on data from the November 2008 and November 2011 sweeps periods.[12] The first date falls early in the 2008-2012 contract period. The second date falls relatively late in the contract period but is long enough ago that the completeness of SESAC's cue sheet data would not be reduced by the recency of the episodes in question.

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[10] SQAD reports that its data are based on "[o]ver $12 billion actual costs collected per year across all 3 local broadcast media types." See SQAD, "Local Data," http://www.sqad.com/products/#local-data (last visited Mar. 26, 2013).

[11] We use the database that is generally referred to by SESAC as the "Cue Sheet Database," which consists primarily of SESAC cue sheets.

[12] The November 2008 sweeps period ran from October 30, 2008 to November 27, 2008. The November 2011 sweeps period ran from October 27, 2011 to November 24, 2011. For convenience, I sometimes refer to these as the 2008 and 2011 periods below.

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B. Estimation of Revenues for Each Episode Shown

13. As noted, the license fee for a given station under the PPL formula depends on its *SESAC Share*—the share of its revenues coming from episodes with SESAC music relative to its revenue from all episodes shown. My analysis uses the Nielsen, TMS, and SQAD data to provide an estimate of the advertising value of each episode shown on each station, using the following approach.[13]

14. The TMS schedule data are needed for episode-level information. While Nielsen has information on which program was shown in a particular time slot, it does not provide the episode level information that is needed to match a given episode to the cue sheet for that episode. The Nielsen data are needed to provide the ratings for each episode.

15. Combining the TMS schedule data with Nielsen ratings data provides an estimate of the audience for each episode. Each episode from TMS is assigned the ratings for the quarter hours covered by its scheduled start and end times.[14] For example, if an episode on a station runs from 3:00-3:30 pm, it is assigned the number of households that Nielsen estimated as viewing that station for the 3:00-3:15 pm quarter hour and the 3:15-3:30 pm quarter hour.[15] The audience for a given episode is expressed in the the number of household-quarter hours, so an episode that had 10,000 households watching in the first quarter hour and 15,000 households

[13] The MRI calculations discussed in the body of my report appear to have been based on actual program revenues. *See* MRI00010741. The fact that their results generally are broadly consistent with mine suggests that the proxy I use is a reasonable one.

[14] At certain times, a scheduled episode may not run at its scheduled time or may be replaced by another episode. For example, live sports events can run longer than scheduled. An episode that followed a sports event that ran long would receive part of the ratings of the sports event. There is no reason to believe that this presents a systematic bias toward finding greater or lesser savings from the PPL.

[15] If an episode does not start or end exactly on a quarter hour, it is assigned a pro rata share of any partial quarter hours. So, for example, if an episode runs from 3:05-3:35 pm, it is assigned two thirds of the 3:00-3:15 pm quarter hour audience, all of the 3:15-3:30 pm quarter hour audience, and one third of the 3:30-3:45 pm quarter hour audience.

watching in the second quarter hour would have an audience of 25,000 household-quarter hours.

16. The ABC, CBS, NBC, and Univision networks acquire performance rights on behalf of their affiliates for their network feed programming. Episodes that come from the network feeds of those networks therefore are excluded from the PPL calculations. The TMS field that indicates whether an episode is part of a network feed sometimes identifies network programming as syndicated programming. I therefore relied on standard network prime time and late night time slots to exclude network programming.[16] I also relied on information in the Nielsen data on whether an episode was part of network programming.

17. Next, we need to estimate the advertising revenue that is associated with the audience for each episode. The SQAD advertising cost data provides an estimate of the cost per ratings point (CPP) to place a 30 second ad in a given time period (such as 4:00-6:00 pm Eastern) in a given DMA.[17] A ratings point is equal to one percent of television households in the DMA. The ratings points for a given episode are equal to its household-quarter hours divided by the number of quarter hours of the episode divided by the number of television households in the DMA.[18] The estimated advertising revenue from an episode would equal the number of 30

[16] I also used specific exclusions based on the names of significant network programs—such as children's programs—that are shown outside the prime time or late night slots. Similarly, I used specific inclusions of major syndicated programs, including significant SESAC programs, to ensure that they were not excluded if they were shown during a time slot that typically contained network programming. For example, a station might show a syndicated program after the late local news rather than a network program from the network feed.

[17] SQAD suggests that, as a general rule, relative to the cost of a 30 second ad, a 10 second ad would cost 50 percent as much, a 15 second ad would cost 60-80 percent as much, and a 60 second ad would cost twice as much. See SQAD, "Spot TV Data Description and Guidelines for Use," May 2002. For purposes of my analysis, I have assumed that advertising is priced based on showing 30 second ads (or 60 second ads, which have the same cost per second).

[18] Since the number of television households in a given DMA does not change for a given station across its episodes, for the purpose of our calculation, which uses advertising revenues as weights in estimating the *SESAC Share*, we can either divide by the television households in the DMA for all episodes, or skip the

second ads per quarter hour for an episode times the number of quarter hours shown times the ratings points of the episode times the cost per ratings point. I have generally assumed that the number of advertising minutes per quarter hour is the same across episodes.

18. Estimating advertising revenues from infomercials requires some additional comment. An infomercial provides a television station with revenues not through advertising during a particular program; rather, the infomercial itself is the advertising. The revenues needed to make the infomercial profitable for the station are likely much less than the advertising revenues for a non-infomercial program that the station might otherwise air, because the station would then have acquisition or production costs. To take a simple example, suppose the alternative non-infomercial program would cost the station $80 to acquire and would earn $100 in revenue from advertising sold by the station. The station then earns $20. Alternatively, the station could earn the same amount if an advertiser offered the station $20 to air its infomercial. The revenue attributable to the infomercial is only $20 in comparison to the $100 for the other program.

19. I do not have data on revenues associated with infomercials, so I have used the same approach as for other episodes, by estimating revenues based on the audience size of each episode and the cost per ratings point during the relevant time periods. This may overstate the revenues associated with infomercials because of the effect I just described. I have considered sensitivity analyses below that look at the impact of such a potential overstatement. There may be a counteracting effect if the the size of the audience for infomercials is significantly less than

division for all episodes, without affecting the result. We take the latter approach in the software code implementing these calculations.

that for other non-infomercial programs that the station might air. I have also considered sensitivity analyses below that look at the impact of such a potential understatement.

C. Determination of Presence of SESAC Music

20. Given the estimates of the advertising value of each episode shown on a given station, we need to determine if the episode should be treated as having SESAC music. This assessment is based on the following considerations:

a. Episodes of local news and local sports programs were counted as having SESAC music if and only if they were on stations that had a contract with a SESAC news music composer.

b. Infomercials, or paid programming, were treated as subject to the default multiplier of 50 percent.

c. With the exception of episodes falling under (a) and (b), we matched each episode to SESAC's episode-level cue sheet data to determine if the episode had any SESAC music.

21. I discuss these approaches in more detail next.

1. Local programming

22. For episodes of local news and local sports programs, the determination of whether the episode contained any SESAC music was based on infomation provided by SESAC on the local stations that used SESAC news music composers.[19] Stephen Arnold's music was used by 107 stations in November 2008 and 129 stations in November 2011. There were 37 Univision owned and operated stations that used SESAC music in both November 2008 and November 2011. And there were another 3 stations in both November 2008 and November 2011 that used

[19] A small proportion of episodes are classified as "Local" by TMS but are not local news or sports programs. These episodes do not generally appear to be locally produced programming, so I have treated them like other syndicated programming, which are matched up against SESAC's cue sheet data to determine if they contain any SESAC music. I have also considered alternative assumptions in the sensitivity analyses below. Episodes were counted as local news or local sports if the TMS program source field was "Local" and if the TMS genre field was related to news and sports.

SESAC music from Non-Stop Music. Episodes of local news and sports programs from any of these stations were counted as containing SESAC music. Episodes of local news and sports programs from stations other than these were counted as not containing SESAC music. Local news/sports programs accounted for just over 30 percent of all episodes on a revenue weighted basis.

2. Infomercials

23. With respect to infomercials, the plaintiffs' economic expert contends that cue sheets are particularly difficult to obtain for such programming.[20] I understand that cue sheets for infomercials may sometimes be available. Nevertheless, to be conservative, I have taken as a base assumption that cue sheets for infomercials would not have been available and have counted those programs under the 50 percent default multiplier. That is, 50 percent of the revenue from all infomercials for a station was treated as attributable to programs with SESAC music. Infomercials account for about 3 percent of all episodes on a revenue-weighted basis.

3. All other programming

24. For all episodes of programs other than local news/sports programs and infomercials, each episode was matched to SESAC's cue sheet database to determine if a cue sheet was present.[21] These episodes consists primarily of syndicated programming and account for about 65 percent of all episodes on a revenue weighted basis. When a cue sheet was matched to an

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[20] Jaffe Report, at 12-13. Professor Jaffe also makes the same contention with respect to advertisements. The music performed in advertisements is not relevant to the calculation of the PPL fee as the performance rights for ads are covered under the ambient and incidental component, which is a fixed 15 percent of the blanket fee. Episodes were counted as infomercials if the TMS program type field was "Paid Programming" or if the Nielsen program name field contained "PAID" and the program is identified as a local program.

[21] For convenience, I refer to this category as "syndicated" programming, although it includes network programming for networks other than ABC, CBS, and NBC. Such network programming includes network series as well as sports programs. This category also includes a small amount of programs classified by TMS as "Local", which, as I noted below, does not generally appear to be locally-produced programming. I consider alternative assumptions for such "Local" programs and find that it does not significantly affect the results.

episode, the estimated advertising revenue from that episode was counted as SESAC if the cue sheet contained a cue from a SESAC affiliate. Around 25 percent of all episodes that were checked against cue sheets matched to a cue sheet with SESAC music, on a revenue weighted basis.

25. When a cue sheet was not matched to an episode, three additional methods were used to determine how much of the episode's revenue to attribute to SESAC.

26. First, for shows that had a series-specific multiplier—an estimate of the proportion of episodes of that series that contained SESAC music based on available cue sheets—from the SESAC Syndicated Program Catalog (SSPC), that multiplier was used for all episodes of that series that did not match individually to a cue sheet.

27. And second, for the 2005-2007 PPL, there were a number of series that SESAC agreed in negotiations with MRI to treat as having no SESAC music, unless SESAC had a cue sheet indicating there was SESAC music in an episode.[22] For episodes of these series, I assumed that the zero multiplier would apply for all episodes that did not match individually to a cue sheet.[23] Episodes for which this assumption was used accounted for roughly 6 percent of all episodes (including local news/sports and infomercials) on a revenue weighted basis. I note that SESAC's own projections of PPL fees in 2008 maintained the same assumptions as were used for the 2007 PPL.[24]

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[22] MRI00003545.

[23] Even if SESAC had not agreed to continue this practice, it is extremely likely that cue sheets were available for such episodes and that the frequency of SESAC music in episodes of such series that did not otherwise match to a cue sheet was zero or close to zero. In cases where there was a (positive) series specific multiplier from the SSPC for a series that was on this list, I took the higher series specific multiplier to be conservative.

[24] SESAC-0679836; SESAC-0679835.

28. Third, there were some episodes for which TMS reported data at only a program (or series) level rather than at an episode level. These episodes generally could not have been matched to SESAC's cue sheet data.[25] For such episodes, I used the average frequency of SESAC episodes in all programming except local programming and infomercials—which was about 32-33 percent—as the probability that a given episode would have SESAC music.[26]

29. All told, these methods accounted for roughly 75 percent of episodes (including local news/sports and infomercials) on a revenue-weighted basis. For the remaining approximately 25 percent of episodes, the estimated advertising revenue was counted as not coming from SESAC programs. I considered two additional issues.

30. First, could a significant fraction of such episodes in fact contain SESAC music? In general, my understanding is that it is very unlikely a significant fraction contained SESAC music given that SESAC has a strong incentive to accurately track the use of its affiliates' music. Moreover, my understanding is that SESAC affiliates have strong incentives to ensure that SESAC has cue sheets for any episodes with their music, as these cue sheets ensure that affiliates are paid royalties for performances of their music.[27] In addition, SESAC is likely to have series-specific multipliers for shows with a significant likelihood of containing SESAC music. For purposes of this analysis, I therefore start with the base assumption that none (or a

[25] A small proportion of cue sheets in SESAC's cue sheet database are present with a series level identifier. Some of these are characterized as an "average" cue sheet. For episodes that had only a series level identifier in the TMS data and that matched to the same series level identifier in SESAC's cue sheet database, I assumed the match was for the correct episode. This was conservative as all such matches were to cue sheets with SESAC music, so all such episodes are counted as SESAC episodes for the purpose of the PPL calculation.

[26] The share includes episodes assigned a SESAC percentage through a series-specific multiplier or a zero multiplier. Specifically, I calculate the revenue-weighted frequency of episodes with SESAC music, excluding programming where the network pays for the music rights, local programming including local news and sports, infomercials, and episodes for which only series-level information is available. This share is then applied to those programs for which only series-level information is available in a second round of the calculation.

[27] As discussed in the report, some major affiliates have guaranteed payments.

negligible percentage) of the episodes that did not match to a cue sheet and that did not have a series-specific multiplier contained SESAC music.To account for the possibility that certain of these episodes did contain SESAC music, however, I also consider sensitivity analyses, which find that my general result is not significantly affected even if as much as 25 percent of such episodes in fact contained SESAC music.

31. The second issue I considered is whether there might be some episodes of syndicated programs for which cue sheets could not have been obtained. My understanding is that cue sheets are routinely created for syndicated programs. As discussed, among other reasons is the fact that they are important to PROs in paying their affiliates. If stations used the PPL or expected to use the PPL in the future, I would expect they or their PPL processor would be able to obtain complete cue sheet records for their programs (if they have not done so already) including, for example, by asking for the right to receive cue sheets when buying new syndicated programs.

32. I consider a range of sensitivity analyses below, which find that my general result is not significantly affected even if there would not have been cue sheets available for as much as 50 percent of such episodes.

D. PPL Savings

33. Given these assignments of each episode as containing SESAC music or not, or being treated under the default multiplier, it is then straightforward to calculate the *SESAC Share* of revenue from episodes with SESAC music relative to revenue from all episodes for each station and to use that to estimate the fee due under the PPL:

PPL FEE = *SESAC Share × 5.34 × Blanket Fee +*
(Blanket Fee × 15% Incidental/Ambient Use Fee) +
(Blanket Fee × 15% Administrative Fee)

34. Once we know the fee under the PPL for each station and its blanket fee, we know how much it would save under the PPL and can express this in both dollar and percentage terms. I have found that there were 149 stations based on the November 2008 data that would have had a lower PPL fee than the blanket fee and 205 based on the November 2011 data.

35. As I noted in the body of the report, we have to consider whether the savings under the PPL are sufficiently high as to be worth the processing and other costs associated with the PPL. By way of a threshold for electing the PPL, I use the same $99 per month in savings as discussed in the main report, which corresponds to the observed levels of monthly savings for the station at the 10th percentile of savings among stations that elected the PPL, averaged across 2005-2007.[28]

36. Table 1 shows the number of stations that would have had greater savings than this threshold level based on the November 2008 and November 2011 data. We see that there were 86 stations based on the November 2008 data and 123 stations based on the November 2011 data that had estimated savings in excess of the threshold, for an average of 104.5 stations for the two periods.

[28] *See* Section V.H.2 in the main report for additional details. As I discuss below, there remain a significant number of stations that would have saved under the PPL assuming a higher threshold level of savings.

Table 1: Number of Stations Exceeding Savings Threshold

November 2008	*November 2011*	*Average*
86	123	104.5

37. These results indicate that, despite the changes made by SESAC in the PPL formula for the 2008-2012 license period, a significant number of stations could have saved money under the PPL. As I discussed in the main report, this is consistent with MRI's analysis, with SESAC's internal analysis, and with the analysis performed for SESAC by its outside consultants.

38. Professor Jaffe might respond by arguing that the numbers of stations exceeding the savings threshold, as set forth here, are not high enough for the PPL to be "viable." But he has provided no way of determining how many stations must achieve PPL savings for the PPL to be "viable." He has advanced no economic theory or analysis that would enable one to conclude that 204 (the average number of stations electing the PPL for 2005-2007) is "enough" stations for the the PPL to be viable but 86 or 123 is not "enough." As I have noted, the PPL does not arise from competition among PROs, so there is no such thing as a degree of viability that one would expect under competition.

39. Moreover, my analysis is conservative in the sense that it assumes that stations make no changes to their programming or music use in order to achieve PPL savings. In particular, if a station were interested in taking the PPL, one would expect that it might make changes to its programming or music use to decrease the amount of SESAC music. Given that most stations gave up the right to elect the PPL as a condition of their station group receiving a group discount, they would have had no such incentive to make such changes for the 2008-2012 period.

E. Sensitivity Analyses

40. I have also considered a variety of sensitivity analyses to assess whether changing certain assumptions in the methodology I have described above would change my general conclusions about the ability of stations to save under the 2008-2012 SESAC PPL. Most of the sensitivity analyses are conservative and look at alternative assumptions that would lower the number of stations that would save. I have not generally analyzed alternative assumptions that would increase the number of stations that would save.

1. Alternative savings thresholds

41. The $99 savings threshold I have considered in my base analysis is based on the actual savings of stations electing the PPL at the 10th percentile of savings—that is, 10 percent of the PPL stations saved less and 90 percentile saved more—averaged across 2005-2007. I also consider a threshold of $55, which is based on the 2005-2007 average of PPL savings for stations at the 5th percentile.

42. In addition, I have considered the results based on alternative savings thresholds I have seen in the discovery record. In the analyses performed for SESAC by its outside consultants, monthly savings thresholds of $0, $250, and $417 were considered.[29] Table 2 shows the number of stations that would have exceeded these thresholds based on the November 2008 and November 2011 data.

[29] These were expressed as annual savings thresholds of $0, $3,000 and $5,000. *See* Deposition of Steven Herscovici, January 9, 2013, at 134:10-136:15, 160:17-162:19; ANALYSIS0002677-685.

Table 2: Number of Stations Exceeding Savings Threshold

Savings Threshold (monthly)	*November 2008*	*November 2011*	*Average*
$0	149	205	177
$55	101	141	121
$99 (Base Case)	86	123	104.5
$250	50	73	61.5
$417	31	47	39

43. The $0 monthly savings threshold may be lower than required for a station to elect the PPL in the short run, as the station will have costs associated with undertaking the necessary reporting under the PPL; I note parenthetically that one of the blanket license's efficiencies is that it eliminates these costs. The roughly 150-200 stations in each year that have some level of savings does, however, illustrate that there are a significant number of stations that had savings under the PPL formula for 2008-2012. And if stations had made changes to their programming to reduce the use of programs with SESAC music even further, they would have increased their savings, possibly to the point that the savings would have exceeded their costs under the PPL. So this is a measure of stations that could potentially save enough under the PPL to elect it. At the $55 threshold, which corresponds to the 5th percentile of savings among stations electing the PPL in 2007—a plausible threshold—the number of stations benefiting increases to 121 stations on average.

44. The $250 and $417 monthly savings thresholds are likely higher than required for many station to elect the PPL, since among stations taking the PPL from 2005-2007, about 40 percent saved less per month than $250 and about 60 percent saved less than $417, on average across

those years.[30] Nevertheless, the results indicate that there are a significant number of stations with savings above even those thresholds.

2. Alternative assumptions about infomercial frequency

45. The identification of infomercials is of particular concern, as plaintiffs argue that cue sheets may be particularly difficult to obtain for such programming. As I discussed above, I have conservatively assumed that none of the infomercials shown would have had a cue sheet, so that they are all treated under the 50 percent default multiplier. I consider here a range of alternative assumptions for the amount of revenue coming from episodes of infomercial programming.

46. If there were infomercials that were not identified as such in the TMS data, then the proportion of revenue from infomercials would be understated.[31] Separately, as I discussed above, the estimates of revenues from infomercials may be overstated or understated. Table 3 gives the results at the base $99 monthly threshold of savings for these alternative assumptions of increased or decreased infomercial revenue. As the table shows, these assumptions have a neglible effect on the results as a result of the relatively small revenue share of infomercials at about 3 percent.[32]

[30] Calculations based on SESAC-0373761.

[31] My analysis generally relies on TMS's schedule information to identify the episodes being shown. To be conservative, I also categorized an episode as an infomercial if the Nielsen record(s) to which it matches contains "PAID" in the name field and the program is identified as a local program.

[32] This low share is consistent with Professor Jaffe's views. See Jaffe Report, Appendix D, at 5.

Table 3: Number of Stations Exceeding Savings Threshold

Percentage Change in Infomercial Revenue	*November 2008*	*November 2011*	*Average*
-50%	92	134	113
-25%	88	127	107.5
0% (Base Case)	86	123	104.5
+25%	82	119	100.5
+50%	80	116	98
+100%	70	109	89.5

3. Alternative assumptions about prevalence of SESAC music in episodes of local programs

47. As I discussed above, there are some episodes that TMS categorizes as from "Local" sources. For my base analysis, I have used the process described above for determining whether the episode contains SESAC music.

48. Here, I consider three alternative assumptions to account for the possibility that such programming might be idiosyncratic and difficult to match to cue sheets. First, I assume that those episodes have the same SESAC usage as the station's locally produced news and sports programming. Second, I assume those episodes have the same SESAC usage as for that station's overall SESAC Share across all episodes. And third, I assume those episodes would be treated under the default multiplier of 50 percent—that is, I assume that those episodes would not have had cue sheets and would have been treated as 50 percent attributable to SESAC.[33] As Table 4 shows, these alternative assumptions have a negligible effect on the results.

[33] I am assuming that these episodes are not locally-produced programs. Locally-produced programs without a cue sheet would be assigned a 100 percent multiplier under the terms of the PPL. I am aware of no reason why local stations using a PPL could not create cue sheets for their own programming.

Table 4: Number of Stations Exceeding Savings Threshold

Change in Local episodes assumption	*November 2008*	*November 2011*	*Average*
No Change (Base Case)	86	123	104.5
Same SESAC percentage as station's local news/sports	92	128	110
Same SESAC percentage as station's overall SESAC percentage	88	128	108
Treated under default multiplier of 50%	83	119	101

4. Alternative assumptions about prevalence of episodes with SESAC music

49. I have considered a range of assumptions about "missed" SESAC episodes for those episodes not covered by any of the approaches above—matching to cue sheets, use of a series specific multiplier, use of an industry multiplier for episodes without episode level TMS data, and use of the prior zero percent multiplier. Table 5 shows the results relative to the base case if the proportion of episodes of programs other than local news/sports or infomercials that contained SESAC music ranged from 0 to 25 percent on a revenue weighted basis. A significant number of stations would continue to save under these assumptions. The results indicate that even if we assumed the percentage were 25 percent, the PPL would have been a viable option for many stations.

Table 5: Number of Stations Exceeding Savings Threshold

Percent of Non-SESAC Episodes Assumed to Be SESAC	*November 2008*	*November 2011*	*Average*
Zero (Base Case)	86	123	104.5
5%	77	112	94.5
10%	76	110	93
15%	76	104	90
20%	70	102	86
25%	68	97	82.5

5. Alternative assumptions about unavailability of cue sheets

50. As I noted above, my understanding is that cue sheets are generally available for syndicated programs. Nevertheless, to account for the risk that local stations or their PPL processors might not have been able to obtain cue sheets for certain episodes, the sensitivity analysis below considers some assumptions about that being the case for some proportion of episodes of the programs that were not matched to cue sheets or otherwise accounted for (for instance, through a series-specific multiplier). Any such missing cue sheets are likely to correspond to a small proportion of a station's revenue as there would be strong incentives for stations or their PPL processor to obtain cue sheets (if they have not done so already) for episodes of programs that are believed not to have SESAC music and that account for a significant portion of revenues; indeed, such episodes would likely be shown on stations in multiple markets, so that a PPL processor would have an incentive to collect the corresponding cue sheets on behalf of multiple clients. If the station and SESAC did not come to an agreement to accept them as not having SESAC music, the revenue from such episodes would have been treated as subject to the default multiplier of 50 percent—that is, 50 percent of such revenues would have been treated as coming from episodes with SESAC music.

51. As Table 6 below shows, a significant number of stations would continue to save under these assumptions about missing cue sheet data.[34] Even if cue sheets were missing for as much as 50 percent of all such episodes the PPL would have remained viable for a significant number of stations.

Table 6: Number of Stations Exceeding Savings Threshold

Percent of Non-SESAC Episodes Assumed to Have Unavailable Cue Sheets	*November 2008*	*November 2011*	*Average*
Zero (Base Case)	86	123	104.5
10%	77	112	94.5
20%	76	110	93
30%	76	104	90
40%	70	102	86
50%	68	97	82.5

[34] These numbers are the same as in Table 5 above. This is because an assumption that, for example, 5 percent of unmatched episodes had SESAC music is effectively the same as an assumption that cue sheets would not have been available for 10 percent of unmatched episodes, with a 50 percent multiplier applied to that 10 percent.

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APPENDIX C: MATERIALS CONSIDERED

The following lists the documents and information that I and/or my staff working under my direction at Global Economics Group have considered in connection with my expert report.

Case Filings in *Meredith Corp. v. SESAC, LLC*

First Amended Complaint

Expert Report of Adam B. Jaffe, filed March 4, 2013 (including all documents cited and all documents produced)

Expert Report of Keith Zajic, filed April 1, 2013

Letter to The Honorable Naomi Reice Buchwald, May 17, 2010

Memorandum of Law in Support Of Defendant SESAC LLC's Motion to Dismiss All Counts of The Complaint

Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss

Plaintiffs' Supplemental Objections and Responses to SESAC's First Set of Interrogatories to Plaintiffs

Deposition Testimony (including exhibits)

Deposition of Barry Massarsky, January 4, 2013

Deposition of Steven Herscovici, January 9, 2013

Deposition of Frederick Gershon, January 11, 2013

Deposition of Donald A. Jasko, January 15, 2013

Deposition of Mike Tolleson, January 15, 2013

Deposition of Stephen Arnold, January 16, 2013

Deposition of William Slantz, January 17, 2013

Deposition of Ira N. Smith, January 24, 2013

Deposition of Elizabeth Haley, January 25, 2013

Deposition of William Watson, February 1, 2013

Deposition of Katherine Whalen, February 5, 2013

Deposition of Michael Eck, July 25, 2012

Deposition of Hunter Williams, July 25, 2012

Deposition of Dennis Lord, July 27, 2012

Deposition of Pat Collins, July 31, 2012

Deposition of Sherah Carney, September 21, 2012

Deposition of Matt Kupersmith, October 2, 2012

Deposition of Steven Counce, October 3, 2012

Deposition of Eric Stephens, October 5, 2012

Deposition of Kate Alphonso, October 11, 2012

Deposition of Jim Hart, October 11, 2012

Deposition of Maxine Edwards, October 16, 2012

Deposition of Alexander Meshechok, October 18, 2012

Deposition of William Robert Lee, October 23, 2012

Deposition of Ulysses Carlini, October 26, 2012

Deposition of Richard D. Adams, November 6, 2012

Deposition of Douglas Lowe, November 14, 2012

Deposition of John Josephson, November 15, 2012

Deposition of Robbin Holliday, November 16, 2012

Deposition of David Catalano, November 19, 2012

Deposition of Richard Heidt, November 21, 2012

Deposition of Hunter Williams, November 27, 2012

Deposition of Alixandra Steier, November 28, 2012

Deposition of Robert Apfel, November 30, 2012

Deposition of Charley Johnson, November 30, 2012

Deposition of Jason Walker, December 6, 2012

Deposition of Willard Hoyt, December 11, 2012

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Deposition of Dennis Lord, December 14, 2012

Deposition of Pat Collins, December 18, 2012

Deposition of James MacDermott, December 19, 2012

Deposition of Ron Gertz, December 20, 2012

Deposition of Stephen Claar Swid, February 7, 2013

Deposition of Charles Sennet, February 13, 2013

Deposition of Daniel Reynolds, February 14, 2013

Deposition of Toni Nguyen, February 11, 2013

Documents by Bates Number

ALL0004175	ALL0004197	ALL0004231
ALL0004332	ALL0004552	ALL0004600
ALL0006836	DIGI0038621	DIGI0038652
DIGI0038662	GAN00002481	ION00000658
JAFFE_SESAC00000725	JAFFE_SESAC00000782	JAFFE_SESAC00001052
JB 002273	MERE00070896	MRI00003545
MRI00003946	MRI00004121	MRI00007421
MRI00007424	MRI00010741	SESAC-0303611
SESAC-0303631	ALL0004175	SESAC-022192
SESAC-0257687	SESAC-0261683	SESAC-0267647
SESAC-0267653	SESAC-0271290	SESAC-0290014
SESAC-0290266	SESAC-0290880	SESAC-0294988
SESAC-0320410	SESAC-0320411	SESAC-0320412
SESAC-0324602	SESAC-0324603	SESAC-0324604
SESAC-0324606	SESAC-0325761	SESAC-0326191

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SESAC-0327564 SESAC-0344513 SESAC-0348259

SESAC-0349270 SESAC-0373759 SESAC-0373761

SESAC-0373761 SESAC-0377743 SESAC-0413601

SESAC-0417852 SESAC-0456350 SESAC-0456633

SESAC-0456638 SESAC-0456639 SESAC-0459231

SESAC-0459231 SESAC-0460633 SESAC-0460635

SESAC-0460637 SESAC-0461931 SESAC-0466490

SESAC-0466491 SESAC-0466514 SESAC-0467018

SESAC-0467020 SESAC-0467041 SESAC-0467052

SESAC-04714902 SESAC-0483313 SESAC-0493470

SESAC-0513663 SESAC-0616676 SESAC-0617002

SESAC-0617074 SESAC-0617448 SESAC-0617451

SESAC-0617454 SESAC-0617542 SESAC-0617597

SESAC-0617601 SESAC-0617620 SESAC-0617629

SESAC-0617640 SESAC-0617647 SESAC-0617663

SESAC-0617670 SESAC-0617676 SESAC-0617679

SESAC-0617691 SESAC-0617700 SESAC-0617705

SESAC-0617712 SESAC-0617732 SESAC-0617760

SESAC-0617778 SESAC-0617782 SESAC-0617801

SESAC-0617809 SESAC-0617824 SESAC-0617832

SESAC-0617837 SESAC-0617849 SESAC-0617856

SESAC-0617882 SESAC-0617973 SESAC-0617993

SESAC-0618009 SESAC-0618015 SESAC-0618062

SESAC-0618112 SESAC-0618135 SESAC-0618158

SESAC-0618161 SESAC-0618191 SESAC-0618222

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SESAC-0618246	SESAC-0618248	SESAC-0618252
SESAC-0618255	SESAC-0618278	SESAC-0618300
SESAC-0618305	SESAC-0618309	SESAC-0618315
SESAC-0618327	SESAC-0618330	SESAC-0618333
SESAC-0618340	SESAC-0618346	SESAC-0618354
SESAC-0618382	SESAC-0618393	SESAC-0618489
SESAC-0618563	SESAC-0618580	SESAC-0618591
SESAC-0618594	SESAC-0618673	SESAC-0618683
SESAC-0618698	SESAC-0618785	SESAC-0618819
SESAC-0618869	SESAC-0618922	SESAC-0618929
SESAC-0618981	SESAC-0618993	SESAC-0619384
SESAC-0621064	SESAC-0622120	SESAC-0622121
SESAC-0628900	SESAC-0675747	SESAC-0676807
SESAC-0676807	SESAC-0677622	SESAC-0677622
SESAC-0677638	SESAC-0679838	SESAC-0679834
SESAC-0679835	SESAC-0679836	SESAC-0679837
SESAC-0680074	SESAC-0271318	SESAC-0790665
SESAC-0790665	SESAC-0799264	SESAC-0807537
SESAC-0820745	SESAC-0820748	SESAC-0820750
SESAC-0820753	SESAC-0821219	SESAC-0821406
SESAC-0821627	SESAC-0821707	SESAC-0821914
SESAC-0822189	SESAC-0822370	SESAC-0822471
SESAC-0823046	SESAC-0823485	SESAC-0823505
SESAC-0823566	SESAC-0823795	SESAC-0823808
SESAC-0823912	SESAC-0823925	SESAC-0836051

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SESAC-0847313	SESAC-0847315	SESAC-0907463
SESAC-0919989	SESAC-0919995	SESAC-0926000
SESAC-0926089	SESAC-0963821	SESAC-0963823
SESAC-0971553	SESAC-0973693	SESAC-0973701
SESAC-0973738	SESAC-0973741	SESAC-0973746
SESAC-0973774	SESAC-0973789	SESAC-0974959
SESAC-0974960	SESAC-0975278	SESAC-0975280
SESAC-0975282	SESAC-0975999	SESAC-0976001
SESAC-0976321	SESAC-0976322	SESAC-0983657
SESAC-Meredith 002480	SESAC-Meredith 002481	TMLC00000001
TMLC00000057	TMLC00000192	TMLC00000215
TMLC00000342	TMLC00000348	TMLC00000456
TMLC00000464	TMLC00000581	TMLC00000588
TMLC00000600	TMLC00000678	TMLC00000718
TMLC00000748	TMLC00000859	TMLC00000861
TMLC00000928	TMLC00000937	TMLC00001051
TMLC00140524		

Data and Documents for PPL Analysis

Nielsen Media Research, Nielsen Station Index ratings data and file layout, November 2008 and November 2011

Nielsen-SQAD Market and Daypart IDs

SESAC Cue Sheet Database and file format

SESAC data on station blanket fees, 2008-2012

SESAC information on stations using Stephen Arnold for news music

SESAC information on stations using SESAC affiliates other than Stephen Arnold for news music

SESAC Syndicated Program Catalog (SSPC) and file layout, November 2008 and November 2011

SESAC Affiliates Database and file layout

SESAC Song Database and file layout

Spot Quotations and Data, Inc. (SQAD), Spot TV Data and file layout, December 2008 and December 2011

SQAD Spot TV Data Description and Guidelines for Use

Tribune Media Services, Inc. (TMS), TV Listings Schedules, and file layout, October-November 2008 and October-November 2011

Arbitration Documents from *SESAC, Inc. v. Television Music License Committee*, No. 13 133 01583 05

Expert Report of Annabel Cohen and Catherine Ryan

Expert Report of Barry Kresch (Jan. 6, 2006)

Expert Report of Bonnie Greenberg (Dec. 2, 2005)

Expert Report of Donald A. Jasko (Dec. 2, 2005)

Expert Report of Donald A. Jasko (Dec. 8, 2005)

Expert Report of Judith A. Chevalier (Dec. 2, 2005)

Expert Report of Leslie Bider (Dec. 2, 2005)

Expert Report of Adam B. Jaffe (Dec. 2, 2005)

Expert Report of Amy Bertin Candell (Dec. 2, 2005)

Expert Report of Amy Bertin Candell (Jan. 22, 2006)

Expert Report of Paul Katz (Dec. 2, 2005)

Expert Report of Robert E. Hall (Dec. 2, 2005)

Expert Report of Robin Flynn (Dec. 2, 2005)

Expert Report of Steven Herscovici (Dec. 6, 2005)

Expert Report of Steven Herscovici (Dec. 2, 2005)

Exhibit used in Arbitration Testimony of Amy Bertin Candell (Exhibit 60) (Jan. 24, 2006)

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Materials From Other Cases

Arsberry v. Illinois, 244 F.3d 558, 562 (7th Cir. 2001)

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)

Brantley et al v. NBC Universal, Inc. et al., No. 09-56785, slip op. (9th Cir. March 30, 2012)

Brief for Economists as Amicus Curiae in Support of the Petition for Writ of Certiorari, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U.S. 877 (2007)

Brief for Economists in Support of Petitioner as Amicus Curiae, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., 551 U.S. 877 (2007)

Brief for the United States as Amicus Curiae, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)

Brief of Amici Curiae Economists in Support of Petitioners, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

Complaint, *United States v. Am. Soc'y of Composers, Authors and Publishers* (S.D.N.Y. 1941) (No. 13-95)

Complaint, *United States v. Broadcast Music, Inc.* (E.D. Wis. 1941) (No. 459)

Complaint, *United States v. Broadcast Music, Inc*. (1964) (No. 64-3787)

Consent Decree in *United States v. Broadcast Music, Inc. and RKO General, Inc.* (S.D.N.Y. 1966) (No. 64-3787)

Final Order in *United States v. Am. Soc'y of Composers, Authors and Publishers* (S.D.N.Y. 2012) (No. 41-1395)

Broadcast Music, Inc, v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979)

Buffalo Broadcasting Co. v Am. Soc'y of Composers, Authors and Publishers, 744 F.2d 917 (2d Cir. 1984)

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007)

Order for the Determination of Reasonable License Fees in *United States v. Am. Soc'y of Composers, Authors and Publishers* (S.D.N.Y. 2004) (No. 13-95)

Order Modifying the 1966 Consent Decree in *United States v. Broadcast Music Inc.* (S.D.N.Y. 1994) (No 64-3787)

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990)

Columbia Broadcasting Sys. Inc. v Am. Soc'y of Composers, Authors and Publishers, 620 F.2d 930 (2nd Cir. 1980)

National Cable Television Ass'n v Broadcast Music, Inc. 772 F.Supp. 614 (D.D.C. 1991)

Second Amended Final Judgment in *United States v. Am. Soc'y of Composers, Authors and Publishers* (2001) (No. 41-1395)

United States v. Am. Soc'y of Composers, Authors and Publishers, et al. (Buffalo Broadcasting Co.) (S.D.N.Y 1993) (No. 13-95)

Industry and Economic Literature

Alfred E. Kahn (1990), "Deregulation: Looking Backward and Looking Forward," *Yale Journal on Regulation*, Vol. 7

Alison Alexander, James Owers, Rod Carveth, C. Ann Hollifiled, and Alibert N. Greco (2004), *Media Economics: Theory and Practice* (3rd ed.), New York: Routledge

Anthony Gar-On Yeh and Fulong Wu (1999), "The transformation of the urban planning system in China from a centrally-planned to transitional economy," *Progress in Planning*, Vol. 51, No. 3

Barry Nalebuff (2003), "Bundling, Tying, and Portfolio Effects: Part I, Conceptual Issues," U.K. Department of Trade & Industry, *DTI Economics Paper No. 1*

Berklee College of Music, *Music Careers in Dollars and Cents 2012 Edition*

Charles Rochet and Jean Tirole (2006), "Two-sided markets: a progress report," *RAND Journal of Economics*, Vol. 37, No.3

Connolly, Marie and Alan B. Krueger (2006), "Rockonomics: The Economics of Popular Music," NBER Working Paper No. 11282

David Baskerville and Tim Baskerville (2006), *Music Business Handbook and Career Guide*, (8th ed.), Thousand Oaks: Sage Publications

David Moser and Cheryl Slay (2012), *Music Copyright Law*, Boston: Cengage Learning

David S. Evans and Richard Schmalensee (forthcoming) "The Antitrust Analysis of Multi-Sided Platform Businesses" Roger Blair and Daniel Sokol, eds, *Oxford Handbook on International Antitrust Economics*

David S. Evans, and A. Jorge Padilla (2005), "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach," *The University of Chicago Law Review*, Vol. 72, No. 1

David S. Evans, and Michael Salinger (2005), "Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law," Vol 22 *Yale Journal on Regulation*, Vol. 22, Issue 1

Dennis Carlton and Michael Waldman (2002), "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries," *The RAND Journal of Economics*, Vol. 33, No. 2, at 195, 215

Dennis W. Carlton and Jeffrey M. Perloff (2005), *Modern Industrial Organization* (4th ed.), Upper Saddle River: Prentice Hall

Eric Emch and T. Scott Thompson (2006), "Market Definition and Market Power in Payment Card Networks," *The Review of Network Economics,* Vol. 5, Issue 1

Evans, David S. and Michael D. Noel (2008). "The Analysis of Mergers that Involve Multi-Sided Platforms", *Journal of Competition Law and Economics,* Vol. 4, Issue 3

F. A. Hayek (1945), "The Use of Knowledge in Society," *The American Economic Review*, Vol. 35, No. 4

Film Music Magazine (2011), *Film Magazine 2011-2012 Film & TV Music Salary and Rate Survey*

Frank P. Maier-Rigaud and Ulrich Scwaibe (2012), "Market Definition," *OECD Best Practice Roundtables in Competition Policy*

James A. Johnson (2012), "Media Publishing: What the Songwriter and Practitioner Need to Know," *Entertainment, Arts & Sports Law Journal*, Vol. 22, No. 3

James Cooper, et al. (2005), "Vertical Restrictions and Antitrust Policy: What About the Evidence?" *Competition Policy International*, Vol. 1, No. 2

Jay M. Fujitani (1984), "Controlling the Market Power of Performing Rights Societies," *California Law Review*, Vol. 72, Issue 1

Jean-Charles Rochet and Jean Tirole (2003), "Platform Competition in Two-Sided Markets," *Journal of the European Economic Association*, Vol. 1, No. 4

Jeffrey Ulin (2013), *The Business of Media Distribution: Monetizing Film, TV and Video Content in an Online World*, New York: Focal Press

Marc Rysman (2007), "Empirics of Antitrust in Two-Sided Markets," Competition Policy International, Vol. 3, No. 1

Marc Rysman (2009), "The Economics of Two-Sided Markets," *Journal of Economic Perspectives*, Vol.23, No. 3

Massimo Motta (2004), *Competition Policy: Theory and Practice*, Cambridge: Cambridge University Press

Michael D. Whinston (1990), "Tying Foreclosure, and Exclusion," *The American Economic Review*, Vol. 80, No. 4

Michael Salinger (1995), "A Graphical Analysis of Bundling," *Journal of Business*, Vol. 68, No. 1

N. Gregory Mankiw (2008), *Principles of Economics* (5th ed.), Mason: South-Western Cengage Learning

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

Organization for Economic Co-operation and Development (2009), "Two Sided Markets," Publications: OECD Policy Roundtable Reports

Richard E. Caves (2005), *Switching Channels: Organization and Change in TV Broadcasting*

Roger Blair and Daniel Sokol, eds*, Oxford Handbook on International Antitrust Economics*

Thomas. R., Eisenmann, Geoffrey Parker, and Marshall W. Van Alstyne (2006), "Strategies for Two-Sided Markets," *Harvard Business Review*, Vol. 84, No. 10

Tommaso Valletti (2006), "Mobile Call Termination a Tale of Two-Sided Markets," *Communications and Strategies*, No. 61

U.S. Department of Justice & Federal Trade Commission, "Horizontal Merger Guidelines" (2010)

W. Kip Viscusi, Joseph E. Harrington, Jr., and John M. Vernon (2005), *Economics of Regulation and Antitrust* (4th ed.)

Wei Li and Dennis Tao Yang (2005), "The Great Leap Forward: Anatomy of a Central Planning Disaster," *Journal of Political Economy*, Vol 113, No. 4.

Other Documents

ASCAP 2010 Annual Report

ASCAP Local Station Per Program Television License 2010-2016

ASCAP-TMLC Letter re 2011 License Extension, signed December 20, 2010

BMI 2010 Annual Report

BMI Local Television Station Music Performance Per Program License for the term ending December 31, 2004

BMI Local Television Station Interim License Agreement 2005

Chrysler "Models: HIGHLIGHTS," http://www.chrysler.com/hostc/vsmc/vehicleSpecModels.do?modelYearCode=CUC201301 (last visited Mar. 26, 2013)

Marriott "Chicago Marriott Downtown Magnificent Mile," http://www.marriott.com/hotels/hotel-rooms/chidt-chicago-marriott-downtown-magnificent-mile (last visited Mar. 26, 2013)/
Marriott, "Chicago Marriott Downtown Magnificent Mile," http://www.marriott.com/hotels/hotel-information/fitness-center/chidt-chicago-marriott-downtown-magnificent-mile/ (last visited Mar. 26, 2013)

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

Radio Television Digital News Association, "RTDNA / Hofstra Survey Finds More Jobs, Higher Profits in TV News," http://www.rtdna.org/uploads/files/v1.pdf, (last visited, Apr. 1, 2013)
SQAD, "Local Data," http://www.sqad.com/products/#local-data (last visited Mar. 27, 2013)

Sam Schechner and Rebecca Dana, “Local TV Stations Face a Fuzzy Future”, The Wall Street Journal, Feb. 10, 2009

SESAC Local Television Primary Channel Per Program License Agreement for the term commencing January 1, 2008 and ending December 31, 2012, at 6-7, available at http://www.sesac.com/pdf/Local_TV_08-12_Per_Program_Agreement_Standard_Form.pdf

SESAC, "History," http://www.sesac.com/About/History.aspx (last visited Mar. 26, 2013)

SESAC, “SCL Film & TV Songwriter Showcase Announced,” http://www.sesac.com/News/News_Details.aspx?id=1407 (last visited Mar. 26, 2013)

“SESAC and Television Music License Committee Announce Agreement,” Business Wire, April 11, 2002

State of the Media, "Local TV: By the Numbers," http://stateofthemedia.org/2012/local-tv-audience-rise-after-years-of-decline/local-tv-by-the-numbers/ (last visited Mar. 26, 2013)

The Television Music License Committee, "The History of Television Music Performance Rights," http://www.televisionmusic.com/Joomla_1.5.15/index.php?option=com_content&view=article&id=4 (last visited Mar. 26, 2013)

TMLC Announcement re Settlement with ASCAP for 2010-2016, June 7, 2012