EXHIBIT 9

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

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.	09 Civ. 9177 (PAE)

Plaintiffs' Merits Expert Report

Adam B. Jaffe

March 4, 2013

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I. INTRODUCTION

A. Qualifications

My name is Adam B. Jaffe. I am the Fred C. Hecht Professor in Economics at Brandeis University in Waltham, Massachusetts. From 2003-11, I was Dean of Arts and Sciences at Brandeis. Before becoming Dean, I was the Chair of the Department of Economics. Prior to joining the Brandeis faculty in 1994, I was on the faculty of Harvard University. During the academic year 1990-91, I took a leave of absence from Harvard to serve as Senior Staff Economist at the President's Council of Economic Advisers in Washington, D.C. At the Council, I had primary staff responsibility for science and technology policy, regulatory policy, and antitrust policy issues.

I have authored or co-authored over eighty scholarly articles and two books. I have served as a member of the Board of Editors of the *American Economic Review*, the leading American academic economics journal, as an Associate Editor of the *Rand Journal of Economics*, and as a member of the Board of Editors of the *Journal of Industrial Economics*. I am a Research Associate of the National Bureau of Economic Research (NBER), in which capacity I co-founded and co-directed for many years the NBER *Innovation Policy and the Economy* Group. The website http://ideas.repec.org/, hosted by the Federal Reserve Bank of St. Louis, which ranks economists based on the strength of their scholarly publications, ranks me 303 out of approximately 35,000 economists worldwide. At Brandeis and Harvard, I have taught graduate and undergraduate courses in microeconomics, antitrust and regulatory economics, industrial

organization, law and economics, and the economics of innovation and technological change.

I have served as a consultant to a variety of businesses and government agencies on economic matters, including antitrust and competition issues, other regulatory issues, and the valuation of intellectual property, including music performance rights. I have been qualified as an economic expert in federal courts in the Southern District of New York (proper basis for music performance license fees in cable television, 2001 and appropriate structure and benchmark fee for music performance license in background music service, two separate cases in 2010), Idaho (evaluating market power and allegations of anticompetitive behavior, 2002), and in the Southern District of New Jersey (commercial success as a factor in patent obviousness determination, 2009). My testimony has also been accepted and used by state courts, state regulatory agencies, the Federal Energy Regulatory Commission and its Administrative Law Judges, private arbitration panels, and arbitration/royalty panels convened by the U.S. Copyright Office/Library of Congress.

I have consulted for both owners and users of intellectual property on its valuation and the interaction between intellectual property and competition. I have consulted for the Copyright Clearance Center on the valuation of photocopying licenses and the American Chemical Society on paper and digital journal subscriptions and the relationship between the two. I chaired the Brandeis committee that drafted its current Intellectual Property Policy. I have testified on behalf of both plaintiffs and defendants in patent cases involving a consumer product, a medical device, a software program, and pharmaceuticals. I testified at the request of the Chairman before the U.S. House

Subcommittee on Courts, the Internet and Intellectual Property on patent policy reform. I have testified in arbitration proceedings under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) regarding the valuation of test data with respect to the safety of pesticides.

With respect specifically to the licensing of music performances involving performance rights organizations (PROs), I have prepared written expert reports and presented testimony on behalf of local television stations, cable television channels, and a background music service in the ASCAP and BMI "Rate Court" proceedings, conducted pursuant to Consent Decrees between these entities and the U.S. Department of Justice, Antitrust Division (DOJ), in federal court in the Southern District of New York.[1] I assisted in the design and development of a television music use survey that the Television Music License Committee continues to use today. In 2006, I also testified on behalf of local television stations in their arbitration with SESAC for the 2005-07 license period, which I describe further below in Section III.B. In addition, I testified on behalf of the Public Broadcasting Service in its copyright office arbitration with ASCAP and BMI in 1998.

In 2010, I testified on behalf of the background music service DMX in separate cases in the BMI and ASCAP Rate Courts.[2] My testimony in both cases was to the effect that: (1) the traditional method of licensing music performance rights through a "blanket license" that aggregates rights held by numerous different copyright owners

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[1] The history and operation of the ASCAP and BMI "Rate Courts" is discussed in Section II.C below.
[2] *Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010); *Broadcast Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010).

confers market power on BMI and ASCAP; (2) the fees paid by DMX in direct licensing contracts with music publishers demonstrated that the historical blanket license fees charged by ASCAP and BMI were well above the competitive level; and (3) an Adjustable Fee Blanket License (AFBL) could mitigate that market power if designed correctly.[3] My testimony was used by both Judge Stanton and Judge Cote in their decisions, both of which established an AFBL as an alternative to the traditional ASCAP and BMI blanket licenses, using the formula I recommended, and at a license fee level tied to the direct-license benchmark that I recommended. These decisions were affirmed by the Second Circuit in 2012.[4]

My complete *curriculum vitae*, listing relevant experience, testimony, and publications, is attached as Appendix A.

B. Purpose of Analysis

I have been asked by Counsel for the Plaintiffs to: (1) provide an overview of the economics of music performance licensing in local television; (2) determine the appropriate relevant product market within which to assess the extent of SESAC's market power over local television station licensees and the competitive consequences of SESAC's actions; (3) assess SESAC's market power in that market; (4) assess the competitive consequences of SESAC's licensing practices in that market since 2008, after the 2001-04 and 2005-07 license periods that were the subject of industry-wide negotiations and oversight to some degree by a panel of third-party, neutral arbitrators;

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[3] I describe and explain the traditional blanket license, the nature of direct licenses, and the significance of the AFBL in Sections II.B and II.C below. A glossary of technical terms used in this Report is attached as Appendix C.

[4] *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012).

(5) evaluate the extent to which procompetitive benefits of SESAC's actions (if any) outweigh any competitive harm; and (6) quantify the injury to the Plaintiffs (and other local television stations) from SESAC's anticompetitive conduct and address preliminarily how to ameliorate, at least to some degree, the anticompetitive effects of SESAC's ongoing behavior.

I am being compensated at my normal hourly consulting rate of $1,000/hour for work performed in connection with this proceeding. My compensation is not dependent in any way on the opinions expressed herein, in any subsequent written report or at trial, nor is it dependent on the outcome of this proceeding.

C. Materials Considered

In undertaking my economic analysis, I and those under my direct supervision have reviewed court filings, relevant case law, deposition testimony, documents and data produced in this proceeding (to which we had complete access), publicly available documents and data, and the relevant economic literature. In addition, I have had a number of conversations with representatives of the local television industry – both as part of this proceeding and for the prior work that I have done on behalf of local television stations. My work in this matter is currently ongoing. I understand that expert discovery is not complete and that SESAC's licensing practices that are the subject of my Report are continuing unabated in the marketplace today. As new information warrants, I may update my conclusions. A listing of the materials that I have considered to date in forming my opinions is attached as Appendix B.

D. Summary of Main Conclusions

Based on my review of the evidence in this case developed through discovery and my understanding of the local television industry, I find that SESAC's licensing practices have insulated (and continue to insulate) SESAC and its affiliates from competition in the market for the performance rights owned or controlled by SESAC affiliates. SESAC's licensing practices have forced Plaintiffs (and other local television stations) to deal with SESAC and its affiliates solely on a collective basis, to take a SESAC blanket license jointly priced at artificially high rates without any meaningful connection to the extent of a station's use of SESAC music, and without any viable alternative to that blanket license. SESAC is able thereby to maintain and enhance its monopoly power in the relevant market and harm the Plaintiffs (and other local television stations). These conclusions are based on the following key findings:

- In order to function, a local television station must have a license to publicly perform music from the repertories of each of the three PROs in the United States: ASCAP, BMI, and SESAC.
- A license that grants a local television station the right to broadcast performances of music by all composers affiliated with a given PRO for a flat fee regardless of the amount of that PRO's music that is used – a "blanket license" – is inherently anticompetitive because that license:
    - eliminates competition between and among composers affiliated with a given PRO; and

  - enables otherwise competing composers affiliated with a given PRO to collectively fix the price of that license at supracompetitive rates.

- ASCAP and BMI operate under Consent Decrees with the DOJ, overseen by Rate Courts, that constrain to some degree the anticompetitive effects of a blanket license by, among other things, imposing on ASCAP and BMI: (1) the compulsory licensing of music users during license fee negotiations; (2) the availability of a neutral third party with broad rate-setting and supervisory authority – a U.S. federal court judge – to decide on a reasonable license fee in the absence of an agreement; (3) the required offering of an economically viable alternative to the blanket license for the purpose of injecting some degree of competition into the licensing of those organizations affiliates' musical works; and (4) the prohibition of any requirement or restriction that would preclude, directly or indirectly, any rights holder from issuing licenses directly to music users so that licensees can take advantage of alternatives to the blanket license.
- In contrast to the requirements imposed on ASCAP and BMI, since at least 2008, SESAC has: (1) eliminated price competition among its rightsholders by aggregating their copyrights into a single blanket license with a collusively determined price; (2) maintained specific agreements with key music rightsholders whose music is regularly embedded in local television programming that effectively prevented

them from issuing direct licenses to rights users that would compete with the collectively-priced license; (3) modified the per-program license, which was the only alternative it offered to the blanket license, so as to render it economically nonviable to stations; and (4) eliminated any ability to have a neutral third-party determine license fees.

- As a result, local television stations have been injured by being forced to take the blanket license offered by SESAC at supracompetitive fee levels that bear no relationship to the fees that would emerge in a workably competitive marketplace and by SESAC offering no viable per-program license alternative to its blanket license.
- There are no procompetitive business justifications to support SESAC's business practices.
- In order to remedy SESAC's anticompetitive behavior, it would be necessary to eliminate SESAC's anticompetitive business practices by enjoining it from issuing licenses with respect to the music embedded in non-locally-produced programming. In the alternative, the anticompetitive effects could be somewhat ameliorated by imposing the same constraints on SESAC that govern ASCAP and BMI. Moreover, to compensate Plaintiffs (and other local television stations) for the amounts they have been overcharged since 2008, it would be necessary to award actual damages that I have conservatively estimated to be $1.6 million for the Plaintiffs and approximately $32

million (before trebling) for all local television stations for which I have complete license fee information.

II. INDUSTRY BACKGROUND

This section of the Report describes the practical, economic, and historical context within which SESAC's conduct must be evaluated.

A. The Use of Music on Local Television

1. The Role of Local Television Stations in the Broadcast Day

Most television stations are affiliates of television networks such as ABC and Fox. For such affiliates, a significant portion of the broadcast day is programming provided by the network. The ABC, CBS, NBC, and Univision and TeleFutura networks handle the acquisition of music performance rights for their network programming.[5] That is, the network companies obtain "through-to-the-viewer" rights so that no separate licenses are needed by the local stations to perform the music in the network programs.[6] Therefore, the affiliates of these networks need to worry only about performance rights for a portion of their broadcast day. Other stations, which include both stations that have no network affiliation and those affiliated with a broadcast network such as Fox that does not acquire performance rights for their network programs, need to secure performance rights for their entire broadcast day. This case involves only those programs for which

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[5] *See, e.g.*, SESAC-0571828, -31-32; http://www.bmi.com/creators/Royalty/us_television _royalties/detail ("BMI currently licenses the ABC, CBS, NBC, and Univision television networks under agreements where the fee . . . is paid for by the network instead of by the local TV station.").

[6] Broadcast networks transmit their programming to affiliated local television stations, which then retransmit this programming to viewers in their geographic markets. "Through-to-the-viewer" licenses obtained by some networks from PROs, including SESAC, provide all rights necessary to perform the music, from the initial network transmission through to the viewers of this programming.

the local station must acquire the performance rights.

2. Pervasiveness of Music on Local Television

Musical compositions are performed in television programming in the form of "feature" presentations (where the performer of the music appears visually in the broadcast), background music that is played along with dramatic action in movies, dramas, sitcoms, and paid programming or "infomercials," as well as program themes that may be played leading into and out of a given program and "bumpers" that may be played leading into and out of commercial breaks. In addition to this music in television programming, music performances are also broadcast in commercials, public service announcements, and in televised public events such as sports contests or campaign events that contain a musical performance that is not the primary focus of the event. Music performances in commercials and those captured unintentionally in the broadcast of public events are referred to herein as "incidental and ambient" performances.

3. Penalties for Unauthorized Public Performances of Copyrighted Music

As I understand it, local television station broadcasts of these television music uses constitute public performances under U.S. copyright law, requiring the television station to have permission for the performance unless the musical composition being performed is in the public domain, not copyrighted, or constitutes a "fair use." The station must secure this permission, either directly or indirectly, from the copyright owner (typically a composer or music publisher).

If a station broadcasts a copyright-protected performance of a musical work without permission, at the election of the copyright owner, it faces statutory

penalties for copyright infringement.[7] As I understand the law, these penalties are not strictly conditioned upon the economic significance of the infringement, and the lack of intent to infringe is not a defense. Thus, for example, a station that broadcasts a program with ten distinct musical compositions, for which the station held the performance rights for nine of the ten and believed incorrectly that it held the performance rights for all ten, could nonetheless be liable for infringement penalties for the one composition for which it did not obtain performance rights. My understanding is consistent with the views SESAC and its owners have expressed concerning the potential severity of the penalties for copyright infringement.[8]

4. Control Over Music Use in Television Programming

The economic analysis of the market for music performance rights must begin with an understanding of the role that music plays in television programming, and the decision processes that result in the broadcast of performances. Music content is determined in different ways in different kinds of programming.

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.[9] For these programs, it is within the station's control to ensure that it does not broadcast music

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[7] It is my understanding that these statutory damages can be as high as $150,000 per infringed work.
[8] *See, e.g.,* OZ_00000000121, -21-22 (SESAC financial investor, Och-Ziff, wrote in its investment memorandum justifying its acquisition of a significant ownership stake in 2007, among other things: "The copyrights of … songs are federally protected with significant penalties for copyright infringement…. [T]he penalties for using SESAC content without a license are extremely severe.").
[9] Other than incidental and ambient music, as defined above, almost all of the music in local news programs is in the program themes that are played at the beginning and end and sometimes as a transition between program segments or into or out of commercials.

performances for which it does not have a performance right.

Other kinds of programming, including syndicated series (e.g., Seinfeld and Wheel of Fortune), movies, and paid programming or "infomercials," are produced elsewhere. For this kind of programming, decisions about program content – including the quantity and identity of music incorporated in the program – are made by a third party when the program is first produced. 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.

As discussed further below in Section IV.B, such screening of syndicated programs, infomercials, and movies to avoid broadcast of compositions for which a station has not secured performance rights would be a largely impractical task even if the producers of programming provided the stations with a complete inventory of the music in the programs that are delivered "in the can."[10] While stations do have access to "cue sheets" for some programs, this is frequently not the case.[11] In particular, cue sheets are

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[10] *See, e.g.*, 11/14/12 Lowe Dep. Tr. at 50 ("A lot of programming, we don't know what music is in or is going to be in the programming. . . . [E]ven if a show … had a theme song from BMI, we'd buy it and then before we air the show, that composer could flip to ASCAP, so it becomes a futile effort to figure out what it is. It could change.").

[11] *See, e.g.,* 11/16/12 Holliday Tr. at 118 ("The syndicators sometimes will provide [cue sheets]; sometimes they won't."); 11/6/12 Adams Tr. at 171 ("Q: Are there particular types of programming for which you believe it is difficult to obtain cue sheets? A: Yes. … All syndicated programming."). Indeed, SESAC does not receive cue sheets for all programs either. 9/21/12 Carney Dep. Tr.at 45-46; SESAC-0456633 ("[W]e

difficult or impossible to obtain for many infomercials, and are simply not generated as a general rule for commercials.[12] Moreover, publishers and composers can switch their affiliations from one PRO to another, making it even more difficult to determine definitively whether a program contains any music controlled by a particular PRO.

In summary, television stations bear a legal obligation to ensure that they have permission to perform any music that they broadcast, and face potentially large penalties for failing in that obligation. But they do not control which music is in many of their programs, and they do not even know which music is in portions of their broadcasts.[13] In the next subsection, I will discuss how television stations could acquire legal permission for its music broadcasts, and how they do so in fact.

B. Licensing of Public Performances of Music on Local Television

1. A Competitive Market for Music Performance Rights on Local Television

The essence of the problem described in the previous section is that the television stations are obligated to ensure that they have permission for all of the music performances they broadcast, but they do not have the control or the information necessary to satisfy that obligation. An obvious solution to this problem would be for the parties that do have the information and control regarding music in programming and commercials to secure music performance rights at the time the music performance is

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don't receive cue sheets for every program."); SESAC-0956305 (SESAC's cue sheet administrator in 2009 was "currently not requesting any cue sheets from production companies if [SESAC was] not sure that [it had] music in the show."); 11/27/12 Williams Dep. Tr. at 274-76.

[12] *See, e.g.,* 11/16/12 Holliday Dep. Tr. at 67 ("I don't understand how somebody could know the musical content, since the commercial gets delivered sometimes the day of."). And it might well be impossible to identify a musical composition played by the marching band at a football game.

[13] Note that affiliates of non-licensed networks such as Fox face a particularly acute form of the problem of not controlling what music is in syndicated programs. Not only does the program (and its music) arrive "in the can," the station cannot even choose which programs to broadcast, as those choices are made by the network rather than the station. *See, e.g.*, MERE00019680, -84.

recorded. This could include the producers of syndicated programs, movies and commercials, all of whom already secure all of the other creative rights needed to create and broadcast the program. The value of the performance rights secured by producers for the benefit of their local television station customers would be incorporated in the contracts or other economic arrangements that govern the station's use of the material. Local television stations would still need to acquire the rights for the music in the programs that they produce themselves; in that regard they would then be performing the same function that other programming producers perform.[14]

In this world, the cost of acquiring the right to perform music on local television would be determined by competition among composers. If the producer of a television program wished to incorporate a cue of music into the program, it would contact the copyright owner, and together they would determine the terms and conditions (including the compensation to be paid, if any) under which that owner would permit the desired public performance. The producer could then consider whether to incorporate the music under these terms and conditions, try to negotiate better terms, or not incorporate the music at all. Note that, in this hypothetical competitive market, even though the copyright owner has an absolute monopoly on the right of performance in *her* work, the terms and conditions that are specified for the license of that right are subject to the forces of competition, at least to some degree. If the copyright owner sets the price too high, then the producer has the option of either substituting a different work available on more favorable terms and conditions or hiring a composer to create a new musical work

[14] Some arrangement might also be needed to cover the performance of "ambient" music in news and sports events.

for the contemplated program. Of course, if the producer is making a documentary about the Beatles, then it is unlikely to want to do so without using any Beatles music. If the producer is making a documentary about rock-and-roll in the 1960s, there are many different songs, available from a wide variety of copyright holders, that it could use. For the local news broadcasts, there may be many composers available to write a news theme. Thus, competitive market forces would determine the market price for the right to broadcast each particular performance. The extent of discipline that this competition would impose would depend on the musical work and the circumstances of the performance, but the principle that competition exists would always be present.

This hypothetical competitive market for music performance rights on local television would involve what economists call "transaction costs." That is, programming producers and copyright owners would have to expend time and/or money negotiating and then paying the fees. These costs would likely be passed on to the local television stations, so that the cost of programming would be increased to reflect both the value of the performance rights conveyed by the copyright holders and the costs of acquiring those rights.

Of course, virtually all real markets involve transaction costs; the observation that transaction costs would exist cannot be taken to imply that a hypothetical market structure is necessarily impractical. A typical television show embodies multiple creative or artistic inputs, such as a script, visual images, acting, and direction. Many of these artistic elements also involve copyright rights, and hence, diverse permissions are necessary to broadcast a television program (including copyright performance rights other than those for musical compositions). Generally, the producer of a television

program obtains, and conveys to the television station, all of the rights needed for the station to broadcast the program – with the sole exception of the right to perform the musical compositions publicly. Indeed, the program producer must interact with the owner of the musical works in any event, both to contract for new music to be created for the program, and, with respect to both new or previously-created music, to secure a separate copyright right – a synchronization or "sync" right – permitting it to incorporate the selected music into the audiovisual program. It is hard to see why also acquiring the closely related public performance right for the same musical composition would entail burdensome transaction costs.[15]

In the next section, I will explain that this hypothetical competitive structure is not, in fact, how music performance rights are currently acquired for television broadcasts. It is *not* the common practice for program producers to obtain and convey performance rights. But before turning to the discussion of how the market has evolved in practice, it is useful to examine briefly a closely related market that functions well with a competitive-market structure.

Movie theaters need permission for the public performance of music that occurs when they show movies to their customers. However, the theater does not decide what music is in each movie, and does not even know what music is in each movie unless the movie's creator were to provide that information. Thus, they are in a situation that is

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[15] At the time a program is produced, the number of future performances of the program would be unknown, so any compensation for the right to make these future performances would have to reflect that uncertainty, either by paying a fixed sum based on expected performances, or offering contingent compensation based on future success. But this difficulty is no greater for music performances than for the other artistic components of the production, for which all of the necessary rights are typically acquired at the time of production.

economically similar to the situation of a television station wishing to broadcast a syndicated program. But, for decades now, movie theaters do not, in fact, need to acquire performance rights for the music in movies, because movie producers do so at the time the movie is made, and convey the right to the theaters, just as was proposed above.[16] This system works fine, which provides empirical confirmation that the transaction costs of this market structure are not prohibitive.

2. The Blanket License for Music Performances on Local Television

Now let us turn from this hypothetical market to the market that currently exists for music use in local television programming. The current circumstances surrounding the production and broadcast of most television programming bear little resemblance to the hypothetical competitive market described above (or to the market that has evolved in the movie theatre industry).

Composers or publishers of works appearing on local television almost always grant the right to license the public performance of their works to a PRO. In the U.S., virtually all composers grant this right to one of the three U.S. PROs – ASCAP, BMI, and SESAC.[17] So, to obtain the public performance rights to music in the programs that they broadcast, local television stations have historically acquired blanket licenses from ASCAP, BMI, and SESAC, rather than obtain such rights directly or have those

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[16] This competitive market for the music performance rights in the movie industry was brought about in large measure by a private antitrust lawsuit. In *Alden-Rochelle Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), operators of motion picture theatres challenged certain provisions of ASCAP's by-laws which prevented movie producers from conveying music performance rights, forcing theaters to take a blanket license for music performance rights which were not sold by movie producers. A federal court concluded that ASCAP violated the antitrust laws and issued an injunction stopping ASCAP's members from licensing music performance rights to the music embedded in movies to anyone but the movie producers.

[17] As discussed in greater detail below, the Consent Decrees require that the rights granted to ASCAP and BMI be non-exclusive. SESAC, on the other hand, has secured grants of rights from certain of its affiliates that are exclusive or effectively exclusive.

rights conveyed to them by program producers. Such blanket licenses traditionally convey the right to unlimited performance of any music within the PRO's repertory at a fixed price that is unaffected by the extent of actual music performances.[18] To understand the economic implications of this market structure, let us begin by considering a world in which there was a single PRO that licensed the works of all U.S. composers on a blanket basis. We will then move on to the reality of the three-PRO world that currently exists in the United States.[19]

When this hypothesized single PRO licenses stations on a blanket basis to broadcast music performances, there is no room for competition to determine the level of the associated license fees. The PRO is negotiating on an all-or-nothing basis with stations. In the absence of some external constraint on these negotiations, the economic effect of such a negotiation is the same as if all U.S. composers and publishers formed a cartel for the sale of music performance rights. Stations would have no opportunity to shop for different sources of music. Their only choices would be to: (1) pay whatever blanket license fee the PRO demands; (2) purge their broadcasts (including commercials) of all copyrighted music; or (3) infringe and pay the penalties. Unless, again, there is some external constraint on this process, the result would be a license fee level for the blanket license reflecting market power far in excess of the market power of the

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[18] In addition to music performances on their traditional channels, the stations need permission for performances on digital subchannels, and on their websites. These relatively new performance contexts remain much less important economically. In the case of ASCAP and BMI, such performances are covered by the same blanket license that covers primary channel broadcasts. SESAC has required stations to take a separate license.

[19] The U.S. is unusual in having more than one PRO. Most countries have a single PRO that represents all rightsholders. *See* Ariel Katz, The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights, 1 J. Competition L. & Econ. 541, 544 (2005).

individual copyright holders conveyed by the U.S. copyright laws.

It is true that there might be transaction costs savings in this single-PRO world, relative to the competitive world described above in which the performance rights for each television program were secured by the program's creator. But, there would still be transaction costs in the single-PRO world, because the PRO has to negotiate licenses with users, has to have a system for dividing up the license fee it collects among rightsholders and distributing those monies, and maintain an infrastructure permitting the enforcement of the collective rights it represents. Given all of the other rights (including synchronization rights) that program creators would still need to secure, there is no reason to believe that these PRO transaction costs would be less than the transaction costs in the hypothetical competitive world. Nonetheless, it has typically been assumed that the blanket license conveys transaction cost benefits.

In considering any transaction cost benefits of the blanket license, it is worth noting that these costs are mitigated in local television by the existence of the Television Music License Committee (TMLC). The TMLC has a professional staff that is financed by contributions from local television stations. It negotiates performance rights license fees on an industry-wide basis with ASCAP and BMI, thereby reducing negotiation costs for both the stations and the PROs. It negotiated industry-wide fees with SESAC for the period 1995-2004 and industry-wide fees for the period 2005-07 were set by arbitration that resulted from the industry-wide agreement negotiated

between the TMLC and SESAC.[20]

If one assumes that a blanket license conveys such transaction-cost benefits, then public policy faces a dilemma. On the one hand, the pooling of multiple composers' performance rights into a single license may help rightsholders and music users economize on transaction costs; on the other hand, it creates a monopoly in a market that otherwise could be competitive, with the result of elevating prices (license fees paid by music users such as local television stations) above the competitive level. With respect to ASCAP and BMI, the individually approved and supervised settlements of DOJ antitrust enforcement actions have mitigated these anticompetitive effects to some extent. I will discuss this after considering the consequences of having multiple PROs.

3. The Blanket License for Music Performances on Local Television – SESAC as the Third PRO

I turn now to the fact that we have three PROs, each of which represents a non-trivial set of rightsholders, instead of a single PRO representing all rightsholders. 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.

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[20] Since 2008, SESAC has sought individual license agreements with stations or station groups, thereby reducing the transaction cost benefits of the blanket license form, as confirmed by then-SESAC individual owner, Freddie Gershon. ANALYSIS0001214, -1470-1471 (3/20/2008 Gershon Dep. Tr.) ("Q. [A]re there advantages to SESAC licensing local television stations on an industry wide basis rather than on an individual basis? A. Oh, I think they're enormous, yeah, it's extremely convenient, it's very efficient."); -1472 ("Are there advantages in dealing with them as opposed to having to deal with all the station groups and individual stations and individual business affairs departments in such a large market, absolutely."); -1473 ("[T]he last thing we wanted to do in the world is have to go through the enormous time, energy and expense of this inefficient operation of going station to station, group to group….").

Consider first the transaction cost consequences of increasing the number of PROs. Whatever the real magnitude of transaction cost benefits from blanket licensing (if any), that benefit can only diminish as the number of PROs increases. Any blanket licensing system requires a system for collecting license fees, measuring or estimating the share of performances of the music of different rightsholders, and then distributing royalties based on those estimated performance shares. Such a system has a significant fixed-cost component, i.e., a significant component of the cost that is relatively insensitive to the size of the PRO repertory that is administered. This means that when we go from one PRO to two, the costs of administering the first PRO will decline by less than the new costs that must be carried to administer the second PRO. And the same is true when we add a third PRO. So, if we compare the actual world in which we have ASCAP, BMI, and SESAC to a hypothetical world with no SESAC, *no* transaction-cost benefits have been created. Indeed, the overall transaction costs of the system likely have gone up, because we now have three partially duplicative systems for administering music royalties. Thus, in balancing the tradeoff between transaction cost savings and monopoly power, the existence of SESAC and its blanket license paradigm creates no benefit on the transaction-cost side; on the contrary, its existence only reduces the transaction-cost benefits that might otherwise exist through the blanket-licensing activities of BMI and ASCAP.[21]

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[21] At a theoretical level, it is possible that a new PRO would invent new methods that would reduce overall costs. I have seen no evidence to suggest that SESAC has done this. Further, the fraction of the fees retained by the PRO rather than being distributed to affiliates is considerably higher for SESAC than for ASCAP or BMI, suggesting that SESAC's costs are higher rather than lower on a proportional basis. *See* SESAC-0880955-1025, -964 ([redacted]); ASCAP 2011 Annual Report, available at http://www.ascap.com/about/annualreport.aspx (ASCAP distributed $519.5

Turning to the market-power side of the equation, a multiplicity of PROs does nothing to mitigate the anticompetitive consequences of blanket licensing. To do so, there would have to be competition on the licensing side among the PROs. And for BMI, ASCAP, and/or SESAC to compete with each other for licensees, it would have to be the case that the blanket license of one could substitute, at least to some degree, for the blanket license of the others. They demonstrably do not. In order to function, a television station must have a license to publicly perform music from the repertories of each of these organizations, and, as set forth in Sections IV.A and IV.B, indeed essentially all stations do carry licenses from all three PROs. The reason is that a blanket license from one PRO protects the station only against the possibility of infringement of that PRO's compositions. Since so much of the stations' programming arrives "in the can," and they are responsible for the music performances in commercials and for programs for which they do not even know the identity of the music, it is not possible for a station to limit its music performances to compositions licensed by only one or two of the three U.S. PROs. Hence, in the real world of three PROs, licenses from each of them are just as essential as the single license from an all-encompassing PRO would be in a hypothetical one-PRO world.

SESAC controls a much smaller repertory than ASCAP or BMI.[22] Doesn't this mean that it has less monopoly power over its licensees? I consider this question in detail in Section IV.B below, with reference to the specifics of SESAC music use on

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million of $635.7 million of domestic revenues); *Broadcast Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 362 (S.D.N.Y. 2010) (noting BMI's domestic overhead rate of 17%).

[22] *See, e.g.*, 1/24/13 Smith Dep. Tr. at 147.

television. For this background discussion, suffice it to say that the specific nature of music use on television, combined with the risk of copyright infringement penalties that are not tied to economic significance renders traditional "market share" calculations irrelevant to the magnitude of market power in this context. *Any* PRO that controls sufficient distinct titles to make it infeasible for a station to purge itself of performances of all of those titles – giving that PRO a "critical mass" – has monopoly power. SESAC's repertory is, by its own design, well above that threshold. Stations do not have any substitute for a SESAC blanket license and so have no more ability to forego "buying" from SESAC than they do to forego buying from ASCAP or BMI.

In summary, the blanket license administered by SESAC is an inherently anticompetitive instrument. As discussed in the following Section, this license form has been tolerated by the U.S. courts in the case of BMI and ASCAP in certain markets, in the context of specific constraints on their market power imposed by Consent Decree with DOJ, and because of asserted transaction cost benefits. SESAC's licensing program carries no such transaction-cost-saving benefits, and its monopolistic implementation has not been constrained in any way since 2008.

C. The ASCAP and BMI Consent Decree Limitations on the Blanket License

The solution that U.S. antitrust regulators have devised with respect to blanket licenses offered by ASCAP and BMI is to place constraints on their behavior to mitigate, at least in part, the monopoly power created by allowing a single price to be quoted for a bundle of rights that would otherwise compete with each other. ASCAP and BMI both operate under Consent Decrees with the DOJ, administered by Rate Courts, with the following requirements (among others):

1. They must grant a license to anyone who requests one, including interim licenses to those licensees with whom ASCAP or BMI is engaged in negotiations.

2. If the PRO and the licensee cannot agree on a license fee rate, either party may submit the dispute to the Rate Court to determine a "reasonable" license fee.

3. They must offer genuine alternatives to the blanket license.

4. Their right to license on behalf of rightsholders must be non-exclusive, such that rightsholders are not limited or restricted from licensing their music outside of the PRO if they so choose.

1. Mandatory Licensing and Rate Court

Because a license to the rights represented by each PRO is essential for a local television station to operate, an unconstrained PRO could elect to license on a blanket basis only, and demand exorbitant license fees that effectively extracts all of the surplus or economic profit to be earned by the station.[23] To solve this "hold up" problem, the ASCAP and BMI Consent Decrees prohibit these PROs from withholding a license from any party that requests one. This allows the PRO and the licensee to negotiate the license fee without the threat of copyright infringement litigation hanging over the licensee. If such negotiations fail, either party can apply to the Rate Court to determine a "reasonable fee." The federal courts have interpreted the "reasonable fee" requirement to correspond to the fee that would prevail in a competitive market.[24]

In practice, most licensees do reach a fee agreement with ASCAP and

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[23] Since the station's alternatives are to shut down or face infringement litigation, the maximum fee that an unconstrained PRO could theoretically extract bears no relationship to the actual contribution of music performances to television programming

[24] *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 576 (2d Cir. 1990) (the Rate Court's task is to "define a rate or range of rates that approximate the rate that would be set in a competitive market."); *United States v. ASCAP (In re Applications of RealNetworks, Inc., Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) ("fundamental to the concept of 'reasonableness' is a determination of what an applicant would pay in a competitive market").

BMI over license terms. The economics of bargaining predicts that the outcome of a negotiation will fall somewhere between "walkaway" points or "best outside option" of the two parties. Since the stations need a license, and ASCAP and BMI are required to grant the stations a license, the "walkaway point" for each party is recourse to the Rate Court to set the license fee. This means that the license fees agreed to by the parties in such negotiations are constrained by their respective expectations of what fee would be set if it were litigated in Rate Court. In principle, the parties expect that the Rate Court would set the fee at the reasonable or competitive level (though they will not know specifically what that level would be). Going to Rate Court is, however, costly. For a station that believes the Rate Court would set a fee of $5 million, after litigation that would cost the station $3 million, the theoretical "walkaway" point in a license fee negotiation would be $8 million. This would be, of course, much less than the monopoly or hold-up level that the PRO could extract if it were unconstrained, but it is still above the competitive level ($5 million in this example).[25] Thus, we would expect that negotiated fees in ASCAP and BMI licenses are below the monopoly level but above the competitive level.[26] This tendency has been recognized by the Rate Court and the Second Circuit in its own analysis of the relationship between negotiated license fees

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[25] Rate Court is costly for ASCAP and BMI as well, but the PROs will consider both the revenues they get from a particular licensee and also the impact that each negotiated fee will have on its ability to extract higher fees from other licensees because the Rate Court frequently looks to previous negotiated transactions as benchmarks for its analysis and both ASCAP and BMI are required (by their Consent Decrees) to treat similarly situated licensees similarly. For this reason, the cost of Rate Court is likely to be less of a factor for the PROs than for the licensees.

[26] Though the Rate Court attempts to set fees at the reasonable level, they have not typically had available to them truly competitive benchmarks for the reasonable fee. They have instead been forced to rely on evidence from previous bilateral agreements, which likely exceed the competitive level for the reason just explained. This circularity between negotiated agreements and "reasonable fees" as determined by the Rate Courts only amplifies the likelihood that observed PRO fees are above competitive levels despite some Rate Court discipline.

agreements and the competitive license fee level.[27]

2. "Genuine Alternatives" to the Blanket License and Non-Exclusive Agency

I started by setting out two stylized alternative models of music performance licensing on television – a "competitive" model in which the rights are secured by the station or the program creator at the time of program creation (as has existed in the movie industry for decades), and a blanket-license model, in which the station pays a lump sum for all of the music of a given PRO which is then distributed by the PRO among the composers and publishers. While, in certain contexts, it has been asserted that the blanket license model is more efficient in a transaction cost sense, we do not actually know which is more efficient. Ideally, we would like to let the marketplace decide which model works better.

Even if it is true that, in general, a blanket license paradigm might reduce overall transaction costs, one can easily imagine that there will be some specific circumstances in which a station would prefer to secure the needed performance rights by other means. For example, a station that hires a composer to write the theme for its news program could easily incorporate the performance rights for that theme into its contract with the composer. In addition to such "direct" licensing, there may be opportunities to have a third-party program creator secure such rights on the station's behalf ("source"

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[27] *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012) (ASCAP "exercises market-distorting power in negotiations for the use of its music."); *In re Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010) (rejecting PRO agreements as benchmarks of reasonable fees and setting fees far below prevailing PRO rates); *Broadcast Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 335 (S.D.N.Y. 2010) (same); *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 46 (2d Cir. 2012); *United States v. Broadcast Music, Inc. (In re Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005) ("[R]ate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights.").

licensing). Under a traditional blanket license, however, a station that secures such rights through direct and source licenses receives no credit from the PRO with which the rightsholder is affiliated for having done so. The blanket license fee is the blanket license fee, and is not reduced by the PRO if a licensee secures performance rights for some of its music through other means. A station that did pay to secure such performance rights would pay twice for the same rights: once through its source or direct license, and again through its blanket license.

To solve this double-payment problem and to allow the marketplace to determine (at least to some extent) which licensing mechanisms are most efficient, the Consent Decrees require ASCAP and BMI to offer a "per-program" license as a genuine alternative to the traditional blanket license.[28] More recently, the Rate Courts and the Second Circuit have required ASCAP and BMI to offer an Adjustable Fee Blanket License.[29] I will describe each of these, and then go on to discuss how they operate to create some limited amount of competition with the traditional blanket license.

a) Per-Program License

The per-program license can be thought of as a kind of package of smaller blanket licenses each of which covers a portion of the local television station's broadcasts. In effect, a station that elects a per-program license instead of a traditional blanket license gets a bundle that consists of blanket licenses for some set of programs it broadcasts, plus an additional blanket license that covers its incidental and ambient music

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[28] ASCAP Consent Decree § VIII; BMI Consent Decree § VIII.
[29] *Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010); *Broadcast Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010); *Broadcast Music Inc., v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012); *WPIX, Inc. v. Broadcast Music, Inc.*, 09 Civ. 10366, Opinion and Order (S.D.N.Y. Apr. 27, 2012).

performances. For any individual program that contains one or more instances of music licensed by that PRO, the station pays for that program. For any program that contains no music licensed by that PRO (or if the station is able to license all of the PRO music that appears in the program directly with the rightsholders or at the source), the station does not pay any license fee for that program.[30] The station also gets – and pays for – a blanket license that covers all of the incidental and ambient music performances in all of its programs (including those programs for which it is not paying a license fee). This means that a station that elects the per-program license can reduce the overall license fee it pays to the PRO by clearing one or more of its programs of music from that PRO. It can do this either through direct licensing, source licensing, or by simply eliminating particular music from the program.

The requirement to offer a per-program license to television stations was in the ASCAP Consent Decree beginning in 1950. But for decades it was not a viable option for local television stations, because it was priced in such a way as to make it uneconomic. In a landmark Rate Court decision in 1993, the ASCAP Rate Court required ASCAP to adopt a specific formula for the per-program license that made it, for the first time, a genuine alternative to the blanket license for many stations.[31] The fundamental economic logic behind this decision was the idea that the per-program license should be priced in such a way that, in the absence of any specific efforts to clear

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[30] Because, as noted above, not all programs come to the station with accurate "cue" sheets, the per-program formula must also contain a provision for handling programs in which the identity of the music is unknown. I return to this issue below in my discussion of the SESAC per-program license in Sections III.C. and V.D.

[31] *United States v. ASCAP (In re Application of Buffalo Broad. Co.)*, Civ. No. 13-95 (WCC) (MHD), 1993 WL 60687, at **52-78 (S.D.N.Y. Mar. 1, 1993).

its programming of ASCAP music, the cost of a per-program license for a typical station should equal the cost of the blanket license for that station, plus a surcharge to cover ASCAP's increased costs in administering the per-program license. Implementing this license form requires the establishment of several parameters of the per-program license fee formula, and these parameters jointly determine whether the formula does or does not achieve the objective of pricing the per-program license at the same level as the blanket license for the typical station. I illustrate how these parameters achieve that objective with a stylized example in Appendix D.

The per-program license in use today by ASCAP and BMI provides local television stations with substantial benefits. With a viable per-program license option, approximately 450 local television stations take advantage of this alternative to the blanket license offered by ASCAP and BMI, resulting in savings of approximately 45-55% off their blanket license fees. As described below, SESAC never offered a viable per-program license until they were contractually required to after electing to pursue the arbitration that set license fees for the 2005-07 period. The arbitration required SESAC to offer a viable per-program license during that license period based on the ASCAP per-program formula (with some adjustments to reflect differences in the number of programs containing ASCAP and SESAC music). At its peak, in 2007, 248 stations took advantage of this alternative to the blanket license offered by SESAC, resulting in savings of approximately $2 million in 2007 (off of total industry-wide blanket license fees of $19.3 million), and $3.5 million cumulatively over 2005-07. As discussed further below in Sections III.C and V.D, after the arbitration period ended and SESAC was no longer subject to any form of third-party oversight, SESAC modified the parameters of the per-

program formula in a manner that rendered the per-program alternative non-viable. Indeed, no stations operated pursuant to a SESAC per-program license during the 2008-12 period.[32]

With that said, while a viable per-program license injects some degree of competition into the marketplace for public performances of music on local television, in and of itself it does not fully mitigate the monopoly power conferred on PROs by their use of the blanket license. It is but one important piece of the various constraints imposed on ASCAP and BMI under Consent Decrees with DOJ. As an initial matter, because the per-program license fee is tied to the blanket license fee, if the blanket license fee is itself inflated (as SESAC's blanket license has been from 2008-12 as set forth in Sections III.C. and VIII.A.), then the per-program fee will be inflated. Moreover, as discussed in greater detail below, the utility of a per-program license to a given station depends on, among other factors, the station's programming mix and its ability to secure source- or direct-licenses for the music embedded in its programming. Stations typically are only able to secure direct-licenses for the music in the programming that they produce themselves, such as local news, and are generally not able to secure source licenses for programming produced by third parties. Thus, the practical utility of the per-program license is limited (and as discussed in Section V.D., SESAC rendered its per-program license nonviable since 2008). Given this limited utility of the per-program license, it is not surprising that less than half of local television stations avail themselves of the ASCAP and BMI per-program licenses.

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[32] 10/16/12 Edwards Dep. Tr. at 102.

b) Adjustable-Fee Blanket License

As noted, the per-program license can be thought of as a bundle of smaller blanket licenses. Because of this structure, it still suffers to some extent from the double-payment problem, by which a station must pay for certain performances through the PRO license even if permission has been secured through other means. If a program contains multiple music cues of a given PRO, and the station secures permission to perform some but not all of those cues, the station must pay the full per-program fee for that program, despite having separate permission for some of the performances. The Adjustable-Fee Blanket License or AFBL avoids this problem.

The AFBL was developed first in the context of background music services. The Second Circuit recently upheld the required implementation of the AFBL for both ASCAP and BMI for the licensee DMX, and affirmed the principle more broadly. BMI disputed that it was obligated to offer an AFBL to local television stations, but the BMI Rate Court disagreed.[33] In the wake of that ruling and as part of a broader agreement, BMI and the local television stations agreed in January of 2013 to implement an AFBL for local television stations beginning July 1, 2014.[34] ASCAP and the local television stations agreed in May 2012 to implement an AFBL for local television stations beginning in 2015.[35]

Under the AFBL, the blanket license fee for the PRO is reduced for every use of the music in the repertory of that PRO for which rights are secured by an

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[33] *WPIX, Inc. v. Broadcast Music, Inc.*, 09 Civ. 10366, Opinion and Order (S.D.N.Y. Apr. 27, 2012) (LLS).
[34] Texas Association of Broadcasters, "TMLC Announces Reduced Performing Rights Fees," available at: https://www.tab.org/news-and-events/news/tmlc-update.
[35] ASCAP Local Station Television Blanket License, Ex. A, available at: http://www.ascap.com/licensing/tv/.

alternative mechanism. Without regard to program structure, stations will get a credit on their blanket fee for each music use that they are able to license via an alternate mechanism. There are issues as to how the music use is measured and entered into the formula, but the main point is that it will create an additional mechanism by which stations can explore alternatives to the blanket license for particular music uses.

SESAC has never offered an AFBL to any local television station licensee.

c) Ability for Rightsholders to Direct and Source License

As noted at the beginning of this section, a viable per-program license (historically and prospectively) and the AFBL (once it is implemented) allow direct and source licensing to compete to some extent with the blanket license. The U.S. federal courts have permitted the blanket license to withstand antitrust scrutiny, in certain industries, only in the context in which an alternative licensing mechanism of this kind was available.[36] But it is important to note that these alternatives can function as viable competitive alternatives only if composers and publishers have the ability to contract with television stations and/or program producers to license public performances of their works outside of the aegis of the PRO, and if the terms of the alternative make such competition economically feasible.

If the PRO were permitted to lock up rightsholders with contracts that prohibit them from competing, or make it economically impossible for them to compete for placement of their music, then the potentially pro-competitive effect of these alternatives would be nullified. This is why the last of the major restrictions in the

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[36] *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

ASCAP and BMI Consent Decrees mentioned earlier is so important. The requirement that the PROs' contracts with rightsholders do not preclude or impede the possibility of licensing outside the PRO is crucial to ensure that the monopolistic force of the blanket license can be disciplined by alternative license mechanisms to whatever extent those alternatives are attractive to rightsholders and music users.[37] As discussed in Section V.C below, SESAC has precluded certain of its key rightsholders with music in local television programming from entering into direct and source licenses.

3. Summary of the Analysis of the Competitive Consequences of Blanket Licensing

Because it eliminates competition among composers for performances on local television, the blanket license is an inherently anticompetitive form. It has been permitted because of its asserted transaction-cost benefits, but even with the assumed existence of those benefits, it has been explicitly sanctioned only in the presence of specific restrictions designed to mitigate, to the extent feasible, the inherent anticompetitive effect of eliminating competition through collective pricing. In their economic essence, these restrictions consist of: (1) a requirement to license all users at license fee rates that (if necessary) are reviewed for reasonableness by a third party; (2) the existence of alternatives to the blanket license that allow users to secure a portion of the performance rights they need outside the PRO in an economically reasonable way;

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[37] One might ask whether rightsholders' own desire to compete for performances might prevent PROs from using exclusive contracts, making a prohibition of exclusivity unnecessary. In general, we know that members of a cartel have an individual incentive to compete rather than being restricted by the cartel, but we believe that they will also understand the collective benefit in monopolization and so we prohibit it. In this specific context, there is the further reality that one must, in fact, join a PRO in order to receive compensation for many public performances. Other than a small number of extremely popular composers, no individual composer could afford to insist on non-exclusivity if the PROs insisted on exclusive contract terms.

and (3) a prohibition on the PRO's restricting or interfering with the ability of rightsholders to compete through these alternative licensing mechanisms.

D. Experience with Source and Direct Licensing

Without a viable per-program license or AFBL, stations receive no economic benefit from securing source or direct licenses for the music they perform. Stations would still need a blanket license for the performances that they could not license by these means (including those that they cannot even identify) and they would receive no savings on the blanket license by virtue of obtaining the performance rights by other means. Subsequent to the creation of viable per-program licenses by ASCAP and BMI, however, we have seen some development of these markets.

From an economic perspective, there are two reasons or situations under which we might expect to see a source or direct license accepted by a rightsholder, assuming that the rightsholder is acting in her own economic self-interest and is not considering any possibility that a general growth in source and direct licensing might undermine the entire blanket license system and the monopoly-level royalties that system produces. First, the rightsholder would rationally agree to a direct or source license if that contract yielded greater royalties for the same set of performances than the royalties that the rightsholder would expect to get as its share of PRO license fees if no source or direct license is made. Second, the rightsholder might agree to source and direct license for a smaller royalty share if she believes that in the absence of a direct or source license the program creator will substitute a different composer and therefore all royalties would be lost.

Consider first whether we would expect there to be many situations where

a rightsholder would reasonably expect to earn greater royalties through a source or direct license than they would earn through the PRO license for the same performances. If the PRO distribution systems operate the way they should, so that rightsholders receive a share of the PRO license fees that reflects their performances and the value of those performances, then we would expect that what a program creator would be willing to pay in a direct or source license would be roughly similar to the royalty distribution that the composer would expect to receive for the same performances under the PRO license. The PRO royalty distribution might be slightly less, because the PRO retains some fraction of its revenues (on the order of 20% for ASCAP and BMI) to cover its operating costs.[38] On the other hand, it might be somewhat more, because the PROs have considerable discretion in how royalties are distributed, and they have demonstrated their ability and willingness to adjust distributions to make greater payments to those rightsholders they fear may be considering direct or source licenses.[39] On balance then, we expect that we would not necessarily see a large volume of direct and source licensing based on program creators' willingness to pay direct or source licensing royalties that exceed the royalty distributions that the rightsholders expect to receive for the same performances via the PRO license.

The second mechanism – source or direct licensing because the rightsholder fears the potential loss of the performances to another composer – seems potentially more likely. In this case, the rightsholder is trading off some amount of

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[38] ASCAP 2011 Annual Report, available at http://www.ascap.com/about/annualreport.aspx (ASCAP distributed $519.5 million of $635.7 million of domestic revenues); *Broadcast Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 362 (S.D.N.Y. 2010) (noting BMI's domestic overhead rate of 17%).

[39] *See, e.g.*, *In re Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516, 535 (S.D.N.Y. 2010) ("BMI paid Universal a sizeable advance to stop Universal from signing a direct license.").

royalty against no royalty from this program, if other music is used. Faced with a real belief that the choice is between a source or direct license and no royalty, the individual rational rightsholder would then have a strong incentive to consider the source or direct license.

Turning from theory to what has actually occurred, we have seen widespread use of direct licensing during the periods that the PROs have offered viable per-program licenses, for the rights to perform the music in locally-produced programs such as local news.[40] We have seen much more limited use of source licensing for syndicated programs. This pattern is easily understood in light of the incentives discussed above.

Because the local television station controls the selection of music for its locally-produced programming, it can easily choose music based on which rightsholders are willing to agree to direct licensing. Put simply, the underlying basic mode of competition among composers to sell their wares operates with respect to music for locally-produced programming (but, again, only if the per-program license exists to solve the double-payment problem). It is therefore not surprising that many stations have successfully licensed their news themes directly, and enjoyed per-program license fee savings as a result.[41]

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[40] *See, e.g.*, HOAK00098209 (direct license agreement between KHAS and 615 Music); SCRIP00038799 (direct license agreement between KSHB and Gari Communications); MERE00021612 (direct license agreement between KCTV and TunEdge Music Service).

[41] Again, this competition always operates subject to the market power created intentionally by the U.S. copyright law. If a station really wants the music of a specific composer, that composer will be able to demand a larger royalty or could refuse to direct license and insist on continuing to collect PRO royalties. But stations that have weaker preferences among composers can and will insist on direct licenses and competition will operate to reduce the royalties.

Now consider the economic incentives operating in the context of potential source licensing, i.e., having the producer of a syndicated program acquire the performance rights and then recover the cost incurred thereby when the program is syndicated. There are two possibilities. One is that the producer may seek to acquire the rights after the program has already been created, perhaps because the producer's television station customers want to acquire the performance rights through the producer so that they can clear the program and reduce their per-program license fees. In this case, the rightsholder faces no risk of the performances being lost to another composer; the music has already been embedded in the program. The incentive is if the producer can offer a royalty that exceeds the PRO license royalty. As already noted, the economic interests of the rightsholders and the producers (acting on behalf of stations) in these circumstances will tend to work against the existence of a mutually beneficial source license agreement.[42]

The other possibility is that the program producer might seek the source license before the program has been made. Here, there is the theoretical possibility for the rightsholder of losing the royalty stream entirely, so there is the theoretical possibility of a mutually agreeable deal. But to make such a deal, the program producer will have to credibly threaten to use different music, and will have to be willing to pay up front to secure these rights in hopes of recovering the cost in higher syndication fees by virtue of

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[42] Music Reports, Inc. (MRI), acting on behalf of stations, has made efforts to acquire source licenses for popular syndicated programs. They have had only limited success. *See, e.g.*, MRI00008150 (Fox representative writes "As you know public performance licenses have always been the broadcaster's obligation, and we are not interested in shifting that responsibility."). *See also* MERE00072983 (email between Meredith and Belo regarding "pushback" from producers to stations' efforts to secure source licenses.).

the program's performance rights being cleared. This is a complex proposition at best. It is not like the case of movies and movie theaters, where, as the result of a private antitrust lawsuit, the rights are secured at this stage, and the theaters expect that they will have to pay the movie distributor for these rights as part of the overall bundle of rights needed in order to show the movie. It is a messy world in which some stations might be willing to pay more for a program that has these rights, but those that have chosen to stay on the blanket license would get no benefit and hence would not want to pay more. To recoup the costs, the producer would either have to charge more to everyone (perhaps antagonizing or losing those stations that use the blanket license), or else develop a differentiated pricing strategy. If the producer chooses to use a differentiated pricing strategy, it would have to estimate in advance how many stations would be willing to pay more in order to have the rights. Without such an estimate, the producer would not know how much she could afford to offer for the source license.

Given these complexities, it 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.[43]

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[43] It is also possible that a conflict of interest on the part of program producers limits the extent of source licensing. For music that is created originally for a program, the program producer often obtains a copyright interest in this music and assigns these rights to its own music publishing company, which then collects the performance royalties. If the program producer can decide that its own music will be in the program, then there is no competitive mechanism operating to induce the rightsholder to agree to the source license. The program producer who is also the rightsholder would include the source license with the

E. Measurement of Music Performances on Television

In order to discuss the level of prices charged by SESAC in a meaningful way, we need to have an economically meaningful way of measuring the quantity of music performance that is being licensed. Intellectual property is not like widgets, in that it does not cost the seller more to provide more performances (once the music has been created). Nonetheless, most licenses for the use of intellectual property scale the license fees collected to some measure of the scale or intensity of use of the licensed property. Further, in order to make any economically meaningful statement comparing SESAC license fees at a point in time to SESAC's license fees at another point in time, one needs to quantify the change in the number of performances of SESAC music that are being licensed.

For music performances, a meaningful metric has two dimensions: how much music was performed in a program (potentially including factors such as how many distinct songs, duration, and role of the music in the overall audiovisual experience) and how extensive, important or widely seen was the broadcast itself (how many people watched). I consider each issue in turn.

Unfortunately, there is no agreed-upon methodology for quantifying the amount of music in a given television program. ASCAP, BMI, and SESAC each have different and incompatible methodologies, and these methodologies change over time.[44]

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program only if the royalties earned thereby exceeded the royalties that would be earned through the PRO license. As noted above, this is unlikely to be a significant incentive.

[44] ASCAP, ASCAP Payment System, available at: http://www.ascap.com/members/payment/royalties.aspx; BMI, U.S. Television Royalties, available at: http://www.bmi.com/creators/royalty/us_television_royalties/detail; SESAC, How We Pay: Film & TV, available at: http://www.sesac.com/WritersPublishers/HowWePay/tvFilm.aspx.

For example, a performance of a program theme may be given greater weight than background music, or it might be given less. For the purpose of dividing up the collected royalties among different rightsholders, these distinctions make a big difference, because some composers specialize in background music and others specialize in themes; changes in the relative weights of those categories will make a big difference to how a given PRO distributes the license fees it collects. But it is less clear that these distinctions should matter systematically for evaluating the overall amount of music on local television that should be attributed to a particular PRO at a particular point in time. In fact, in my experience, when looking at such aggregate measures, it makes relatively little difference how different kinds of music performances are counted.[45]

For purposes of royalty distribution, ASCAP, BMI, and SESAC do take into account music duration (to varying degrees). All else equal, a program that contains ten minutes of music is judged to have more music in it than a program that has five minutes of music. This also makes economic sense – all else equal, the significance of the contribution of the music to the overall program value is likely to be greater the greater the amount of time when music is being performed. On this basis, for my analysis, I treat all music performances the same, and measure the amount of music in a given program simply as the total music duration in the program.

There is also no standard practice with respect to the extent or significance

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[45] A related issue is whether, for performance royalty purposes, the music of one composer is inherently more valuable than another's. Both ASCAP and BMI make no distinction in valuation as between the music of different composers. *See* ASCAP, ASCAP Payment System, available at: http://www.ascap.com/members/payment/royalties.aspx; BMI U.S. Television Royalties, available at: http://www.bmi.com/creators/royalty/us_television_royalties/detail. In other words, Bruce Springsteen receives a much greater royalty distribution than an unknown composer, because his songs are performed much more often. But he does not receive any more for a given performance than anyone else.

of the broadcast itself. For example, for some purposes, programs at different times of the day are given different weight, particularly to reduce the relative significance of programs broadcast between midnight and six AM. As noted above, for the purpose of the per-program license, programs are weighted by the amount of revenue that they produce. Each of these approaches is related to the number of people watching the program. Further, it is logical to think of the number of performances represented by a broadcast as being proportional to the number of people who view the broadcast. Finally, data on program ratings, which is essentially the size of the program audience, are widely available on a comparable basis for different programs and different stations. For these reasons, I utilize broadcast viewership to measure the extent of broadcast performances.

Combining these two concepts, we can think of the number of public performances corresponding to the music in a particular program as the product of the total music duration (measured in minutes) times the number of people who viewed the program. With this underlying measure of the number of public performances, we can aggregate the licensed performances of SESAC or another PRO on a given station or group of stations over a particular period of time. This aggregate of performances gives us a metric of the total licensed performances. This total number of performances of music can then be compared across time or across contexts to derive an economically meaningful measure of how the use of music has changed on local television over time.

III. THE DEVELOPMENT OF SESAC AND ITS MONOPOLY

A. Early History

SESAC was founded in 1932, and operated for many years on the fringe of the music performance licensing market, focusing on the licensing of religious and

European concert and stage music.[46] In 1992, Stephen C. Swid, Ira Smith, Freddie Gershon, and Allen & Co. purchased SESAC and developed a plan to grow the company.[47] Prior to this, local television licenses from SESAC cost so little in absolute dollars that even if they were significantly elevated over a reasonable level on a per-unit basis, the amount of money involved was such that it was rational for stations to pay it rather than question it.[48] But the new owners adopted a new strategy. They recruited several high-profile composers to switch from BMI and ASCAP and embarked on a campaign to increase their license fees dramatically.[49] Beginning in the late 1990s, SESAC licensing fees, including from local television stations, rose rapidly, and faster than ASCAP and BMI licensing fees.[50] Even though SESAC justified these fees with reference to the key composers it had taken away from BMI and ASCAP, there was no mechanism by which the increase in SESAC fees was offset by any decline in the fees paid to BMI and ASCAP.[51] As discussed above, even though SESAC still controlled much less music than BMI and ASCAP, stations had no choice but to pay whatever license fees SESAC demanded, and the fees paid to SESAC were disproportionate to its share of all performances of PRO licensed music.

In 1996, the TMLC negotiated an industry-wide license with SESAC, as it

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[46] *See, e.g.*, *Affiliated Music Enters., Inc. v. SESAC, Inc.*, 160 F. Supp. 865, 867, 870 (S.D.N.Y. Jan. 30, 1958); ANALYSIS0001214, -377 (3/20/2008 Gershon Dep. Tr.).
[47] *See, e.g.,* SESAC, About Us: Our History, available at: sesac.com/about/history.aspx; ANALYSIS0001214, -1383 (3/20/2008 Gershon Dep. Tr.).
[48] *See* ANALYSIS0001214, -1326-27 (3/20/2008 Gershon Dep. Tr.).
[49] *See, e.g.,* SESAC 0678455, -58, -60-61 (presentation reflecting SESAC's strategy for affiliating with writers for music on "Dr. Phil" among other syndicated programming).
[50] *See, e.g.,* SESAC-0885462, -63.
[51] During the duration of an ASCAP or BMI license agreement, there could be no adjustment to reflect their loss of composers. At license expiration, stations could try to negotiate a reduction, or theoretically could ask the Rate Court to impose a reduction, to reflect these losses.

had previously done with ASCAP and BMI on behalf of stations. This resulted in an industry-wide SESAC blanket license covering the period 1995-2000. At impasse with the TMLC on terms of a new license, SESAC elected to arbitrate these terms with the TMLC and during the arbitration, in 2002, SESAC and the TMLC reached an agreement on a new industry-wide license for the period 2001-04. This license agreement contained a provision specifying that the parties would attempt to negotiate an extension for 2005-07, with the proviso that if agreement could not be reached, SESAC could elect to have the license terms for that follow-on period be determined by commercial arbitration. (As part of this agreement, if SESAC chose to arbitrate, it agreed to offer a per-program license for the period from April 1, 2005 to December 31, 2007.) No agreement was reached, and an arbitration was held in 2006 to determine the fees and license terms for the 2005-07 period.

B. The Arbitration Period: Industry-Wide License from 2005-07

The arbitration panel settled on a 2005 industry-wide blanket license fee of $16 million and set industry-wide blanket license fees for 2006 and 2007 that correspond to 10% increases from 2005 to 2006 and from 2006 to 2007.[52] At the time of the arbitration hearing, music use data were not available for 2006 or 2007, but SESAC presented testimony to the effect that the local television industry's use of SESAC music should be expected to increase by 10% per year during that period.[53] The rules of the arbitration proceeding did not require the panel to explain its reasoning, but it seems reasonable to believe that the 10% increases for those two years were predicated on an

[52] SESAC-0771434, -36 (Jun. 22, 2006 Award).
[53] TMLC00000348, -422 (Transcript of Record, SESAC v. Television Music License Committee Arbitration, January 13, 2006).

expected increase in the use of SESAC music of approximately that amount, given the testimony of SESAC's expert.

In fact, SESAC music use did not increase at that rate. Based on the contemporaneous data from the TMLC industry-wide music use study, total performances of SESAC music on local television declined from 2005 to 2007. This decline was the combined effect of two forces. First, SESAC's share of music use on local television declined.[54] In addition, total music performances on local television declined, because local television audiences were generally declining over this period. Thus, if the arbitrator-set fee for 2005 was reasonable on a per-performance basis, it has to be the case that the arbitrator-set fees for 2006 and 2007 were above the reasonable level, since the fees went up and the extent of public performances declined. Since the 2005 fees were set when the facts on SESAC music use for 2005 were known, and the fees for 2006 and 2007 were set on the basis only of projections, if one assumes that the 2005 fee was reasonable, the logical conclusion is that the 2006 and 2007 fees were above the reasonable level.

The arbitration panel also established a formula for a per-program license, following, in broad outline, the concept and formula that had been established previously for ASCAP and BMI, but setting the key parameters of the per-program formula to correspond to the facts, as they understood them, of SESAC music use on local

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[54] SESAC estimated that its share declined from 10.7% in 2005 to 8.4% in 2007. *See* SESAC-0661157; MERE00041787, -96; TMLC00146866.

television.[55] The key parameters that they adjusted were the per-program multiplier and the revenue fraction to be applied to programs containing no identified SESAC music, but containing some music that cannot be identified in terms of the PRO with which it is affiliated.

As discussed in greater detail in Appendix D, the per-program multiplier is a number that is multiplied by the proportional fee that would be paid for a given program under the blanket license, to determine the fee that should be paid for that program under the per-program license. It is greater than one to reflect that not all programs contain the music of a given PRO, so if there were no such increase, a station switching to the per-program license would receive a windfall. In the original ASCAP case, the Court determined that the multiplier should be 1.33, reflecting a conclusion, based on the record evidence in that proceeding, that about 75% of programs typically contain some ASCAP music. Multipliers for the ASCAP and BMI per-program licenses have always been in the range of 1.33-1.55. The arbitration panel set the SESAC multiplier at 5.34,[56] corresponding to an assumed fraction of programs containing SESAC music on the typical station of 18.7% (1/5.34).[57] All else equal, the fact that the SESAC multiplier was so much larger than the ASCAP and BMI multipliers operates to increase significantly the cost of the per-program license, but this difference is explained by the

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[55] *See, e.g.*, SESAC-0771431, -38-39 (Jun. 22, 2006 Award); SESAC-0270724, -48-78 ("License" cited in June 22, 2006 Award as describing the "payment methodology" set by the arbitration panel for the computation of per-program license fees).

[56] The panel added on an additional 7% to the multiplier for administrative costs. SESAC-0771431, -38 ("the Multiplier … shall be five hundred forty-one (541) percent, which is inclusive of a seven (7) percent administrative fee intended to cover … all of [SESAC's] administrative expenses for and relating to Per Program Licenses.").

[57] Jasko Ex. 5, Complaintant's Ex. 40-A, *SESAC v. Television Music License Committee* Arbitration (Jan. 9, 2006).

smaller percentage of programs broadcast on local television that contain SESAC music.[58]

After post-award briefing, the arbitrators set the fractional weighting to be applied for programs that do not contain identified SESAC cues but do contain unidentified cues at 5%.[59] In doing so, the arbitration panel rejected SESAC's position that this parameter should have been 50% because the 50% figure was (and is) used for the ASCAP and BMI per-program licenses.[60] As explained in more detail in Appendix D, the arbitrators were correct in rejecting the ASCAP/BMI number for SESAC, because the license fee rate for unidentified programs is intimately connected to the per-program multiplier. SESAC's greatly elevated per-program multiplier reflects the reality that a small number of television programs contain its music, meaning that under the blanket license it is those few shows that are actually generating the entire blanket license fee. For the same reason, if the music in a show cannot be identified, it is much less likely that it does, in fact, contain SESAC music than that it contains BMI or ASCAP music. Hence, the payment for such programs to SESAC should be proportionally smaller.

Finally, consistent with the basic theory of the per-program license and with the then-current ASCAP and BMI per-program formulae, the arbitrators included within the per-program formula a 15% charge for performances of incidental and ambient music, that all per-program stations were required to pay despite their clearing of SESAC

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[58] *See* Appendix D for more complete explanation and a step-by-step example of the impact of the multiplier on the per-program fee.
[59] 7/25/12 Williams Dep. Tr. at 137; SESAC-0278700, -74.
[60] SESAC-0299413 (SESAC's letter brief to arbitrators proposing a 50% default multiplier).

music from their programming.[61]

Out of the approximately 1,100 local television stations licensed by SESAC, 180 stations utilized the SESAC per-program license in 2005, saving a total of approximately $575,000 out of the overall blanket license fee of $16 million.[62] In 2006, 185 stations took the per-program option, resulting in just under $1 million in savings (out of the overall blanket license fee of $17.6 million), and 248 stations took the per-program option in 2007 resulting in approximately $2 million in savings (out of the overall blanket license fee of $19.3 million).[63] The 2007 savings represented approximately 43% of the-otherwise applicable blanket license fee obligation for these stations.[64]

C. The Post-Arbitration Period: Individual Licenses Since 2008

1. TMLC-SESAC Industry-Wide Negotiations

During 2007, SESAC and the TMLC engaged in negotiations to try to establish an industry-wide license for the period commencing in 2008, when the contract under which the arbitration-governed license was created expired. Unlike the 2005-07 period, the license fees and terms for this period were not subject to arbitration or any other neutral third-party rate setting mechanism. The TMLC initially made an offer of $11.1 million based on its view that the use of SESAC music by local television stations had declined since 2005 and was likely to decline even further in 2008 if Stephen Arnold, the SESAC affiliate whose music was used most widely on local television, declined to

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[61] SESAC-0771434, -39 (Jun. 22, 2006 Award).
[62] *See* SESAC-0373761.
[63] *Id.*
[64] *Id.*

renew his expiring affiliation agreement.[65] After receiving additional music use information and being informed that Mr. Arnold was renewing his affiliation with SESAC, and in an effort to compromise, the TMLC increased this offer to $15 million as the TMLC calculations based on the industry-wide music-use study indicated that a SESAC license priced to be equivalent to the ASCAP blanket license fee on an equivalent-music-use basis would be somewhere between $13-$15 million.[66] SESAC's own data showed that the aggregate use of SESAC music on local television had declined from 2005 to 2007.[67] SESAC rejected this offer and refused to accept anything less than a substantial increase above the 2007 industry-wide fees awarded by the arbitrators.[68] In a final effort to reach agreement, and having no recourse to Rate Court (or other third-party rate setting body), the TMLC made an offer of a base blanket fee of $19.5 million for 2008, notwithstanding its belief that such a fee was well above any reasonable fee level.[69] The TMLC's willingness to make an offer that was considerably higher than the market-power influenced ASCAP rate, and considerably higher than the fees that the arbitration panel had determined to be reasonable for 2005, was based on its expectation that SESAC would demand even higher fees from stations in individual negotiations and the TMLC's desire to protect stations from infringement claims.

SESAC's final offer to the TMLC for an industry-wide license for 2008 was $26.9 million (an increase over SESAC's own initial offer of $23 million).[70] This

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[65] TMLC00146866, -69; TMLC00139812, -813.
[66] *See* TMLC00146866, -70.
[67] *See* SESAC-0661157; TMLC00146866, -71.
[68] *See* TMLC00146866, -69-70; TMLC00146353.
[69] *See, e.g.,* SESAC-0375077, -88; TMLC00129469-70.
[70] *See* SESAC-0375077, -88.

would have represented a 39% increase over the 2007 blanket fees, and a 67% increase over the fee level the arbitration found to be reasonable for 2005, when SESAC's music use on local television was actually higher than in 2008.[71]

2. SESAC's Negotiations With Individual Local Television Stations

a) Blanket Fee levels

After the industry-wide negotiations broke down, SESAC notified stations that license negotiations would be at the station level, rather than with the TMLC.[72] On November 27, 2007, SESAC extended new license offers.[73] SESAC's initial license fee demand for 2008 licenses was an across-the-board 10% increase in the station's blanket license fee over the 2007 level,[74] despite the overall decline in the use of SESAC music on local television from 2005 to 2008.[75] Although some stations and station groups were able to negotiate fee increases of less than 10%, sometimes based on changes to their programming mix, SESAC was otherwise unwilling to negotiate decreases to its fee demand.[76] SESAC offered multi-year license agreements with an increase of 6.95% to be added each year on top of the already inflated 2008 blanket license fee.[77] And, although SESAC offered station groups certain group discounts that ranged from 2-6%, depending

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[71] *See* TMLC00146866.
[72] *See* SESAC-0375077, -88-89.
[73] *See, e.g.*, HOAK00000531.
[74] *See* 10/3/12 Counce Dep. Tr. at 28.
[75] SESAC sought to justify the 10% increase based upon the arbitration panel's fee determination for the 2005-07 license period. *See, e.g.*, 7/31/12 Collins Dep. Tr. at 93 ("The current rates were set using the results of a previous arbitration for the three years prior to 2008. . . ."); 120-21 ("SESAC . . . used the same 10 percent that the arbitrators ordered, increased the 2008 license fees, and then for subsequent years we lowered the increase to 6.95 . . . .").
[76] *See* 10/16/12 Edwards Dep. Tr. at 44-45; 177-178; 7/31/12 Collins Dep. Tr. at 132 ("If they gave us the information that showed that their programming line-up had changed, and their amount of SESAC programming, if you will, was reduced, then a reduction was negotiated from the '08 license fee which followed through, through '12.").
[77] *See, e.g.,* 10/16/12 Edwards Dep. Tr. at 44; HOAK00000531. SESAC also offered one-year renewable agreements, at a 10% annual increase. *See, e.g.*, 10/3/12 Counce Dep. Tr. at 80; SESAC-0503324.

on the size of the group, SESAC required those groups to forego any of their stations taking a per-program license for the entirety of the license period as a condition of receiving the group discount for any year.[78]

Many stations at this time expressed to SESAC that the fee demands seemed to be entirely divorced from normal market forces, given that SESAC music use had declined, the industry (and the economy generally) was in the throes of a major downturn, and there was no reason to believe that any of this would change in such a way as to justify the continued increases above the rate of inflation for every year of the license contract.[79] In the end, all or virtually all stations eventually gave in to SESAC's demands, in some cases only after having been informed by SESAC that it was withdrawing interim authorization for performance of its music and therefore the station would be subject to copyright infringement claims if it did not agree to the license terms demanded.[80]

In the 2005-08 time frame, audiences on local television were generally in decline, causing the scale of station performances of music to decline.[81] Given that

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[78] 10/23/12 Lee Dep. Tr. at 97-98, 194; SCRIP00016804, -12.

[79] *See, e.g.*, SESAC-0271413 ("Unfortunately, SESAC has been unwilling to face the reality of reduced music use of its repertoire by my station . . . and provide a reasonable renewal rate in keeping with marketplace realities."), SESAC-0300823 ("I must reiterate that our use of SESAC music has decreased dramatically. Our revenue has decreased. The value of our company has decreased. Under current business conditions, it would be fiscally irresponsible of me to enter into a contract that pays you 6 to 7 percent increases for a five-year window"). *See also* SESAC-0483313, SESAC-0451628, -29, SESAC-0679849, -58, and SESAC-0271370, -71.

[80] *See, e.g.*, SESAC-0350643 ("I am very disappointed and disturbed by your ending our interim authorization on June 30."); SESAC-0351910 ("I was surprised and disappointed to receive your letter of July 31, 2008 informing me that interim authorization to perform all copyrighted musical works is no longer effective as of August 1, 2008 and that we now have the choice of signing your contract or be in violation of the copyright infringement…") SESAC ultimately sent cease and desist letters to stations in January 2008 that had not signed contracts. *See, e.g.,* SESAC-0375077, -168, -170, -172.

[81] *See* TMLC00153679-84 (Expert Report of Barry Kresch in *WPIX Inc., et al. v. Broadcast Music, Inc.*, 09 Civ. 10366 (S.D.N.Y. Dec. 23, 2011).

SESAC's share of music use on local television was also declining, a SESAC blanket license fee controlled by competitive market forces would have had to decline. Instead, SESAC insisted on continuous increases. As discussed further below, stations had no choice but to accede to these increases.

b) SESAC's Modifications to the Per-program License Formula

The other significant change that SESAC made once it was no longer bound by the oversight of the arbitration panel was to modify its per-program formula. SESAC documents make clear that it viewed the savings that stations enjoyed during the 2005-07 license period using the per-program license as a "loss" or a revenue "shortfall"[82] that it wanted to eliminate. It did this by making two economically unjustified modifications to the per-program formula that had the effect of making it economically unviable. First, despite the fact that the blanket license fee already explicitly covers the right to make incidental and ambient performances,[83] SESAC added an incidental and ambient surcharge *on top of* the station's blanket license fee if the station wanted to use the per-program option.[84] Second, SESAC changed the fraction weighting for programs with no identified SESAC cues and one or more unidentified cues from 5% to 50%, far in excess of its program share.[85] At the same time that it increased the license fee for unidentified programs by a factor of 10, SESAC revised its per-program license to eliminate the opportunity of stations to provide evidence (through

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[82] *See, e.g.*, SESAC-0983709; SESAC-0456842; SESAC-0274931; SESAC-0274947; SESAC-0667425; 7/25/12 Williams Dep. Tr. at 121.
[83] *See, e.g.*, SESAC-0604762.
[84] *See, e.g.*, SESAC-0677598, -603; SESAC-0661213.
[85] *See, e.g.*, 7/25/12 Williams Dep. Tr. at 137.

cue sheets) that a particular program aired by a station did not contain SESAC music.[86] As a result of these two changes, which will be discussed further below, in contrast to the 248 stations electing the SESAC per-program license in 2007, *none* utilized the per-program option in the 2008-12 period, obviously concluding that the per-program license had been made nonviable, and no station has done so since.[87]

In addition to these economically unjustified changes to the per-program license, restrictions in SEASC's agreements with key affiliates effectively prevented these affiliates from issuing direct licenses to rights users, making a per-program election even more difficult for a station.[88] These restrictions are discussed in Section V.C below.

In summary, beginning in 2008, SESAC had an established monopoly position and was using that position to extract performance fees well in excess of the level that it would have obtained had there been robust competition among owners of performance rights who benefit from copyright protection but otherwise compete with each other for performances. SESAC was able to do this only because its blanket license eliminated competition among its rightsholders, and it is not subject to the constraints on exploitation of the blanket license to which ASCAP and BMI are subject through the DOJ Consent Decrees. The relevance of these constraints – and the relevance of their absence in the case of SESAC – is clear in the history. With the ever-present possibility of fees set by the Rate Court, ASCAP and BMI agreed to reductions in their fees during the negotiations that culminated in license fees covering the periods 1998-2009 and 2010-

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[86] *See, e.g.*, SESAC-0661213; SCRIP00009390; SCRIP00011142.
[87] *See, e.g.*, 1/17/13 Slantz Dep. Tr. at 234; SESAC-0661213.
[88] *See, e.g.*, SESAC-0617679; SESAC-0618489; 7/27/12 Lord Dep. Tr. at 55, 78, 92, 208-211.

16 (ASCAP) and 2005-17 (BMI). When subject to oversight of fees and license terms by a neutral arbitration panel, SESAC license fees were apparently tethered to the expected use of its music, and it was compelled to offer a per-program license that allowed some stations flexibility that resulted in significant savings from the blanket license fees. As soon as it was freed of these constraints and any oversight, SESAC demanded license fee increases untethered to any economic reality, and it unilaterally rendered the per-program option non-viable (eliminating the revenue losses suffered during the 2005-07 license period). Nonetheless, the stations, who could not function without a SESAC license and were given the option of accepting SESAC's terms or infringing, were forced to accept the monopoly price.

IV. ANALYSIS OF SESAC'S MONOPOLY POWER IN THE RELEVANT ANTITRUST MARKET

A. The Relevant Product Market

A relevant market definition is a tool used to structure analyses of competitive effects and antitrust injury. SESAC is in the business of licensing performance rights for music whose copyright is held by those rightsholders that have contracted with SESAC for that purpose. In determining the boundaries of the relevant product market for SESAC, we must identify the set of products that are "reasonably interchangeable" with SESAC's product.

As discussed above, in Section II.A, local television stations do not control the music performances they broadcast in syndicated programs, movies, infomercials, and commercials. In many cases they do not even know what music is in these broadcasts. Further, even if program creators did accurately track the identity of all

music in their creations (including commercials), and convey that information to the stations, stations would still have difficulty knowing which of their broadcasts contain SESAC music because SESAC does not make available an up-to-date repertory database in usable form.[89] Moreover, publishers and composers can switch their affiliations from one PRO to another, making it even more difficult to determine definitively whether a program contains any music in the SESAC repertory.

Since stations do not control and/or cannot identify the music performances contained in the programming they broadcast (other than locally-produced programming), they are not in a position to interchange or substitute non-SESAC music with SESAC music. Therefore, the right to broadcast performances of music by non-SESAC composers is not "reasonably interchangeable" with the product that the stations seek to license from SESAC.[90] For the same reason, the blanket license offered by ASCAP and BMI is not reasonably interchangeable with the performance rights that the stations seek from SESAC.

Indeed, this lack of interchangeability is obvious from the fact that virtually every station carries a license from both ASCAP and BMI, and nonetheless feels the need to also acquire a performance rights license from SESAC.[91] Hundreds of stations carry *blanket* licenses from both ASCAP and BMI, which give them the

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[89] *See infra* at n. 101-102.
[90] Specifically, a station might, for a given locally-produced program, be able to substitute an ASCAP or BMI composer for the composer of its news theme, but that elimination of SESAC music would in no way diminish the station's need for a SESAC license. Further, in the 2008-present period, when no viable per-program license is available, there is also no mechanism by which any such substitution could reduce the station's SESAC fee. Hence, the possibility of substitution of ASCAP or BMI music at the program level does not in any way constrain SESAC's license pricing in the 2008-present period.
[91] *See, e.g.*, GAN00000262; OZ_0000048165, -170.

unlimited ability to perform as much ASCAP and BMI music as they like, with no increase in cost if they increase their performances of those PROs' music. For these stations, the cost of substituting ASCAP or BMI music for SESAC music is literally zero. If the music of ASCAP and BMI composers, or the ASCAP or BMI blanket licenses, were reasonably interchangeable with the performance rights sought from SESAC, it would be economically irrational to pay significant additional money to SESAC for the right to perform SESAC music. Hence, the only economically valid conclusion is that the relevant product market in which SESAC operates includes only the music performance rights of SESAC rightsholders.

The right to perform SESAC music in media other than broadcast television cannot be substituted for the right to broadcast on television. (That is, having the right to perform music on the radio or in a bar does not give you the right to perform that music on television.) Hence, the relevant product market is the market for performance rights of music in the SESAC repertory on local television. The relevant geographic market is the United States.

In addition to the above direct evidence that there are no products that are reasonably interchangeable with performance rights for music in the SESAC repertory, we can also apply the "small but significant and non-transitory increase in price" or SSNIP test. The SSNIP test was developed and is used by the DOJ and the Federal Trade Commission to establish relevant product markets to assess whether a merger or

acquisition will result in a substantial lessening of competition.[92] Under this test, if a SSNIP by a business or a product is or could be effectively undercut by competition from businesses selling other products outside of a proposed relevant product market definition, then the market definition must be broadened to include those competing products. Conversely, if a SSNIP cannot be effectively undercut by competition from products outside of a proposed relevant product market definition, then the definition is appropriate.

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[93] and the estimated total industry-wide public performances of SESAC music on local television for the same period.[94] As shown in the graph, 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. This is a significant price increase, and it was clearly not transitory. It was not undercut in any way by other products substituting for the SESAC blanket license. Indeed, essentially 100% of local television stations continued to license performance rights from SESAC despite this increase, rather than switching to some other product.[95] Thus, the

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[92] *See* 2010 DOJ Merger Guidelines § 4.1.1 available at www.justice.gov/atr/public/guidelines/hmg-2010.html.
[93] This analysis excludes certain stations, such as those owned and operated by the ABC, CBS, and NBC television networks.
[94] The SESAC performance totals are derived from the TMLC music use surveys, which are described in Appendix F. They correspond to a larger universe of stations than the fee numbers in the table, but there is no reason to believe that the overall trends in SESAC music use differ substantially between the identified stations and the industry as a whole.
[95] *See, e.g.*, Swid Ex. 46, pg. 51 (showing the number of SESAC local television and network licensees has increased between 2008 and 2012).

SSNIP test confirms the proposed relevant market definition.[96]

B. Evidence Regarding SESAC's Monopoly Power in the Relevant Market

From the perspective of economics, monopoly power is the ability to raise prices without suffering a loss in business that makes the price increase unprofitable.[97] At the most basic level, monopoly power derives from selling a product that buyers cannot do without and for which the buyers do not have good substitutes. If buyers need the product, and cannot substitute some other seller's product for it, then their purchases will tend not to decline if the price is raised, allowing such increases to remain profitable. Hence, the evidence that is fundamentally most probative on the issue of SESAC's monopoly power relates to the extent to which the buyers in the relevant market can switch to other sellers if and when SESAC raises its license fees.[98]

I have already discussed why stations cannot do without permission to broadcast performances of the music in the SESAC repertory. In this subsection, I will consider at a hypothetical level whether stations could practicably acquire the needed permissions without taking a license from SESAC. I will then go on to show that in fact, essentially no stations go without a SESAC license and that the historical evidence is that SESAC suffers literally no diminution in its sales when it raises its prices significantly.

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[96] The test is the effect of a "small but significant" price increase. Clearly, if there is a *large* price increase with no response, that makes the conclusion even stronger.

[97] I understand that, as a legal matter, monopoly power can be defined as the power to control prices or exclude competition. This definition is similar in effect to the one used in the text and my opinions in this Report are consistent with that legal formulation.

[98] Note that this question is closely related to, but not the same as, the issue of defining the relevant market. In the previous section, I explained that the relevant market is the licensing of performance rights for music from the SESAC repertory, because the acquisition of performance rights for other music cannot effectively be substituted by the stations for their need for permission to broadcast performances of SESAC music. In this section, I explore the extent to which competition from other sellers (the SESAC rightsholders themselves) *within* that market, or the stations ability to forego purchases entirely, disciplines SESAC's price-setting ability.

In order to investigate the hypothetical question of whether a station could, if it chose to, acquire the rights it needs to broadcast performances of SESAC music without taking a SESAC license, consider the situation faced by the stations in 2008, when SESAC refused to continue the industry-wide license even with a significant license fee increase and demanded that individual stations agree to a license or face infringement litigation.[99] Each station faced a stark choice: (1) accept SESAC's license terms; (2) find some other way to get permission to broadcast performances of SESAC music or eliminate that music from their programs; or (3) infringe the copyrights of SESAC rightsholders. I will assume that infringement is not an economically relevant choice, so the question facing these stations was whether, for every instance of SESAC music they would otherwise broadcast, they could either eliminate that music from being broadcast or secure the performance rights by some other means. If stations could have eliminated SESAC music from their programs or secure the rights to perform it without a SESAC license, then they could decline SESAC's license demand, and SESAC's market power would be limited. On the other hand, if it would have been prohibitively expensive to secure the rights necessary to avoid taking a SESAC license, SESAC would not have to worry about losing sales by raising price and has monopoly power.

A station that wished to determine if it had a realistic option would have to examine the identity of each piece of music it was going to broadcast in the coming year, and then focus on those works in the SESAC repertory to determine if it could secure those performance rights by means other than SESAC or else eliminate that music from

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[99] *See, e.g.,* HOAK00000531; SESAC-0607362.

its broadcasts. As has been discussed, the reality is that the stations do not, in fact, know the identity of much of the music they broadcast.[100] With respect to SESAC, the situation is made particularly difficult by the fact that SESAC does not make available a current dataset identifying its music. Stations seeking a list of all compositions in SESAC's repertory are directed to the website where they are allowed to make up to 100 searches (with the option to request more), but cannot view all the compositions in the repertory.[101] Alternatively, SESAC provides a static paper copy of its repertory for a several hundred dollar fee.[102] Of course, as SESAC acquires or loses composers, its repertory changes, rendering reliance on any version of its repertory highly risky.

Thus, a station's effort to determine if it could decline a SESAC license would have foundered on data difficulties pretty much from the start. Nonetheless, to get a quantitative feel for the complexity of such an effort, I undertook an ex post analysis of the situation facing such a station. My analysis looks at a much easier problem than the

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[100] *See* SESAC-0271797, -98 (Citadel Communications negotiation letter with SESAC about its inability to control SESAC music in its programming: "As you know, as a practical matter, Citadel is unable to control whether SESAC music is performed by its stations, particularly with respect to music contained in commercials and syndicated programming."). *See also* 11/14/12 Lowe Dep. Tr. at 51-52 (Lowe has never asked a provider of syndicated programming to convey music performance rights with the programming because "that's not the practices of the industry forever . . . for a long time the syndicators and producers don't get the performance rights and it's been our responsibility to get the performance rights. So, for me, in a couple markets to go to the syndicators and try to demand that they get performance rights would be a futile effort."); 11/16/12 Holliday Dep. Tr. at 70-71 (Holliday has never tried to obtain performance rights for infomercials because the stations often receive the programming the day before airing, so there is no time. She has never asked an infomercial producer to cover performance rights because the producer would just go to her competitor.); 11/14/12 Lowe Dep. Tr. 46-47 (Lowe does not seek source licenses for infomercials because "[i]t's not practical to do that.").

[101] *See* 7/31/12 Collins Dep. Tr. at 35-36; 7/25/12 Eck Dep. Tr. at 18-22, 21, 22.

[102] *See* 7/31/12 Collins Dep. Tr. at 33, 35-37. *See also* SESAC-0271378, -85-86 (Letter from General Manager of KVLY and KXJB to SESAC: "As a SESAC music licensee and in the interest of attempting to know what I am buying or in the alternative *know what I must refrain from using,* please send me an up-to-date, electronic copy of SESAC's complete repertory and a list of syndicated television programs in which you warrant SESAC music appears. I could not find any of this critical information on your website. Certainly SESAC would not reject my right to identify and have knowledge of what I am contractually committed to buying.") (emphasis in original).

one stations would have really faced. I looked at only a single month's programming whereas the station would have to analyze a year or more of programming to make a determination; I also ignored commercials entirely, whereas the station would have to consider music embedded in commercials to avoid infringement. Moreover, I am doing the analysis after the fact rather than prospectively, so I have better and more complete information than the stations would have had. What this analysis shows is that even this greatly simplified version of the problem is essentially insoluble.

I chose six of the Plaintiff stations and created a database containing all of their programs for May of 2008. I enlisted MRI to use their proprietary music database to identify as much of the music as they could in these programs. For these stations, between 5% and 40% of the programs contained SESAC music. Of course, identifying the music is but the first step. Once the station had figured out what SESAC music it had (or was going to have, prospectively), it would have had to have decided what to do about it. In some cases, perhaps it might have decided to drop the programs. However, it seems unlikely that the station could have dropped a large number of programs without significant revenue loss, so it would more likely have tried to acquire the needed performance rights from the rightsholders. For these six stations, based only on the music identified as SESAC by MRI, this would have required license negotiations with 12 to 39 distinct composers or 10 to 34 distinct music publishers.[103]

Unfortunately, these numbers greatly understate the problem even for this

[103] For the purpose of this analysis I am ignoring the fact, discussed below, that SESAC has contracts with some of its rightsholders that would effectively preclude them from licensing the music performances needed by the station.

single month, because MRI had no cue sheet information for 29% to 50% of the programs on the different stations. A station attempting to operate legally without obtaining a license from SESAC would have had to decide what to do about these programs. To my knowledge, MRI has the best music use data that are available to stations, so it is not clear how a station could go about dealing with programs that MRI could not identify.

This analysis provides clear support for the relevant product market in this case described above in Section IV.A, and dramatizes the impossibility of a station choosing to operate without a blanket license from SESAC. Indeed, all or virtually all local television stations carry a SESAC license and have done so continuously.[104] In some contexts, a firm's market share in the relevant market is taken as evidence, in and of itself, of the firm's market power. In this case, SESAC has a 100% market share in the relevant market.

The stations themselves were clear in their understanding at the time of the predicament in which they found themselves:

> "I am powerless to resist your demand for higher rates since the onerous effects of copyright law violations provide you with an advantage that make negotiations over rate one-sided against this small market broadcaster."[105]
>
> "As you know, we need a SESAC license. It gives us little leverage in the negotiating, and you took advantage of it. My option is to sign a bad, unfair license, or be subject to copyright infringement."[106]
>
> "Although SESAC's repertory is much smaller than ASCAP's and BMI's, our stations cannot be assured that they can avoid all SESAC music. As you

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[104] SESAC-0912944, -56 ("SESAC has historically licensed more than 99% of the commercial television stations operating in the United States"). *See also* 10/13/12 Lee Dep. Tr. at 117-18.
[105] SESAC-0350801, -02
[106] MERE00007618, -19.

> know, television stations run a wide variety of third party programming and commercial spots, and it is impossible as a practical matter to be certain that this material will never contain some SESAC content."[107]

Given that stations cannot do without a SESAC license, there is no effective constraint from market forces on SESAC's ability to raise its prices. This conclusion is also demonstrated by the actual experience when SESAC did, in fact, raise its prices significantly from 2008 to 2012. SESAC's blanket license fees from a set of local television stations[108] were increased by 28 percent without any increase in the number of public performances of SESAC music in local television over this period.[109] Stations that operated under a per-program license during the 2005-07 license period that were forced to switch to a blanket license for the 2008-12 license period experienced additional effective increases.[110] Despite this significant price increase (over a period during which television stations suffered declines in overall audience, and hence likely declines in their revenue), I am not aware of a single station licensed in 2005 that chose to drop the SESAC license over this period.[111] This ability to raise prices significantly with no loss of sales is the economic definition of market power.

SESAC's monopoly power over local television stations is also confirmed by its and its part-owner and investment bankers' analysis:

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[107] SESAC-0302688, -89.
[108] As noted above, this analysis excludes certain stations, such as those owned and operated by the ABC, CBS, and NBC television networks.
[109] As discussed further below, in Section V.D, in addition to these large increases in the blanket license fee, SESAC also in this period significantly degraded the usefulness of the per-program license. This degradation in the value of the product to the users represents a further effective price increase.
[110] *See, e.g.*, MERE00046552, -54, -55.
[111] SESAC-0732405, -16 ("There is very little risk that SESAC would start to lose licensees….SESAC has increased the number of licensed locations each and every year. This trend will continue for many years."). *See also* 10/13/12 Lee Dep. Tr. at 117-118 (All stations have licenses from all three PROs, except those channels that use little or no music whatsoever.)

> "[n]ecessity of use of SESAC material has led to virtually 100% renewal rates"; "[i]t would be impossible for a television or radio station to operate without a SESAC license"; and "[c]ost of infringement is prohibitive."[112]
>
> "Historically, SESAC has had considerable leverage in negotiations with licensees given the importance of the music of SESAC affiliates, and we anticipate this to continue."[113]
>
> "Unlike BMI and ASCAP, SESAC is not bound by any consent decree and is therefore free to select any publisher or writer it chooses to represent. Further, its operations are not subject to the United States Department of Justice scrutiny. This freedom from regulation results in higher license fees per title."[114]

An additional consideration that is sometimes included in an analysis of monopoly power is the extent of barriers to entry into the relevant market. If such barriers are high, it suggests the presence of monopoly power, because entry will not be able to occur to undercut monopoly pricing. If such barriers are low, it suggests an absence of market power, because any attempt at monopoly pricing would likely be undercut by new entrants attempting to take advantage of the high prices and associated profits.

Because the relevant market is the licensing of works in the SESAC repertory, entry into this market would be very difficult. SESAC affiliates are contractually committed to SESAC for overlapping durations. Further, for the reasons explained above, a new entrant who somehow managed to woo a subset of SESAC's affiliates away would still not be able to offer to the stations a substitute for the SESAC blanket license. As long as SESAC retained enough of its affiliates so that stations could not be confident they could avoid infringement, such a fourth PRO would only create an

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[112] OZ_00000048165, -70.
[113] OZ_00000000121.
[114] SESAC-0653189, -216.

additional fee demand without giving the stations the ability to decline SESAC's demands. Hence, the barriers to entry into this market are high and protect SESAC's market power.[115]

In summary, local television stations are captive to SESAC and it is crystal clear that SESAC possesses monopoly power over stations in the relevant market.[116]

V. EFFECT OF SESAC'S BEHAVIOR ON COMPETITION

A. Overview

SESAC, in concert with its affiliates, has engaged in three major categories of anticompetitive acts to create and maintain its monopoly power and to exploit it to raise music performance license fees above the competitive level:

1. It eliminated price competition among rightsholders by contractually obtaining the agreement to aggregate their copyrights into a single blanket license which was offered at a joint price.

2. It reached specific agreements with key rightsholders with music in local television programming that either prevented them from competing with the jointly-priced license, created overwhelming economic disincentives for them to do so, or mandated that SESAC gets to fix the price for any such direct licenses. This, in turn, created a disincentive for stations to opt for the SESAC per-program license and attempt to secure at least some of the rights to perform SESAC music in competitive market transactions.

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[115] *See, e.g.*, SESAC-0858562, -71.

[116] SESAC's own recognition of its monopoly power is inherent in its observation that it is able to do better than ASCAP and BMI because it is not subject to the consent decree limitations: "We are neither subject to an anti trust Consent Decree and its significant attendant requirements. By virtue of these decrees and through the use or threat of rate courts, per program and direct licensing, the TMLC has succeeded in significantly reducing the blanket license fees and actual total fees paid to our competitors. We are not obligated to offer per program or per piece licenses or obligated to attend rate courts. These are significant advantages for a for profit company …." SESAC-0925995.

3. In the post-arbitration license period, SESAC modified key aspects of its per-program license formula offered to local television stations to eliminate it as a viable alternative to the blanket license, thereby increasing fees and eliminating the only available mechanism for stations to seek more competitive performance license fees in the relevant market than were offered under the SESAC blanket license.

Each of these categories of actions increased SESAC's monopoly power and increased prices in the relevant market. Moreover, these categories of anticompetitive acts also interact to make the combined anticompetitive effect greater.

B. Joint Pricing

As noted above, despite the monopoly that the U.S. copyright law conveys on an individual rightsholder regarding the use of his or her own works, there remains the opportunity for these individual rightsholders to compete to have their music performed on local television. When a group of rightsholders 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. In the context of a PRO, the inherent anticompetitive effects of the copyright pooling arrangement are partially mitigated by Consent Decrees ASCAP and BMI entered into with DOJ that constrain their ability to exploit the resulting market power. SESAC faces no such constraints and so its collective pricing of the works of many composers who might otherwise be competing remains inherently and actively anticompetitive.

The anticompetitive consequences of joint pricing cannot be avoided by an attempt to construe the relationship between SESAC and the rightsholders in its repertory as vertical rather than horizontal. In a purely vertical relationship, SESAC would be the agent for different rightsholders, either selling the work of each at prices set by the

original rightsholder, or negotiating on behalf of each rightsholder to license his or her music.[117] But this is not what SESAC does. It does not offer to any potential licensee the possibility of licensing the work of one or any subset of the rightsholders in the SESAC repertory.[118] The only possible license one can get from SESAC is a license in which one gets all of the music in the repertory at a single price. The fact that affiliates have authorized SESAC to set this monopoly price unilaterally (rather than by communication among the otherwise competing rightsholders) does not in any way mitigate the reality that it is a monopoly price and one that yields overall revenue that exceeds what the rightsholders could receive collectively if they were competing with each other.

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.[119] Therefore, the fact that SESAC has chosen actively

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[117] One sees this "common agency" model in, for example, the insurance industry (independent agents sell policies for several different insurance companies) and professional representation (a sports or talent agent negotiates terms on behalf of multiple performers or athletes). Even in this context, economists have pointed out the possibility that the common agency creates market power (*see* Bernheim, Douglas; Whinston, Michael; "Common marketing agency as a device for facilitating collusion, Rand Journal of Economics, Vol. 16, No. 2, Summer 1985.), so the suggestion of a vertical rather than horizontal relationship does not, in and of itself, make the situation innocent.

[118] 12/18/12 Collins Dep. Tr. at 213-14.

[119] Under circumstances where sales environment or service quality are a concern, the *upstream* firm may have an incentive to constrain the prices of the downstream distributor, to preserve the downstream quality incentives. In the case of SESAC we have the downstream distributor seeking to constrain the sales behavior of the upstream supplier, which cannot be justified by service quality arguments. And considerations of service quality do not seem to apply to this market in any case.

to restrict direct licensing by its affiliates, and/or to fix the price at which such direct licenses would occur, in order to maintain the inflated blanket license fees it charges users, demonstrates that SESAC is in a horizontal relationship to its affiliates, a relationship that could be competitive if such competition were not actively suppressed.

As discussed further below, SESAC has actively included provisions in its contracts with some of its key rightsholders whose music is embedded in local television programming that have the clear economic intent and effect of discouraging the rightsholders from competing with the SESAC blanket license through direct licensing. If its relationship to the rightsholders were purely vertical, it would have no reason to engage in such restrictions—a party that is merely a customer does not have any legitimate reason to discourage its supplier from selling to other parties. Thus the very existence of these provisions is inconsistent with the conception of the relationship between SESAC and its rightsholders as a purely vertical one.

C. SESAC's Restrictive Agreements with Key Affiliates

As noted above, the economic justification for allowing the inherently anticompetitive blanket licensing of music performances that has been advanced in other contexts is that it might economize on transaction costs. If the minimization of transaction costs is real and significant, then stations who have access to a blanket license would be uninterested in alternatives, such as direct licensing, since by definition direct licensing can only occur if the station is willing to bear the transaction cost. Therefore, it is an economically important test of the entire theory of the blanket license that direct licensing be allowed to coexist with the blanket license. The ASCAP and BMI Consent Decrees recognize this principle by: (1) requiring the PROs to offer a per-program license

that is a meaningful alternative and an AFBL; and (2) requiring that the PROs not interfere with their rightsholders' ability to license their works directly to users such as local television stations.

Before 2002, SESAC entered into agreements with some rightsholders that flatly prohibited them from engaging in direct licensing, and required them to terminate direct licenses that had been executed.[120] More recently, SESAC has changed its strategy and no longer flatly prohibits direct licensing, but instead imposes limitations on such licensing that has the economic effect of preventing competition between such direct licenses and SESAC's own licenses. In particular, in its contracts with certain key affiliates[121] such as Stephen Arnold (leading local news music producer), Jonathan Wolff (composer of music in *Seinfeld* and *Will & Grace*), Robert DeMarco and Michael Egizi (writers for syndicated programs such as *Dr. Phil* and *Entertainment Tonight*), Danny Lux (composer for *Boston Legal* and *Grey's Anatomy*), and Jeff Beal (composer for *Monk* and *Ugly Betty*), SESAC has executed "supplemental agreements"[122] that add provisions that limit the affiliates ability to engage in direct licensing such as the following:

"…Writer and/or Publisher will first refer the third party wishing to secure a

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[120] *See, e.g.*, 7/27/12 Lord Dep. Tr. at 55 (SESAC required affiliate Brian Tarquin Browne to terminate all existing direct licenses upon affiliating with SESAC); SESAC-0617679; 7/27/12 Lord Dep. Tr. at 77-78 (SESAC required affiliate Dennis Brown to terminate all existing direct licenses upon affiliating with SESAC and prohibited him from issuing any new direct licenses.); SESAC-0303590.

[121] *See, e.g.*, SESAC-0456263 at 267-74;TMLC00000215, 266 (Transcript of Record, *SESAC v. Television Music License Committee* Arbitration, Jan. 11, 2006). Nearly all of these composers have become SESAC's top "high earning affiliates" with music in local television programming. *See, e.g.*, 12/14/12 Lord Dep. Tr. at 182-87.

[122] *See* SESAC-0795266 (SESAC used supplemental agreements if the affiliate is "one of the more heavy hitters").

> Direct License…to SESAC for licensing of the Works…"[123]
>
> "…at a rate no less than SESAC's then current licensing rates for similar uses of similar works."[124]
>
> "…for a period of time not exceeding nine months…"[125]
>
> "….SESAC, at its sole election, may choose to: (a) Take payment of said monies received by Writer for the direct license; or (b) Reduce the amount of any payments due to Writer…by SESAC's then standard licensing rate for the direct license."[126]

The clear economic intent and effect of these provisions is to fix the price of a direct license with the result of preventing any competition between SESAC and direct licensing. Either SESAC will get the business, or if it does not, the rightsholder is prevented from offering or accepting terms that are more favorable to the licensee than the terms of the SESAC license.[127] SESAC must approve – and therefore dictates – the price of any license offered by an affiliate subject to this restraint. As part of its approach to minimize its loss of blanket license fee revenue through a station's election to operate under a per-program license, SESAC priced direct licenses at levels unacceptable to stations. Indeed, Stephen Arnold's 2004-07 contract contained this type of restriction and SESAC sent Stephen Arnold tables of pricing information for direct licenses that Stephen

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[123] SESAC-0618929, -32; SESAC-0618489, -95. *See also* SESAC-0261683 at 685; SESAC-0413601 at 608; SESAC-0618594, 602; SESAC-0618698, 705.
[124] SESAC-0261683, -85; SESAC-0413601, -08; SESAC-0618594, -602; SESAC-0618698, -705.
[125] SESAC-0413601, -08. *See also* SESAC-0261683, -85; SESAC-0618489, -95; SESAC-0618594, -602; SESAC-0618698, -705 ("not to exceed twelve (12) months.").
[126] SESAC-0413601, -08; SESAC-0618594, -602; SESAC-0618698, -705; SESAC-0261683, -85. *See also* SESAC-0618929, -933; SESAC-0618489, -495.
[127] In practice, it appears that SESAC enforced the requirement that direct licenses be referred to them for negotiation against Stephen Arnold, but then did not supply price quotes for at least some period of time, leaving both Arnold and the station frustrated. *See, e.g.*, SESAC-0925668, -69.

Arnold himself rejected as excessive.[128] Stephen Arnold testified that these numbers were, in fact, the price floors on direct licenses that SESAC would permit him to charge stations.[129] Accordingly, any rightsholder subject to such restrictions is prevented from competing with SESAC in any economically meaningful way.

In other cases, SESAC imposes significant economic penalties as a disincentive to competition. Stephen Arnold's 2008-11 contract was modified to contain this type of restriction. He was required to pay a $500,000 penalty for the first direct license he issued and more severe penalties for additional direct licenses.[130] Danny Lux's 2007-13 supplemental agreement imposes penalties ranging from $100K-$500K per direct license.[131] Of course, a party who takes a direct license may then reduce its payments to SESAC, and it would be reasonable for SESAC in turn to reduce its royalty distribution to the rightsholder so as not to pay royalties for performances licensed directly. But that is not what SESAC is doing – the financial costs it imposes on rightsholders who engage in direct licensing are not based on a standard royalty distribution formula. There are specific economic penalties designed to make direct licensing uneconomic.[132] A summary of the restrictions on direct licensing of certain key SESAC affiliates is shown in Appendix E.

It is clear that SESAC and its key affiliates understood that the effect of

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[128] SAM0830; SAM1191; SAM0843 (Stephen Arnold telling SESAC that "the [direct license] rates you want me to quote make it literally impossible for any station to benefit from the per program, as the overall fee [] exceeds the blanket…")
[129] *See* 1/16/13 Arnold Dep. Tr. at 125-133; SESAC-0925920, -21.
[130] SESAC-0282137, -40 § 7(B) (Stephen Arnold Supplemental Agreement).
[131] *See* SESAC-0618489 (Danny Lux Supplemental Agreement).
[132] SESAC-0324250 (attorney for Stephen Arnold writes to SESAC that although the agreement "says if SESAC and the Station cannot agree, [Arnold] may issue a direct license . . . we know that he will not issue a [direct] license because of the penalty clauses . . . .").

these restrictions was to eliminate the possibility of meaningful competition through direct licensing. For example:

> "It is in the supplemental [affiliate] agreement that Dennis [Lord] attempted to restrict [the] right [to issue non-exclusive direct licenses] by adding provisions and procedures designed to discourage you from doing it. I think Dennis has worked hard to 'artfully' draw this language in a way designed to avoid an anti-trust violation. I think it is possible they can't legally prevent you from issuing a direct license so they have just made it nearly impossible. I think this means they would be reluctant to have this blow up publicly."[133]

> Stephen Arnold's lawyer testified that he and Arnold "felt [direct licensing] was something that [they] were limited, prohibited from doing….[S]tations were wanting to make various business arrangements and [Stephen Arnold] was restricted from doing that as a result of the terms of [his SESAC affiliate] contract."[134]

> "[W]e believe requiring the station to talk to a representative of SESAC first is impractical, not likely to get a positive result and could lead to losing the station."[135]

> Stephen Arnold's attorney writes to SESAC that Arnold will not issue direct licenses "because of the penalty clauses."[136]

> While being examined on Danny Lux's 2008 agreement which contains penalty terms for direct licenses, Dennis Lord of SESAC testified that a direct license "never happened, hasn't happened, won't happen."[137]

> Don Jasko, a SESAC and industry consultant, advised a potential affiliate, Joel Simon, during negotiations with SESAC: "SESAC seems determined to discourage as much as possible its affiliates' doing direct or source licenses…."[138]

The consequences of these restrictions for direct licensing are also clear from the observed occurrence of such direct license agreements. Prior to 2001, Stephen

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[133] SAM0409, -410 (email from Mike Tolleson, Stephen Arnold's attorney, to Stephen Arnold).
[134] 1/15/13 Tolleson Dep. Tr. at 43-44 (discussing SESAC-0294984).
[135] SESAC-0571071, -73 (Fax from Stephen Arnold's attorney to SESAC requesting that SESAC "[b]e prepared to amend the agreement with Stephen in order to allow him to go directly into a negotiation with a station regarding the terms of a Direct License").
[136] SESAC-0324250.
[137] 12/14/12 Lord Dep. Tr. at 148-149.
[138] DIGITAL0008864.

Arnold, as an affiliate of BMI, had entered into direct licensing agreements with some television stations. When he affiliated with SESAC, he canceled all of his then existing direct license agreements.[139] During the period 2001 to 2011, when his SESAC agreement contained various provisions of the kind described above, there is no evidence indicating that Mr. Arnold executed any direct license agreements for "branded news music." As soon as he executed a new SESAC agreement in 2012 that did not contain any such restrictions, he began direct licensing again, executing at least two such agreements. It thus seems clear that the restrictions in his agreements during the period 2001-11 were, in fact, causing him to eschew direct licensing agreements that he would have otherwise executed in that period.

A corollary anticompetitive effect of the direct licensing restrictions on affiliates was to ensure that stations would not be able to save money through use of the per-program license. As explained by Stephen Arnold:

> "In my current agreement with SESAC, there is a $500,000 penalty if I execute a Direct License with a client-station. I agreed to the condition and I respect it, knowing it is in everyone's best interest to keep my client-stations on a Blanket License."[140]
>
> Stephen Arnold asked SESAC's CEO, Stephen Swid, "to consider a mutually acceptable amendment to our agreement to allow me to offer a Direct License to those stations who seek a per program with SESAC."[141]
>
> "[U]nless there is an opportunity to get a per program, a direct license is not necessary."[142]

Rightsholders who have limitations (or have had at some point during the

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[139] TMLC00000600, -20.
[140] SAM0241 (email from Stephen Arnold to Stephen Swid).
[141] *Id.*
[142] 1/16/13 Arnold Dep. Tr. at 176.

period 2008-12) on their ability to compete with SESAC represented approximately 44% of SESAC's reported local television royalty distributions for the period ending March 31, 2011.[143] Thus, these restrictions affect a quantitatively and qualitatively important fraction of SESAC's repertory, and therefore (in combination with the elimination of the nonviable per-program license, described below) had and continue to have a significant impact in preventing the emergence of competition between individual SESAC composers and the SESAC blanket license.

D. SESAC's Changes to the Per-Program License

As noted above, during the 2005-07 arbitration period, SESAC was compelled to offer a per-program license on reasonable terms, and hundreds of stations took advantage of this option to reduce their license fee payments below their blanket fee allocation. Contemporaneous SESAC documents make clear that they did not view the savings achieved by its station customers as a result of this option as a good thing.[144] Rather, they associated it with a "revenue shortfall"[145] and sought ways to end that shortfall.[146]

In 2008, SESAC modified the per-program formula in several key respects. It increased the charges that stations are required to pay for incidental and ambient music and administrative costs. Additionally, it increased tenfold the charge for

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[143] SESAC-0661820. *See also* SESAC-0661819 (2010), SESAC-0661818 (2009), and SESAC-0661817 (2008). These reported distributions comprise some 95% of all SESAC local television distributions.
[144] *See* ANALYSIS0001941; 7/27/12 Lord Dep. Tr. at 272-273; 12/14/12 Lord Dep. Tr. at 16-17.
[145] *See, e.g.*, ANALYSIS0000060; SESAC-0983709; SESAC-0456842; SESAC-0274931; SESAC-0274947; SESAC-0667425; SESAC-0924036.
[146] "Blanket always preferable to maximize revenue and minimize . . . costs." ANALYSIS0001772, -87 (1995 SESAC Strategy Conference materials). *See also* 12/14/12 Lord Tr. at 17 (SESAC did not want to offer a per-program license because, among other reasons, SESAC would lose money if stations took a per-program license.).

programs with unidentified music. Contemporaneous evidence indicates that these changes were implemented for the express purpose of reducing the "shortfall" that was resulting from the success of the per-program license during the arbitration period.[147] I consider each of these changes in turn.

1. Increased Charges for Incidental and Ambient Music and Administration

The per-program license and the blanket license both provide the licensee with the right to perform "incidental" and "ambient" music. Such music is not eliminated when individual programs are "cleared," and so the per-program license requires the licensee to pay for these uses even if all programs are cleared. As shown in the formula in Appendix D, under the ASCAP formula, and the one established by the SESAC arbitration panel, it is recognized that the blanket license also covers these uses, so that the license fee for them is part of the license fee for the blanket license. The per-program licensee cannot eliminate this portion of the blanket fee, because it is carried as a separate charge that is not reduced as the station "clears" its programs of PRO music.

Because the per-program formula contains a non-reducible charge for incidental and ambient music, this charge must be removed from the blanket license base before that base is used to calculate the cost of the programs that are not cleared by the station. Thus, the current ASCAP and BMI licenses, and the arbitration-imposed SESAC license, reduced the station's blanket fee base by 15% before multiplying that base times the fraction of revenue in uncleared programs.

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[147] *See, e.g.*, SESAC-0924036 ("This leads to lower potential savings for any given station and, therefore, fewer stations electing a PPL.").

SESAC eliminated this part of the formula in 2008, with the effect that stations electing the per-program license must pay twice for incidental and ambient music: once in the blanket license base that is used to determine the fee for programs containing SESAC music and again in a separate 15% charge for incidental and ambient music. There is no economic justification for this change and no economic purpose other than to make the per-program license less attractive to licensees.

At the same time, SESAC increased the surcharge for the administrative costs of the per-program license from 7% (as in the ASCAP license and as approved by the arbitration panel) to 15%.[148] This increase is slightly less economically egregious than the 15% incidental and ambient surcharge, in the sense that it could theoretically be justified if it represented actual incremental license administration costs incurred by SESAC. I have seen no evidence, however, that such costs actually existed. In the absence of such evidence, I can only conclude that this change was also an unjustified increase in the price of the per-program license, intended to make it less viable as a competitive alternative.

2. Increased Default Multiplier Percentage for Programs With Unidentified Music

The other significant change that SESAC made to render the per-program license uneconomic was to increase the weighting factor to be applied to programs with no identified SESAC music, but which contain some unidentified music, from 5% (set by

[148] 7/25/12 Williams Dep. Tr. at 110. SESAC also moved the administrative charge from the multiplier (where it had resided as an increase in the multiplier from 5.34 to 5.41) to a stand-alone charge that cannot be reduced by clearing more programs. This relocation of the charge to make it nonreducible also raises the cost of the license. While I have seen no economic justification for the increased administrative cost, it is economically appropriate to have a non-reducible administrative fee in the per-program formula (provided that the level of the administrative fee charge is reasonable).

the arbitration panel) to 50%. This change has to be understood in the context of the basic theory of the per-program license as a viable alternative to the blanket license. As illustrated in Appendix D, an appropriate per-program license formula operates to cause a typical station that does nothing to modify its music use to pay the same fee under the per-program license as under the blanket license (before addition of any administrative charge that may be assigned to the per-program licensee). For example, the typical station was judged to have ASCAP music in 3/4 (75%) of its programs.[149] Under a per-program license, it pays a fee for those programs that do have music, and no fee for those that do not. To make the two totals come out the same if no behavior is changed, it has to be charged 4/3 (133%) of the blanket fee for those programs that do have music.[150]

Now consider a program for which the PRO affiliation of its music cannot be identified. Under the ASCAP per-program formula, that program is given a 50% weight before having the 133% multiplier applied to it.[151] This means that a program that contains no identified ASCAP music, but contains some unidentified music, results in a fee to ASCAP that is 67% (50% times 133%) of the fee for that same program under the blanket license. This is a reasonable accommodation to the uncertainty generated by unidentified music. Given that the program does not contain identified ASCAP music, the station pays less for this program than it would have paid for the same program under the blanket license. But given that, on average, 75% of programs do contain ASCAP

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[149] *United States v. ASCAP (In re Application of Buffalo Broad. Co.)*, Civ. No. 13-95 (WCC) (MHD), 1993 WL 60687, at *67 (S.D.N.Y. Mar. 1, 1993).

[150] We can think of the blanket license as charging a fee for *all* programs, whether they have ASCAP music or not, that is an average of zero for those that have no music and 133% of a blanket base for those that do.

[151] *United States v. ASCAP (In re Application of Buffalo Broad. Co.)*, Civ. No. 13-95 (WCC) (MHD), 1993 WL 60687, at *79 (S.D.N.Y. Mar. 1, 1993).

music, there is a reasonable chance that this one does too, so the payment is not much less than under the blanket license.

Note, too, that the relative ubiquity of ASCAP music tends to mitigate the frequency with which the 50% factor comes into play. One source of unidentified music is music in variety shows, which have many different compositions in any given episode, and different compositions across the different episodes of a program. For such a program, it is not uncommon to have dozens of individual compositions, most of which can be identified, but there might be one or a small number that cannot. For ASCAP, these unidentified compositions will not matter for per-program fee purposes in most cases, because with many total compositions in the program, there will typically be one or more identified ASCAP compositions, meaning that the program generates a per-program fee regardless of the true ownership of the unidentified cues. Thus, for ASCAP the 50% factor typically comes into play only for programs such as infomercials for which there is no cue sheet and all of the program music is unidentified.

The numbers for SESAC are quite different. Its per-program multiplier is 5.34, corresponding to 18.7% of the programs on a typical station containing SESAC music. If unidentified music were not an issue, the typical station would pay nothing for 81.3% of its programs, but would pay a whopping 5.34 times the blanket fee for the 18.7% of programs that contain SESAC music. This combination of a large multiplier with a small fraction of programs generating payment would work as intended to yield a per-program fee for the typical station that would be the same as the blanket fee if the station does not change its music use.

But now we must consider the consequences of programs that contain

unidentified music. With a 5% weighting factor for unidentified programs, a station would pay about 27% (5% of 5.34) of the proportional blanket license fee for an unidentified program. This is a lower fraction than in the ASCAP case, and it makes sense that it is lower. After all, on average there is a greater than 80% chance that this program in fact contains no SESAC music and should be generating a zero payment. Whereas the overall frequency of ASCAP music means that an unidentified program most likely does contain ASCAP music, the overall frequency of SESAC music means that an unidentified program most likely does not contain SESAC music.

Whereas the 5% factor produces a result that is consistent with the economic logic of the per-program license, a 50% factor does not. Its effect is that an unidentified program generates a fee that is 2.17 times *greater* than the proportional fee for that program under the blanket license (50% of 5.34). And this inflated fee would apply whether the music in the program was completely unidentified, or was a music variety show with dozens of compositions identified as belonging to ASCAP and BMI, no compositions *identified* as belonging to SESAC and a single unidentified composition. It cannot be right that a program with no identified music of a given PRO, but which happens to have even a single unidentified cue, would generate a greater fee than the average blanket license fee.

Fundamentally, the combination of a large multiplier with a large weight for unidentified programs is economically nonsensical. The reason for the large multiplier is that most programs do not contain SESAC music. But if most programs do not contain SESAC music, then a program whose music cannot be identified is also unlikely to contain SESAC music. This small likelihood that the unidentified program

actually contains SESAC music should generate a small payment, not one even greater than the blanket fee.

SESAC purports to justify this increase either by noting that the 50% is the same as the ASCAP percentage,[152] or as creating an incentive for the stations to identify the music.[153] Neither of these justifications has any merit. If SESAC wanted to duplicate the ASCAP per-program license, it could have done so, with a multiplier of 1.33 and a 50% weighting factor for unidentified programs. That combination would have been more favorable to the stations than the formula set by the arbitrators. So instead SESAC cherry-picked the part of the ASCAP formula it liked (the 50% factor), and ignored the part of the formula it didn't like (the 1.33 multiplier). As we have seen, however, these two parameters are intimately interconnected, because they both must reflect the underlying frequency of performances of the PRO's music. If this frequency is high (as with ASCAP), it dictates a relatively low multiplier and a relatively high weight on unidentified programs. If this frequency is low (as with SESAC), the PRO should get the benefit of a larger multiplier, but fundamentally connected to that benefit is the relatively small weight on unidentified programs.[154]

Turning to the justification in terms of the incentive to identify programs, I would point out first that it is not clear that there even is an economically significant incentive issue. Many programs are unidentified because there is no cue sheet for the

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[152] 11/27/12 Williams Dep. Tr. at 69-70.
[153] *See, e.g.*, 10/16/12 Edwards Dep. Tr. at 84-85.
[154] In 2006, during the time the arbitration panel was considering what weight to give to unidentified programs in the per-program license, Don Jasko, a SESAC consultant, carried out an extended email exchange with a SESAC principal in which he tried to convince SESAC that the right weight would be the SESAC program share (i.e., something less than 20%). This effort was rejected. *See* DIGITAL0009712.

program, and it is unclear that any incentive is going to change that.

Second, the incentive for stations to identify programs can only operate if there is a viable per-program model for them to utilize. As illustrated below, SESAC created a per-program formula that does not work for any station. This makes the possibility of good incentives for identifying SESAC music in programs a moot issue.

Finally, to whatever extent incentives are important, they ought to be considered for both parties. If it does not render the entire per-program model nonviable, a relatively high weight for unidentified programs does create a theoretical incentive for the stations to identify the music if they can. But any weight above the program fraction that is the basis for the multiplier actually creates an active *disincentive* for SESAC to identify the music in programs. As noted above, SESAC gets more than twice the blanket license rate for an unidentified program based on the 50% weight. But if they manage successfully to identify the program, there is a better than 80% chance that it will turn out to contain no SESAC music, and they will get nothing. So, on average, they are better off leaving the music unidentified.

To see the actual combined effect of these illegitimate changes to the per-program license, consider KPTV, which used the SESAC per-program license in 2007. When faced with the new per-program license terms, it had an analysis undertaken of how the new formula would affect it. Based on an analysis of its actual programming for one month, it found that, 10 of its 133 programs contained SESAC music, 18 of its programs contained no SESAC music, and 105 of its programs remained unidentified. These unidentified programs accounted for 29% of overall program revenue. As a result, under the 2007 formula (with a 5% payment for unidentified programs), assuming a

blanket fee equal to the 2008 blanket fee, the per-program fee would have been $5,452, a savings of 17% off of the otherwise applicable blanket license.[155] Under the 2008 formula (with the 50% payment for unidentified programs), the per-program fee would have been $11,714, a 78% *increase* over the blanket license. And note that under the new formula, approximately 43% of the calculated per-program fee would have been coming from the unidentified programs. SESAC would be getting nearly as much money overall from the unidentified programs as it would have been getting from the programs known to contain SESAC music.

While this example is for a single station in a single month, the arithmetic is, in fact, overwhelming. This was understood by the Plaintiffs (and other local television stations) at the time and communicated to SESAC, as shown by the following examples. (Note that in several cases the writers refer to the "multiplier" or the "per-program multiplier." It is clear from the context that what they mean by this is the weight to be applied for unidentified programs.)

> "The only reason we are even discussing this with you is that your 50% attributable multiplier for programming with unknown music is illogical and a penalty on us that makes the Per Program unusable."[156]
>
> "[B]ecause you increased the per program multiplier from 10% to 50% in the new, proposed license, the per program license would cost us more than the blanket license, so it has no value to us."[157]
>
> "Also, by increasing your multiplier from 5 to 50% - a ten times increase, you rendered the per program option as worthless."[158]

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[155] These represent monthly estimates. KPTV paid a total per-program fee of $42,500 in 2007 which was a savings of 40% off its total 2007 blanket fee of $71,652. *See* SESAC-0373761.
[156] SESAC-0287870.
[157] SESAC-0287876.
[158] SESAC-0300823.

> "We would prefer to use a Per Program License Agreement, but the terms imposed by SESAC are both onerous and operationally cumbersome for a small market TV station…"[159]
>
> "For years, Waterman Broadcasting has operated under a per program arrangement with ASCAP, BMI, and SESAC. Unfortunately, the new terms and conditions offered by SESAC are so complex that they render this option all but useless."[160]
>
> "SESAC imposed much of this unreasonable fee increase by eliminating what had been a reasonably viable per program license option, and replacing it with a sham per program scheme, under which it is virtually impossible to achieve any benefit."[161]

When the dust settled and the stations had finished analyzing SESAC's post-2007 per-program formula, not a single station chose the per-program license, and none has used it since.[162] This stands in stark contrast to the 248 stations, representing approximately 24% of total 2007 blanket license fees, that used the per-program license in 2007. The changes SESAC made to the 2008 per-program license ended the "revenue shortfall" created by the per-program competitive option.[163]

Finally, SESAC also changed the language in the per-program license governing the procedure for determining if specific programs would be treated as SESAC programs, non-SESAC programs, or unidentified programs. Under the draft per-program license, the framework of which was used to administer per-program licenses during the 2005 to 2007 period, unidentified programs were those programs "for which a cue sheet has not been created or made available to SESAC, [the] STATION and/or its per-

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[159] SESAC-0291542.
[160] SESAC-0291587.
[161] SESAC-0302688.
[162] 10/11/12 Alphonso Dep. Tr. at 198-200; 202.
[163] SESAC recently proposed a reduction in the factor for unidentified infomercials from 50% to 25%. *See infra* at n. 184; Collins Ex. 26. Note that even 25% likely exceeds the SESAC program share, and therefore cannot be justified.

program agent, or [the Television Music License] COMMITTEE…."[164] In the 2008 per-program license, SESAC changed the provision so that unidentified programs were only those programs "for which SESAC [did] not possess a [c]ue [s]heet…."[165] This language seems to say that even if a station had in its possession a valid cue sheet (from its own files, those of its per-program agent, or the TMLC) showing that a given program contained only BMI and ASCAP music, SESAC would require it to be treated as unidentified (with the resulting 50% payment rate) unless *SESAC* had the necessary cue sheet. Several prospective licensees pointed out that it was unreasonable to preclude their using cue sheets from other sources to demonstrate that a program did not contain SESAC music. Despite being made aware of this problem, SESAC never responded to these concerns, and never presented amended contract language that recognized the stations' right to utilize valid cue sheets that SESAC did not possess. The only reasonable conclusion to be drawn from SESAC's decision to change this provision from the one utilized during the arbitration period and SESAC's subsequent lack of a response to this issue is that it had no interest in offering a viable per-program license.

E. Summary of Anticompetitive Behavior

The combined effect of SESAC and its rightsholders' behavior has been to eliminate competition to license music from the SESAC repertory in local television. As a result, there are fewer licensing options available to stations, and license fee rates have been elevated far above the level that would prevail in the absence of these anticompetitive acts.

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[164] SESAC-0924453, -60.
[165] SESAC-0677598, -604.

VI. ANALYSIS OF POSSIBLE PRO-COMPETITIVE EFFICIENCIES

In the cases of ASCAP and BMI, the federal courts have found in challenges in several markets that the anticompetitive impacts of their collective pricing – as mitigated by their Consent Decree constraints – are offset by the transaction cost efficiencies of the blanket license framework. As noted above, in the current SESAC case, we are dealing with an unconstrained joint price setting arrangement, not a blanket licensing framework constrained by Consent Decrees, as one of SESAC's owners, Ira Smith, made clear to his co-owners:

> "We are neither subject to an anti trust consent decree and its significant attendant requirements. By virtue of these decrees and through the use or threat of rate courts, per program and direct licensing, the TMLC has succeeded in significantly reducing the blanket license fees and actual total fees paid to our competitors. We are not obligated to offer per program or per piece licenses or obligated to attend rate courts. These are significant advantages for a for profit company…."[166]

On top of the fact that SESAC is not subject to the mitigating constraints placed on ASCAP and BMI, SESAC does not create the efficiency benefits that convinced the federal courts that ASCAP and BMI's Consent Decree constrained joint pricing is acceptable. The current SESAC licensing situation was created over time as SESAC lured rightsholders away from BMI and ASCAP by offering them greater royalty payments than they could expect from those PROs.[167] By doing so, SESAC was then able relentlessly to increase its license fee demands from licensees, without regard to industry conditions or benchmark license fee levels.

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[166] SESAC-0925995.
[167] ANALYSIS0001926-27 ("SESAC pays more. SESAC's royalty rates for television are consistently higher than those of ASCAP and BMI for both theme and background uses."). *See also*, ANALYSIS0001214, -1442-1443; OZ_00000048165, -71 (Och-Ziff Capital presentation describing SESAC strategy to pay higher royalty payments than BMI or ASCAP); 7/27/12 Lord Dep. Tr. at 263-64 (SESAC strategy is to pay affiliates more than what BMI or ASCAP pay).

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. 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. On the stations' side, they must now negotiate (and, as necessary, litigate) with three PROs instead of two. There has been no offsetting reduction in their transaction needs, so they are now incurring greater transaction costs than they were before. Indeed, Freddie Gershon, an owner of SESAC, testified that he was not aware of anything SESAC offers to its licensee-customers that ASCAP and BMI do not offer to licensees.[168] On the rightsholders side, the overall community was getting all of the monitoring and distribution activity that they needed from BMI and ASCAP. When some of those rightsholders moved to SESAC, the costs of those administrative activities were not significantly reduced for ASCAP and BMI, but a new, third administrative structure had to be built up to distribute the SESAC royalties.[169] If, hypothetically, the total royalties collected by SESAC, ASCAP, and BMI had remained the same as the royalties previously collected by ASCAP and BMI, the aggregate royalty distributions would necessarily have declined, since those greater administrative costs would have had to have been covered before distributions could be made. Therefore, on both the users' side

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[168] 1/14/13 Gershon Dep. Tr. at 29.

[169] According to SESAC's financial statements, overall it distributed only [redacted] of the total fees that it collected for fiscal year 2011 (SESAC-0880955, -64), compared to 80 percent for ASCAP and BMI. The fact that SESAC retains a much higher fraction of the revenues it collects than do the other PROs is suggestive of the higher costs that it is incurring on those same revenues.

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.

Certainly, the owners of SESAC have been made better off by the anticompetitive activity, but that represents only monopoly profits; none of it derives from any pro-competitive source. Some of the rightsholders who switched to SESAC are presumably better off as well. But in considering any benefits to rightsholders that SESAC has generated, it is important to analyze the source of increased royalty distributions they have enjoyed. The only three arithmetically possible mechanisms by which their distributions could increase are (1) the monopoly increase in the overall license fees collected by SESAC as compared to ASCAP or BMI; (2) an increase in the fraction of collections that are distributed by the PRO rather than kept for its own costs and profits; or (3) a redistribution of royalties from other rightsholders. The first of these mechanisms obviously precludes considering the rightsholders' increased distributions as an efficiency-enhancing benefit. Therefore, any argument that SESAC generates pro-competitive benefits that flow to its rightsholders has to be founded on one of the latter two pathways. I consider each in turn.

Increased rightsholder payouts cannot have come from a higher overall percentage of fees being distributed, because SESAC, in fact, distributes a *lower* percentage of the fees that it collects than do ASCAP and BMI. Based on their public representations, ASCAP and BMI retain 17-20 percent of the fees that they collect to

cover their operating costs, and distribute the remaining 80-83 percent.[170] In contrast, SESAC distributes [redacted] of its overall fee collections.[171] Its distribution percentage is somewhat higher for local television fees, at [redacted] in fiscal year 2011, but this is still well below the ASCAP and BMI rates. Hence, the increased dollars flowing to SESAC rightsholders cannot be coming from a reduced SESAC deduction out of fees collected.

The possibility that SESAC has caused a redistribution of royalty distributions from other rightsholders to its rightsholders is more complicated to analyze. Any given rightsholder's distribution changes over time for many reasons, and it would be very difficult or impossible to determine to what extent any declines in distributions to particular ASCAP or BMI rightsholders were, in effect, the source of increased distributions to SESAC's rightsholders. But even if, hypothetically, a portion of the increased payments to SESAC's rightsholders come from this source, this would constitute a pro-competitive benefit only if ASCAP or BMI had been somehow exercising their market power to divert royalties to other parties that were truly earned by the rightsholders that subsequently moved to SESAC, and SESAC somehow fixed this problem. I have seen no evidence to suggest that this was the case, and there are strong reasons to believe that it was not, in fact the case.

ASCAP and BMI each have extensive and sophisticated systems designed to track the use of their affiliates' music on local television and other venues and to

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[170] ASCAP, 2011 Annual Report, available at http://www.ascap.com/about/annualreport.aspx (ASCAP distributed $519.5 million of $635.7 million of domestic revenues or approximately 82%); *Broadcast Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355, 362 (S.D.N.Y. 2010) (noting BMI's domestic overhead rate of 17%).
[171] SESAC-0880960-1025.

apportion the fees that they collect to their affiliates in proportion to that actual usage. The rightsholders that were lured away by SESAC because of the widespread use of their music would therefore have been receiving distributions from ASCAP or BMI in proportion to that widespread use. There is no basis to conclude that any portion of the increased royalties they have collected represent competitive royalties that they deserved but were not receiving from ASCAP or BMI.

Therefore, the increased royalty distributions enjoyed by SESAC rightsholders represent nothing but additional fees extracted from licensees.[172] Such monopoly profits cannot be put forward as a pro-competitive benefit of SESAC's behavior.

VII. OVERALL ASSESMENT OF THE EFFECT OF SESAC'S AND ITS' AFFILIATES' BEHAVIOR ON COMPETITION

SESAC's joint pricing of the music of all of its affiliates in a single package under the blanket license is inherently anticompetitive, resulting in monopolistic pricing above the level that it would obtain if the individual rightsholders exercised only the market power conveyed by their respective copyrights.

SESAC has actively sought to maintain its inherent monopoly power by rendering the per-program alternative economically nonviable, and by restricting the behavior of important affiliates with music in local television programming to eliminate any possibility of their competing with the SESAC blanket license through direct or

[172] *See, e.g.*, SESAC-0456263, -269, -273 (Bear Stearns and Goldman Sachs report on SESAC describing SESAC's conclusion that it would offer Mssrs. DeMarco and Egizi an "aggressive advance/guarantee" of [redacted] annually (approximately [redacted] more than what BMI was paying), and [redacted], because it would recoup the money with "increased license fees from [the] TMLC.").

source licensing.

The inherently anticompetitive nature of SESAC's collusive pricing has not, since 2008, been mitigated by any of the constraints that operate to mitigate ASCAP's and BMI's market power, which include mandatory licensing subject to third-party review of fees for reasonableness, availability of an Adjustable Fee Blanket License, availability of a viable per-program license as an alternative to the blanket license, and prohibition of affiliate contract terms that limit source and direct licensing.

There are no pro-competitive benefits of SESAC's licensing. Any benefits enjoyed by SESAC and its affiliates relative to what would have obtained if those affiliates stayed with ASCAP or BMI represent monopoly profits extracted from SESAC's licensees, including local television stations.

Therefore, the acceptance by the federal courts of ASCAP's and BMI's behavior as not anticompetitive in certain industries does not apply to SESAC, because it does not create any pro-competitive efficiencies and it does not accept any constraints to mitigate the inherently anticompetitive nature of collective pricing.

VIII. QUANTIFICATION OF THE ANTITRUST INJURY SUFFERED BY PLAINTIFF STATIONS

The Plaintiff local television stations have paid more for music performance license fees from 2008 until the present than they would have paid if SESAC and its rightsholders had not raised the price of the blanket license and eliminated the option of the per-program license. In this section, I quantify this harm by comparing the stations' total costs for performance license fees as actually paid to what those total costs would have been in a "but-for" world in which SESAC had not engaged in its

anticompetitive acts.

The essence of the but-for world is that the price of the blanket license would be at the competitive level, and stations would have access to an economically appropriate per-program license to further reduce their obligations below the blanket level if they so choose. Given these two aspects of the but-for world, the damages can be decomposed into two distinct portions. The first portion corresponds to the difference in blanket fee levels between the two worlds. The second portion corresponds to the savings stations would enjoy through a viable per-program license in the but-for world, savings that were not available in the actual world. I will consider each portion in turn.

A. Damages Related to the Elevation of the Blanket License Fee

To calculate the overcharge paid by the Plaintiff stations attributable to the inflated price of the blanket license, we need a reliable estimate of the blanket license fee in the but-for world. In other words, what we seek is the blanket license fee that would be the result of a workably competitive market.

The establishment of the overall level of fees that would have obtained in a competitive market is the task that was undertaken by the arbitration panel in 2006. Although the panel did not provide a narrative justification for its ruling, both parties to the arbitration agreed that the standard they should follow was the same "reasonable fee" standard used in Rate Court.[173] Hence the panel-set license fee is a reasonable starting point for a fee that is not below the competitive level.[174]

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[173] Television Music License Committee Post-Arbitration Brief, *SESAC, Inc. v. TMLC Arbitration*, pg. 28-29 (Feb. 28, 2006); SESAC's Post-Trial Brief, *SESAC, Inc. v. TMLC Arbitration*, pg. 4-5 (Feb. 28, 2006).
[174] I presented testimony to the arbitration panel suggesting a much lower blanket license fee based on the fees in direct licenses that some stations had negotiated with composers. I continue to believe that fees in

The arbitration panel set the overall blanket license fee for local television stations at $16 million in 2005. This overall fee was allocated to the individual stations using an allocation formula that was developed by the TMLC, and approved by the arbitrators, based on SESAC music use and programming information from the stations. For the purpose of the damages calculation, I have used the 2007 TMLC allocation to apportion the industry-wide SESAC fee to the individual stations, since that allocation reflects changes in stations' use of SESAC music between 2005 and 2007.[175]

As noted above, the arbitration hearing took place in 2006, with data through 2005 available. Hence, the panel could only set a license fee in relation to actual SESAC music use data for 2005. Accordingly, for purpose of my Report, I have used only the 2005 blanket license fee, as allocated to each of the Plaintiff stations based on the 2007 TMLC allocation and used that fee as the starting point to calculate each station's but-for fee for the years 2008-12.

It is not unambiguously clear how a competitive 2005 SESAC fee would have changed over time in the but-for world. As noted above, it is reasonable to think of the fee as being proportional to the extent of public performances of SESAC music, which have generally declined in the aggregate over time. For this reason, on the one hand, each station's blanket fee should have tended to decline after 2005. On the other hand, one might expect fees to rise to some extent due to general inflation in the economy.

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direct licenses indicate that the competitive level for the blanket fee would be lower than the $16 million set by the arbitrators. For this reason, the damages calculated in this section understate the true magnitude of the antitrust injury suffered by the Plaintiff stations.

[175] Since there was no industry-wide license after 2007, there are no allocation calculations subsequent to 2007.

Figure 2 attached to this Report shows the overall ASCAP and BMI blanket license fee levels, as negotiated between those PROs and the TMLC, for the period 2004-16. The increase in the ASCAP fees from 2005 to 2009 reflects a cost-of-living adjustment that was in the agreement between ASCAP and the TMLC reached in 2004. ASCAP and the TMLC reached a new agreement in 2012 that governs the period 2010-16, which dropped that adjustment and lowered the fees beginning in 2012. The BMI fees from 2005-17 are all governed by a 2013 agreement between the parties. It set the fees at a constant $85.6 million for 2005-12 and $78.7 for 2013-17.

Although there are year-to-year changes in the relative music use of ASCAP and BMI, public performances of music overall on local television have generally declined through this period, as local television has lost audience to cable television and other media.[176] Note that the combined ASCAP and BMI fees for 2013 are actually slightly below the combined fees in 2005. Thus, the overall effect of the parties' decisions regarding adjustments for inflation and for changes in public performances (driven largely by declining audiences) has been to return total fees for 2013 and beyond to slightly less than the 2005 fee level (and well below the 2004 fee level).

Given this pattern, I calculated blanket license fee damages in two ways. The first method simply took the estimated competitive 2005 fee and allocates the fee using the 2007 allocation and used that fee as a constant for the 2008-12 period. The second method took the 2005 blanket license fee for each station, increased it according to the change in the Consumer Price Index (CPI) for each year after 2005, and also

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[176] TMLC00153679, -84.

adjusted it each year to reflect the overall proportional change in the extent of public performances of SESAC music in local television, as captured in the TMLC music use survey.[177]

These two approaches (each of which can easily be applied to non-Plaintiff stations) yield a range of reasonable (and conservative) values for each Plaintiff station's but-for SESAC blanket license fee. To calculate a range for each Plaintiff station's blanket license fee damages, I simply subtracted these estimates of the but-for fee from the actual blanket license fees paid by the stations. Table 1 shows the resulting range of damage estimates for the Plaintiff stations by year.

Table 1
Named Plaintiff Blanket Damages
2008-2012

		2008	2009	2010	2011	2012	Total
Method 1	Damages	$102,512	$149,080	$197,320	$249,053	$303,505	$1,001,468
	Percent of But-For Blanket Fee	20%	29%	38%	48%	59%	
Method 2	Damages	$115,298	$123,489	$184,074	$240,204	$283,596	$946,661
	Percent of But-For Blanket Fee	23%	23%	35%	46%	53%	

Extrapolated out to all stations for which we have complete license fee information, this amounts to approximately $27 million in damages over the 2008-12 period.[178]

B. Damages Related to the Lack of an Economically Appropriate Per-Program License

As noted above, 248 stations took advantage of the per-program license in 2007; in the aggregate, these stations saved about 43% of the otherwise applicable blanket license fee. Among the Plaintiff television stations, 21 utilized the per-program

[177] The details of the music use survey data are described in Appendix F.
[178] This analysis excludes certain stations, such as those owned and operated by the ABC, CBS, and NBC television networks.

license in 2007; these Plaintiff stations, as a group, enjoyed savings of 43% of their combined per-program license fees. In the but-for world, there would have been similar savings due to the availability of an economically appropriate per-program license.[179] Thus, a second, additional category of antitrust damages corresponds to the percentage savings that these stations would have enjoyed off of the but-for blanket license fees.

As an estimate, it is reasonable to assume that the Plaintiff stations, on average, would have enjoyed the same 43% percentage savings off of their blanket license fees in the years 2008-present as they did in 2007. Based on this estimate, the aggregate additional damages associated with the nonviability of the per-program license would be 43% percent of the aggregate but-for blanket fees of these 21 Plaintiff stations in each year 2008-12. Based on the range of but-for blanket fees for the plaintiff stations calculated in the previous section, this would correspond to an additional $680,000 to $694,000 for that five-year period. [180]

Table 2
Named Plaintiff But-For Per Program Savings
2008-2012

	2008	2009	2010	2011	2012	Total
Method 1	$136,010	$136,010	$136,010	$136,010	$136,010	$680,051
Method 2	$132,652	$142,732	$139,489	$138,335	$141,240	$694,447

Extrapolated out to all stations for which we have complete license fee data, the damages related to the lack of an economically appropriate per-program license

[179] In fact, given the upward trend in the number of stations electing the per-program license in the 2005-07 period (and a similar longer-term trend in the number of stations electing the ASCAP and BMI per-program licenses) it is likely that even more stations would have taken the per-program license in the 2008-12 period. Because my damages calculations assume that no blanket licensed stations would have switched to the per-program license, my damages estimates are conservative.
[180] I understand that SESAC's business practices are continuing and, thus, further damages are being incurred by the Plaintiff stations.

approximately amount to more than $5 million over the 2008-12 period.[181]

For any individual station, there might have been changes in programming or music use that would have caused these savings to fluctuate over time, so that in a but-for world some stations might have enjoyed larger savings than they did in 2007 while some might have enjoyed reduced savings.[182] But since, overall, there is no evidence of a significant increase in the share of SESAC music in local television, there is no reason to expect that, on average, the per-program savings per station would have fallen over time.

The total per-program savings in the but-for world would have been a function of both the number of stations using the per-program license and the average savings that each station enjoyed. The above estimates do not account for the possibility that additional Plaintiff stations (as well as other local television stations) would have used the per-program license after 2007 in the but-for world. Yet the number of stations using the SESAC per-program license rose steadily from 2005 to 2007. This pattern is quite consistent with experience under the BMI and ASCAP per-program licenses and likely reflects learning on the part of the stations about how to utilize the per-program license option. It is likely that this trend would have continued past 2007 if a viable per-program license had been available. As more stations switched to this option, the aggregate savings would have increased, rendering my analysis conservative (i.e., it understates the true damages).

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[181] This analysis excludes certain stations, such as those owned and operated by the ABC, CBS, and NBC television networks.

[182] While, for the reasons noted, it is at least conceivable that certain stations in the but-for would have had a lower savings rate than they did in fact have in 2007, there is no reason to believe that any station's programming or music use would have changed so much that it would have paid more under the per-program license than it would have paid under the blanket license. Were this the case, any rational station would simply switch from the per-program license to the blanket license.

In summary, a reasonable and conservative estimate of the damages incurred by the Plaintiff stations as a group in connection with the nonviable per-program license is $680,000 to $694,000 dollars.[183] This is based on the average per-program savings of 43% of the but-for blanket license fees. The consequences of SESAC's actions also included a loss of per-program savings to non-Plaintiff stations, and likely would also have included the loss of per-program savings by stations that did not utilize the per-program license in 2007 but would have moved to that option in the but-for world.

IX. REMEDY REQUIRED TO END THE ANTICOMPETITIVE INJURY FROM SESAC'S BEHAVIOR

In addition to damages for the injury already suffered, I understand the Plaintiffs are seeking injunctive relief against SESAC because the challenged business practices are ongoing.[184] As discussed, SESAC's licensing practices with respect to the Plaintiffs (and other local television stations) are anticompetitive and have no procompetitive benefits. Based on my economic assessment that SESAC, as currently structured, provides no pro-competitive benefits, and the evidence of a comparable marketplace that operates competitively without any need for PROs (the market for

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[183] This does not include costs paid to MRI for the administration of the per-program license.
[184] *See, e.g.,* Letter from W. Lee to D. Lowe, dated Nov. 30, 2012 ("Because of the pendency of [this] litigation the immediately above line we are maintaining the status quo with respect to license fees keeping your 2012 license fees in effect for 2013 as shown on the enclosed schedules."); 2/14/13 Reynolds Dep. Tr. at 96-97 ("SESAC refused to even discuss fees with us in this most recent negotiation. I'm sorry, dictation."); 180-81 ("[O]ur strategy throughout the 2008 to 2012 SESAC license was to generally try to reduce use of SESAC music in the hope that when renewal time came that we could hopefully negotiate a lower fee. And, as I've mentioned before, based upon the renewal that was dictated to us over the last couple weeks, that's not happening.").

public performances in movie theaters of music embedded in motion pictures), it is my opinion that if SESAC were enjoined from issuing licenses with respect to the music embedded in non-locally-produced programming, then the marketplace for such rights would become substantially more competitive and more economically efficient.

In the alternative, given that SESAC's licensing activities provide no efficiencies additional to those provided by ASCAP and BMI, the mitigation of the anticompetitive effects of SESAC's licensing practices would, at a minimum, require that SESAC abide by the same core restrictions that ASCAP and BMI operate under. These core restrictions include: (1) the compulsory licensing of music users during license fee negotiations; (2) the availability of a neutral third party to decide on a reasonable license fees in the absence of an agreement; (3) the required offering of an economically viable alternative to the blanket license; and (4) the prohibition of any requirement or restriction that would preclude, directly or indirectly, any rights holder from issuing licenses directly to music users.

I reserve the right to supplement my opinion based on the development of the record in this case.

Adam B. Jaffe

March 4, 2013

Appendix A

ADAM B. JAFFE

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PROFESSIONAL EXPERIENCE

Brandeis University, Faculty of Arts and Sciences and International Business School, Waltham, MA

Fred C. Hecht Professor in Economics, 1999 - present
Dean of Arts and Sciences, July 2003 to June 2011
Chair, Department of Economics, 2000 - 2002
Associate Professor of Economics, 1994 - 1999
Chair, Brandeis Intellectual Property Policy Committee, 2001 - 2003
Member, University Advisory Council, 2001 - 2011

Harvard University, Faculty of Arts and Sciences, Cambridge, MA

Associate Professor of Economics, 1989 - 1994
Assistant Professor of Economics, 1985 - 1989
visiting the Kennedy School of Government, 1992-94

President's Council of Economic Advisers, Washington, DC
Senior Staff Economist, 1990 - 1991

EDUCATION

Harvard University, Cambridge, MA
Ph.D. in Economics, 1985
Dissertation: "Quantifying the Effects of Technological Opportunity and Research Spillovers in Industrial Innovation"

Massachusetts Institute of Technology, Cambridge, MA
S.M. in Technology and Policy, 1978
Thesis: "Regulating Chemicals: Product and Process Technology as a Determinant of the Compliance Response"
S.B. in Chemistry, 1976

TESTIMONY AND CONSULTING EXPERIENCE

Television Music License Committee (Weil, Gotshal & Manges, New York)
United States District Court, Southern District of New York, WPIX, Inc., *et al*, against Broadcast Music, Inc., 09 Civ. 10366 (LSS), Expert Report, December 23, 2011; Rebuttal Report January 30, 2012; Deposition March 6, 2012

Enbridge Southern Lights pipeline (Steptoe and Johnson, Washington DC)
U.S. Federal Energy Regulatory Commission Docket Nos. IS11-146-000, IS10-399-000, IS10-399-001,IS10-399-003 (Consolidated), Prepared Rebuttal Testimony, November 1, 2011; Oral Testimony January 10, 2012

Enbridge Southern Lights pipeline (MacLeod Dixon, Calgary)
National Energy Board of Canada, Hearing Order RH-1-2011, Written Reply Evidence, October 6, 2011; Oral Testimony November 17, 2011

Teva Pharmaceuticals USA, Inc. (Goodwin, Proctor, Boston)
United States District Court, Southern District of New York, Teva Pharmaceuticals, et al, v Mylan Pharmaceuticals, et a 09 CV 8824, Expert Report, December 2010, Deposition January 2011

DMX, Inc. (Weil, Gotshal & Manges, New York)
United States District Court, Southern District of New York, United States v. American Society of Composers, Authors, and Publishers (In re Application of THP Capstar Acquisition Corp.), 09 Civ. 7069 (DLC), Expert Report, July 2010; Rebuttal Expert Report, August 2010; Deposition, August 31, 2010; Trial Testimony November 2010.

DMX, Inc. (Weil, Gotshal & Manges, New York)
United States District Court, Southern District of New York, Broadcast Music, Inc. against DMX, Inc., 08 Civ. 216 (LLS), Interim Phase Declaration, August 2008; Interim Phase Deposition, September 2008; Interim Phase Reply Declaration, October 2008, Declaration, August 14, 2009, Deposition, September 14, 2009; Trial Testimony January 2010.

Teva Pharmaceuticals USA, Inc. (Brinks Hofer Gilson & Lione, Chicago)
United States District Court, Southern District of New Jersey, Merck, Sharpe and Dohme Pharmaceuticals SRL v. Teva Pharmaceuticals USA, Inc., expert Report, September 2008; Deposition December 2008, trial testimony February 2009.

Ariba, Inc. (Heller, Ehrman, San Francisco)
In the United States District Court for the District of Massachusetts, Sky Technologies, LLC v. Ariba, Inc., Written Expert Report, July 27, 2007

Finance Ministry, Government of Chile (Santiago, Chile)
Consultation on the development of innovation policy for Chile (2007)

Pro Se Testimony

Before the US House of Representatives, Committee on the Judiciary, Subcommittee on Courts, the Internet and Intellectual Property. Oversight Hearing on the Patent System, "American Innovation at Risk: The Case for Patent Reform." February 15, 2007.

A Group of Internet Webcasters and Radio Broadcasters (Weil, Gotshal & Manges, New York)

Before the Copyright Royalty Board, Library of Congress, Washington, DC; in the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings. Docket No. 2005-1 CRB DTRA. Testimony October 31, 2005; Oral Testimony June 26, 2006; Rebuttal Testimony on Behalf of Internet Webcasters and Radio Broadcasters September 29, 2006; Rebuttal Testimony on behalf of National Public Radio September 29, 2006; Oral Rebuttal Testimony, November 8, 2006.The World Bank (Washington, DC)

The World Bank (Washington, DC)

Consultant regarding project evaluation methodologies for project on financial support for commercial innovation in El Salvadore

Television Music License Committee (Weil, Gotshal & Manges, New York)

Before the American Arbitration Association, SESAC, Inc. against Television Music License Committee. Expert Report, December 2, 2005; Oral Testimony, January 25, 2006

Television Music License Committee (Weil, Gotshal & Manges, New York)

In the United States District Court, Southern District of New York, United States of America against American Society of Composers, Authors, and Publishers, In the Matter of the Application of Post-Newsweek Stations, Inc., et al., Applicants, For the Determination of Reasonable License Fees, 41 Civ. 1395 (WCC) (MHD). Expert Report March 17, 2004; Deposition May 14, 2004; Rebuttal Expert Report June 18, 2004; Deposition July 22, 2004.

Pharmaceutical Care Management Association (Steptoe & Johnson, Washington, DC)

In the United States District Court for the District of Maine, Pharmaceutical Care Management Association v. G. Steven Rowe, in his official capacity of Attorney General of the State of Maine. Declaration, September 2, 2003.

Castano Tobacco Litigation Plaintiff's Legal Committee (Murray Law Firm, New Orleans)

In the Civil District Court for the Parish of Orleans, State of Louisiana, Gloria Scott and Deania M. Jackson, et al., vs. The American Tobacco Company, Inc., et al. Expert Report, June 6, 2000; Deposition, October 18, 2000; Oral Trial Testimony, January 30, February 4-5, 2003.

Television Music License Committee (Weil, Gotshal & Manges, New York)

Before the American Arbitration Association, SESAC, Inc., against Television Music License Committee. Economic analysis of a reasonable license fee for public performance of SESAC music. Expert Report, January 11, 2002.

Phillips Transportation Alaska, Inc. (Birch, Horton, Bittner and Cherot, Anchorage)

State of Alaska, The Regulatory Commission of Alaska, In the Matter of the Application of BP Pipelines (Alaska), Inc. and Phillips Transportation Alaska, Inc., for the Transfer of 3.0845% Interest in the TAPS System. Affidavit (with Lisa J. Cameron) evaluating the competitive impact of a proposed sale of capacity on the Trans Alaska Pipeline System from BP Pipelines (Alaska), Inc., to Phillips Transportation Alaska, Inc., May 25, 2001; Supplemental Affidavit (with Lisa J. Cameron), July 10, 2001.

SFPP, L.P. (Vinson & Elkins, Houston)

United States of America before the Federal Energy Regulatory Commission, In the Matter of ARCO Products Company, et al., v. SFPP, L.P. Prepared Answering Testimony evaluating whether there has been a substantial change in the economic circumstances that were the basis for interstate rates, May 15, 2001; Reply Testimony, July 31, 2001; Oral Testimony, October 25-26, 2001; Supplemental Testimony, February 20, 2002.

A group of internet broadcasters (Weil, Gotshal & Manges, New York; Wiley, Rein & Fielding, Washington, DC)

Before the United States Copyright Office, Library of Congress, in the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings. Direct Testimony in an arbitration proceeding involving the valuation of the right of public performance of digital sound recordings and ephemeral recordings, April 11, 2001; Oral Testimony, August 27-28, 2001; Written Rebuttal Testimony, October 4, 2001; Oral Rebuttal Testimony, October 19-20, 2001.

The Burlington Northern and Santa Fe Railway Company (Steptoe & Johnson, Washington, DC)

Before the American Arbitration Association, Tucson Electric Power Company, Claimant, v. Burlington Northern and Santa Fe Railway Company, Respondent. Direct testimony in an arbitration proceeding concerning a coal transportation contract, January 26, 2001; Deposition, February 9, 2001.

Cheminova A/S (Beveridge & Diamond, Washington, DC)

Before the American Arbitration Association, In The Matter of Arbitration Between Cheminova A/S, Claimant and Griffin LLC, Respondent, Docket No. 23 171 00020 99. Direct Oral Testimony in a data compensation case concerning a pesticide, December 7, 2000; Oral Rebuttal Testimony, December 9, 2000.

Music Choice (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, Washington, DC)

In the United States District Court, Southern District of New York, United States of America against Broadcast Music, Inc., et ano., In the Matter of the Application of Music Choice, et al., Applicants, for the Determination of Reasonable License Fees. Affidavit, July 28, 2000; Expert Report, January 26, 2001; Supplemental Expert Report, March 9, 2001; Deposition, March 28, 2001; Affidavit, April 9, 2001; Oral Testimony, May 29, 2001.

Wilson-Cook Medical Incorporated (Brinks Hofer Gilson & Lione, Chicago)

In the United States District Court for the District of Massachusetts, Boston Scientific Corporation and SCIMED Life Systems, Inc., v. Wilson-Cook Medical Incorporated. Expert Report analyzing irreparable harm related to preliminary injunction in a patent infringement case, July 26, 2000; Deposition, July 27, 2000; Supplemental Expert Report, September 15, 2000.

Owens-Corning (Forman, Perry, Watkins, Krutz & Tardy, Jackson, MS)

In the Circuit Court of Jefferson County, Mississippi, Ezell Thomas, et al. (as to all defendants) and Owens-Corning (as to tobacco defendants only) versus R.J. Reynolds Tobacco Company, et al., and Amchem Products, Inc., et al. Expert Report prepared on behalf of Owens Corning in tobacco litigation, June 14, 2000; Deposition, September 13, 2000.

Ellis Simon, *et al.* (Brown, Rudnick, Freed & Gesmer, Boston)

In the United States District Court, Eastern District of New York, Ellis Simon, et al., v. Philip Morris Incorporated, et al., CV-99-1988, First Amended Class Action Complaint. Testimony on behalf of the plaintiffs in tobacco litigation; Expert Disclosure Statement, December 20, 1999; Deposition, February 28, 2000; Affidavit, April 13, 2000.

Vastar Resources, Inc.

Before the United States of America, Department of the Interior, Minerals Management Service, Further Supplementary Proposed Rule for Establishing Oil Value for Royalty Due on Federal Leases, Affidavit, January 31, 2000. *Before the United States of America, Department of the Interior, Minerals Management Service, Vastar Resources, Inc.'s Request for a Binding Value Determination on Transportation Allowances,* Affidavit April 4, 2000. Testimony on behalf of Vastar Resources, Inc., on issues related to the appropriateness and reasonableness of various methodologies that may be employed for the purpose of determining transportation allowances to be used for royalty payments from federal leases.

Pharmaceutical Research and Manufacturers of America

Prepared research report entitled "Consequences of Pharmaceutical Price Controls on Innovation" (with Catherine Moore), May 1999.

PacifiCorp (Stoel Rives, Portland, OR)

Before the Public Utility Commission of Oregon, UE 102, In the Matter of the Application of Portland General Electric Company for Approval of the Customer Choice Plan. Testimony on behalf of PacifiCorp regarding the company's eligibility to participate in an auction of generation assets, April 26, 1999.

Turner Broadcasting System, Inc., et al. (Weil, Gotshal & Manges, New York)

In the United States District Court, Southern District of New York, United States of America against American Society of Composers, Authors, and Publishers, In the Matter of the Application of Turner Broadcasting System, Inc., et al., Applicants, For the Determination of Reasonable License Fees, CIV. NO. 13-95 (WCC), Expert Report prepared on behalf of the

applicants in litigation about music licensing fees, April 16, 1999; Deposition, July 26-27, 1999; Rebuttal Expert Report, December 16, 1999; Deposition, March 3, 2000.

The American Chemical Society

Developed and evaluated a number of approaches to pricing the web editions of ACS's publications. Modeled the performance of the various pricing plans to assess their ability to protect ACS's publications revenue as web editions replace paper. (1999)

Copyright Clearance Center, Inc. (Weil, Gotshal & Manges, New York, NY)

Primary consultant on statistical and economic matters since 1985. (ongoing)

Procter & Gamble, Inc. (Torys, Toronto)

In the Matter Between Unilever PLC. and Lever Brothers Limited, Plaintiffs, and Procter & Gamble, Inc., and the Procter & Gamble Company, Defendants, Court File No. T-2534-85, Expert Report prepared on behalf of the defendants in patent dispute, January 11, 1999; Reply Report, January 29, 1999; Oral Testimony, December 6-7, 1999.

Ironworkers Local Union No. 17 Insurance Fund and its Trustees (Milberg, Weiss, Bershad, Hynes & Lerach, San Diego)

Ironworkers Local Union No. 17 Insurance Fund and its Trustees, et al., vs. Philip Morris, Inc., et al. (Ohio), Expert Report prepared on behalf of the plaintiffs in tobacco litigation, November 6, 1998; Supplemental Report, December 17, 1998; Deposition, January 11 and 21, 1999; Oral Testimony, February 23, 1999.

State of Wisconsin (Habush, Habush, Davis & Rottier, Milwaukee)

The State of Wisconsin v. Philip Morris, et al. Prepared Expert Witness Report on behalf of the plaintiffs in tobacco litigation, November 1, 1998.

Trans-Alaska Pipeline (Steptoe & Johnson, Washington, DC)

In the Matter of the Correct Calculation and Use of Acceptable Input Data to Calculate the 1997, 1998, 1999, 2000 and 2001 Tariff Rates for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System Filed by Amerada Hess Pipeline Corporation; Arco Transportation Alaska, Inc.; BP Pipelines (Alaska) Inc.; Exxon Pipeline Company; Mobil Alaska Pipeline Company; Phillips Alaska Pipeline Corporation; Unocal Pipeline Company; Phillips Transportation Alaska, Inc.; and Williams Alaska Pipeline Company, LLC, and the Protest by Tesoro Alaska Petroleum Company of the 1997 and 1999 Tariff Rates, Before the Regulatory Commission of Alaska, Docket No. P-97-4. Prepared Direct Testimony evaluating whether the TAPS Intrastate Settlement and the ratemaking methodology it established produce tariff rates that are just and reasonable, October 8, 1998; Second Prepared Direct Testimony, July 12, 2000; Prepared Rebuttal Testimony, February 26, 2001; Oral Testimony, April 10-13, 2001.

Commonwealth of Massachusetts (Brown, Rudnick, Freed & Gesmer, Boston)

The Commonwealth of Massachusetts vs. Philip Morris Incorporated, et al., Civil Action Number 95-7378. Prepared Expert Disclosure Report on behalf of the plaintiffs in tobacco litigation, June 16, 1998; Affidavit in Opposition to Defendants' Motions for Summary Judgement, October 30, 1998.

CBS (Weil, Gotshal & Manges, New York)

CBS Inc. v. American Society of Composers, Authors & Publishers, New York State Supreme Court, New York County. Prepared Expert Report regarding timing of payments under ASCAP agreements, August 11, 1997; Deposition, June 12, 1998; Addendum to Prepared Expert Report, December 1, 1998; Supplemental Deposition, January 28, 1999.

Public Broadcasting System, National Public Radio, and the Corporation for Public Broadcasting (Weil, Gotshal & Manges, New York)

Prepared testimony regarding royalties for copyrighted musical compositions, *In the Matter of the Rates for Noncommercial Educational Broadcasting Compulsory License*, *Before the Copyright Arbitration Royalty Panels*, *Docket No. 96-6, CARP NCBRA,* 1997. Written Testimony, April 1, 1998; Oral Testimony, April 1-2, 1998; Rebuttal Testimony, April 15, 1998; Oral Rebuttal Testimony, May 7, 1998.

State of Minnesota (Robins, Kaplan, Miller & Ciresi, Minneapolis)

The State of Minnesota and Blue Cross and Blue Shield of Minnesota vs. Philip Morris Incorporated, et al., Court File No. C1-94-8565. Prepared Expert Witness Report on behalf of the plaintiffs in antitrust litigation involving allegations of collusive conspiracy, May 29, 1997; Deposition, June 26-27, 1997; Oral Trial Testimony, March 18-23, 1998.

PacifiCorp (Stoel Rives, Portland, OR)

PacifiCorp, Electric Restructuring Transition Plan, Before the Montana Public Service Commission, Docket No. D97.7.91. Prepared Prefiled Rebuttal Testimony evaluating testimony regarding market power in the generation of electricity in Montana, February 24, 1998; Prefiled Surrebuttal Testimony, July 21, 1998.

PacifiCorp (Stoel Rives, Salt Lake City)

United States District Court for the District of Idaho, *Snake River Valley Electric Association v. PacifiCorp*, *Case No. CV 96-0308-E-BLW.* Testimony analyzing allegations of anticompetitive behavior and evaluating market power. Expert Witness Statement, October 17, 1997; Affidavit, February 27, 1998; Expert Report, January 22, 2002; Supplement to the Expert Report, April 8, 2002; Revised Supplement to the Expert Report, August 15, 2002; Affidavit, September 18, 2002; Oral Testimony, September 20, 2002, October 15, 2002.

Trans-Alaska Pipeline (Steptoe & Johnson, Washington, DC)

Prepared Affidavit and Rebuttal Affidavit evaluating the competitive impact of the Amended and Restated Capacity Settlement Agreement, *Exxon Pipeline Co., et al.*, *Application of TAPS*

Carriers for Approval of Amended and Restated Capacity Settlement Agreement, *Before the Federal Energy Regulatory Commission*, *Docket No. OR96-1-000, et al*. (1997)

The Burlington Northern and Santa Fe Railway Company (Steptoe & Johnson, Washington, DC)
Prepared Verified Statement regarding market power in transporting coal, *In the Matter of Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company*, *Before the Surface Transportation Board*, *STB Docket No. 41987*. (1997)

PacifiCorp (Stoel Rives, Portland, OR)
Assisted in FTC pre-merger Hart-Scott-Rodino review; prepared *Economic Analysis of Alleged Vertical Market Power Consequences of Merger of PacifiCorp and Peabody Coal*. (1997)

Subaru of New England, Inc. (Todd & Weld, Boston)
Subaru of New England, Inc., vs. Subaru of Wakefield, Inc., Civil Action No. 96-01475-A, Commonwealth of Massachusetts, Norfolk County, Superior Court Department. Prepared Affidavit regarding appropriate methodology for assessing competitive impact of dealer relocation, November 20, 1996.

Public Service Company of New Hampshire
Direct testimony before the State of New Hampshire Public Utilities Commission, Docket No. DR 96-150, Electric Industry Restructuring, with Joseph P. Kalt, October 18, 1996.

Pro Se Testimony
United States of America before the Federal Energy Regulatory Commission "Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services of Natural Gas Pipelines," Docket No. RM-96-7-000. Comments of Adam B. Jaffe and Joseph P. Kalt, May 30, 1996.

Massachusetts Technology Collaborative
Prepared a study assessing the effects of reductions in federally funded R&D on the Massachusetts economy. (1995-96)

Federal Trade Commission
Asked by Commission staff to prepare testimony for Hart-Scott-Rodino preliminary injunction hearing regarding anticompetitive impact of a proposed acquisition. (1995)

GAF Corporation, *et al*. (Hannoch Weisman, Roseland, NJ)
Joseph Rossi, et al., vs. Standard Roofing, et al., Civil Action No. 92-5377, United States District Court, District of New Jersey. Prepared Expert Witness Report on behalf of six defendants in antitrust litigation involving conspiracy and monopolization claims. (1995)

Connecticut Light and Power Company

Before the Connecticut Department of Public Utility Control, Investigation into Restructuring of the Electric Industry, *Docket No. 94-12-13*. Submitted Written and Oral Hearing Testimony. (1995)

New England X-Ray & Electronics Inc. (Kushner & Sanders, Wellesley, MA)

New England X-Ray & Electronics Inc. vs. Robert T. Kennedy, Inc., et al., Commonwealth of Massachusetts, Number 88-5532. Presented damages study and jury trial testimony regarding breach of contract. (1990-95)

Florida Gas Transmission Company

Before the Federal Energy Regulatory Commission, Docket No. RP95-103-000, Written Testimony supporting FGT's proposed flexible service offerings, inflation-indexed rate, and removal of regulatory constraints on the secondary market for pipeline capacity. (1995)

Burlington Northern Railroad Company (Steptoe & Johnson, Washington, DC)

Southwestern Electric Power Company, Plaintiff, vs. Burlington Northern Railroad Company, Defendant, in the 102nd Judicial District Court of Bowie County, Texas, No. D-102-CV-91-720. Presented Oral Trial Testimony before a state court jury regarding the pricing provisions in two long-term coal transportation agreements, in defense against a claim by the shipper of overcharges resulting from the contract rates failing to reflect the railroads' productivity improvements. (1994)

Houston Lighting & Power Company

Before the Texas Public Utilities Commission, Docket No. 12065, Written Testimony regarding appropriate regulatory policy changes dictated by emerging competition in electricity markets. (1994)

Boston Ventures Management (Boston)

Prepared a report for a venture capital firm on the adverse consequences on investment of the re-regulation of cable TV. (1994)

Kern River Gas Transmission Company (Salt Lake City)

Before the Public Service Commission of Utah, Application of Mountain Fuel Supply Company for Approval of Modifications to its Tariff to Implement a Firm Transportation Rate, Docket No. 94-057-02. Prepared Prefiled Direct and Rebuttal Testimony, as well as Oral Testimony, before the Public Service Commission of Utah regarding the appropriateness of a firm gas distribution tariff including within it costs of upstream pipeline transportation. (1994)

Burlington Northern Railroad Company (Steptoe & Johnson, Washington, DC)

In the Matter of the Arbitration between Public Service Company of Oklahoma and Burlington Northern Railroad Company. Delivered Written and Oral Testimony concerning the interpretation of the pricing and renegotiation provisions of a long-term coal transportation agreement. (1994)

Arco Pipe Line Company (Steptoe & Johnson, Washington, DC)
Prepared written *Comments in Response to Notice of Inquiry, Market-Based Ratemaking for Oil Pipelines, U.S. Federal Energy Regulatory Commission*, *Docket No. RM94-1-000.* (1994)

Kern River Gas Transmission Company (Wright and Talisman, Washington, DC)
Before the Federal Energy Regulatory Commission In the Matter of Kern River Gas Transmission Company, Docket No. RP92-226-000. Delivered Written and Oral Testimony regarding rate design for pipelines built under optional certificates. (1993)

ISK Biotech Corp. (Beveridge and Diamond, Washington, DC)
In the Matter of the Arbitration between ISK Biotech Corporation and Veterans Chemicals, Prepared Testimony regarding allocation rules and competitive impacts in an arbitration proceeding regarding data compensation under the Federal Insecticide, Fungicide and Rodenticide Act. (1993)

Geneva Steel Corp., *et al.* (Kimball, Parr, Waddoups, Brown & Gee, Salt Lake City)
Before the Utah Public Service Commission Docket No. 93-057-01, Written Testimony regarding antitrust implications of LDC treatment of pipeline charges under FERC *Order 636*, on behalf of a coalition of interruptible shippers. (1993)

Enron Gas Services Corp.
Co-authored study analyzing appropriate Public Utility Commission policy towards utility procurement of natural gas and emissions allowances in developing competitive markets. (1993)

New York Power Authority
Prepared analysis and delivered Public Hearing Testimony before the Board of Trustees regarding the economic consequences of below-market pricing for electricity. (1993)

Coalition of Non-Utility Generators
Co-authored study analyzing the effect of power from non-utility generators on electricity prices in New England. (1993)

U.S. Department of Commerce, Economics and Statistics Administration
Co-authored study analyzing the effect of U.S. environmental regulations on U.S. competitiveness. (1993)

International Energy Group
Before the Federal Energy Regulatory Commission, Docket No. PL91-1-000, Prepared Written Testimony regarding electricity transmission access policy. (June 1991)

El Paso Natural Gas Co. (Andrews & Kurth, Washington, DC)

Before the Federal Energy Regulatory Commission, Docket No. CP88-434-000, Prepared Written Testimony analyzing the extent of competition faced by El Paso as a seller of natural gas. (1989)

BOOKS AND EDITED VOLUMES

Innovation and its Discontents (with J. Lerner), Princeton University Press, 2004; issued in paperback, 2006.

Patents, Citations and Innovations: A Window on the Knowledge Economy (with M. Trajtenberg), M.I.T. Press, 2002; issued in paperback, 2005.

Innovation Policy and the Economy, (edited with J. Lerner and S. Stern), M.I.T. Press, Cambridge, Volume 1 (2001) through Volume 8 (2008)

OTHER PUBLICATIONS

"Technology Policy and Climate Change," ***Climate Change Economics***, forthcoming

"International Harmonization of IPR Protection: Lessons from the Economics Literature" (with A.G.Z. Hu), in Intellectual Property Rights and Development, J. Stiglitz, G. Dosi, J. Reichman, M. Cimoli, K. Maskus, eds, Oxford University Press, forthcoming

"Induced Innovation and Technology Trajectory: Evidence from Smoking Cessation Products" (with S. Werfel), ***Research Policy***, 2013

"Comment on "The Diffusion of Scientific Knowledge Across Time and Space: Evidence from Professional Transitions for the Superstars of Medicine," in J. Lerner and S. Stern, eds., **Rate and Direction of Inventive Activity**, University of Chicago Press, 2012

"Comment: The Economics of Technologies to Combat Global Warming," ***Energy Economics***, 33:4, 2011

"Analysis of Public Research, Industrial R&D, and Commercial Innovation: Measurement Issues Underlying the Science of Science Policy," in **The Science of Science Policy: A Handbook**, K. Fealing, J. Lane, J. Marburger and S. Shipp, eds., Stanford: Stanford Business Books, 2011

"Energy, the Environment and Technology Change" (with D. Popp and R. Newell), in B. Hall and N. Rosenberg, eds, **Handbook of The Economics of Innovation**, North-Holland, 2010

"The US Patent System: Does It Strengthen or Weaken Innovation and Progress?" (with J. Lerner), Chapter 2.2 of ***The Innovation for Development Report 2009-2010: Strengthening Innovation for the Prosperity of Nations***, Augusto López-Claros, ed, Palgrave MacMillan, 2009

"Patent Reform: No Time Like the Present," ***I/S Journal of Law and Policy for the Information Society,*** 2008

"The 'Science of Science Policy'," ***Journal of Technology Transfer***, 2008

"Double Research Funding? Be Careful," ***The Scientist***, Vol. 21 No. 7, page 31, 2007

"Academic science and entrepreneurship: Dual engines of growth?" (with J. Lerner, S. Stern and M. Thursby), ***Journal of Economic Behavior and Organization***, 2007

"Peanut Butter Patents Versus the New Economy: Does the Increased Rate of Patenting Signal More Invention or Just Lower Standards?" (with P. Sanyal). ***Annales d'Economie et de Statistique***, 2006

"The effects of economic and policy incentives on carbon mitigation technologies," (with R. Newell and R. Stavins), ***Energy Economics*** 28, no. 5-6: 563-578, 2006.

"Public Financial Support for Commercial Innovation" (with I. Goldberg, M, Trajtenberg, T. Muller, J. Sunderland and E. Armas), World Bank. 2006.

"Innovation and Its Discontents" (with J. Lerner), in ***Innovation Policy and the Economy Volume 6***, A. Jaffe, J. Lerner and S. Stern, eds., 2006; reprinted in ***Capitalism and Society*** Vol. 1 No. 3 (2006) and in **Perspectives on Commercializing Innovation**, F. Kieff and Troy Paredes, eds., Cambridge University Press (2012)

"Do Alliances Promote Knowledge Flows" (with B. Gomes-Casseres and John Hagedoorn), ***The Journal of Financial Economics,*** 2006.

"A tale of two market failures: technology and environmental policy" (with R. Newell and R. Stavins), ***Ecological Economics***, 2005; reprinted in **Intellectual Property, Innovation and the Environment**, Peter Menell and Sarah Tran, eds., Edward Elgar (2013).

"Market Value and Patent Citations: A First Look" (with B. Hall and M. Trajtenberg), ***Rand Journal of Economics***, 2005

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"Economics of Energy Conservation" (with R.G. Newell and R. N. Stavins), in Cutler Cleveland, ed., *Encyclopedia of Energy* , Elsevier, Inc. 2004.

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"International Taxation and the Location of Incentive Activity" (with J.R. Hines, Jr.), in J.R. Hines, Jr., ed., *International Taxation and Multinational Activity*, University of Chicago Press, 2001.

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"The U.S. Patent System in Transition: Policy Innovation and the Innovation Process," *Research Policy,* April 2000.

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"Environmental Regulation and Innovation: A Panel Data Study" (with K. Palmer), *Review of Economics and Statistics*, November 1997.

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"Bounding the Effects of R&D: An Investigation Using Linked Establishment and Firm Data" (with J. Adams), *Rand Journal of Economics,* winter 1996

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"The Energy-Efficiency Gap" (with R. Stavins), *Energy Policy*, 1994.

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"The Energy Paradox and the Diffusion of Conservation Technology" (with R. Stavins), *Resource and Energy Economics*, 1994.

"Energy-Efficiency Investments and Public Policy" (with R. Stavins), *The Energy Journal*, 1994.

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"The Effect of Liquidity on Firms' R&D Spending" (with K. Hao), *Economics of Innovation and New Technology*, 1993.

"Geographic Localization of Knowledge Spillovers as Evidenced by Patent Citations" (with M. Trajtenberg and R. Henderson), *Quarterly Journal of Economics*, August 1993.

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"Oversight of Regulated Utilities' Fuel Supply Contracts: Achieving Maximum Benefit from Competitive Natural Gas and Emission Allowance Markets" (with J. P. Kalt), The Economics Resource Group, funded by Enron Gas Services Corporation, April 1993.

"Achieving Maximum Benefit from Competitive Natural Gas and Emission Allowance Markets" (with J. Kalt), *Proceedings of the U.S. Department of Energy/National Association of Regulatory Utility Commissioners Conference on Natural Gas Use, State Regulation and Market Dynamics in the Post 636/Energy Policy Act Era*, March 1993.

"The Diffusion of Energy-Conserving Windows: The Effect of Economic Incentives and Building Codes" (with R. Stavins), presented at the American Economic Association annual meeting, Anaheim CA, January 1993.

"How High are the Giants' Shoulders: An Empirical Assessment of Knowledge Spillovers and Creative Destruction in a Model of Economic Growth" (with R. Caballero), in O. Blanchard and S. Fischer, eds., *National Bureau of Economic Research Macroeconomics Annual, Vol. 8*, MIT Press, 1993; reprinted in Gene M. Grossman, ed., *Economic Growth: Theory and Evidence*, Vol. II, Cheltenham, UK: Edward Elgar Publishing Limited, 1996.

Review of *Investing in the Future*, by John Irvine, *et al.*, *Journal of Economic Literature*, June, 1992.

Review of *Productivity and U.S. Economic Growth* by D. Jorgenson, *et al.*, *Business History Review*, 1991.

"Evaluating the Relative Effectiveness of Economic Incentives and Direct Regulation for Environmental Protection: Impacts on the Diffusion of Technology" (with R. Stavins), *CSIA Discussion Paper No. 91-1*, Center for Science and International Affairs, Environment and Natural Resources Program, John F. Kennedy School of Government, Harvard University, February 1991.

"Economic Evaluation of Policy Options for Global Climate Change: Some Methodological Reflections," Center for Energy and Environmental Policy, John F. Kennedy School of Government, Harvard University, August 1990.

"Market Power of Local Cable Television Franchises: Evidence from the Effects of Deregulation" (with D. Kanter), *Rand Journal of Economics*, summer 1990.

"Unintended Impacts of Public Investments on Private Decisions: The Depletion of Forested Wetlands" (with R. Stavins), *American Economic Review*, June 1990.

"Universities and Regional Patterns of Commercial Innovation," *REI Review*, Center For Regional Economic Issues, Case-Western Reserve University, 1989.

"Real Effects of Academic Research," *American Economic Review*, December 1989; reprinted in Paula E. Stephan and David B. Audretsch, eds., *The Economics of Science and Innovation*, Cheltenham, UK: Edward Elgar Publishing Limited, 2000.

"Characterizing the 'Technological Position' of Firms, with Application to Quantifying Technological Opportunity and Research Spillovers," *Research Policy*, 1987.

"Demand and Supply Influences in R&D Intensity and Productivity Growth," *Review of Economics and Statistics*, August 1988.

"Technological Opportunity and Spillovers of R&D: Evidence from Firms' Patents, Profits and Market Value," *American Economic Review*, December 1986; reprinted in Edward N. Wolff, ed., *The Economics of Productivity,* Cheltenham, UK: Edward Elgar Publishing Limited, 1997.

"Who Does R&D and Who Patents" (with J. Bound, *et al.*), in Z. Griliches, ed., *R&D, Patents and Productivity*, University of Chicago Press, 1984.

"Benefit-Cost Analysis and Multi-Objective Evaluation of Federal Water Projects," *Harvard Environmental Law Review*, 1980.

"Preventing Groundwater Pollution: Towards a Coordinated Strategy to Protect Critical Recharge Zones (with J.T.B. Tripp), *Harvard Environmental Law Review*, 1979.

OTHER PROFESSIONAL ACTIVITIES

Research Associate, 1994-present, and Faculty Research Fellow, 1985-1994, National Bureau of Economic Research

Lead Author, Fifth Assessment Report, Intergovernmental Panel on Climate Change, 2011 ongoing

Invited Participant, NIH Science of Science Management meeting, October 2008

Co-organizer, National Bureau of Economic Research Innovation Policy and the Economy Group, 1999-2007

Keynote address, NSF Workshop on Advancing Measures of Innovation: Knowledge Flows, Business Metrics and Measurement Strategies, Arlington VA, 2006

Guest Associate Editor, Management Science Special Issue: "Managing Knowledge in Organizations," 2001

Member, National Academy of Engineering Committee on the Impact of Academic Research on Industrial Performance, 1998-2001

Lead author, Third Assessment Report, Intergovernmental Panel on Climate Change, 1998-2001

Associate Editor, *Rand Journal of Economics*, 1997-2003

Member, Economics Roundtable, Advanced Technology Program, U.S. National Institute of Standards and Technology, 1995-present

Member, Board of Editors, *Journal of Industrial Economics*, 1995-2003

Member, Board of Editors, *American Economic Review*, 1995-2000

Co-organizer of the National Bureau of Economic Research Science and Technology Policy Research Workshop, 1995-1998

Project Coordinator, National Bureau of Economic Research Project on Industrial Technology and Productivity, 1994-1999

Invited Speaker, National Academy of Sciences Symposium: *Science and the Economy*, April 1994

Member, Stanford Energy Modeling Forum, Working Group on Competitive Electricity Markets (EMF 15)

Member, Economic Impact Committee, Association of University Technology Managers, 1994-1995

Contributing Author, Working Group III (socioeconomics) of the Intergovernmental Panel on Climate Change (IPCC), 1993-1994

Member, Stanford Energy Modeling Forum, Working Group on Energy Conservation (EMF 13), 1992-94

Referee/reviewer for *American Economic Review, Journal of Applied Econometrics, Econometrica, Economic Inquiry, Economic Journal, Economics of Innovation and New Technology, Journal of Economics Organization and Management, Journal of Environmental Economics and Management, Journal of Health Economics, Journal of Industrial Economics, Journal of Law and Economics, Journal of Political Economy, Quarterly Journal of Economics, Rand Journal of Economics, Research Policy, Review of Economics and Statistics*, *Science*, and MIT Press.

TEACHING EXPERIENCE

Introductory Economics (undergraduate), Microeconomic Theory (Ph.D.), Law and Economics (undergraduate), Environmental and Natural Resource Economics (undergraduate), Industrial Organization (Ph.D. and undergraduate), Government Regulation and Antitrust Policy (Ph.D. and undergraduate), R&D, Innovation and Productivity Growth (undergraduate), Applied Welfare Economics (John F. Kennedy School of Government)

Foundation for American Communications, economics education for journalists, "The Role of Government in the Economy" (1996)

Designed and implemented a two-year Policy Analysis Lecture Series for the U.S. Army Corps of Engineers, New England Division, Regulatory Branch (1988-89)

HONORS AND AWARDS

Venice Award for Intellectual Property, Honorable Mention for Innovation and Its Discontents (2007)

Alfred P. Sloan Dissertation Fellowship, Harvard, 1984-85

Alfred P. Sloan Research Fellowship, MIT, 1976-77

Phi Beta Kappa, 1976

Appendix B

APPENDIX B
List of Materials Considered
March 4, 2013

I. Cases and Court Filings

1. *ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012).
2. *Broadcast Music Inc., v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012).
3. *United States v. ASCAP (In re Applications of RealNetworks, Inc., Yahoo! Inc.)*, 627 F.3d 64 (2d Cir. 2010).
4. *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990).
5. *WPIX, Inc. v. Broadcast Music, Inc.*, 09 Civ. 10366, Opinion and Order (S.D.N.Y. Apr. 27, 2012).
6. *In re Application of THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010).
7. *Broadcast Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010).
8. *United States v. ASCAP (In re Application of Buffalo Broad. Co.)*, Civ. No. 13-95 (WCC) (MHD), 1993 WL 60687 (S.D.N.Y. Mar. 1, 1993).
9. *Buffalo Broad., Co., Inc. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984).
10. *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979).
11. *Affiliated Music Enters., Inc. v. SESAC, Inc.*, 160 F.Supp. 865 (S.D.N.Y. 1958).
12. *Affiliated Music Enters., Inc. v. SESAC, Inc.*, 268 F.2d 13 (2d Cir. 1959).
13. *Alden-Rochelle Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).
14. *Meredith Corp. et al. v. SESAC, LLC et al*., 09 Civ. 9177, Memorandum & Order Denying SESAC's Motion to Dismiss (S.D.N.Y. March 9, 2011).
15. Plaintiffs' Supplemental Objections and Responses to SESAC's First Set of Interrogatories to Plaintiffs, *Meredith Corp. et al. v. SESAC, LLC et al*., 09 Civ. 9177 (S.D.N.Y. Feb. 1, 2013).
16. SESAC's Ltr. to Hon. P. Engelmayer Requesting a Pre-Motion Conference re: Summary Judgment, *Meredith Corp. et al. v. SESAC, LLC et al.*, 09 Civ. 9177 (Mar. 1, 2013).
17. Complaint, *Meredith Corp. et al. v. SESAC, LLC et al*., No. 09 Civ. 9177 (S.D.N.Y. Nov. 4, 2009).
18. Reply Brief in Support of the Defendants' Motion to Dismiss the Complaint, *Radio Music License Committee, Inc. v. SESAC, Inc. et al.*, No. 12 Civ. 15807 (E.D. Pa. Mar. 1, 2013).
19. Plaintiff Radio Music License Committee's Opposition to Defendants'

Motion to Dismiss, *Radio Music License Committee, Inc. v. SESAC, Inc. et al.*, No. 12 Civ. 05807 (E.D. Pa. Feb. 8, 2013).

20. Defendants' Motion to Dismiss the Complaint, *Radio Music License Committee, Inc. v. SESAC, Inc. et al.*, No. 12 Civ. 05807 (E.D. Pa. Dec. 17, 2012).
21. Television Music License Committee Post-Arbitration Brief, *SESAC, Inc. v. TMLC Arbitration*, (Feb. 28, 2006).
22. SESAC's Post-Trial Brief, *SESAC, Inc. v. TMLC Arbitration*, (February 28, 2006).

II. Consent Decrees

1. *United States v. ASCAP*, 1940-43 Trade Cas. (CCH) ¶ 56,104 § II(1) (S.D.N.Y. 1941), *amended, United States v. ASCAP.,* 2001-2 Trade Cas. (CCH) ¶ 73, 474 (S.D.N.Y. 2001) ("ASCAP Consent Decree").
2. *United States v. Broadcast Music, Inc.,* 1966 Trade Cas. (CCH) ¶ 71,941(S.D.N.Y. Dec. 29, 1966), *amended, United States v. Broadcast Music, Inc.,* 1996-1 Trade Cas. ¶ 71, 378 (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree").

III. Academic Publications

1. Ariel Katz, The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performance Rights The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights, 1 J. Competition L. & Econ. 541 (2005).
2. Bernheim, Douglas; Whinston, Michael, Common Marketing Agency as a Device for Facilitating Collusion, Vol. 15, No. 2 Rand J. of Econ (Summer 1985).

IV. Depositions

1. Deposition of Michael Eck, July 25, 2012
2. Deposition of Hunter Williams, July 25, 2012
3. Deposition of Dennis Lord, July 27, 2012
4. Deposition of Pat Collins, July 31, 2012
5. Deposition of Sherah Carney, September 21, 2012
6. Deposition of Steven Counce, October 3, 2012
7. Deposition of Katie Alphonso, October 11, 2012
8. Deposition of Maxine Edwards, October 16, 2012
9. Deposition of Bill Lee, October 23, 2012
10. Deposition of Rich Adams, November 6, 2012
11. Deposition of Doug Lowe, November 14, 2012

12. Deposition of Robbin Holliday, November 16, 2012
13. Deposition of Hunter Williams, November 27, 2012
14. Deposition of Robert Apfel, November 30, 2012
15. Deposition of Jason Walker, December 6, 2012
16. Deposition of Dennis Lord, December 14, 2012
17. Deposition of Pat Collins, December 18, 2012
18. Deposition of Mike Tolleson, January 15, 2013
19. Deposition of Stephen Arnold, January 16, 2013
20. Deposition of William Slantz, January 17, 2013
21. Deposition of Ira Smith, January 24, 2013
22. Deposition of Stephen Swid, February 7, 2013
23. Deposition of Dan Reynolds, February 14, 2013

V. Other Documents

1. All materials cited in body of the Report.
2. TMLC Music Use Surveys
3. Tribune Media Services Programming Data
4. MRI Cue Sheet Data
5. Texas Association of Broadcasters, TMLC Announces Reduced Performing Rights Fees (Feb. 13, 2012), available at https://www.tab.org/news-and-events/news/tmlc-update.
6. TMLC, Settlement with ASCAP for 2010-2016 (June 7, 2012), available at: http://www.televisionmusic.com/Joomla_1.5.15/images/stories/ASCAP_Settlement_Details_June_7_2012.pdf.
7. ASCAP 2004 Local Television Station License
8. ASCAP, ASCAP Payment System, available at: http://www.ascap.com/members/payment/royalties.aspx.
9. ASCAP, ASCAP Television Licensing, available at http://www.ascap.com/licensing/tv.
10. ASCAP, 2011 Annual Report, available at http://www.ascap.com/about/~/media/Files/Pdf/about/annual-reports/annual_2011.pdf.
11. BMI, U.S. Television Royalties, available at: http://www.bmi.com/creators/Royalty/us_television_royalties/detail.
12. SESAC, Our History, available at: sesac.com/About/History.aspx.
13. 2010 DOJ Merger Guidelines § 4.1.1 available at

www.justice.gov/atr/public/guidelines/hmg-2010.html.

14. The following documents listed by Bates number:

ANALYSIS0000057	DIGITAL0008864	MRI00000104
ANALYSIS0000060	DIGITAL0009712	MRI00003272
ANALYSIS0001214	DIGITAL0013420	MRI00003367
ANALYSIS0001772	GAN00000262	MRI00003555
ANALYSIS0001926	HOAK00000531	MRI00003586
ANALYSIS0001941	HOAK00001217	MRI00003828
ANALYSIS0002633	HOAK00029806	MRI00007644
ANALYSIS0002672	HOAK00038799	MRI00008150
ANALYSIS0002813	HOAK00098209	MRI00010727
ANALYSIS0003007	MASSARSKY0004429	MRI00010729
ARS_001_00000003	MERE00001326	MRI00015357
DIGITAL0001395	MERE00007618	MRI00015358
DIGITAL0001518	MERE00019680	MRI00015359
DIGITAL0001525	MERE00021612	MRI00015361
DIGITAL0001531	MERE00041787	MRI00015385
DIGITAL0001828	MERE00044682	MRI00015390
DIGITAL0001830	MERE00045802	MRI00015398
DIGITAL0002913	MERE00045958	MRI00015404
DIGITAL0003049	MERE00045959	MRI00015411
DIGITAL0003051	MERE00046474	MRI00015417
DIGITAL0004563	MERE00051535	MRI00015419
DIGITAL0004740	MERE00072983	MRI00015423
DIGITAL0004984	MERE00085710	MRI00015424
DIGITAL0006471	MERE00085711	MRI00015432
DIGITAL0008839	MRI00000014	MRI00015434
DIGITAL0008843	MRI00000071	MRI00015437

MRI00015439	SCRIP00011146	SESAC-0289679
MRI00015634	SCRIP00015222	SESAC-0289752
MRI00029209	SCRIP00015433	SESAC-0290100
OZ 00000000121	SCRIP00015522	SESAC-0291542
OZ 00000048165	SCRIP00015548	SESAC-0291587
OZ 00000115194	SCRIP00015639	SESAC-0292308
SAM0119	SCRIP00016804	SESAC-0294807
SAM0241	SCRIP00022775	SESAC-0294885
SAM0291	SCRIP00023679	SESAC-0294984
SAM0409	SCRIP00038799	SESAC-0299413
SAM0432	SESAC-0257687	SESAC-0300804
SAM0498	SESAC-0261683	SESAC-0300823
SAM0704	SESAC-0270714	SESAC-0302688
SAM0786	SESAC-0270724	SESAC-0303524
SAM0819	SESAC-0271370	SESAC-0303590
SAM0830	SESAC-0271378	SESAC-0320969
SAM0843	SESAC-0271413	SESAC-0324250
SAM0856	SESAC-0271797	SESAC-0350643
SAM0870	SESAC-0274931	SESAC-0350801
SAM1191	SESAC-0274947	SESAC-0350802
SCRIP00000238	SESAC-0278696	SESAC-0351909
SCRIP00000323	SESAC-0278700	SESAC-0351910
SCRIP00000419	SESAC-0279696	SESAC-0351912
SCRIP00002066	SESAC-0282137	SESAC-0354953
SCRIP00002140	SESAC-0287856	SESAC-0362300
SCRIP00004477	SESAC-0287862	SESAC-0365110
SCRIP00004610	SESAC-0287870	SESAC-0373761
SCRIP00009390	SESAC-0287872	SESAC-0375077
SCRIP00011142	SESAC-0287876	SESAC-0375168

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

SESAC-0375170	SESAC-0572878	SESAC-0573327
SESAC-0375172	SESAC-0572892	SESAC-0573405
SESAC-0375296	SESAC-0572904	SESAC-0573419
SESAC-0413601	SESAC-0572917	SESAC-0573433
SESAC-0413604	SESAC-0572931	SESAC-0573447
SESAC-0451366	SESAC-0572946	SESAC-0573460
SESAC-0451628	SESAC-0572959	SESAC-0573474
SESAC-0456195	SESAC-0572972	SESAC-0573487
SESAC-0456263	SESAC-0572986	SESAC-0573502
SESAC-0456633	SESAC-0573000	SESAC-0573517
SESAC-0456842	SESAC-0573014	SESAC-0573531
SESAC-0459294	SESAC-0573048	SESAC-0573545
SESAC-0459540	SESAC-0573062	SESAC-0573559
SESAC-0463613	SESAC-0573076	SESAC-0573573
SESAC-0478571	SESAC-0573090	SESAC-0573587
SESAC-0483313	SESAC-0573104	SESAC-0573601
SESAC-0483314	SESAC-0573118	SESAC-0573615
SESAC-0571071	SESAC-0573132	SESAC-0573629
SESAC-0571389	SESAC-0573178	SESAC-0573677
SESAC-0571828	SESAC-0573192	SESAC-0573689
SESAC-0572535	SESAC-0573205	SESAC-0573703
SESAC-0572776	SESAC-0573219	SESAC-0573717
SESAC-0572789	SESAC-0573232	SESAC-0573731
SESAC-0572802	SESAC-0573246	SESAC-0573745
SESAC-0572814	SESAC-0573260	SESAC-0573759
SESAC-0572826	SESAC-0573273	SESAC-0573773
SESAC-0572839	SESAC-0573286	SESAC-0573787
SESAC-0572852	SESAC-0573300	SESAC-0573800
SESAC-0572865	SESAC-0573314	SESAC-0573813

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

SESAC-0573827	SESAC-0574413	SESAC-0575052
SESAC-0573840	SESAC-0574446	SESAC-0575067
SESAC-0573853	SESAC-0574480	SESAC-0575079
SESAC-0573867	SESAC-0574526	SESAC-0575120
SESAC-0573881	SESAC-0574556	SESAC-0575133
SESAC-0573895	SESAC-0574569	SESAC-0575146
SESAC-0573989	SESAC-0574585	SESAC-0575159
SESAC-0574003	SESAC-0574602	SESAC-0575204
SESAC-0574048	SESAC-0574618	SESAC-0575249
SESAC-0574063	SESAC-0574634	SESAC-0575261
SESAC-0574078	SESAC-0574648	SESAC-0575278
SESAC-0574093	SESAC-0574660	SESAC-0575292
SESAC-0574107	SESAC-0574717	SESAC-0575307
SESAC-0574122	SESAC-0574742	SESAC-0575354
SESAC-0574137	SESAC-0574786	SESAC-0575398
SESAC-0574149	SESAC-0574800	SESAC-0575411
SESAC-0574163	SESAC-0574813	SESAC-0575424
SESAC-0574176	SESAC-0574827	SESAC-0575437
SESAC-0574201	SESAC-0574841	SESAC-0575452
SESAC-0574215	SESAC-0574855	SESAC-0575465
SESAC-0574229	SESAC-0574868	SESAC-0575478
SESAC-0574243	SESAC-0574883	SESAC-0575492
SESAC-0574281	SESAC-0574896	SESAC-0575507
SESAC-0574320	SESAC-0574911	SESAC-0575521
SESAC-0574333	SESAC-0574924	SESAC-0575535
SESAC-0574346	SESAC-0574937	SESAC-0575548
SESAC-0574359	SESAC-0574950	SESAC-0575561
SESAC-0574372	SESAC-0574979	SESAC-0575575
SESAC-0574388	SESAC-0574991	SESAC-0575589

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

SESAC-0575602	SESAC-0576211	SESAC-0576822
SESAC-0575614	SESAC-0576223	SESAC-0576838
SESAC-0575626	SESAC-0576237	SESAC-0576854
SESAC-0575640	SESAC-0576250	SESAC-0576870
SESAC-0575653	SESAC-0576263	SESAC-0576896
SESAC-0575666	SESAC-0576277	SESAC-0576908
SESAC-0575697	SESAC-0576291	SESAC-0577008
SESAC-0575711	SESAC-0576303	SESAC-0577053
SESAC-0575726	SESAC-0576328	SESAC-0577077
SESAC-0575739	SESAC-0576354	SESAC-0577102
SESAC-0575752	SESAC-0576382	SESAC-0577115
SESAC-0575767	SESAC-0576397	SESAC-0577142
SESAC-0575779	SESAC-0576410	SESAC-0577152
SESAC-0575826	SESAC-0576436	SESAC-0577196
SESAC-0575837	SESAC-0576475	SESAC-0577235
SESAC-0575850	SESAC-0576502	SESAC-0577262
SESAC-0575864	SESAC-0576537	SESAC-0577277
SESAC-0575876	SESAC-0576553	SESAC-0577317
SESAC-0575889	SESAC-0576569	SESAC-0577352
SESAC-0575912	SESAC-0576583	SESAC-0577376
SESAC-0575942	SESAC-0576598	SESAC-0577396
SESAC-0575956	SESAC-0576626	SESAC-0577415
SESAC-0575970	SESAC-0576638	SESAC-0577434
SESAC-0575982	SESAC-0576655	SESAC-0577453
SESAC-0575996	SESAC-0576758	SESAC-0577465
SESAC-0576037	SESAC-0576771	SESAC-0577476
SESAC-0576050	SESAC-0576782	SESAC-0577546
SESAC-0576157	SESAC-0576796	SESAC-0577558
SESAC-0576199	SESAC-0576809	SESAC-0577573

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

SESAC-0577585	SESAC-0578411	SESAC-0579049
SESAC-0577598	SESAC-0578445	SESAC-0579096
SESAC-0577608	SESAC-0578491	SESAC-0579146
SESAC-0577636	SESAC-0578540	SESAC-0579176
SESAC-0577686	SESAC-0578552	SESAC-0579200
SESAC-0577734	SESAC-0578565	SESAC-0579213
SESAC-0577747	SESAC-0578576	SESAC-0579226
SESAC-0577787	SESAC-0578587	SESAC-0579239
SESAC-0577812	SESAC-0578598	SESAC-0579253
SESAC-0577835	SESAC-0578629	SESAC-0579295
SESAC-0577859	SESAC-0578643	SESAC-0579306
SESAC-0577885	SESAC-0578670	SESAC-0579318
SESAC-0577912	SESAC-0578697	SESAC-0579347
SESAC-0577924	SESAC-0578710	SESAC-0579359
SESAC-0577949	SESAC-0578722	SESAC-0579370
SESAC-0577961	SESAC-0578734	SESAC-0579381
SESAC-0577973	SESAC-0578746	SESAC-0579393
SESAC-0577985	SESAC-0578776	SESAC-0579429
SESAC-0578009	SESAC-0578791	SESAC-0579442
SESAC-0578063	SESAC-0578804	SESAC-0579478
SESAC-0578120	SESAC-0578850	SESAC-0579491
SESAC-0578156	SESAC-0578862	SESAC-0579503
SESAC-0578220	SESAC-0578873	SESAC-0579516
SESAC-0578232	SESAC-0578884	SESAC-0579542
SESAC-0578258	SESAC-0578906	SESAC-0579554
SESAC-0578269	SESAC-0578916	SESAC-0579565
SESAC-0578281	SESAC-0578929	SESAC-0579603
SESAC-0578293	SESAC-0578941	SESAC-0579628
SESAC-0578339	SESAC-0578968	SESAC-0579640

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

SESAC-0579651	SESAC-0580528	SESAC-0582363
SESAC-0579686	SESAC-0580544	SESAC-0582385
SESAC-0579722	SESAC-0580576	SESAC-0582460
SESAC-0579758	SESAC-0580634	SESAC-0582472
SESAC-0579793	SESAC-0580647	SESAC-0582490
SESAC-0579819	SESAC-0580727	SESAC-0582502
SESAC-0579936	SESAC-0580737	SESAC-0582517
SESAC-0579950	SESAC-0580777	SESAC-0582529
SESAC-0579993	SESAC-0580877	SESAC-0582541
SESAC-0580008	SESAC-0580946	SESAC-0582557
SESAC-0580023	SESAC-0581016	SESAC-0582756
SESAC-0580039	SESAC-0581086	SESAC-0582784
SESAC-0580050	SESAC-0581155	SESAC-0582838
SESAC-0580064	SESAC-0581224	SESAC-0588017
SESAC-0580081	SESAC-0581294	SESAC-0588736
SESAC-0580092	SESAC-0581363	SESAC-0588749
SESAC-0580103	SESAC-0581432	SESAC-0588815
SESAC-0580115	SESAC-0581502	SESAC-0588913
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SESAC-0580180	SESAC-0581640	SESAC-0588974
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SESAC-0580233	SESAC-0581848	SESAC-0589082
SESAC-0580274	SESAC-0581917	SESAC-0589151
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SESAC-0580393	SESAC-0582186	SESAC-0589196
SESAC-0580441	SESAC-0582200	SESAC-0589242
SESAC-0580453	SESAC-0582228	SESAC-0589355
SESAC-0580482	SESAC-0582334	SESAC-0589370

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER

SESAC-0589383	SESAC-0595972	SESAC-0599657
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SESAC-0589421	SESAC-0596082	SESAC-0599767
SESAC-0589447	SESAC-0596137	SESAC-0599822
SESAC-0589474	SESAC-0596192	SESAC-0600006
SESAC-0589487	SESAC-0596202	SESAC-0600047
SESAC-0589501	SESAC-0596234	SESAC-0600090
SESAC-0589551	SESAC-0596309	SESAC-0600105
SESAC-0589773	SESAC-0596828	SESAC-0600118
SESAC-0589816	SESAC-0598530	SESAC-0600140
SESAC-0589998	SESAC-0598560	SESAC-0603910
SESAC-0590037	SESAC-0598570	SESAC-0603927
SESAC-0590052	SESAC-0598580	SESAC-0603958
SESAC-0590065	SESAC-0598623	SESAC-0603974
SESAC-0590078	SESAC-0598635	SESAC-0603984
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SESAC-0595332	SESAC-0598663	SESAC-0604004
SESAC-0595476	SESAC-0598810	SESAC-0604014
SESAC-0595490	SESAC-0599140	SESAC-0604024
SESAC-0595506	SESAC-0599155	SESAC-0604034
SESAC-0595524	SESAC-0599189	SESAC-0604142
SESAC-0595539	SESAC-0599217	SESAC-0604173
SESAC-0595588	SESAC-0599272	SESAC-0604204
SESAC-0595643	SESAC-0599327	SESAC-0604232
SESAC-0595697	SESAC-0599381	SESAC-0604245
SESAC-0595752	SESAC-0599437	SESAC-0604272
SESAC-0595807	SESAC-0599492	SESAC-0604315
SESAC-0595862	SESAC-0599547	SESAC-0604382
SESAC-0595917	SESAC-0599602	SESAC-0604425

SESAC-0604472	SESAC-0674419	SESAC-0925668
SESAC-0604762	SESAC-0675054	SESAC-0925920
SESAC-0604762	SESAC-0676806	SESAC-0925921
SESAC-0604774	SESAC-0677598	SESAC-0925995
SESAC-0604813	SESAC-0678455	SESAC-0956092
SESAC-0604857	SESAC-0678456	SESAC-0956305
SESAC-0604870	SESAC-0679848	SESAC-0971553
SESAC-0604881	SESAC-0679849	SESAC-0983709
SESAC-0604894	SESAC-0732405	SESAC-0983710
SESAC-0607362	SESAC-0742731	SLANTZ-00041
SESAC-0617679	SESAC-0771434	SLANTZ-00110
SESAC-0618300	SESAC-0795266	SLANTZ-00201
SESAC-0618489	SESAC-0858562	TMLC00000215
SESAC-0618594	SESAC-0880955	TMLC00000348
SESAC-0618698	SESAC-0880960	TMLC00000600
SESAC-0618929	SESAC-0880974	TMLC00014520
SESAC-0620997	SESAC-0880988	TMLC00014521
SESAC-0621039	SESAC-0880988	TMLC00014677
SESAC-0622120	SESAC-0881001	TMLC00063247
SESAC-0634069	SESAC-0881014	TMLC00129469
SESAC-0653189	SESAC-0885462	TMLC00130182
SESAC-0653214	SESAC-0888757	TMLC00139812
SESAC-0661213	SESAC-0912944	TMLC00140637
SESAC-0661157	SESAC-0924032	TMLC00146353
SESAC-0661817	SESAC-0924036	TMLC00146666
SESAC-0661818	SESAC-0924058	TMLC00146866
SESAC-0661819	SESAC-0924064	TMLC00153679
SESAC-0661820	SESAC-0924453	WEIL00008025
SESAC-0667425	SESAC-0954965	WEIL00008029

Appendix C

APPENDIX C
Glossary of Commonly Used Terms

1. "Adjustable-fee blanket license" or "AFBL" means a license from a PRO that authorizes a user to perform any music in that PRO's repertory, the fee structure for which provides credits for individual performances of compositions from that PRO's repertory that are licensed via either a source- or direct-license.

2. "Affiliate" or "member" means any copyright owner, composer, writer or publisher of music that has entered into an agreement with a PRO that enables the PRO to license the right to publicly perform the copyright-owner's, composer's, writer's or publisher's non-dramatic musical compositions.

3. "ASCAP" means the American Society of Composers, Authors and Publishers.

4. "Blanket license" means a license from a PRO that authorizes a local television station to perform any music in that PRO's repertory, the fee for which does not vary depending on the extent to which the music user in fact performs music from that PRO's repertory.

5. "BMI" means Broadcast Music, Inc.

6. "Direct license" means a license obtained from rights holders, such as composers who write music for local television programming, that conveys the necessary performance rights directly to users.

7. "Local television station" or "user" means any commercial television station licensed by the Federal Communications Commission to broadcast a television signal (whether digital or analog).

8. "Performing rights organization" or "PRO" means an association or corporation, such as ASCAP, BMI, or SESAC, that collectively licenses rights of public performance on behalf of numerous copyright owners.

9. "Per-program license" means a license from a PRO that authorizes a local television station to perform any music in that PRO's repertory, the fee for which varies depending upon which programs contain that PRO's music that are not otherwise licensed either via a direct- or source-license.

10. "Programming" means television programs, whether produced by local stations, broadcast networks, or by third parties, including, but not limited to, the programs themselves, logos, promotions, commercials, etc.

11. "Repertory" means those copyrighted musical compositions the right of public performance of which a given PRO has the right to license.

12. "Source license" means a license to perform the music contained in television programming obtained at the source of the programming from program producers or distributors who have acquired the right to convey public performance rights to the music in the programming to local television stations or other end users.

13. "SESAC" means the SESAC, LLC, including its predecessors.

14. "TMLC" or the "Television Music License Committee" means the limited liability company that represents approximately 1,200 local commercial television stations in connection with music performance rights dealings with certain PROs.

Appendix D

APPENDIX D
Illustration of the Per-Program Formula[1]

I. Overview of the Per Program License

Suppose that the typical station, prior to any efforts to clear its programming of ASCAP music, has one or more instances of ASCAP music in 80% of its programs. To illustrate the relationship between the per-program license fee and the blanket license fee, imagine a hypothetical station that has just ten programs. Per our supposition, it would then have eight programs with some amount of ASCAP music and two programs with no ASCAP music.[2] If this hypothetical typical station were to switch from the blanket license to the per-program license, it would not have to pay any fee for two of its programs. Thus, if the per-program license were priced equally to the blanket license (ignoring for the moment the administrative cost surcharge), then the station would save money without having done anything to reduce its need for ASCAP permissions. The per-program formula is designed to prevent this windfall savings from occurring.

Suppose further that the blanket license fee for this station is $117.65. This blanket license provides to the station permission to perform all of the music in the

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[1] The per-program license in use today by ASCAP (and BMI) is the result of the original formula adopted in the *Buffalo Broadcasting* rate proceeding decision, subsequent negotiations between the parties, and a subsequent modification to the ASCAP consent decree. I will discuss the formula as it exists today, and abstract from the miscellaneous changes that have occurred over time.

[2] ASCAP's share of music plays on local television is slightly less than 50%. But because the typical program has multiple music plays, the fraction of programs that contain *one or more* ASCAP plays is higher; most likely in the range of 70% to 80%. To see how this works, consider that the 8 programs that we have assumed contain *some* ASCAP music will typically also contain BMI music and may have some SESAC music, while the 2 programs that have no ASCAP music contain only BMI and SESAC music (or no music at all). Hence, if 80% of programs have some ASCAP music, the fraction of all plays that belong to ASCAP will be considerably lower than 80%. For SESAC, whose share of music plays is much lower, the fraction of programs containing one or more SESAC plays is lower, but still higher than its share of music plays. The specifics for SESAC are discussed in the main Report text.

licensing PRO repertory in its programs, as well as all of its incidental and ambient music affiliated with the licensing PRO. The current ASCAP and BMI per-program license formulas call for an incidental and ambient use fee that is set at 15% of the value of the blanket license. Stated differently, 15% of the blanket license fee corresponds to the permission for performance of incidental and ambient music. This means that 85% of the blanket license fee corresponds to the fee for music other than the incidental and ambient music. In our example, this base program fee would therefore be .85 X $117.65= $100.[3] If we were to think of this $100 on a per-program basis, you might think of it as $10.00 for each of the ten programs.[4] But that is not really right, because two of the ten programs do not have ASCAP music. In reality, the $100 is paying for only eight programs, so it corresponds to $12.50 per program. Another way of saying this is that in order to determine the per-program base fee, we take the blanket fee, remove the incidental and ambient use portion, and then apply a "multiplier" equal to 1.25 in this example.[5] The number 1.25 is equal to the mathematical reciprocal of the fraction of the programs containing ASCAP music. (80%=.8=8/10; the reciprocal is therefore 10/8 which equals 5/4 which equals 1.25.) The current ASCAP and BMI per-program multipliers are increased to account for the costs incurred in administering the per-program license.

To express this in an equation (now including the add-on for administrative costs):

[3] The remaining $17.65 is the charge for incidental and ambient music; 17.65=15% of 117.65.
[4] In reality, the fee is not divided equally among the programs, but in proportion to the revenue each program generates for the station. I ignore this complication for now, and return to it below.
[5] I.e., 100 X 1.25 = 125. 125/10 = 12.50, so the per-program fee is $12.50 for each program that contains ASCAP music.

Per-program fee = (Blanket fee) X (.15) +
(Blanket fee) X .85 X (multiplier + admin fee add on) X (fraction of programs that contain ASCAP music)

Note first how this works for a station that ends up, at the end of the day, with its fraction of programs that contain ASCAP music equal to that of the typical station before any efforts to clear music (80% in our example). Since the multiplier is, by construction, the reciprocal of this number, their product is one. This means that the per-program fee is equal to .85X(blanket fee) + .15X(blanket fee) + administrative fee (which equals the blanket fee + the administrative fee). This station would pay exactly what they would pay under the blanket license, plus the administrative fee. This is the outcome we desire.

Consider next a station that managed to clear ASCAP music from every one of its programs.[6] Its fraction of programs containing ASCAP music would therefore be zero, and its per-program fee would be 15% of the blanket fee. Its clearing of ASCAP music from its *programming* is assumed to have no impact on the amount of ASCAP incidental and ambient music it is still performing (in commercials, and in non-musical public events). In effect, it is purchasing a license only for its incidental and ambient uses.

Finally, consider the actual case of a station that secures licenses directly from the composers for its locally-produced programming, and/or secures source licenses from the producers of one or more of its syndicated programs. Such a station will have a share of programs containing ASCAP music that is less than the "typical" share that was used to calculate the multiplier. Suppose, for example, that with a multiplier of 1.25, a station achieves a situation where only 48% of its programs contain ASCAP music. 48%

[6] This never occurs; I consider this case only to illustrate how the formula works.

of 1.25 is .6, so its per-program fee would be equal to (.6 +.15 + administrative fee) = 75% + the administrative fee. This station would save 25% off the blanket fee (less the administrative fee) by virtue of acquiring the rights to some of its performances of ASCAP repertory music directly from the rights-holders rather than through ASCAP.

There are three distinct reasons why the savings are less than 25% despite the fact that 52% of its programs contain no ASCAP music. First, the entire structure recognizes that for the typical station, some programs are ASCAP-music-free more or less by accident; the multiplier prevents stations from benefitting from this "free" situation. Second, all stations are presumed to need permission for their incidental and ambient performances, and these performances are assumed to be unaffected by the acquisition of rights to the music in the programs. This means that the overall reduction in ASCAP music, when these are included, is less than the reduction in music in the programs. Finally, the per-program formula contains an explicit add-on for administrative costs. Essentially, stations only start to save through the per-program license after the reduction in their music use overcomes this additional cost.

II. Additional Per Program License Considerations

This simple example captures the economic essence of the per-program formula, but it does ignore two important details.

a. Program Revenue

The formula in reality is based not on the fraction of programs that contain ASCAP music, but on the fraction of program *revenue* associated with programs that contain ASCAP music. In other words, in adding up how many programs must be paid for under the formula, programs are weighted by the revenue they bring to the station.

This means, for example, that infomercials have relatively little weight in determining the per-program fee, because they bring the stations relatively little revenue. Conversely, highly rated programs will receive relatively large weight because they typically earn greater revenue. Revenue weighting does not change the fundamental operation of the per-program license, but it does have an effect in terms of the ease or difficulty for any given station to derive savings from switching to the per-program license.

b. Treatment of Unidentified Music

The formula must also deal with the reality that the identity of some music in some programs may be unknown to both the station and the PRO. In considering how this should be treated, two economic realities have to be considered. First, we must remember that under the formula, a program "counts" as a program that must be paid for if it contains any identified music belonging to the licensing PRO that is not subject to a source or direct license. Thus a program that contains four known ASCAP songs and one unidentified song must be paid for in an ASCAP per-program license; the presence of the unidentified song does not reduce the payment to ASCAP at all. Conversely, if a station has cleared the four ASCAP songs in a program, but there remains one unidentified song, how that one song is treated will determine how the whole program is treated.

Second, in practice the stations prepare per-program reports that are reviewed by the PRO before a final determination is made on the payment due. This means that if a song is unidentifiable to the station or its per-program service, but is identifiable by the PRO, it will be identified. Each PRO has a specific incentive to identify its own music. Its copyright owners undertake efforts to make sure that their titles are known to the PRO, because their share of royalty distributions typically depend

on their music being identified. The PROs also invest their own resources in tracking their music.[7]

Given the PROs incentive and practice regarding identifying their own music, a piece of music that is unidentifiable by a given PRO is much less likely to belong to that PRO than is a random musical selection. Similarly, for a program that contains no identifiable cues from a given PRO, but does contain one or more cues that the PRO cannot identify, the likelihood that the program contains any music from that PRO is much lower than the overall or average probability that a program contains music from that PRO. That is, if 80% of programs on local television contain ASCAP music, then the probability that a program contains ASCAP music if we know that it contains no identified ASCAP cues, but does contain one or more cues that ASCAP cannot identify is, in fact, ASCAP music is much lower than 80%.

In principle, one could try to estimate the bias that is inherent in the titles that are identified and unidentified, and construct a formula for handling unidentified cues, which would depend on the overall fraction of music of the PRO, the estimated bias in their identifications, and the number of unidentified cues in each program.[8] But the formula would be complicated. Instead, the per-program license as initially constructed for ASCAP and then adapted for the other PROs simply applies some fraction, so that a program that contains no identified cues of a given PRO, but does contain one or more unidentified cues, counts as some fraction of a program. Lacking data on the precise magnitude of the bias in the PRO's identification efforts, it is not possible to derive the

[7] *See, e.g.*, http://www.ascap.com/members/payment/identifying.aspx ("ASCAP is committed to a high standard of accuracy in identifying performances and has developed many technological innovations that have set international standards.").
[8] The likelihood that the program contains *at least one* cue that is appropriately attributed to a given PRO increases as the number of unidentified cues in the program increases.

correct value for this fraction. The only quantitative conclusion that can be drawn is that it should be significantly less than the average fraction of programs containing PRO music that is the basis for the calculation of the multiplier.

To see this point, consider again our simple example, in which the typical station has 80% of its programs containing some ASCAP music, so the per program multiplier is 1.25. Now consider again our station with ten programs, and assume for illustration that *none* of these programs contains a single identifiable ASCAP cue, but every one of them contains at least one cue that ASCAP cannot identify. Given that ASCAP works hard to identify its own music, and no identified ASCAP music is being performed, it would be reasonable to expect that most or all of these programs are, in fact, free of ASCAP music. But if the fraction that is applied to programs that contain no ASCAP music but do contain unidentified music were set at 80%, then this station would enjoy no per program savings.[9] For it to get the benefit of some measure of savings – which it certainly should, given that it has cleared itself of all identified ASCAP cues, the fraction applied to these programs with unidentified cues has to be significantly less than 80%.[10]

A particularly bizarre and unfair outcome would be generated if this fraction were set a level *above* the fraction that is the basis of the multiplier. Such a formula has no basis in the inherent economic logic of the per program license. It produces the result that stations with a significant number of unidentified programs

[9] All of its programs would count as ASCAP programs, but with a weight of .8. This would be mathematically equivalent to the situation where 20% of its programs had no ASCAP music and 80% had identified ASCAP music. This is the standing of the "typical" station for which the multiplier makes the per-program fee equal to the blanket fee plus the administrative fee.

[10] For this illustration, I have again ignored the revenue weighting of programs in the per-program formula. Including revenue weighting would complicate the example but not affect its point.

would have per-program fees above their blanket fees, even if they have an otherwise typical programming mix. Unless one fails to understand the per-program license, the only reason one would propose such a formula would be because of an explicit intent to ensure that the per-program license is not economically viable. As discussed in Section V.D of the main Report, that is precisely what SESAC did in 2007, which made the per-program license offered by SESAC to local television stations not economically viable since 2008.

Appendix E

APPENDIX E
SESAC's Restrictive Agreements with Affiliates

Affiliate	Selected Programming	Period Ending 3/31/2008	Period Ending 3/31/2009	Period Ending 3/31/2010	Period Ending 3/31/2011
Stephen Arnold	Locally Produced News Programs	[redacted]	[redacted]	[redacted]	[redacted]
Jeff Beal	Ugly Betty, In Plain Sight, Monk, GCB, Medium	[redacted]	[redacted]	[redacted]	[redacted]
Danny Lux	Boston Legal, Grey's Anatomy, Ally McBeal, The Good Wife, The Bachelor	[redacted]	[redacted]	[redacted]	[redacted]
Jonathan Wolff	According to Jim, Seinfeld, Will & Grace, Less than Perfect, Reba	[redacted]	[redacted]	[redacted]	[redacted]
Michael Egizi	Entertainment Tonight, Dr. Phil, Rachael Ray, The Insider	[redacted]	[redacted]	[redacted]	[redacted]
Robert DeMarco	Entertainment Tonight, Dr. Phil, Rachael Ray, The Insider	[redacted]	[redacted]	[redacted]	[redacted]
Total Royalties (Composers and Publishers)		**$4,658,208**	**$5,072,093**	**$5,782,760**	**$6,407,422**
Total Local Television Royalties*		**$9,395,196**	**$11,699,942**	**$13,034,960**	**$14,640,566**
Percentage of Total Local Television Royalties		**50%**	**43%**	**44%**	**44%**

Notes: *Local television royalties for the top 93 affiliates of SESAC which represents 95% of royalties. (Letter from Susan Kohlmann to Benjamin Marks, Carrie Anderson, and Marie Matthews, 9/8/2011)
Sources: SESAC-0661817-0661820; Arnold 2008 Supplemental Agreement (SESAC-0289679-0289706); Beal 2008 Supplemental Agreement (SESAC-0289752-0289757); Lux 2007 Supplemental Agreement (SESAC-0618489-0618499); DeMarco 2005 Supplemental Agreement (SESAC-0294807-0294832); Egizi 2005 Supplemental Agreement (SESAC-0290100-290125); Wolff 2005 Affiliation Agreement Extension (SESAC-0413601-0413626); www.sesac.com.

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APPENDIX E
SESAC's Restrictive Agreements with Affiliates

Affiliate	Agreement Period	Notification	Rate	Contract Length	Reimbursement
Stephen Arnold	**2008-2011**			"...for a period of time not exceeding twelve (12) months…"	"...(i) the Direct License will be subject to an administration fee payable to SESAC in an amount equal to fifteen percent (15%) of the amount payable under such license, and (ii) ... upon the issuance of such Direct License(s), the amount payable to Writer and Publisher under Paragraph 2 will be reduced by the greater of the following amounts and the amount payable under such Direct License ...: (i) Five Hundred Thousand Dollars and no cents ($500,000.00) for the first Direct License issued during the Term hereof or, if such first Direct License is issued to a station group, then the reduction shall be equal to Three Hundred Fifty Thousand Dollars and no cents ($350,000.00) times the number of stations in such station group; and (ii) Seven Hundred Fifty Thousand Dollars and no cents ($750,000.00) for the second Direct License issued during the Term hereof or, if such second Direct License is issued to a station group, then the reduction shall be equal to Four Hundred Fifty Thousand Dollars and no cents ($450,000.00) times the number of stations in such station group; and (iii) One Million Dollars and no cents ($1,000,000.00) for the third Direct License issued during the Term hereof or, if such third Direct License is issued to a station group, then the reduction shall be equal to Five Hundred Fifty Thousand Dollars and no cents ($550,000.00) times the number of stations in such station group. (iv) Notwithstanding the foregoing, in no event shall Writer and/or Publisher be required to pay SESAC monies under this Paragraph 7 for a particular Direct License greater than the amount of the Minimum Guarantee due Writer and Publisher during the term the Direct License. Additionally, upon the issuance of the third Direct License to Potential Direct Licensee(s) during the Term, Writer and/or Publisher will be entitled to no further payments that would otherwise be due and payable under ...unless SESAC shall, in its sole discretion, elect ... to continue to make such payments..."
Jeff Beal	**2008-2012**	"…Writer and/or Publisher will first refer the third party wishing to secure a Direct License…to SESAC for licensing of the Works…"			"…Writer and/or Publisher shall, within five (5) business days of receipt of the license fee, send payment to SESAC in the equivalent amount, which shall be used as a credit against any unrecouped balance…"
Danny Lux	**10/2007-9/2013**	"…Writer and/or Publisher will first refer the third party wishing to secure a Direct License…to SESAC for licensing of the Works…"		"…for a period of time not exceeding twelve (12) months…"	"…(i) the Direct License will be subject to an administration fee payable to SESAC in an amount equal to fifteen percent (15%) of the amount payable under such license, and (ii) …upon the issuance of a Direct License to any of the User(s) listed on Schedule F... or any User(s) owned and/or controlled by the Schedule F entities, the amount payable to Writer and Publisher...will be reduced by the greater of the applicable amount on Schedule F and an amount equal to the amount payable under such Direct License...;and upon the issuance of the fifth Direct License to schedule F Entity(ies) or the issuance of the third Direct License to Potential Direct Licensee(s) other than a Schedule F Entity During the Term,...,Writer and/or Publisher will be entitled to no further payments that would otherwise be due and payable...unless SESAC shall in its sole discretion elect ...to continue to make such payments." *Schedule F lists amounts from $100,000-500,000 depending on the licensing entity.
Jonathan Wolff	**2005-2016**	"…Writer will first refer the potential user to SESAC for licensing of the works…"	"…at a rate no less than SESAC's then current licensing rates for similar uses of similar works…."	"…for a period of time not exceeding nine months…"	"….SESAC, at its sole election, may choose to: (a) Take payment of said monies received by Writer for the direct license; or (b) Reduce the amount of any payments due to Writer …by SESAC's then standard licensing rate for the direct license…"
Michael Egizi	**4/2005-9/2010**	"…Corporation will first refer the potential user to SESAC for licensing of the works…"	"… at a rate no less than SESAC's then current licensing rates for similar uses of similar works…"	"…for a period of time no not exceeding twelve (12) months…"	"….SESAC, at its sole election, may choose to: (a) Take payment of said monies received by Writer or Publisher for the direct license; or (b) Reduce the amount of any payments due to Writer or Publisher…by SESAC's then standard licensing rate for the direct license…"
Robert DeMarco	**7/2005-12/2009**	"…Corporation will first refer the potential user to SESAC for licensing of the works…"	"… at a rate no less than SESAC's then current licensing rates for similar uses of similar works…"	"…for a period of time not exceeding twelve (12) months…"	"….SESAC, at its sole election, may choose to: (a) Take payment of said monies received by Writer or Publisher for the direct license; or (b) Reduce the amount of any payments due to Writer or Publisher…by SESAC's then standard licensing rate for the direct license…"

Sources: Arnold 2008 Supplemental Agreement (SESAC-0289679-0289706); Beal 2008 Supplemental Agreement (SESAC-0289752-0289757); Lux 2007 Supplemental Agreement (SESAC-0618489-0618499); Egizi 2005 Supplemental Agreement (SESAC-0290100-290125); Wolff 2005 Affiliation Agreement Extension (SESAC-0413601-0413626).

Appendix F

APPENDIX F
TMLC Music Use Survey

I. Use of the Survey to Calculate Blanket License Fee Damages

In order to calculate the damages associated with the inflated SESAC blanket license fees in the 2008-2012 period (which were not set by an arbitration panel or other third-party neutral), I utilize the 2005 SESAC blanket license fees (which were set by an arbitration panel) as a benchmark for the competitive fee level.[1] It is reasonable that in a but-for world this competitive fee level would have changed over time in proportion to changes in the overall extent of performances of SESAC music in local television. I present a damages calculation in which the fees are adjusted in this way. To do this, I rely on the TMLC industry-wide music-use surveys to estimate the trend over time in the number of public performances of SESAC music on local television.

II. Overview of the Survey

The TMLC, with the assistance of outside economists, conducted music use surveys for the years 2005, 2006, 2008, 2009 and 2011. For these music use surveys, the TMLC collected programming and cue sheet information for stations' primary broadcast channels for a sample of stations and broadcast days. The surveys were undertaken by the TMLC for, among other purposes, providing information for its industry-wide license negotiations with PROs, and have been used in Rate Court litigation with BMI. The 2011 survey was undertaken to update the previous data, in part for the purpose of this litigation, using the same methodology that had been used previously. Because we do not

[1] For the reasons discussed in the text of the Report, the 2005 industry-wide SESAC fee set by the arbitration panel is almost certainly above the competitive level.

have data for 2010 or 2012, we have to interpolate or extrapolate the data we do have to yield estimates for those years. For 2010, I use the average of the 2009 and 2011 values. For 2012, I simply use the 2011 values. Since public performances of SESAC music were generally declining over this period, these estimates, if anything, will tend to overstate the extent of SESAC performances in those years. Any such overstatement would cause the damage estimates presented to understate the true damages.

III. The Survey's Methodology

The music use surveys that I rely on here are statistically valid surveys designed to measure music use in non-network local television programming on primary broadcast channels. In each of the survey years, between 75 and 80 stations were randomly selected, and, for each selected station, programming information and cue sheets were collected for a sample of programming days.

Programming information was collected from the sampled stations and from TV Data, a company in the business of compiling and selling television broadcast schedules to newspapers and other users. Cue sheets for the programs that were broadcast during the various sample periods were collected primarily from the sampled stations and Music Reports, Inc. (MRI). To the extent ASCAP had them, ASCAP provided cue sheets for programs in the sample for which the TMLC had not otherwise obtained a cue sheet as part of the license fee agreements reached between the TMLC and ASCAP. In addition, these cue sheets were supplemented with the cue sheets that SESAC produced in this proceeding. Finally, because the surveys were used in connection with Rate Court litigation with BMI, the cue sheet information for the years before 2011 was supplemented by additional music use information obtained from BMI in connection with

that litigation. Because the 2011 survey was completed subsequent to getting additional information from BMI, there is no opportunity to supplement the information for 2011 in this way. As a result, the totals for 2011 do not reflect any additional BMI information, and are therefore not strictly comparable with the totals for the previous years. Since my use of the dataset is solely for the purpose of estimating the trend in SESAC music use, I base my estimates on a consistent series in which the additional BMI information is not used.[2]

The music use and programming data collected allowed the survey to identify the total minutes of music in most of the sampled programming and to divide these total minutes of music among the following categories:

- Minutes of ASCAP-affiliated music
- Minutes of BMI-affiliated music
- Minutes of SESAC-affiliated music
- Other[3]

In dividing the music up among the above-noted categories "split works" (i.e., works with affiliated parties from two or more different PROs) were handled by crediting each PRO with a share of the music that is proportionate to its reported share of the split work.

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[2] As a check, I have calculated damages using the BMI data for those years in which it is available. The results do not change in any meaningful way. In fact, the total damages presented in the text of the Report are slightly lower than the total damages calculated using the BMI data.

[3] The "other" category includes minutes of music in the public domain, minutes of music affiliated with foreign PROs, and minutes of music with unknown affiliation. Foreign works typically are licensed through one or another U.S. PRO, but because of limitations in the data, it is not possible to allocate all of the minutes of music affiliated with the foreign PROs to the appropriate U.S. PRO. Because my analyses are driven by changes over time, and not absolute numbers, the fact that performances of foreign works are not allocated to the appropriate U.S. PRO is unlikely to have a material effect on the results.

For some programs, no music use information was available. For these programs I estimate music use information using a three-step process. First, if cue sheets for at least two other episodes of the same series were available from the music use surveys, the average music use in the episodes for which there were cue sheets were used to serve as a proxy for the music use in the episode for which cue sheets were missing. Second, if cue sheets were available for at least two other broadcasts of a locally produced news program on the same station, the average music use in those locally produced news broadcasts on that station for which there were cue sheets was used to serve as a proxy for the locally produced news broadcasts on that station for which cue sheets were missing. For the remaining programs for which cue sheets were unavailable, the average music use reflected in the cue sheets for other programs in the same genre was used.[4]

As noted in the text of the Report, to measure the extent of music performances appropriately, it is necessary not only to measure changes in the minutes of music being performed, but also to account for the size of the audience listening to the music. In order to include this dimension in the analysis, the survey incorporates data concerning audience size provided by The Nielsen Company (Nielsen) – the widely accepted source for audience data in the television industry.

Nielsen does not collect audience size information by station for each of the individual program broadcasts contained in the sample. Nielsen does, however, collect viewership data in each of the four "sweeps" months (February, May, July, and

[4] Programming was classified into the following genres: Children, Comedy, Drama, Game Show, Movie, Music, News, Other, Paid Programming & Home Shopping, Religious, Sitcom, Sports, Tabloid, and Talk Show. These genres are assigned using data provided by TV Data. Because TV Data genres are narrowly defined, they have, in certain instances, been combined into the broader genres listed above.

November) for all of the sampled stations in each year of the sample.[5] To estimate the audience size of each program in the sample, the survey uses the average number of "gross impressions" for each station across the four sweeps periods for the hour and year in which the program was aired.[6]

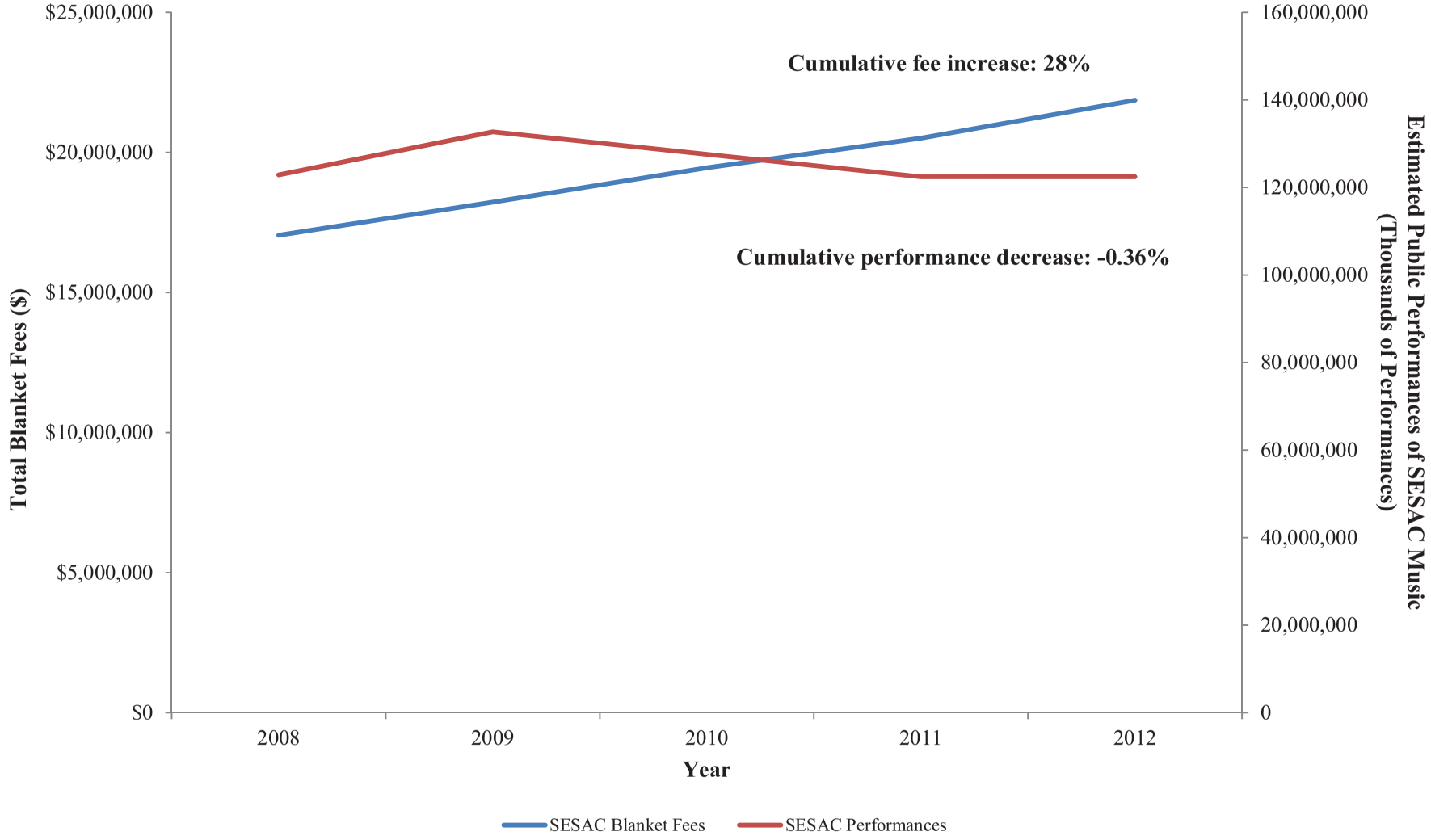
Combining the estimates of SESAC music use by program with the audience estimates by program as described above allows the calculation of an estimate of overall SESAC music performances (minutes of music times number of viewers) in each year. These estimates are used in Figure 1, and as described in the Report text to adjust the 2005 SESAC fee levels by station for the overall rate of change of public performances of SESAC music over time.

[5] I understand that the first "sweeps" of 2009 were actually in March rather than February, because the nation-wide switch from analog to digital television broadcasts was originally scheduled for February 2009.

[6] In this context, a gross impression is an audience member per unit of time. The Nielsen data reports viewership in quarter-hour segments from which it is possible to calculate gross impressions in person-hours.

Figure 1

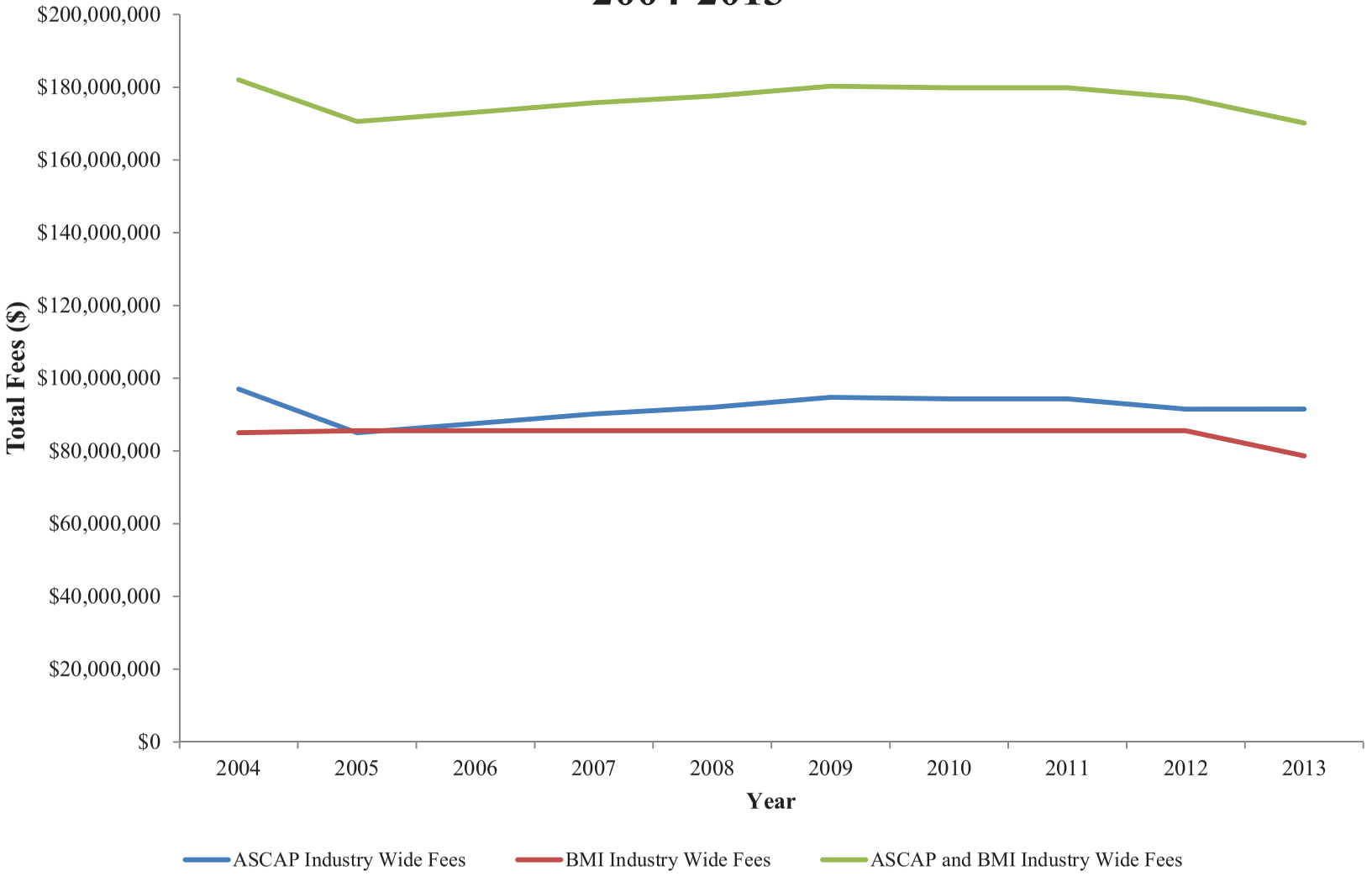
Figure 1
SESAC Blanket License Fees vs. SESAC Performances
2008-2012



Notes: 2010 is an average of the public performances estimates for 2009 and 2011. The 2012 public performance estimate is assumed to equal 2011.
Sources: Local Television Station License Agreements with SESAC Covering the 2008-2012 Period; TMLC Music Use Surveys.

Figure 2

Figure 2
ASCAP and BMI Industry Wide Fees
2004-2013



Notes: In 2004, ASCAP and the TMLC agreed to license fees for the period April 1, 1998 through December 31, 2009. In 2012, ASCAP and the TMLC agreed to license fees for the period January 1, 2010 through December 31, 2016. In 2013, BMI and the TMLC agreed to license fees for the period January 1, 2005 through December 31, 2017.
Sources: Texas Association of Broadcasters, TMLC Announces Reduced Performing Rights Fees (Feb. 13, 2012), available at https://www.tab.org/news-and-events/news/tmlc-update (BMI fees) ; ASCAP 2004 Local Television Station License (ASCAP fees for 1998-2009); ASCAP Television Licensing, available at http://www.ascap.com/licensing/tv (ASCAP fees for 2010-2016).