Testimony of

Future of Music Coalition

On
"Music Licensing Under Title 17, Part Two"
Hearing

House Subcommittee on Courts, Intellectual Property and the Internet

June 25, 2014

Chairman Coble, Vice-Chairman Marino and members of the committee, it is a privilege to submit the following testimony for the record in this important hearing on music licensing.

Future of Music Coalition (FMC) is a national nonprofit education, research and advocacy organization for musicians. For thirteen years, we have observed changes to traditional industry business models, informing artists about what these developments could mean for artists' ability to reach audiences and be compensated for their work. FMC supports artists having a choice in how they exploit their copyrights, as well as their ability to take advantage of the innovations that help them reach potential audiences. We are cautiously optimistic that the ongoing review of current copyright law will result in recommendations for updating the Copyright Act that serve the interest of creators. To this end, we will outline criterion that we see as necessary for improving conditions for creators within the context of Title 17 of the Copyright Act.

As we have described in previous written testimony before this committee, ongoing technological shifts have reshaped how music artists and rightsholders create music and bring that music to fans. Though it is true that the larger industry players were not able (or willing) to respond to the digital disruption at its onset, nearly every participant in today's music marketplace are utilizing existing and emerging technologies to realize their goals. Even the major media conglomerates have pivoted to a place where the majority of their business is digital. Independent labels and publishers are servicing music users—such as digital services, and ultimately, fans—on an impressive array of platforms. Individual artists now have the ability to publish and perform music to a global audience with the click of a mouse or swipe of a screen. Yet despite the many exciting transformations within our sector, there remain numerous frustrations that limit the kind of growth that would encourage further investment in music and those who create it. In this testimony, we will describe existing tensions and remark on the basic values that must inform any attempt at reform.

Music Licensing, Broadly

FMC has weighed in on the state current music licensing with high degree of specificity, most recently in the form of comments to the Copyright Office in their Music Licensing Study.[1] We are also participants in roundtable conversations about potential ways forward, which will hopefully inform the work that this committee undertakes in the months to come. There are a number of areas that Congress could address in legislation, and there are currently several proposed bills that focus on specific adjustments to existing law for the benefit of various parties. FMC believes strongly that the goal in optimizing the Act for contemporary and future realities must be in line with Article I, Section 8 of the United States Constitution, which is silent on the matter of intermediaries, but clearly empowers Congress to make laws that incentivize authors to benefit the public.

FMC believes that music licensing and the copyright laws that give it shape should encourage the following:

1. Transparency and leverage in compensation structures
2. Artist inclusion in music data standards and management
3. Artist access to communications platforms
4. Uniformity in rights

1. Transparency and leverage in compensation structures

The current trend of direct deals between rightsholders and services raises many questions about transparency and leverage for the broader class of musicians and composers. There are recent deals between Clear Channel and the major labels (and a couple of independents, including Taylor Swift's label) to compensate for over-the-air plays at a percentage of overall revenue. In addition, there is the preference of major publishers to negotiate digital performance licenses directly. With each approach, there is a clear danger of the marketplace being tilted to favor just a handful of power players.

[1] *Future of Music Coalition Comments in Music Licensing Study*, United States Copyright Office Cong., 23 (2014) (filing of Casey Rae, VP for Policy and Education, Future of Music Coalition). Web.

Rightsholders often make the argument that direct deals establish a higher floor for compensation, but may end up being a race to the bottom. Take for example the deals made by the bigger labels with Clear Channel to pay a portion of revenue for AM/FM broadcast.[2] In no way are these deals a substitute for a full public performance right. First off, they leave out all performers who aren't signed to the label under such a deal. Second, there is little chance for anyone but the biggest labels and biggest artists to get to the negotiation table. Third, such deals aren't at all transparent. Inasmuch as we even know the terms, there are rumors that the provisions trade *some* compensation for over-the-air plays in exchange for lowered rates around digital streams. If (and some would say when) Internet radio overtakes terrestrial broadcasting in listenership, this means that "fair market" webcasting rates may end up being *lower* than those currently negotiated under the statutory license. Lastly, there are legitimate concerns that such arrangements are a backdoor to payola-like practices.

There are similar concerns about music publishers and digital music services. While the ability for publishers to remove partial catalog from Performance Rights Organizations (PROs) have been rebuffed by the courts, there is the ever-present possibility that the biggest music publishers will withdraw all catalog from the PROs, leaving just the smaller publishers and non-commercial broadcasters covered by the blanket licenses offered by the two PROs operating under consent decrees. Again, the case is made by the bigger publishers and their trade industry representatives, that direct deals will raise the floor for compensation overall, particularly if these deals are allowed to inform rate-setting in the courts (or arbitration, as is the preference of the publishers). Whether this would be the actual result of eliminating the consent decrees is doubtful. More likely is a further fracturing of the licensing marketplace to the competitive disadvantage of independent publishers, songwriters and smaller broadcasters. The impacts would be felt well outside of the Internet and satellite radio marketplace, which is why the Department of Justice must exercise caution and restraint when reviewing the consent decrees for a

[2] *See Warner Music Group and Clear Channel Announce Landmark Music Partnership*, CLEAR CHANNEL (Sept. 12, 2013) web; *see also Clear Channel and Fleetwood Mac Sign Landmark Revenue-Sharing Agreement*, CLEAR CHANNEL (June 12, 2013) web (marking the first directly negotiated performing rights partnership between a radio company and an artist).

possible amendment.

Eliminating the rate court in favor of an arbitration process also raises concerns. Arbitration proceedings are typically sealed and do not create a record or precedent, a move away from transparency—unless the rules around arbitration include mandatory public disclosure.

There is still a need for artist intermediaries. PROs and SoundExchange in many cases represent the only leverage individual songwriters and performers have in rate-setting proceedings. We wholeheartedly agree with both camps that artists deserve to be compensated for their work at a fair rate, but we would strongly urge this subcommittee to look beyond rate determination standards and consider the frameworks under which artists are paid and through which services can quickly and efficiently perform catalog for listeners. Transparency and leverage for artists within these structures must be at the forefront of any potential solutions, followed closely by what formulas are most likely to grow the legitimate digital marketplace.

We extend our concerns about transparency and leverage to interactive streaming, in which artist compensation is complicated and uncertain. Within the current licensing framework, recording artists signed to a label are compensated based on what is in their contract. It seems safe to say that individual artists—even highly successful ones—are unlikely to make much money from these platforms, as compensation is held against recoupable costs and may already be quite low based on the artists leverage at the time of signing a contract. For songwriters, there are issues of audit rights, an issue that has been brought forward by some parties in the Copyright Office Music Licensing inquiry.[3] From our vantage point, we see the stark difference in compensation and licensing between interactive and non-interactive services as troubling for the long-term sustainability of the digital music ecosystem.

[3] "U.S. Copyright Office - Music Licensing Study." *U.S. Copyright Office - Music Licensing Study*. U.S. Copyright Office, n.d. Web. 10 June 2014.

We are sensitive to the desire of some independent artists and labels for an "opt-out" option within statutory or compulsory licensing schemes. However, we also identify with the arguments put forward by the independent label trade group the American Association of Independent Music (A2IM), which has called for an expanded statutory license for interactive services to ensure that indies can compete on a level playing field within on-demand platforms like Spotify and Beats Music. By all available metrics—Billboard charts, Grammy nominations, global demand—independent music represents an essential and growing sector. However, the heavily consolidated major labels consistently inflate their market share in order to obtain large up-front payments and equity stakes in emerging digital music platforms. This places independents at a perpetual disadvantage in terms of licensing and investment. Artists, too, are affected, as they are typically last in line for compensation and have next to no leverage within the rate-setting process for interactive services. As FMC states in our own Copyright Office filing:

> "FMC considers supporting the expansion of a statutory license for sound recordings on interactive music services for the reasons of clear and transparent creator splits and direct payments. We do, however, recognize that in an environment where on-demand listening continues to supplant higher-margin transactions such as downloads, that there are many questions regarding the return on investment in the creation, distribution and promotion of recorded music. We believe that some of these questions can be addressed by integrating higher-margin commerce—scarce goods and other unique opportunities—within existing and future access platforms."

Congress should consider enacting an expanded statutory license for interactive streaming. This would present an opportunity to establish equitable and direct payment to musicians, as well as allowing services to more efficiently obtain licenses. Currently, negotiations for major label catalog takes an average of 18 months and a tremendous amount of up-front capital[4] with no guarantee of reaching terms. More efficient licensing would allow services more room to innovate new and enticing ways to deliver music to fans, and get artists paid more quickly (and hopefully directly). It may be possible to

[4] Touve, David. "Innovation at the Edge: An Investigation of Music Licensing Efforts and the Process of Opportunity Development." Davidtouve.com. Washington and Lee University, 22 July 2012. Web. 09 May 2014.

construct this system to include opt-out provisions under an extended collective license; at any rate, Congress should closely consider how to narrow arbitrary technological distinctions between streaming platforms in order to establish a more competitive marketplace built on transparency and efficiency.

2. Artist inclusion in music data standards and management

Future of Music Coalition is on record in support of voluntary global copyright registries and/or authentication databases as a means to reduce frictions in the digital music marketplace and more efficiently compensate creators for various uses of their work. We also support metadata standardization to streamline these processes.

We wholly endorse the approach described by Jim Griffin in his testimony at this hearing,[5] particularly his call for inclusion for the recordation of copyrights and a broader availability of information about ownership and other data:

> "Performers, featured artists, background artists, writers, editors, translators, owners and all associated with a copyright should be included in efforts to record and enumerate copyright information because they often have remuneration and attribution rights, and they can help elucidate ambiguous information. Much as we do with land ownership records, we should welcome any claim related to any work."

While there are a number of such databases extant or in development, they are either lacking in accuracy or depth of information or are to one or another extent proprietary. The Copyright Office offers one example of a publicly searchable rights database, but some of its records are incomplete and not always available online.

Any comprehensive registry system or systems would benefit tremendously from metadata standardization, as would commercial platforms that sell or provide access to music. There is still much work to be done in fixing metadata—the information that accompanies a sound recording file and is delivered to download stores like iTunes and

[5] *Testimony of Jim Griffin before the House Subcommittee on Courts, Intellectual Property and the Internet*, 113th Cong. (2014) (testimony of Jim Griffin). Print.

streaming platforms like Spotify or Pandora. Metadata includes things like performer, composer, record label, and release date, but it could also include useful information like production and songwriting credits, which music professionals depend on to encourage future work.

Better data on the input side and enhanced functionality and interoperability on the output side would alleviate many of the existing frictions in the music licensing space while pointing the way towards potential solutions for other copyright sectors. The government, including the United States Congress, should encourage all parties to work towards a comprehensive, globally workable database (or databases) for music, with unique numerical signifiers and improved metadata standards.

3. Artist access to communications platforms

It may seem that we've solved the problem of access for creators, but high-quality and affordable broadband Internet service—a critical resource for music entrepreneurs—remains frustratingly out of reach for many. At the time the National Broadband Plan was published in 2010, around 100 million Americans lacked access to broadband Internet in their homes. Where broadband Internet is available, users often have only one or two choices in providers. Prices remain high for wireline Internet service, and just a few companies control the rapidly growing mobile space.[6] High consumer prices for broadband can also impact how much money consumers have to spend on legitimate entertainment offerings. An absence of competition is also a factor in the lack of incentive to build out to more communities. This encourages telecommunications carriers to enter preferred partnerships with well-capitalized companies who can afford to pay for premium access to subscribers—it's easier money and requires no new investments in or improvements to the existing network.

[6] *See* Laura Houston Santhanam, et al., *Audio: By the Numbers*, PEW RESEARCH CENTER FOR EXCELLENCE IN JOURNALISM, *available at* http://stateofthemedia.org/2012/audio-how-far-will-digital-go/audio-by-the-numbers/. Mobile and other transportable digital devices are experiencing strong listenership growth, with as many as 40% of Americans currently consuming music through a digital device and projections for 2015 double that figure. Importantly, the amount of people using a mobile device to consume online music in an automobile doubled from 2010 to 2011.

Musicians and songwriters know payola when we see it. Currently, the FCC is considering rules that would establish a "tiered" Internet service, which would allow Internet Service Providers (ISPs) to create a fast lane for content providers that agree to pay a fee. While this may make good business sense for the telecom and cable companies, it would be devastating to entrepreneurs and innovators in music and elsewhere. ISPs should not be allowed to pick winners and losers in a free market. Products, services, innovations, songs and ideas must be allowed to find their audiences without undue interference based on business or political preferences. Who on this committee has not used Twitter to reach your constituencies? Where will the next Twitter come from if the flow of information is controlled by just a handful of gatekeepers? Congress must support an Internet where creativity and commerce can flourish in a free market. Clear rules of the road for ISPs that allow any and all *lawful* online content to reach end users is the bare minimum to promote American competitiveness for future generations. This is not a partisan issue, though some would seek to make it so. It's a small enterprise issue, an innovation issue, a global competition issue and a free speech issue. It's also a music issue, and that's why we are raising it today.

Concerns go beyond the currently debated Open Internet proposals. Last year, AT&T announced a "sponsored data" scheme in which the company would charge its subscribers for data overages engendered through the use of the services and applications of its preferred partners. While such activity may be permissible under even recently overturned net neutrality rules, it illustrates how competition and clear rules of the road are necessary to innovation online. If ISPs are allowed to pick winners and losers among applications and services, artists may find themselves locked into structures that don't play to their economic advantage, thereby frustrating a key incentive of our copyright regime.

We urge Congress to consider issues of broadband competition and openness as it examines issues around copyright to ensure that the incentive to create, innovate and seek remuneration remains viable for all artists and entrepreneurs who use the Internet.

4. Uniformity in rights

There is currently much talk of "parity" in the music licensing space. While generally FMC has been opposed to "one-size fits all" solutions to licensing issues, we do recognize that the current system offers unfair advantages for some, while limiting opportunities for others. Above, we referenced the recent decision by the Department of Justice to reexamine the consent decrees that govern two of the three songwriter/publisher PROs.

In recent comments filed before the Copyright Office, ASCAP claimed the consent decrees are no longer necessary at all. Echoing separate comments filed by BMI, the organization also recommended that if the consent decrees remain, they should be entirely reshaped to allow the "bundling" of licenses beyond just public performance uses. This would allow the PROs to offer mechanical and synchronization licenses alongside those for public performance. The PROs cite efficiency and the need to be globally competitive as reasons for these tweaks, but it's clear that they also want to expand their own businesses.

Meanwhile, recent court decisions have favored Internet radio company Pandora in arguments about royalty rates and whether major publishers should be allowed to withdraw partial catalog to license directly to services. (Publishers' reason for wanting to go direct is to achieve higher rates than those set by the courts when parties fail to reach common ground.) On the rate-setting issue, the court largely sided with Pandora, scolding ASCAP for heavy-handed negotiation tactics. Ultimately, the rates stayed where they have been (1.85 percent of revenue, as opposed to a scheduled increase to 3 percent sought by ASCAP).

As to the standard for determining rates, the publishers and PROs prefer a "willing seller, willing buyer" approach, which is what labels and performing artists have for sound recordings used on Internet and satellite radio.

Songwriters are likely caught in the middle. On one hand, the consent decrees shaped the member agreements at ASCAP and BMI, which most songwriters find fair. (These agreements establish 50-50 splits between publisher and songwriter/composer for performances of musical works). If the consent decrees were eliminated, songwriters may find all the leverage for the licensing of musical works falling to just a few major publishers that can dictate what innovations can come to the marketplace and how writers get paid. Which is to say, eliminating the consent decrees (or amending them too far) is something of a Faustian bargain. Creators should not be forced to trade transparency, leverage, and direct/equitable payment for the mere possibility of rate increases.

Music services should also be nervous. The consent decrees were originally put in place to curb the anticompetitive tendencies of ASCAP and the publishers, which in the 1930s and 1940s had a monopoly on the licensing of music. Without these limits and the blanket licensing allowed by the consent decrees, it is unlikely that AM/FM radio would have ever gotten off the ground. And, considering that over-the-air broadcasters only pay songwriters and publishers (but not performers and labels), this would have meant that countless music creators would miss out on a key revenue stream. Internet and satellite radio services obviously want to pay the lowest rates possible, but apprehension about a post-consent decree world raises concerns for other reasons—namely, the ability to bring catalog to music listeners quickly and efficiently, grow the legitimate digital market and pay creators.

A bill currently before Congress, the Songwriter Equity Act, would accomplish many of the publishers' goals with regard to performance and mechanical royalties. It doesn't go as far as to eliminate the consent decrees, however, which is probably why the National Music Publishers Association has been putting pressure on the Department of Justice (DOJ).

For its part, the DOJ should proceed with caution and not simply cave to the demands of just a handful of powerful publishing companies. It's crucial that government regulators consider closely the impact of any decisions on songwriters for whom rates are important,

but who also depend on transparency and leverage in these systems. It would be a poor outcome for creators and fans if DOJ intervention resulted in a fracturing of the legitimate marketplace at a time when we should be doing everything we can to make digital music work for all parties, especially artists.

There are also efforts to resolve the issue around the digital public performance of pre-1972 copyrights. Make no mistake about it, FMC wants older artists to be paid for the use of their work, which is one of the many reasons we've supported a terrestrial public performance right—countless legendary performers who are not songwriters have been for decades unable to collect money for AM/FM airplay. Worse still, the lack of a reciprocal right means they don't get paid for overseas plays in the many nations and territories that value American expression. We believe full federalization—not litigation or stopgap legislation—is best way to ensure that all recording artists can exercise their full rights under law, from performance to rights recapture. The next move should be a complete terrestrial performance right as a first step towards parity across platforms. One thing is for certain: the major label tactic of litigation for high damages is insufficient to establishing a long-term mechanism for compensating so-called "legacy" performers. There is certainly no indication that a big win for the labels would result in a single cent going to the performers or their heirs. There is certainly no such provision to share equity with artists when a company like Beats Music gets sold for 4 billion dollars, just as no portions of the money awarded from successful filesharing lawsuits has been distributed to artists.

One reason the labels are likely keen to press their case is that if they can get a favorable ruling establishing liability around pre-'72s, this precedent might be extended to the "safe harbors" governing other internet service providers, such as search engines and user-upload sites.

Again, we think there is a better solution, and one that would result in services knowing what to pay and to whom, and where performers are directly compensated. And that solution is the full federalization of pre-1972 copyrights.

There are, of course, many other issues that Congress might consider when approaching an update of the Copyright Act, some of which we have itemized in previous submitted testimony. We expect that as proposals are formulated and introduced, that there will be further opportunities to comment on specifics.

Conclusion

FMC is committed to helping artists navigate these issues. We look forward to engaging with the subcommittee further to ensure that creator viewpoints—particularly those in the independent sector—are considered as you go about your important work. Although it isn't easy to find solutions that satisfy the many stakeholders in today's music space, we are convinced that working artists must be part of the process.

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