

Testimony of
Public Knowledge, the Consumer Federation of America,
and the Electronic Frontier Foundation

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Hearing On: Music Licensing Under Title 17 Part Two

June 25, 2014

Dear Chairman Goodlatte, Ranking Member Conyers, and members of the committee:

It is a privilege to submit the following testimony for the record in this hearing on current music licensing issues.

Public Knowledge (PK) is a non-profit organization that advocates for the public's access to knowledge and open communications platforms. The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in the federation, set policy in the annual consumer assembly and govern it through their representatives on the organization's Board of Directors. The Electronic Frontier Foundation (EFF) is a nonprofit civil liberties organization working to protect consumer interests, innovation, and free expression in the digital world.

The legal provisions that shape our music licensing system should encourage a competitive, innovative market of music platforms and services that are accountable to music fans and musicians. This requires a set of well-developed structures that promote efficient licensing practices that minimize costs for everyone while promoting competition between intermediaries like record labels, publishers, collective licensing organizations, and distribution services. It has been said that companies operating in the music industry today must navigate a labyrinth of music licensing to be successful. PK, CFA, and EFF ask Congress to support policies that will simplify and strengthen music licensing mechanisms to promote the development of new competitive services while providing reasonable compensation for artists. The music licensing structures shaped or encouraged by copyright law should promote the creation of new music and increase the public's access to that music.

Online music services help musicians and their fans alike by giving listeners avenues to conveniently and legally access music. They can also give musicians new tools to create and distribute music, giving musicians the choice of forgoing traditional intermediaries to retain copyright ownership, collect a greater percentage of royalties, or simply maintain more control over their own careers. But if copyright law and licensing structures give traditional intermediaries the leverage to demand equity, enormous advances, or royalties disproportionate to their share of the marketplace, new online services will be beholden to the largest corporate rightsholders and will only become a tool for further entrenching the inequities in today's music

industry. This would only lead to fewer new tools to empower musicians and less competitive and innovative options for the public trying to legally access music.

The recent decision in the rate court dispute between Pandora and ASCAP is an important case study in how market concentration among rightsholders gives large incumbents the incentive and ability to harm consumers and independent musicians. The court's ruling rejected the notion that Internet radio should be treated differently from traditional radio under antitrust law. The ruling highlighted telling evidence of the publishers' willingness and ability to exert market power. The court found that Sony/ATV Music Publishing (Sony) and Universal Music Publishing Group (UMPG) "each exercised their considerable market power to extract supra-competitive prices" and further, that "[b]ecause their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." In addition, the court noted that Sony and UMPG attempted to withdraw selective rights from ASCAP despite the fact that "[s]ongwriters, and at least some independent music publishers, were concerned about the damage that might be wrought" with regard to transparency, payment disputes with publishers, and overall problems of consolidation in the industry.

This recent court decision is an important reminder that a legal framework that is sensitive to market power and protects principles like reasonable nondiscriminatory rates and transparency remains critical to a successful music marketplace. The consent decrees currently in force with the two largest performing rights organizations, ASCAP and BMI, remain necessary to achieve the efficiencies of collective licensing while preventing abuses of market power. Similarly, Congress should preserve statutory licensing options for a variety of online music services, to ensure a competitive and level playing field for music services and rightsholders of all sizes. At the end of the day, Congress must promote reasonable and efficient music licensing mechanisms to ensure the sustainability of innovative new services that benefit musicians and their fans alike.

We include the attached comments of Public Knowledge and the Consumer Federation of America for the record, which explain in further detail why the major publishers and major labels hold a concerning level of market power and why reasonable licensing mechanisms are necessary to ensure a competitive marketplace.

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Appendix A

Jodie Griffin, *Comments of Public Knowledge and the Consumer Federation of America*, Copyright Office Docket No. 2014-03 (May 23, 2014), https://www.publicknowledge.org/assets/uploads/blog/14.05.23_PKCFAComments.pdf.

Appendix B

Mark Cooper, *Comments of the Consumer Federation of America and Public Knowledge on Music Licensing Study*, Copyright Office Docket No. 2014-03 (May 23, 2014), http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Consumer_Federation_of_America_Public_Knowledge_MLS_2014.pdf.

Appendix C

Jodie Griffin, *Rewind, Reclaim: Copyright Termination in the Music Business*, PKTHINKS (Mar. 2014), <https://www.publicknowledge.org/documents/rewind-reclaim>.