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# Symposium Presentation: NSAI Director Bart Herbison On Copyright Reform For Songwriters

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# SYMPOSIUM PRESENTATION: NSAI DIRECTOR BART HERBISON ON COPYRIGHT REFORM

FEATURING BART HERBISON\*

**Mr. Herbison:** We have to start with the understanding that when you hear your favorite song, there are two copyrights involved: when the songwriter writes that song, his or her copyright is for the underlying musical composition; when the artist records their version of that song, that's the sound recording copyright. These two rights are governed by vastly different rules. Songwriter copyrights—the way those rates and royalties are set—are largely regulated by the government, and the other copyright, barely regulated by the government.

Let's talk about the songwriter copyright first. Songwriters are paid three ways: the first is a sales royalty, which is also called a mechanical royalty. It gets the name mechanical royalty because the rules that govern the way those rates are set and the way those songs are licensed are from 1909. Literally. Right. I'm surprised too. [Laughter.] In 1909 those rules were promulgated to govern the licensing and distribution of mechanical player piano rolls.<sup>1</sup> That doesn't work so much in 2015 in the digital world with smartphones.

Let's explain that. When a songwriter gets a song on an artist's album and that song or album is sold, either on a CD or a legal download, the songwriter gets a mechanical royalty. The current mechanical royalty is 9.1 cents.<sup>2</sup> Said a different way, if I co-write that song with you, we each have a publisher, and our song gets on a CD that sells a million copies, earning 10-15 million dollars in CD sales, we have a four-way split of \$91,000, or \$27,500 each. That \$27,500 is all the songwriter earns for a hit song that sold a million copies.

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\* Bart Herbison is the director of the Nashville Songwriters Association International, the world's largest not-for-profit songwriters trade association. NSAI is dedicated to protecting the rights of and serving aspiring and professional songwriters in all genres of music.

1. See 17 U.S.C. § 115(a)(1) (2012).
2. 37 C.F.R. § 385.3 (2016).

Those copyright rules from 1909 work the same way today as back then. We are under an 801(b) standard of evidence.<sup>3</sup> There are four points that make up that standard, and which I'm not sure anybody could explain to you, other than to say it's sort of a cost-of-living increase. But it's not exactly, because it's not a cost-of-living increase that's tied to the consumer price index or anything like it. If the songwriter's mechanical sales royalty rate, which started in 1909 at two cents, had been properly adjusted for inflation according to the consumer price index, it'd be 52 cents today. But it's not. It is 9.1 cents. Once every five years three judges who make up the Copyright Royalty Board meet and consider an archaic standard of evidence to set our mechanical sales royalty rate, which has been the same now for about, 12 years I think.

That's the first way a songwriter gets paid, and I should tell you, there's almost no sales left. I took this job as director of the Nashville Songwriters Association International [NSAI] in 1997. The big album at that time was *Wide Open Spaces* by the Dixie Chicks, which sold 14 million copies in 14 months and we had multiple, multiple, triple platinum, dozens and dozens of gold albums.<sup>4</sup> You sold records then! There are no record sales today. If you take Taylor Swift out of the equation in Nashville, we haven't had a million-selling album in about three years. There are very few record sales left.

The second royalty that songwriters get is a performance royalty. That's when your song is performed—whether it's performed on a broadcast radio station, in a bar or restaurant, at Bridgestone Arena, or on a streaming phone app. The rules for songwriters for that performance royalty come from 1941.<sup>5</sup> [Laughter.]

Let's go back historically to that climate: it's pre-World War II, and a huge focus for the federal government is antitrust. They don't want to be limited to one ammunition manufacturer, one ship builder, or one steel company, and they certainly don't want nefarious corporations or business owners to take advantage of a war climate and collude on price setting. So at that time, the U.S. Department of Justice's primary focus is antitrust.

Every songwriter in the United States, and around the world for that matter, must join something called a Performing Rights Organization [PRO]. Three

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3. See 17 U.S.C. § 801(b).

4. See *Gold & Platinum*, RIAA.COM, [http://www.riaa.com/gold-platinum/?tab\\_active=default-award&se=dixie+chicks+wide+open+spaces#search\\_section](http://www.riaa.com/gold-platinum/?tab_active=default-award&se=dixie+chicks+wide+open+spaces#search_section) [<https://perma.cc/B9GE-HNWB>] (last visited August 14, 2016).

5. *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 13-95, 1941 U.S. Dist. LEXIS 3944 (S.D.N.Y. Mar. 4, 1941); see *United States v. Broadcast Music, Inc.*, No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. 1966).

PROs in the United States control well over 99% of the licensing and royalty collection of performances in this country. They are ASCAP, BMI, and SESAC. Back in 1941 we just had two: ASCAP and BMI. And ASCAP and BMI, one reason they went under consent decree was their collective 100% share of the broadcast market for performance royalties and the lack of any rate-setting instruments when broadcasters disagreed with the PROs. So the government, through the Department of Justice [DOJ], swooped in and established consent decrees in 1941. By the way, I find it ironic that the DOJ says no consent decree should last longer than a decade, but our consent decrees have been around for 74 years! [Laughter.]

The consent decrees set a framework that worked fine before the digital distribution of music. That framework created one rate court, made up of one federal judge in the Southern District of New York who is appointed for life, for ASCAP. They created a similar rate court, a separate U.S. District judge in the Southern District of New York who is also appointed for life, for BMI. This framework disallowed what we call the willing-buyer, willing-seller standard of evidence. The real question is where I started: What's the song itself worth? In other words, what is the songwriter copyright rate? And what's the artist's version of that song worth? In other words, what is the sound recording copyright rate? What would the marketplace say the value is? I'll get there in a minute and tell you what the marketplace has said for a long, long time.

These rate court judges periodically set rates for different levels of performance. They set rates for a wide variety of performance contexts: for live performances, for bars and restaurants, for radio stations, for music that's played on TV, and now for streaming applications. Here is the toughest part for us, both with sales royalty procedures and performance royalties from the rate courts: once the judges have those rates we are bound by what is essentially another compulsory license. On the mechanical royalty there is a compulsory license.

Who heard about Taylor Swift pulling her songs from Spotify?<sup>6</sup> She should be able to do that. If I, as a songwriter, disagree with what the distributor of my song wants to pay me, I should have the ability in the marketplace to simply say, "No." But we do not. Remember when I said artists and record labels aren't under these same rules, largely? This is a prime example. On the performance royalty side, songwriters and the music publishers who represent them have two options: they must either allow their PRO to license their music for all purposes from bars and restaurants, called general

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6. See Steve Knopper, *Taylor Swift Abruptly Pulls Entire Catalogue From Spotify*, ROLLING STONE (November 3, 2014), <http://www.rollingstone.com/music/news/taylor-swift-abruptly-pulls-entire-catalog-from-spotify-20141103> [<https://perma.cc/A49A-Y9E2>].

licensing, and streaming, or alternatively, they can just not license anything! Songwriters and even large music publishers simply don't have the resources to license millions of businesses and thousands of radio stations. So songwriters and publishers are essentially also in a compulsory licensing situation for the performance royalties too, just like the sales royalties, even though it's not referred to that way. Songwriters could technically negotiate themselves or withhold their songs, but realistically that is impossible, so songwriters are bound by those rates set by the ASCAP and BMI rate court judges.

The result of all this has been that in just the past decade we have lost at least 80% of America's working songwriters. And some artists write their own songs, but for the songwriter who wrote "Always on My Mind," or "Change the World," or "Girl Crush," which we just announced is our song of the year,<sup>7</sup> they don't sell t-shirts, they don't sell concert tickets, they don't get product endorsements. They are bound by arcane government rules and they are under a compulsory license. We've lost an astonishing amount of America's working songwriters as a result.

I'll give you an illustration of why rules from even 1941 don't work today. The way you get money from broadcast radio stations in America today is to buy one license from ASCAP, from BMI, from SESAC, and then a provider can broadcast or stream all that music for a year for no further charges. For terrestrial radio, small market stations pay a small fee, large market stations pay a large fee, and medium market stations pay a medium fee. Once you add all that up, when your favorite song is played on a broadcast radio station it earns a few pennies per play, which is then split among the cowriters and the publishers. When that same song is streamed on Pandora, it earns six ten-thousandths of a penny. For millions of spins the songwriter's one-fourth share is a few tens or maybe a few hundreds of dollars. You can't pay the bills with that. You're not going to be a professional songwriter, are you?

Remember I said a songwriter gets paid three ways? You've got sales royalties and performance royalties. There is one place—only one place—where songwriters are in the free market and have been for almost a century. That is when your song is in a TV show or a film. That is called synchronization—synching the music to a video—and we've been able to negotiate those rates since talking pictures. I would argue, as the director of NSAI, that the song is worth 99.99%, or you can go sing the phonebook. But the marketplace says the songwriters get half for writing the song, and

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7. *Songs of the Year*, NSAI, <https://www.nashvillesongwriters.com/nsai-songs-year> [<https://perma.cc/2DQQ-DYYB>] (last visited August 14, 2016).

the artist who interprets that song gets half. A 50-50 split. For nearly a hundred years.

So what are we doing to change things? We have had more activity in three areas on copyrights than I've seen in my adult lifetime in just the past couple of years. The first is Congress. All of our issues go through the House and Senate Judiciary Committees. You can be a Committee Chairman for six years in the House or Senate, subject to term limits. Bob Goodlatte from Virginia became the chairman in 2013 of the House Judiciary Committee. Remember, we get our copyright from Article I, Section 8 of the U.S. Constitution: "To promote the progress of science and useful arts," Congress may grant for a limited time the exclusive rights of creations to their authors.<sup>8</sup> The founding fathers were authors and inventors. James Madison wrote that language in Article I, Section 8. Mr. Goodlatte is a very thoughtful person, and I believe he feels a Madison-esque responsibility to take copyrights into the modern era—not just music, but movies, books, photographs, etcetera. He has held 20 hearings on copyrights and much of that attention has been focused on music licensing and songwriters being under antiquated rules. Hopefully he will help move legislation during his last two years as Chairman beginning in 2017.

The U.S. Register of Copyrights, Maria Pallante, in early 2014, wrote what was essentially a green paper and delivered a speech at a college about what we need to do to modernize American copyrights.<sup>9</sup> Then she became, in February of 2014, the first witness before the House Judiciary Committee to talk about the problem as well as, in some broad strokes, avenues for modernizing American copyright law. Then Mr. Goodlatte proceeded to hold 20 hearings with more than 100 witnesses, and a lot of that focused on music licensing. That was phase one of the process, and it ended in July of 2015 with the very last hearing. We're in the middle of phase two, which is to take these volumes of information, try to digest it, try to narrow the focus about what Congress's responsibility is, and frankly, what's politically achievable.

So in phase two, Mr. Goodlatte and both the House minority and majority staff, Democratic and Republican, had some very focused meetings with stakeholders in this music copyright area and some of the other areas. And they are going around the country to do something that they haven't done in a long time. You may or may not have seen, about three weeks ago, we had the House Judiciary Committee here in Nashville for the first field hearing they've had on music licensing in 19 years. They'll be doing one in

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8. U.S. CONST. art. I § 8, cl. 8.

9. See Maria A. Pallante, Review and Reflection: Copyright Hearings and Related Discourse in the Nation's Capital, 13 J. MARSHALL REV. INTELL. PROP. L. 487 (2014).

California with the tech sector, and my guess is one more this year in New York about other, non-music copyright issues. That'll be phase two.

In phase three, they decide—really Mr. Goodlatte decides—what the legislative solution will look like, and what is politically achievable.<sup>10</sup>

In a perfect world, my trade association NSAI, the National Music Publisher's Association, and the PROs would ask Congress to completely get us out from under government control and put us 100% in the free market. There is no way that would happen politically. We've already got some pretty large problems, but over the air radio broadcasters and a number of others would oppose that because we would be able to demand much higher rates or tell them they can't use our music. For most that would be too bold a step from 1909 and 1941 into the modern marketplace. It would also be politically unachievable, even our sponsors in Congress say so.

What we have done instead is ask for something in the middle, called the Songwriter Equity Act.<sup>11</sup> And it's pretty simple. It changes the archaic standards of evidence that both the Copyright Royalty Board and rate court judges must consider now to a willing-buyer, willing-seller standard. Anytime Congress does something this comprehensive they want unanimity within an industry. That current mechanical rate of 9.1 cents—if this passes and the judges gets to look at the marketplace which has said 50-50 for years, this would be my guess of a likely scenario: On the few CDs that are sold, we wouldn't get much of a raise. Maybe that 9.1-cent rate stays the same, maybe it's a dime, or maybe it's 12 cents. But those judges can also take into account costs, and that's an expensive prospect.

Let me represent record labels for a minute. When you burn a CD, shrink wrap it, barcode it, put it on a truck, get it to a warehouse, take it Walmart and Target, and take returns, there's not a lot of profit in that. And the judges will take that into account. But on a digital download, which is the way most people buy music now—the ones who still buy music—there's not much cost involved in that. There is some cost, but the distribution cost is minimal. And the labels have already raised the price to \$1.29 on most digital downloads. So there's a healthy profit margin left for them in the cost structure and probably a pretty big raise possible for songwriters. The

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10. In April 2016, Mr. Goodlatte commented on the status of the committee's copyright review process. "In the weeks ahead, we will identify areas where there is a likelihood of potential consensus and circulate outlines of potential reforms in those areas. Then we will convene stakeholders for further work on these potential reforms." Press Release, House Judiciary Committee, Chairman Goodlatte Remarks At World IP Day Event (April 26, 2016), <https://judiciary.house.gov/press-release/chairman-goodlatte-remarks-world-ip-day-event/> [<https://perma.cc/VFN6-J2WW>].

11. Songwriter Equity Act, H.R. 1283, 114th Cong. (2015).

rate court judges, when they consider streaming—and that’s what’s killing the American songwriter; nobody’s buying music because you can get it all streaming for free—my guess is that these services, Pandora and Spotify in particular, because we’re under government structures and the labels have negotiated their rates, we’ve either got a 12:1 or 14:1 disparity between what performance artists are paid and what songwriters are paid. My guess is that will even out some. So we’ve asked for the Songwriter Equity Act.

Quickly, the record labels have a separate bill.<sup>12</sup> Their bill contains three or four provisions. They do not get a royalty from broadcasters, from over the air radio stations. Every other country in the world does, but they don’t. They’ve wanted it and have tried to get it for decades, but that’s a mountain politically because the most powerful, in my opinion, lobbying group in Washington are the broadcasters. Copyrights before 1972 are not under federal copyright protection—this is the sound recording, the record—that was supposed to be left up to the states, but the states never passed laws. So in the record labels’ bill they would federalize pre-1972 copyrights. Like us, they would change the rate satellite radio pays them under 801(b) to a willing-buyer, willing-seller standard. So we’ll see. We’ll see what Congress does, if anything. We have some friends in Congress that get this, but it’s the most dysfunctional political time in American history. They are not doing anything about *anything*. [Laughter.] Copyrights are hard to understand, they’re not popular, and we’ve got a lot of potential opposition. Songwriters not so much now, but it depends on what can get pulled together and what Mr. Goodlatte decides to do.

So that’s Congress. I’m going to move on to the DOJ and its consent decrees. Also in February of last year, the DOJ opened up these consent decrees in a way they haven’t done since they were created. They asked for input and are trying to come up with some recommendations to change these consent decrees with rate courts. This is pretty complicated, but let me go into the consent decrees. Two big publishing companies, Sony and Universal, withdrew the digital portion of their songs from ASCAP and BMI last year, and they negotiated directly with the streaming services. They got a huge pay raise. Then the DOJ said, “You can’t do that. These consent decrees say you have to pull everything out or nothing.”<sup>13</sup> And that left too much money on the table. All of the bars and restaurants, they pull that out, they have no way to license tens and tens of thousands—how do they license with the radio stations? So the DOJ said, “Let’s look at it.”

If I’m a songwriter *and* the artist I have another whole income stream from mechanical royalties, but I’ve got to go to somebody named the Harry Fox

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12. Fair Play Fair Pay Act, H.R. 1733, 114th Cong. (2015).

13. Pandora Media, Inc. v. Am. Soc’y of Composers, Authors, and Publr., 12 Civ. 8035 (DLC) 2013 U.S. Dist. LEXIS 133133 at \*1 (S.D.N.Y. Sept. 17, 2013).



agency for those. Why have ASCAP and BMI collect only my performances but not my mechanicals when most of the money comes from the same services and it would cost a whole lot less for the artist? We're asking that ASCAP and BMI be able to license and collect both of those royalties, just for efficiency. And we'll see.

It seemed like that was going pretty well until recently when the DOJ, because of anti-trust concerns . . . Let me first stop and explain. On a song there can be dozens of companies and performing rights societies involved. In hip hop for example there's often five or six songwriters and producers that own a share of the song and different publishing companies—one might be at ASCAP, another at SESAC, another at BMI. According to an interpretation from the DOJ, if you are Pandora, Spotify, or another service, you could go to any one of those individuals, their companies, or performing rights societies and license the whole song after talking to just that one entity.<sup>14</sup> We don't like that. It would lead to rate shock. It would take this dagger that's already in the heart of songwriters and twist it. [Laughter.]

So we're in the comment period on that. We'll see where that goes. But here's the process for that. The DOJ also has three phases. Phase one is collecting information to come up with some recommendations. That was supposed to last three or four months, then six months, and it's been 18 months. We'll see how long that takes. But eventually, the DOJ intends to recommend some changes to these consent decrees to the rate court judges. Then you've got the two rate court judges. The ASCAP judge and the BMI judge are very philosophically different. So the DOJ is on some very unique ground. How do they make recommendations to two rate court judges, when they have no authority whatsoever to make them accept those changes? And what do the rate court judges do? They could have discovery hearings, or they could undertake any process with court-appointed experts that they want to consider these changes. It could be months, years. And what if they don't agree? What did we accomplish when we get down to two rate court judges that see this differently? But by the stroke of providence, let's suppose three or four years from now they do. Then there's an appeals process. And I guaran-damn-tee you, whatever side loses, it's going to be appealed. My guess? This goes to the U.S. Supreme Court. They love this sort of thing. So we'll see. That process takes years.<sup>15</sup>

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14. This process is called 100 percent licensing and is a departure from the longstanding industry practice, known as fractional licensing, under which approval from each partial owner was required for a license. See Ed Christman, *The Dept. of Justice Said to Be Considering a Baffling New Rule Change for Song Licensing*, BILLBOARD (July 30, 2015), <http://www.billboard.com/articles/business/6649208/the-dept-of-justice-said-to-be-considering-a-baffling-new-rule-change-for> [https://perma.cc/238F-UU3D].

15. After this presentation but before publication, the DOJ concluded its review and recommended no amendments to the consent decrees, leaving in place the 100 percent

So remember I said we're attacking this in three areas? There's Congress, there's the DOJ, and there's the marketplace.

Back when the consent decrees were entered, the DOJ definition of a monopoly was two companies controlling something. SESAC in the past few years has gone from 2% of the marketplace to 10%. Now there is the new PRO Global Music Rights, started by Irving Azoff, and I am sure there will be some others. My guess is the marketplace pushes the government or renders what the government needs to do unnecessary or largely unnecessary at some point. So we let the marketplace work. It's going to be very interesting to observe over the next few years.

So to sum all this up, you've got two copyrights. Songwriters generally, except for film and television, are regulated by the government under rules that are over a hundred and over 70 years old. We need to change that. There is some attention in Congress, but just in the House of Representatives—the Senate is not really paying much attention to this right now. You have songwriters that should ask Congress, “Get out of our business. Look, antitrust is fine, keep an eye on us, but leave us alone.” That's pretty aggressive, and it's just not politically achievable yet. And if we shoot too far and lose, this is it. So all the organizations involved in the United States, which are the three performing rights societies, the publishers and the songwriters, have agreed that our strategy is the Songwriter Equity Act. You have the record labels that are asking for some different things, and their copyright is different from us. You have a process that's in phase two of the three-part process, and we'll know sometime early next year if and what Congress is going to do. In the meantime you've got the U.S. DOJ taking a pretty thorough look at these consent decrees, but doing it under a process that takes a long, long, long, long, long, long time. [Laughter.] And you have the marketplace working. We'll see where it goes.

For songwriters, we will get to a better place. We will get paid more fairly, and we will get compensated. A songwriter's agent, essentially, is a music

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licensing requirement. *See* Brittany Hodak, U.S. Dept. Of Justice Deals Crushing Blow To Songwriters, *FORBES* (July 1, 2016), <http://www.forbes.com/sites/brittanyhodak/2016/07/01/u-s-dept-of-justice-deals-crushing-blow-to-songwriters/#1376623f1127> [<https://perma.cc/L7EL-ASWR>] (story on the ruling that includes a quote from Mr. Herbison). Several weeks later, Judge Louis Stanton overturned the DOJ's interpretation as it applies to the BMI consent decree, concluding that fractional licensing is allowed. *United States v. Broadcast Music, Inc.*, No. 64 Civ. 3787 (LLS), 2016 U.S. Dist. LEXIS 126588 at \*5–6 (S.D.N.Y. Sept. 16, 2016). The DOJ has appealed. *See* Ed Christman, Dept. of Justice Appeals BMI Consent Decree Decision, *BILLBOARD* (Nov. 11, 2016), <http://www.billboard.com/articles/business/7573537/doj-appeal-bmi-consent-decree-decision-fractional-licensing> [<https://perma.cc/Y9FK-J55N>].

publisher. Successful songwriters, at least early in their career, sign with a music publisher and split their royalties with the music publisher in some fashion. It's usually 50-50 but if you have success, it's going to be more. The songwriter's job is to be the creator and write the songs; the publisher's job is to exploit those copyrights to get them cuts and to get them film and TV placements. In 1997 there were somewhere between three and four thousand legitimate publishing deals for songwriters in Nashville. Today there are about 500. And a whole lot of that decline is because when we sold records you didn't need the big radio single, you just needed a bunch of album cuts. And with 42 record labels and three or four hundred artists and songs going up and down the charts in 20 or 22 weeks instead of staying on for 30, 40, or 50, that meant three to four singles a year, an album every year. We couldn't—you couldn't get enough songs. That's never coming back. We understand that and we realize that. So it's going to be singles. Money for the songwriter who doesn't sell the t-shirts and doesn't tour is going to be from a single on the radio. But we believe that that payment can be much healthier in the digital era. We're not against Pandora and Spotify. Look, even if we were, streaming is a reality. They are finally paying us for their free versions because it's all based on advertisements. They've got a subscription part where you pay—nobody does that yet. Very few people. So we are figuring it out. It's a very, very important time. Very important time for us, because whatever we do, we may be able to tweak it five or ten years down the road, but the framework we set right now is going to last for a long, long time.

I want to thank you for having me today. We've got about five more minutes to answer any questions anybody has.

**Audience Member 1:** I was curious, as a songwriter, would it be more lucrative to be signed with SESAC than BMI and ASCAP?

**Mr. Herbison:** We'll see. Right now, they're all a little different, they all pay a little different, but they're all rather the same—the way money comes in there's sort of a little rollercoaster. Some years it's BMI that pays more, some years ASCAP, some years SESAC, it really depends on the number of writers and artists at the PRO and the number of hits they have licensed. Some years ASCAP has the big hits, some years it's BMI. I think that's a perceptive question. My guess is you are certainly going to get a higher rate from streaming services when that deal comes out, because SESAC is going to get to negotiate and threaten to pull content. They don't have to wait on a consent decree. They're not under a compulsory license. So that's going to be very interesting to watch.

Yes?

**Audience Member 2:** So, thank you, because that was as good a summary as I've heard of the situation in a while. There's one more thing that I'd add though, and that's all of this—the rate setting to the extent it references so-called market rates—and any free market that arises is all done against the backdrop of a massive infringement and black market that's depressing the price. There are plenty of players in the ecosystem that take advantage of this. Google, for example, can rely on, you know, YouTube is now the biggest place for streaming music. YouTube can rely on the notice and takedown system, which is essentially a defective system that's completely ineffective at stopping copyright infringement. And what Google can say to a copyright owner that can negotiate with it, that can set market rates is Google has, pretty clearly said, “Look, you can take our deal. You can take our rate, our low, low rate, or you can send us notice, and we'll take the stuff down, but it'll pop back up and you won't get paid for it.” And so this suppresses the rates in the marketplace; it suppresses what streaming services can charge; it really suppresses the revenue pool for everybody.

And I think that's a big background here and a really hard problem to tackle, because as much as broadcasters have power in Washington, tech interests like Google spend more money than almost anyone else now.

**Mr. Herbison:** That's correct. That's very perceptive. I will say there was a precedent-setting case where Viacom sued YouTube.<sup>16</sup> That and some other court cases and a lack of foresight in the Digital Millennium Copyright Act resulted in an impossible whack-a-mole scenario. Imagine Bart Herbison writes the Bart song, and it's the biggest song on YouTube. I can take it down, one user at a time. Except there are 75 million times I serve the notice, and when we take one down, another illegal version appears. There are a couple more active court cases that could tweak that some. I am not at liberty to discuss some of the things we are discussing in Congress to impact portions of that.

There's one other thing I should mention: our data is crap. So you're going to hear a lot about transparency. The data is junk. ASCAP's data system is different from BMI's, which is different from SESAC's, which is different from Harry Fox's. And even good players in the digital space that want to go get a license, and depending on how they want to use it they may have to get two, three, four licenses—they don't know who owns the song. The metadata is junk. One of the things the copyright office has suggested that we and others support—they went much more comprehensively, but the one part of their report we all support, both on the music industry content creators' side and on the digital distribution as well as other

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16. *Viacom Int'l, Inc. v. Youtube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

distribution side—is that we have to have one place where all the data is right. This would allow all the different publishers, PROs, report to one place where that data is clean, and at least you can figure out where you need to go to get the necessary permissions. There’s a real possibility Mr. Goodlatte does nothing and says, “You guys work this out,” and I’m pretty confident he will address the transparency data issues when he does this.

Time for one more question.

**Audience Member 3:** If I could add to that. I work in the classical music field, and we have a direct deal with Pandora for that exact reason, the metadata issue. In classical music we have arrangers in addition to composers, so it’s not like the mainstream or the country field where you can identify a song based on three or four songwriters. We have 900 different versions of just the Bach Goldberg Variations and arrangers, so keeping track of all that, there’s just not a system in place. So that’s why for us it’s better for us to deliver our metadata directly and our audio directly to a service like Pandora and receive back the reports directly rather than go through a system like SoundExchange or anywhere else where it’s not set for the metadata we use. So there is a good side to some of these direct services.

**Mr. Herbison:** That’s well said. And thank you for having me. [Applause.]