Written Statement of Paul Williams
President and Chairman of the Board
American Society of Composers, Authors and Publishers
on
"Music Licensing Under Title 17 – Part Two"
Before the
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Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet
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Mr. Chairman, thank you for this opportunity to present testimony before the Subcommittee on Courts, Intellectual Property, and the Internet of the U.S. House of Representatives Committee on the Judiciary on the important subject of the future of music licensing.

I am the President and Chairman of the Board of the American Society of Composers, Authors and Publishers ("ASCAP"), the oldest and largest performing rights organization ("PRO") in the United States. But first and foremost, I am a songwriter. For 100 years, ASCAP has defended and protected the rights of songwriters and composers, like myself, and kept American music flowing to millions of listeners worldwide. Today, our 500,000 songwriter, composer and music publisher members depend on ASCAP for their livelihoods, by negotiating licenses, tracking public performances, distributing royalties and advocating on their behalf. Through a century of innovation, ASCAP's collective licensing model has served as the primary gateway to music for businesses seeking to perform copyrighted music, ensuring that they may efficiently obtain licenses to perform the millions of works in ASCAP's repertory. As we consider our next 100 years, I firmly believe that ASCAP's collective licensing model is the most effective, efficient and compelling model to serve the needs of music creators, businesses that perform music, and music listeners everywhere.

New technologies, however, have dramatically transformed the way people listen to music, a transformation that, in turn, is greatly changing the economics of the music business, particularly for songwriters and composers, who do not share the same revenue streams as recording artists, such as concert and merchandise revenue. Streaming music through services such as Pandora, Spotify, and iTunes Radio is growing at a fast pace as physical music sales and digital downloads decrease in popularity. Digital audiovisual services such as Netflix and Amazon are revolutionizing the ways in which the world watches television and movies, changing the traditional media landscape. Music is now enjoyed by more people, in more places and over more devices, and ASCAP and our members embrace these new services as means to bring our music to the public. But the regulatory system that governs how ASCAP can license such new services has failed to keep pace, making it increasingly difficult for music creators to realize a competitive return for their creative efforts and for PROs such as ASCAP to appropriately serve the needs of their members (music creators), customers (music licensees) and the music listening public. A time for change has come.

In my testimony, I will describe how collective licensing by PROs such as ASCAP and Broadcast Music, Inc. ("BMI") plays an essential function in the music marketplace and continues to do so in the face of a digitally transformative economy. I will then describe how regulatory oversight through negotiated consent decrees and the U.S. Copyright Act has failed to meet those changes in the marketplace. Finally, I will suggest modifications to the consent decrees that will address such shortcomings and emphasize how Congress may assist in ensuring that ASCAP's songwriter, composers

and music publisher members realize competitive prices that reflect the true value of their music.

I. Collective Licensing Is Crucial to the Music Licensing Marketplace

On February 13, 1914, a group of visionary songwriters convened at the Hotel Claridge in New York City to address the problem facing songwriters and composers of that day – how to efficiently obtain compensation for the widespread use of their copyrighted music by thousands of businesses performing their music countrywide. The solution was the creation of ASCAP, the first PRO. ASCAP would negotiate and administer bulk licenses for the non-dramatic public performance rights in works of its members on a collective basis, monitor music usage by and collect fees from licensees, distribute royalty payments to its members and protect from infringement of its members' exclusive public performance rights. A bulk license offered by ASCAP would provide efficiencies for both rights holders, who would otherwise struggle to individually license or enforce the millions of performances of their works by thousands of individual users on an individual basis, and licensees, who would otherwise find it impossible to efficiently clear the rights for their performances if forced to negotiate separately with each individual copyright owner. Most crucial to its success, ASCAP's collective licensing would permit its members to spread the costs of licensing and monitoring music usage among the entire membership, thereby reducing costs to a manageable level and ensuring that more of the money collected is paid to songwriters and publishers as royalties. As a testament to ASCAP's collective efficiencies, ASCAP – *which operates on a non-profit-making basis*, distributing all license fees collected, less operating expenses, as royalties to its members – today distributes to our members as royalties

approximately 88% of all fees we collect, on account of performances made by over 700,000 different entities, making it the most efficient PRO in the world.

Moreover, PROs like ASCAP offer their members another crucial benefit – transparency. Unlike other relationships, such as that found with many record labels and recording artists where royalties are distributed on a pass-through basis, hinging on complex contracts, ASCAP's relationship with its members is direct and transparent. Every dollar that ASCAP receives is divided into two – fifty cents is allocated to songwriters and composers and fifty cents to music publishers. ASCAP distributes separately each allocation directly to our songwriter and composer members, and to our music publisher members, regardless of their separate contractual agreements. This direct relationship provides much needed transparency and is crucial to the continued ability for songwriters and composers to earn a competitive return for the use of their music.

A century ago, ASCAP's efforts were directed towards the music users of that day – performance venues and other public establishments that play music, such as bars, restaurants, hotels and retail stores. With the progression of technology over the years, ASCAP innovatively met the demands of the marketplace, ably negotiating licenses on a non-exclusive basis for the public performance rights in the musical works in our repertory of millions of works, as well as the repertories of nearly 100 foreign PROs with which ASCAP has reciprocal agreements, to a wide range of licensee industries. In the 1920s through the 1940s, ASCAP met the needs of the radio marketplace devising licenses that today serve thousands of radio stations. In the 1950s through the 1970s, ASCAP engineered licensing for the developing local and network television industry. In

the 1980s and 1990s, ASCAP provided solutions to the emerging cable and satellite industries. In each decade, despite challenges posed by new technologies and business models, ASCAP was able to work with user industries to provide efficient licensing solutions that would provide a much needed stream of income to ASCAP's members for the use of their works – royalties such songwriters and publishers might otherwise be unable to collect. The consent decree did not impede ASCAP's ability to serve our members, who for decades were able to earn a living writing and composing music, largely due to the royalties collected by ASCAP on their behalf.

Today, ASCAP's role remains unchanged, despite the seismic changes confronting the music industry by virtue of the advent of the Internet and other digital technologies. If not for PRO collective licensing, the billions of performances made by digital music services such as Pandora, Spotify and Apple's iTunes Radio would require clearance on a copyright-owner-by-copyright-owner basis – exactly the problem faced by ASCAP's founders years ago, but on a magnitude far greater. Indeed, such services herald PRO collective licensing as a model of licensing efficiency to be emulated throughout the market, without which licensing – and their businesses – would suffer.[1] In fact, the U.S. Copyright Office and its current and past Registers of Copyright have attested to the success of and need for the PRO collective licensing model, and its potential as a model for other rights.[2]

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[1] *See*, *e.g.*, Comments of Sirius XM Radio Inc., U.S. Copyright Office, In the Matter of Music Licensing Study: Notice and Request for Public Comment, Docket No. 2014-3 ("Music Study") at 5 ("[T]he efficiencies of the blanket licenses and one-stop shopping may justify the PROs' existence"); Comments of the Digital Media Association, Music Study at 27 ("[T]he blanket licenses (among other forms of licenses) offered by ASCAP, BMI and SESAC provide a framework that promotes licensing efficiencies and reduced transaction costs for both licensors and licensees alike.")

[2] *See* U.S. Copyright Office, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT 32 (2011); Maria Pallante, Remarks at the Copyright Matters program of February 25, 2014 ("Pallante Remarks") ("[I]t is clear there will always be an important role for the collective

Today's robust marketplace for performing rights is built on the foundation provided by collective licensing. Indeed, competition in the collective licensing marketplace has expanded widely. ASCAP now competes with two other PROs in the U.S. – BMI and SESAC, Inc. (a private unregulated PRO) – as well as new profit-making market entrants.

The role of the PRO therefore remains vital to the future of the music marketplace – both for ASCAP songwriter, composer and publisher members, who depend on the performing right royalties collected by ASCAP as a major source of income, particularly as digital music streaming services account for an increasingly larger portion of music revenues in the U.S. and other sources of royalties (such as those from the sale of compact discs and digital downloads) decline, as well as for digital content services, who depend on the efficiencies of PRO collective licensing to compete in the market. However, it has become clear – as I explain below – that the consent decree regulating ASCAP has failed to properly adjust to meet those changes, leaving ASCAP's members in much the same place as they were a century ago at the Hotel Claridge – searching for a solution to the problem of how to achieve a competitive return for the widespread use of their copyrighted music. And, much like its forebears concluded then, the solution is a vibrant ASCAP that provides collective licensing in an efficient manner. However, to

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licensing paradigm, which was innovative when ASCAP was founded 100 years ago and remains innovative today."); Statement of Marybeth Peters, The Register of Copyrights, Before the Subcommittee on Intellectual Property, Committee on the Judiciary, United States Senate 109th Congress, 1st Session, July 12, 2005, Music Licensing Reform ("The United States also has collective licensing organizations, such as ASCAP, BMI and SESAC, which appear to function quite successfully. These performing rights organizations license the public performance of musical works – for which there is no statutory license – providing users with a means to obtain and pay for the necessary rights without difficulty. It seems reasonable to ask whether a similar model would work for licensing of the rights of reproduction and distribution.")

maintain the feasibility of that solution, the consent decree must, too, adapt. A time for change has indeed come.

II. The ASCAP Consent Decree and U.S. Copyright Law Require Adjustment

In 1941, ASCAP settled a lawsuit brought by the Department of Justice and entered into a consent decree (the "Consent Decree" or "Decree") that prohibited ASCAP from receiving an exclusive grant of rights from its members and required ASCAP to charge similar license fees to music users that are "similarly situated." The ASCAP Consent Decree has only been amended twice – first in 1950 and, subsequently in 2001, prior to the biggest developments of the digital music era, including the introduction of Apple's iPod. In its current form, the Decree requires ASCAP, after receiving a request for a license from a music user, to negotiate a reasonable license fee or seek such a determination from a "rate court." Pending the completion of any such negotiations or rate court proceeding, the Decree grants the music user the right to perform any or all of the musical works in the ASCAP repertory.

Additionally, among other things, the Decree prohibits ASCAP from acquiring or licensing rights other than for the public performance of musical works, such as mechanical or synchronization rights. As I discuss below, it is now apparent that the Decree has failed in these and other respects to accommodate the rapid and dramatic changes in the music licensing marketplace brought about by the extraordinary evolution in the ways in which music is now distributed and consumed. As a result, the collective licensing model that has, for the past century, benefited music creators, licensees and consumers alike, and which is necessary for a viable music licensing system in the future, is at risk.

A. The Automatic License Requirement

Under the Decree, a music user is entitled to begin performing any or all ASCAP music as soon as a written license application is submitted, without the threat of infringement, before fees are negotiated by the parties or set by the rate court. However, the Decree does not currently compel either ASCAP or an applicant to commence a rate court proceeding in the absence of agreement on final license terms, nor does it establish a definite timeline for the negotiation of a final fee – elements of the licensing process that certain users have begun to exploit as a dilatory tactic to avoid paying competitive prices to perform the ASCAP repertory.

For many years, the license application process was merely a procedural step leading to eventual final licenses for established industries. ASCAP traditionally negotiated licenses with industry committees or associations representing entire classes of licensees. For example, ASCAP negotiates with the Television Music Licensing Committee, which testified before you on June 10th, to reach license agreements for the entire local broadcast television industry. Established relationships and courses of conduct, as well the development of traditional media business economies – such as the radio and television broadcast economies – led generally to continued payment of fees, even without a negotiated final license in place.

In today's marketplace, however, digital services without a history of negotiating licenses and paying fees, and often without any proven business model, utilize the Decree license process to their benefit. As ASCAP licenses are compulsory and fees can be set retroactively, certain music users have strategically delayed or extended the negotiating process, choosing to remain applicants or interim licensees indefinitely—in some cases a

decade or longer—without paying fees to ASCAP or providing ASCAP with the information necessary to determine a reasonable final fee. In some cases, music users have decided that interim license rates are more favorable than anticipated rate increases, and have made strategic choices to stay on interim terms for as long as ASCAP permits. In other cases, new applicants have applied for a license – claiming the shelter of the Consent Decree's guarantee of a right to perform ASCAP members' music while an application is pending – while simultaneously disclaiming the need for such a license and refusing to provide the information ASCAP needs to formulate a fee proposal.

In the scenarios above, ASCAP has limited choices. It can do nothing and permit users to remain as applicants or interim licensees longer than would be preferred without paying any fees. Or, it can accept what it believes is a sub-optimal outcome and, open the door for other users to argue that ASCAP must offer to them the same sub-optimal license due to the Decree's mandate to offer the same license rates and terms to similarly situated licensees. Or, ASCAP can decide whether to use its limited resources to pursue a lengthy, expensive and arduous rate court proceeding, which, as I describe below, can result in below-market rates. ASCAP's members consequently often find themselves placed between a rock and a hard place.

This problem is particularly pronounced with regard to new digital services or other new media services that are particularly susceptible to changing market conditions. As compared to traditional music users like terrestrial radio stations or television broadcasting networks, the potential scale and type of music use can now vary widely among new media licensees, complicating the process through which ASCAP values the requested license. Moreover, the speed with which new media licensees enter and exit

the market has increased. As a result, ASCAP's need for information from an applicant regarding its plans for a particular service has increased, both to calculate a reasonable fee, but also – in the event that the applicant refuses to provide information – to assess the potential costs and benefits of petitioning the rate court to set a reasonable fee. When applicants ignore ASCAP's requests for information, ASCAP can lack even the basic information necessary to determine whether rate court litigation is justified. These problems might be mitigated somewhat if the new media services were amenable, and able, to negotiate on an industry-wide basis like other industries do. However, as these new media services elect not to (or simply cannot) negotiate collectively, ASCAP is forced to go down the same path with each service separately at a huge cost to ASCAP's members.

B. The Rate Court Process

Until the advent of the digital era, the rate court process was rarely invoked. Established industry groups and ASCAP were generally able to reach license agreements outside of the rate court. However, as I described earlier, the compulsory license application process under the Decree has led to licensing deadlock with many digital services, forcing greater resort to the rate court. Indeed, of the 30 or so rate court proceedings to date over the past half century, more than half were initiated since 1995.

While the ASCAP rate court was meant to provide a forum for the efficient and timely determination of rate disputes, in practice, rate court litigation has resulted in great expense and prolonged uncertainty for both ASCAP and license applicants. The Decree mandate to commence the trial within one year of the filing of the initial petition is rarely met, largely because the parties are permitted the full range of costly pretrial motion

practice and discovery afforded by Federal rules; post-trial appellate proceedings or possible proceedings on remand further delay the determination of a final fee even beyond the original expiration date of the license at issue.

Rate court proceedings have proven to be extremely expensive for the parties involved. In addition to enormous internal administrative and labor costs, ASCAP and applicants have collectively expended many tens of millions of dollars on litigation expenses related to rate court proceedings, much of that incurred since only 2009. Of course, each licensee bears only the expense of its own ASCAP rate court proceeding; ASCAP must bear the expense of them all.

C. Rate-Setting Standards

In addition to making the rate-setting process administratively faster and less expensive, there is a dire need to establish a clear rate-setting standard that looks to competitive free-market benchmarks. Under the Decree, the rate court must set a "reasonable fee." However, the Consent Decree does not define "reasonable;" thus, ASCAP and our members are burdened by the lack of clarity regarding what factors the rate court should consider when setting a reasonable fee and the weight given to those factors. The rate court has often looked to the concept of fair market value, looking at the price that a willing buyer and a willing seller would agree to in an arm's length transaction, and finding that this value can best be determined by the consideration of analogous licenses or benchmark agreements from a competitive market. However, many of the licenses presented as benchmarks – those between ASCAP or BMI and various licensees – are inherently different from the licenses that would be obtained in a competitive market. This is because a seller's ability to refuse to sell is a key

requirement for a true market transaction, and neither ASCAP nor BMI are free to refuse to license their repertories under their respective consent decrees.

But the last few years have seen an increase in the number of direct licenses negotiated between music publishers and music users outside of the compulsory licensing regime imposed by the ASCAP and BMI consent decrees – licenses that can be used as a measure of competitive pricing in the market for public performance rights. As certain publishers withdrew their digital rights from ASCAP and BMI and negotiated licenses in the free marketplace outside of the constraints of consent decrees (a phenomenon I will describe below), the rate court was, for the first time, supplied with actual competitive market benchmarks. However, the rate court signaled in its most recent decision that it would not rely on the most recent licenses negotiated by copyright owners in the free market – rates that were widely known to be higher than what applicants were willing to pay the PROs – a result that means that ASCAP's members will be paid lower rates than what other copyright owners are receiving from the same licensee.

In addition, the rate court is not permitted to look to other relevant marketplace indicia when it sets rates. Section 114(i) of the Copyright Act prohibits the rate court in setting fees for the performance of musical works from looking at fees paid *by those same services* to the recording industry for the performance of sound recordings, leading to rate disparities in favor of sound recordings in the order of 12 to 1. This problem has been addressed by the introduction of the Songwriter Equity Act, which I discuss below.

It is clear that the legal and regulatory restrictions imposed on ASCAP by the Consent Decree and the Copyright Act severely limit ASCAP's members from achieving competitive market rates for their works.

D. Flexibility in Licensing Is Imperative

The option for copyright owners to directly license works has long been a key feature of ASCAP membership. Because ASCAP can accept grants of rights only on a non-exclusive basis, ASCAP's members are free to issue licenses directly to users, and many have done so over the years. Of course, due to the efficiencies afforded through ASCAP's collective licensing system, most ASCAP members, however, have licensed all of their works through ASCAP all of the time. However, certain ASCAP publisher members recently developed concerns that, due to the constraints imposed by the Decree and the inability to achieve competitive market rates through the rate court process, licensing their songs through ASCAP in the new media marketplace did not allow them to realize the full value of their copyrights. Moreover, some ASCAP members wanted increased flexibility to manage their own rights and negotiate contractual scope and terms directly with particular music users (terms which the Decree might prohibit). These members questioned whether their only option to achieve these licensing goals was to withdraw their membership from the PROs altogether.

To ensure that our members would be able to exercise the rights granted to them under the copyright law as copyright owners, but not be forced to surrender all of the benefits of PRO collective licensing by withdrawing from ASCAP completely (after all, licensing tens of thousands of music users individually is practically impossible for any copyright owner), ASCAP struck a balance: we decided to permit our publisher members to withdraw rights on a limited basis, giving such members the flexibility to license digital services on their own in the free marketplace while retaining the blanket efficiencies afforded by collective licensing for all other uses for the benefit of owners

and users alike. BMI took a similar approach. However, the ASCAP and BMI rate courts both denied copyright owners this flexibility, ruling that the ASCAP and BMI respective consent decrees did not allow for a partial grant of rights, but instead require copyright owners to be either "all in" as PRO members or "all out."

As a result, copyright owners are currently forced to choose to either remain PRO members and reap the benefits of PRO collective licensing, but through a regulated system that does not compensate them for the true value of the performances of their works or leave the PRO system altogether, achieving competitive rates in the marketplace, but losing the efficiencies of collective licensing and leaving unlicensed performances by thousands of music users they cannot affordably individually license. The crucial problem with this second choice is that the efficiencies of collective licensing depend on the PRO's ability to spread the costs of licensing and monitoring music usage among the entire membership, thereby reducing costs to a manageable level; the loss of major members from the PROs would severely limit such efficiencies for the remaining members, perhaps so much so that the PROs could not efficiently operate anymore. If that happens, and the collective system consequently collapses, we all lose – songwriters, music services and consumers alike.

Furthermore, the Decree denies ASCAP the flexibility to construct the licenses its digital music users seek. The public performance right licensed by ASCAP on behalf of its members is only one of several exclusive rights provided to copyright holders of musical compositions. Others include the right to reproduce and distribute musical works as phonorecords (the "mechanical right"); the right to use a recording of a musical work in timed relation with visual images, such as part of a movie or television program (the

"synchronization" or "synch right"); and the right to print or display a composition's lyrics (the "print right"). Each of these rights are licensed separately; at the moment, services typically license performance rights through a PRO and mechanical rights and synch rights directly from the copyright owner, administrator or a designated agent, often on a song-by-song basis.

This division of licensing was sufficiently convenient in the traditional analog world in which licensees rarely needed licenses for multiple rights. The introduction of digital technology, however, has changed the traditional licensing environment, requiring digital users to often clear multiple rights for the same use. Digital music services that stream music on an on-demand basis need a public performance license as well as a mechanical license. A wide variety of digital music services display lyrics as songs are streaming, necessitating both public performance and print licenses. Services utilizing audiovisual content are now required to clear synchronization rights on a large scale basis, which must be obtained from the publishers directly, again on a song-by-song basis. Separate licensing of these rights is inefficient and may discourage new media users from properly licensing their services.

These complexities inherent in a multiple rights clearance system have triggered music users to vocalize their desires for collective licensing solutions. ASCAP, of course, offers that collective blanket licensing solution, but is prohibited under the Consent Decree from licensing rights in musical compositions other than public performance rights. Other PROs in and outside of the U.S. are able to do so. Indeed, many foreign PROs are already engaged in the process of licensing multiple rights. ASCAP's inability to offer licenses for multiple rights not only creates licensing

inefficiencies for music users to the detriment of consumers who ultimately bear the transactional costs, but it also places ASCAP's members at a competitive disadvantage in the licensing marketplace if other organizations can license those rights.

E. U.S. Copyright Law Must Be Technology Agnostic

While music businesses have been built upon a rights model largely unchanged in 100 years, the drastic changes in the means by which copyrighted content is used and transmitted on a global scale means copyright law must be modernized to ensure that copyright owners are protected in the future. Consumers no longer rely upon a passive, pre-scheduled means of experiencing content. Rather, digital content is made available in a myriad of ways that permit consumers flexibility in the means by which they experience such content. The old strict divide between user-uncontrolled, non-interactive webcast streaming and full download transmissions that took minutes (or hours) to complete has evolved into hybrid technologies that do not lend themselves to traditional content delivery labels. Users care little how they obtain content – the simply wish to access it, whenever and wherever they choose. Technologies have evolved to meet those consumer expectations.

While the differences in technologies and user experience may be reflected in the ultimate compensation paid for those experiences, it is clear that artificial legal differentiation between what is and what is not compensable under U.S. law is no longer justified. ASCAP has always believed that our Copyright Act grants to copyright owners the broadest protection for the offering of their works to the public, and does so in a

manner that brings our law in compliance with various international treaty obligations.[3] However, a number of recent cases have interpreted the public performance right in such a manner so as to limit the reach of a copyright owner's rights. First, courts have held that transmissions that result in content downloads do not meet the statutory definition of a performance, even though it is clear that such technologies have evolved to make any such distinction irrelevant.[4] More recently, decisions have further limited the extent of the performance right by holding that the transmissions of certain individually-accessible content on a one-to-one basis at the request of consumers are not "public" performances, thus denying copyright owners the right to authorize and be compensated for those transmissions.[5]

If these decisions and their rationale are permitted to stand, the narrowing of the public performance right based on loophole-exploiting technological engineering will lead to the increased use of music without due compensation to its creators. And, considering that countries around the world do not make these technological distinctions in their laws, and we now exist in a borderless digital economy, U.S. rights holders are further disadvantaged. Continued access to creative output depends on competitive compensation to creators for the use of their works, without which, again, ultimately the consumers lose.

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[3] *See* Joint Comments of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., The Songwriters Guild of America, SESAC, Inc. and The National Music Publishers' Association, U.S. Copyright Office, Study on the Right of Making Available, Docket No. 2014-2.
[4] *U.S.* v. *ASCAP, In the Matter of the Application of America Online, Inc*., 627 F.3d 64 (2d Cir. 2010).
[5] *WNET, Thirteen* v. *Aereo. Inc*., 712 F.3d 676 (2d. Cir. 2013); *Cartoon Network LP v. CSC Holdings, Inc*., 536 F.3d 121 (2d Cir. 2008)

III. Proposals For Change

Maintaining ASCAP as the effective licensing solution it has been for the past century requires change – changes to update the Consent Decree, as well as change to the copyright law. Specifically, I propose the following modifications.

A. Modifying the Consent Decree

Maria Pallante, current Register of Copyrights and Director of the U.S. Copyright Office, stated recently that "the time has come to review the role of the consent decrees governing ASCAP and BMI".[6] That time is now. In order to alleviate the significant limitations placed on ASCAP and our members by the Consent Decree, I propose four ways in which the Decree should be modified.

1. Permitting Limited Grants of Rights. The Decree should permit PROs to accept partial grants of rights from copyright holders. Allowing ASCAP to maintain the compromise already struck with our members would preserve the benefits of collective licensing for users and owners in many situations, while allowing copyright holders to pursue direct non-compulsory licenses when they felt it was economically efficient and beneficial to do so. This approach would also afford greater latitude in structuring license arrangements, ultimately benefiting copyright owners and music users alike. Further, by encouraging the negotiation of direct licenses by truly willing buyers and willing sellers who are not under any compulsion to grant licenses, this approach would result in competitive market transactions that would then provide informative benchmarks for the rate-setting tribunal. Finally, members would be encouraged to remain within the PRO system, thereby effectuating collective efficiency for, and benefiting, all other members, music users and consumers alike.

[6] *See* Pallante Remarks.

2. Expedited Rate-Setting Process. The Consent Decree's rate-setting process should be replaced with an expedited arbitration process with focused discovery that would be significantly faster and substantially less costly. Expedited arbitration proceedings would serve two purposes. First, both music creators and music users would benefit from a more definite timeline and cheaper resolution of license fee disputes. Second, it would discourage applicants for automatic Decree licenses from indefinitely resting on mere license applications or remaining on interim licenses, and impose on applicants an obligation to pay for their use of ASCAP members' music.

3. Competitive Market Rate Standards. The establishment of an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders provide the best evidence of reasonable rates would ensure that rates are based on competitive market transactions. Such a presumption would provide more certainty for all parties involved and also encourage more out-of-court negotiations, by providing the parties a reliable preview of the rate court's ultimate benchmark analysis and discouraging the strategic use of rate court proceedings to avoid the influence of market rates.

4. Licensing Multiple Rights. ASCAP should be permitted to extend the benefits of collective licensing through aggregated licensing to music users that could negotiate with ASCAP for multiple rights – namely, mechanical, synchronization and print rights in addition to public performance rights – in a single transaction. This would finally create a "one-stop shop" for musical work rights. Modifying the Consent Decree in this way would respond to licensee demand for simplification of the licensing process and administration of multiple rights. In addition, the flexibility to structure licenses that

aggregate rights would greatly reduce transactional costs and administrative expenses for owners and music users, which would benefit their customers, and, ultimately provide music creators with a greater monetary return for the use of their works. This would also allow ASCAP to compete more effectively in both the domestic and international licensing marketplace with owners or PROs that can, and do, aggregate rights.

B. Modifications to the Copyright Law

1. Songwriter Equity Act . ASCAP, along with other PROs and music publisher and songwriter groups, have joined to support the Songwriter Equity Act ("SEA"), a bill that would further the goals of providing competitive market rates to songwriters and composers. The SEA would provide for the setting of competitive market rates under the outdated pre-World War One era Section 115 mechanical license, and would remove the unfair barriers placed by Section 114(i) upon rate courts from considering license rates and fees paid by services for the public performances of sound recordings in setting fees for the same public performances of the underlying musical works. Significantly, the SEA does not mandate the rate-setting bodies to increase rates. Rather, it will permit them to finally be able to examine and take into account all relevant market evidence in setting rates. It is our hope that the passage of the SEA will further the ability for songwriters and music publishers to achieve competitive prices for the use of their works and lessen the inequitable disparity currently in place between payment for sound recordings and musical works. ASCAP and our members thank Representative Doug Collins and Hakeem Jeffries for their leadership in introducing this bill, and thank the many subcommittee members who have joined them through their co-sponsorship.

2. Making Available Right. The Supreme Court, understanding the significance of the issues raised in the *Aereo* case regarding Internet retransmission of broadcast signals to individual users, is reviewing the lower court's decision and will thereby shed further light on the reach of the performance right. ASCAP hopes and expects the Court to rule in favor of a broad reading of the performance right. However, regardless of the ultimate decision, U.S. law should remain agnostic regarding how copyrighted content is made accessible to users, and should extend protection to cover all means by which copyrighted content is made accessible to the public. This principle of neutral treatment is the basis for the broad "making available" right required upon signatories to the two WIPO Internet Treaties, the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, which were intended to provide a broad technology-agnostic exclusive right to encompass all manner and form of providing and disseminating copyrighted works to the public regardless of the manner of such transmission. Congress must ensure that the U.S., as a signatory to those treaties, provides a copyright law that respects this principle, and to the extent necessary, amend the Copyright Act to confirm that copyright owners should receive due compensation for the use of their works regardless of the means of delivery.

IV. Conclusion

For 100 years, PRO collective licensing has served as the solution to an efficient licensing marketplace, and it remains the solution today. However, new innovations in the marketplace demand that the outdated regulations governing the ability of the PROs to license on behalf of their songwriter, composers and publisher members evolve to meet those changes in order to provide competitive remuneration for the use of those

members' musical works. Without those changes, copyright owners may abandon the collective PRO system in hope of achieving competitive rates on their own, potentially tearing apart our collective licensing system. If that were to occur, everyone loses. Withdrawing copyright owners lose the efficiencies offered by the PROs, leaving unlicensed many performances of their work. Other copyright owners lose the ability to license their work on a blanket basis. Songwriters and composers lose the transparencies and services provided by the PROs. Services lose the ability to license on an efficient and transactional cost saving basis. And the ultimate losers would be those for whom the music is intended – the consumers. A time for change has indeed come.

Mr. Chairman, ASCAP and I look forward to working with your committee and staff to achieve these changes, and ensure that the music licensing marketplace works for all.