Written Statement of Elizabeth Matthews
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on
Performance Rights Organization Consent Decrees
Before the
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Mr. Chairman, thank you for this opportunity to present testimony before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the U.S. Senate Committee on the Judiciary on the important subject of performance rights organization consent decrees and the challenges they present in the current music licensing marketplace.

I am the Chief Executive Officer of the American Society of Composers, Authors and Publishers ("ASCAP"), the oldest and largest performing rights organization ("PRO") in the United States. For over 100 years, ASCAP has defended and protected the rights of songwriters and composers, and kept American music flowing to millions of listeners worldwide. Today, our 520,000 songwriter, lyricist, composer and music publisher members depend on ASCAP for their livelihoods, relying on ASCAP to negotiate licenses, track public performances, distribute royalties and advocate 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 look forward to 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 fans everywhere, and a necessary component of the music licensing marketplace.

By way of background, each musical recording encompasses two distinct copyrighted works: (1) the musical work, which is the underlying composition, including the lyrics and musical composition; and (2) the sound recording, which is a specific recorded version of a musical work. ASCAP licenses the right to perform publicly the musical works. It does not license any rights inherent in sound recordings.[1]

New technologies 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 receive the same revenue streams – such as concert and merchandise revenue – that recording artists receive. Streaming music through services such as Pandora and Spotify is growing at a fast pace as physical music sales and digital downloads decrease in popularity. This growth is spurred on by the increasing availability of broadband internet – as of 2013, 93% of Americans had access to broadband speeds of at least 3 megabits per second[2] – and the proliferation of handheld wireless technologies, such as smartphones and tablets. These streaming services perform virtually wall-to-wall music for their users with limited commercial interruptions, and provide each user with a personalized stream, using music with much greater intensity than traditional broadcast platforms. Music is now enjoyed by more people, in more places and over more devices, and ASCAP and our members embrace

[1] For more detail on the intricacies of the music licensing marketplace, *see* U.S. Copyright Office, COPYRIGHT AND THE MUSIC MARKETPLACE (February 2015) (hereinafter "Copyright Office Report").

[2] *See* Nat'l Telecommunications & Information Administration, U.S. BROADBAND AVAILABILITY: JUNE 2010 – JUNE 2012 at 4 (May 2013), *available at* http://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf.

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 songwriters and composers to realize a competitive return for their creative efforts and for PROs such as ASCAP to appropriately serve the needs of their customers (music licensees), the music listening public, and the songwriters and composers who depend on the income from collective licensing for their livelihoods.

As the Copyright Office recognized in its recent Report on Copyright and the Music Marketplace, "the time is ripe to question the existing paradigm for the licensing of musical works and sound recordings and consider meaningful change."[3] We agree that 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 a valuable 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 outdated consent decrees has failed to meet those changes in the marketplace, threatening the future of collective licensing and depriving songwriters and composers of a competitive return on their labor. Finally, I will suggest modifications to the ASCAP consent decree 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 to address the problem facing songwriters and composers of that day – how to efficiently obtain

[3] Copyright Office Report at 1.

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 U.S. PRO. ASCAP would negotiate and administer blanket licenses for the non-dramatic public performance rights in its members' works on a collective basis, monitor music usage by and collect fees from licensees, and distribute royalty payments to its members. A blanket license offered by ASCAP would provide efficiencies for songwriters, composers and publishers who would otherwise struggle to individually license or enforce the millions of performances of their works by thousands of individual businesses that publicly perform music, and licensees, who would otherwise find it impossible to clear efficiently the rights for their performances if required 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 not-for-profit basis*, distributing all license fees collected, less operating expenses, as royalties to its members – today distributes to its members as royalties approximately 88% of all fees it collects, on account of over 500 billion performances made annually 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. Every dollar that ASCAP receives is essentially divided into two – fifty cents is allocated to songwriters and composers and fifty cents to music publishers. After

subtracting overhead expenses, 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 crucially important to songwriters and composers, who believe it helps ensure they earn a competitive return for the use of their music.

A century ago, ASCAP's efforts were directed towards the performance venues of that day – public establishments that played 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 over 100 foreign PROs with which ASCAP has reciprocal agreements, to a wide range of licensee industries. Considering the importance of U.S. music around the world, ASCAP's ability as a PRO to negotiate these reciprocal agreements with foreign PROs provides a substantial benefit to the U.S. economy. For example, in 2013, ASCAP paid foreign PROs $66 million, but ASCAP received payments from foreign PROs of approximately $330 million, or almost one-third of its total revenue, for the performance of ASCAP members' music abroad.

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 that songwriters and composers would otherwise likely 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.[4] In fact, the U.S. Copyright Office and its current and past Registers of Copyright have repeatedly attested to the success and critical importance of the PRO collective licensing model.[5]

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[4] *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.")

[5] *See* Copyright Office Report at 150 ("Since the first part of the twentieth century, ASCAP and BMI have provided critical services to songwriters and music publishers on the one hand, and myriad licensees on the other, in facilitating the licensing of public performance rights in musical works."); 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 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

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 numerous other PROs and licensing entities in the U.S., including BMI and SESAC, Inc. (a private unregulated PRO), as well as new for-profit market entrants, such as Global Music Rights ("GMR"), which are also unregulated.

The role of the PRO remains vital to the future of the music marketplace. ASCAP's songwriter, composer and publisher members depend on the performing right royalties collected by ASCAP as a major source of income. This is especially so 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. Indeed, between 2012 and 2014, publisher revenues attributable to performance royalties increased from 30% to 52%, as revenue attributable to mechanical royalties fell from 36% to 23%, and revenue attributable to synchronization licenses declined from 28% to 20%.[6] Digital content services also rely 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 songwriters and composers in much the same place as they were a century ago – searching for a solution to the problem of how to achieve a competitive return for the widespread use of their copyrighted music. And,

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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.")

[6] Copyright Office Report at 71 (citing data from the National Music Publishers' Association).

much like its forbearers concluded then, the solution is a vibrant ASCAP that provides collective licensing in an efficient manner. However, to maintain the feasibility of that solution, the consent decree must, too, adapt.

II. The ASCAP Consent Decree Requires Modification

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 licensees that are "similarly situated." The ASCAP Consent Decree has been amended only 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 and cellular devices that enable consumers to stream music anywhere there is a wireless signal or cell coverage.

In its current form, the Decree requires that ASCAP, after receiving a request for a license from a music user, negotiate a reasonable license fee or seek judicial determination of such fee from what is commonly called the "rate court" – the court with ongoing jurisdiction over the Decree. 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 without having to pay a single penny. 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, 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 applicants have begun to exploit as a dilatory tactic to avoid paying competitive prices to perform the ASCAP repertory. In other words, under the current Decree, applicants can perform songwriters' and composers' works without making a single payment for months and, in many cases, years.

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 License Committee 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, exploit the Decree licensing process to their benefit. As ASCAP licenses are compulsory and fees can be set retroactively, certain music applicants and licensees 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, licensees 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.[7] In sum, it is a system that is profoundly unfair to the songwriters and composers dependent upon the public performance royalties that ASCAP collects on their behalf.

In the scenarios above, ASCAP has limited choices. It can do nothing and permit applicants and interim licensees to remain in that status 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 licensees 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

[7] *See id.* at 157-58 (noting that current licensing process allows licensees to "pay nothing or greatly reduced fees for years as negotiations drag on" and "significantly increases the leverage of licensees at the expense of the PROs and their members"). As the Copyright Office Report goes on to note, this situation is highly anomalous, as "commercial entities do not typically receive a steady supply of product for months or years based on a mere letter request. But such is the case with music." *Id.*

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 licensees, such as 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 the applicant's plans for a particular service has increased, both for the purpose of calculating 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 attempt to license each service separately at a huge cost to ASCAP's members.

B. The Rate Court Process

Until the advent of the digital era, ASCAP and licensees rarely found it necessary to invoke the rate court process to determine final license fees. Established industry groups and ASCAP were generally able to reach agreement on license terms 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, requiring more frequent 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 the federal procedural rules. Also, 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 – and our songwriter, composer and publisher members – 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 outside 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 our songwriters and composers will be paid lower rates than those other copyright owners are receiving from the same licensee.[8]

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 on the order of 12 to 1. This problem would be addressed by the passage of the Songwriter Equity Act, which would remove this restriction.

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. Indeed, as the Copyright Office noted in its recent report on Copyright and the Music Marketplace, "[t]here is substantial evidence to support the view that government-regulated licensing processes imposed on publishers and songwriters have resulted in depressed rates."[9]

[8] This problem may be exacerbated by the intertwining of antitrust oversight and rate-setting in the rate court context. *See id.* at 155. Leaving antitrust oversight appropriately with the federal courts, and moving rate-setting to an expedited arbitration process, as proposed in Part III *infra*, would help ensure that the focus in rate setting is on "empirically based economic analyses of the proper rate for" the licensee. *Id.* at 154.

[9] *See id.* at 159.

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, and many have done so over the years. Of course, due to the efficiencies afforded through ASCAP's collective licensing system, most ASCAP members have licensed all of their works through ASCAP all of the time. However, certain ASCAP publisher members recently expressed 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 license terms directly with particular licensees (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 entities 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 copyright

owners and licensees 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 entities that they cannot affordably license on an individual basis. The crucial problem with this second choice is that the efficiencies of collective licensing depend on the PROs' 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.

The Copyright Office raises this same concern in its recent report on Copyright and the Music Marketplace, noting "the possibility of wholesale defections by major (and perhaps other) publishers from ASCAP and BMI if government controls are not relaxed, and the potential chaos that would likely follow."[10] And it is not just the publishers – several prominent songwriters have already left ASCAP for GMR, which is unregulated and not constrained by a consent decree.

[10] *Id.*

The Decree also denies ASCAP the flexibility to construct the licenses its digital music services 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 services 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 generally on a song-by-song basis. Separate licensing of these rights is inefficient and may discourage digital music services from properly licensing their services.

These complexities inherent in a multiple rights clearance system have led some to express their desires for multi-right 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 licensees 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.

The Copyright Office specifically recognizes these inefficiencies and competitive disadvantages in its recent report on Copyright and the Music Marketplace, and concludes that it is time for the government to "pursue appropriate changes to our legal framework to encourage bundled licensing, which would eliminate redundant resources on the part of both licensors and licensees."[11] We wholeheartedly agree.

III. Proposals for Change

Maintaining ASCAP as the effective licensing solution it has been for the past century requires changes to update 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."[12] That time is now. In order to alleviate the significant limitations placed on ASCAP and our

[11] *Id*. at 161.

[12] *See* Pallante Remarks.

members by the Consent Decree, ASCAP has proposed a number of modifications to the Consent Decree, including the following:

1. 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 than the current process, which involves full-scale discovery and litigation in federal court. Expedited arbitration proceedings would serve two purposes. First, both music creators and applicants 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.[13]

2. Permitting Limited Grants of Rights. The Decree should also be modified to permit ASCAP to accept partial grants of rights from copyright holders. This would preserve the benefits of collective licensing for licensees and copyright owners in many situations, while allowing copyright owners 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 licensees 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

[13] The Copyright Office agrees that the rate-setting process should no longer take place before the designated rate court, but suggests that such proceedings instead "migrate" to the Copyright Royalty Board. *See* Copyright Office Report at 155. ASCAP notes, however, that rate-setting proceedings before the Copyright Royalty Board – which tend to be equally (if not more) expensive and time-consuming as rate court proceedings – would not achieve the same efficiencies that would result from expedited arbitration proceedings.

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, licensees and consumers alike.

The Copyright Office agrees that ASCAP should be permitted to accept partial grants of rights from its members, which would permit those publishers and songwriters to license their works directly in the free marketplace as owners of the sound recording are entitled to do.[14]

3. Licensing Multiple Rights. The Consent Decree should also be modified to permit ASCAP to license mechanical, synchronization and print rights in addition to public performance rights when requested to do so by its members. This would enable ASCAP to better serve licensees that may seek to negotiate with ASCAP for multiple rights in a single transaction, creating at last 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 licensees, 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

[14] *See id.* at 159. We respectfully disagree with the Copyright Office's suggestion that this "opt out" right should be limited to interactive streaming services such as Spotify, but not extend to personalized streaming services such as Pandora.

PROs that can, and do, aggregate rights. As I noted earlier, the Copyright Office specifically supports ASCAP's ability to license multiple rights.[15]

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 works. Other copyright owners lose the ability to license their works on a blanket basis. Songwriters and composers lose the transparencies and services provided by the PROs. Music 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.

Mr. Chairman, ASCAP and I thank you for your interest in these very important issues affecting hundreds of thousands of U.S. songwriters, composers and music publishers and look forward to working with your committee to ensure that the musical works licensing marketplace works for all.

[15] *Id*. at 161.