Before the
DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Washington, D.C.

In the Matter of:	)
Antitrust Consent Decree Review	)

COMMENTS OF
SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

Screen Actors Guild – American Federation of Television and Radio Artists ("SAG-AFTRA") submits these comments in response to the Department of Justice's Notice of Inquiry dated June 4, 2014 ("NOI"), in which the Department of Justice announced the initiation of a study to review the operation and effectiveness of the Consent Decrees governing the performing rights organizations, ASCAP and BMI (the "Consent Decrees").

Interests of SAG-AFTRA

SAG-AFTRA is the nation's largest labor union representing working media artists. SAG-AFTRA was formed in 2012 through the historic merger of two labor unions, Screen Actors Guild ("SAG") and the American Federation of Television and Radio Artists ("AFTRA"), and now represents more than 165,000 actors, announcers, broadcasters, recording artists, background vocalists, and other media professionals. SAG-AFTRA exists to secure the strongest protections for media artists in motion pictures, television, sound recordings and most other forms of media, including all forms of digital media.

SAG-AFTRA represents the sound recording performers – including royalty artists and session vocalists – whose creative work brings American music to life. Many of these sound recording performers are also songwriters and composers in their own right. Without the songs that they create, there would be no performance of the songs that we enjoy. The talent, drive and output of American artists are at the heart of creative works of the greatest cultural and economic value to our country.

SAG-AFTRA works to ensure not only that sound recording performers are fairly compensated when their performances are recorded in the first instance, but also that they benefit fairly from the continued exploitation of their recorded work. To that end, SAG-AFTRA has long advocated for the amendment of the Copyright Act to provide a performance right in sound recordings, so that sound recording performers will receive some share of the enormous

profit generated from the broadcast of their recordings by the terrestrial radio industry. AFTRA was at the forefront of the legislative effort to enact the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"), and most particularly, played a pivotal role in ensuring that the Section 114 statutory license for non-interactive digital performances delivered crucial benefits to sound recording performers, including an inalienable 50% share in the licensing proceeds, and direct payment to them of the sound recording performers' share by the collective licensing agent, SoundExchange.[1]

Similarly, SAG-AFTRA submits these comments today on behalf of those artists who are songwriters and composers to ensure that they are fairly compensated from the licensing of the musical works created from their talents and skills. Without their songs, the music industry as we know it would not exist. In any discussion involving changes to the current compulsory licensing system, we believe artists' interests should be the focal point. Under the existing compulsory licensing system for publicly performed musical works, there are a number of concerns with aspects of the Consent Decrees that negatively impact songwriters and composers. SAG-AFTRA appreciates this opportunity to comment on this subject as it affects artists' ability to further their careers and earn a living from the exploitation of their creative works.

Aspects of the Consent Decrees Undermine the Effectiveness of Collective Licensing of Public Performance Rights in Musical Works

As a preliminary matter, SAG-AFTRA agrees that collective licensing of the public performance of musical works has been positive for artists. The three performing rights organizations ("PRO" or "PROs") in the U.S. – ASCAP, BMI and SESAC – license, administer and enforce the public performance rights of musical works on behalf of affiliated artists and small and large publishers. Artists, as well as consumers, benefit from the administrative and economic efficiencies of collective licenses managed by the PROs. By affiliating with a performance rights organization, artists are guaranteed to share equally with publishers in the benefits flowing from the collective license, without regard to their individual bargaining power. It also means that artists have the very substantial benefit of direct and transparent administration by their designated PRO(s). PROs pay the artists and publishers directly, so artists are not dependent upon complex, slow and expensive audits to ensure the accuracy of their payments, as is the case with royalties stemming from other uses of their works.

However, in recent years, ASCAP and BMI have faced significant challenges in this new digital realm, including ensuring their affiliated artists and publishers are fairly compensated,

[1] In particular, AFTRA conditioned their indispensable legislative support for the DPRA on the inclusion of the statutory license which mandated a 50% share for sound recording performers, and on an agreement with the major recording companies that the artists' statutory license share would be inalienable.

due to obligations the Consent Decrees impose upon them. Consequently, any troubles faced by the performing rights organizations naturally impact their affiliated artists.

The ASCAP and BMI Consent Decrees have been in effect since 1941 and 1964, respectively. Despite momentous changes in the music marketplace, especially in the digital realm, which was not even imagined 7 decades ago when the Consent Decrees took effect, the Consent Decrees have operated with minimal modification. They no longer adequately serve their purpose in their current form, as the scales have tipped too far in favor of licensees' interests over those of the artists.

SAG-AFTRA has concerns with the Consent Decrees, in their current form, particularly in regard to their impact on the livelihoods of songwriters and composers in the digital music marketplace. The most fundamental concern for these artists is the devaluation of their creative work by below-market licensing rates.

The Consent Decrees are outdated and in relation to the current digital landscape, diminishing the artists' ability to exploit their works. First, the Consent Decrees mandate that both PROs unequivocally grant a license to any user who submits an application, granting immediate access to the PRO's entire repertoire upon application without first having to negotiate economic terms of the license or make any payment. As the user has already obtained access to the PRO's full repertoire of songs, either without payment or with payment of only interim fees, there is little to compel their good-faith participation in negotiations with the PRO. If the parties cannot reach agreement on license terms, either party may commence a rate court proceeding, but is not mandated to do so and the PRO must weigh the costs of doing so with the anticipated increase in revenue over any interim license under which the parties have been operating. In addition, even after a party initiates a rate court proceeding, the proceedings are governed by the Federal Rules of Civil Procedure, including all motion practice and discovery allowed thereunder, which may considerably extend the process. Consequently, without any time constraints on the negotiations or the subsequent judicial proceeding, prospective licensees can drag their feet for years, even indefinitely, exploiting the licensing system to avoid payment.[2] As the success-rate of companies in the digital space is limited,

[2] As compulsory rates can be set retroactively, certain digital services have prolonged the process for over a year, while taking advantage of the interim license fee or simply opting to remain an applicant. *See United States v. Am. Soc'y of Composers, Authors and Publishers* (*In re American Online, Inc.*) 485 F.Supp.2d 438 (S.D.N.Y. 2007)(approximately 17 months); I*n re MobiTV, Inc.*, 712 F.Supp.2d 206 (S.D.N.Y. 2010)(estimated 24 months); *In re THP Capstar Acquisition Corp.*, 756 F.Supp.2d 516 (S.D.N.Y. 2010)(almost 50 months, although some delay attributable to transition of rate court judges); *In re Pandora Media, Inc.*, 12 Civ. 8035, 2014 WL 1088101 (S.D.N.Y. March 18, 2014)(approximately 16 months).

potential licensees can use these loopholes in the Consent Decrees to shift their business risks to the PROs and, through them, to the artists and publishers.

Secondly, the resulting rates, whether the PRO settles for lower negotiated rates or pursues rate proceedings, often do not reflect market realities and are significantly lower than the fair market value of the licensed songs. This is due largely to the lack of clarity in the Consent Decrees as to the standard applied in rate determinations. Pursuant to the Consent Decrees, the PRO's have the burden to show that its proposed license fees are "reasonable."[3] However, the Consent Decrees provide no guidance to the rate courts to aid in their determinations. If a court does not agree with the rates submitted by the PRO, it can establish on its own "a reasonable fee based on all the evidence".[4] However, in recent years, the rate courts have refused to consider evidence of actual fair market value of licenses negotiated directly between publishers and licensees.[5] Without a clear standard of review, courts tend to favor hypothetical benchmarks over the actual fair market value of these licenses. This process creates irreparable harm to the artists and to the economic value of their works.

Apart from the inexplicable vagaries of the rate-setting process set forth by the Consent Decrees, it is inefficient, expensive and burdensome upon the PROs. For example, in the last thirty years, ASCAP has participated in more than 30 rate proceedings, costing their affiliated artists and publishers tens of millions of dollars to defend their public performance rights.[6] There appears to be no light at the end of the tunnel for artists under the existing terms of the Consent Decrees, particularly in regard to the digital space. In fact, there is a very vocal threat resonating from some major publishers that the current system may leave them no choice but to abandon the PROs altogether. While large publishers may have more success negotiating their own licenses, this would be catastrophic for countless artists and smaller publishers who rely on the collective power of the PROs to negotiate and enforce the licensing of their musical works. More specifically for artists, it could result in the loss of bargaining strength and the direct and transparent royalty payments from their PRO.

Notwithstanding the number of advantages artists reap from the collective public performance licensing of their works, licensees also reap substantial benefits: they obtain the right to use a PRO's entire repertoire provided they comply with the license conditions; they are relieved of the substantial burden and expense of individual negotiations with copyright

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[3] *See United States v. American Soc'y of Composers, Authors & Publishers*, 2001-2 Trade Cas. (CCH) 73, 474 (S.D.N.Y. June 11, 2001); *United States v. Broadcast Music, Inc.*, 1996-1 Trade Cas. (CCH) 71,378 (S.D.N.Y. Nov. 18, 1994).

[4] *Id.*

[5] *See In re Pandora Media, Inc.*, 12 Civ. 8035, 2014 WL 1088101 (S.D.N.Y. March 18, 2014)(refusing to consider direct licensing rates negotiated for similar digital radio services).

[6] See Statement of Paul Williams, ASCAP President and Board Chairman, before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary, United States House of Representatives, June 25, 2014, available at http://judiciary.house.gov/_cache/files/5b77d14c-1ea5-491a-a508-5167e5d3d95c/062514-music-license-pt-2-testimony-ascap.pdf.

owners; they enjoy the simplicity of a single license payment rather than paying many licensors; and they benefit from shifting many costs of license administration to the PRO which bears the cost of properly allocating license fees to entitled copyright owners and creators. However, below-market rates should *not* be added to these other, very significant, benefits to licensees. Together, the collective licensing model is a win for all stakeholders. This makes the identification and removal of existing problems in the terms of the ASCAP and BMI Consent Decrees all the more critical.

Needed Improvements to the Consent Decrees

Unless the Consent Decrees are modified, the damage to artists from the devaluing of their works will be irreparable. Artists should benefit fairly from the continued exploitation of their musical works. To that end, license fees should be set at a willing buyer – willing seller standard, whether through negotiation or when set by a rate court. When determining a reasonable fee, the rate court must consider evidence of privately negotiated rates which are a better indicator of the license's value in the market than are hypothetical benchmarks. In reality, the rate court's interpretation of "reasonable" fees has resulted in the scales tipping in favor of licensees in a manner highly prejudicial to creators and owners of musical works, rather than leveling the playing field for all stakeholders involved.

Any new standard must create clarity and certainty for the parties, as well as the courts, and must shift the way the parties currently negotiate in the digital realm, preventing the prolonged negotiation process that has been costly and unproductive. We further ask that the Department of Justice consider amending the Consent Decrees to mandate timelines for initiating a rate-court hearing when parties reach impasse and to allow for expedited, streamlined proceedings. Finally, we urge that the Department of Justice revisit the requirement in the Consent Decrees compelling the PROs to authorize the use of works upon application. At a minimum to prevent the abuse of this provision, we propose that the Department of Justice consider mandating that an applicant submit an interim fee payment *before* authorization is granted for the use of a musical work. This nominal payment will fairly reward struggling artists for their creative work while negotiations and rates are finalized. As artists heavily rely on performance royalty income from the licensing of their works, they deserve this payment for the use of their works.

Conclusion

We appreciate the Department of Justice initiating this conversation to examine the operability of the antitrust Consent Decrees in their current form. While collectively licensing the public performance of musical works can provide many benefits to songwriters and composers, SAG-AFTRA believes that some changes are critical to the Consent Decrees to ensure that their works are compensated in a manner that reflects their true value to the nation's economy and culture.

Respectfully submitted:

Duncan Crabtree-Ireland
Chief Operating Officer & General Counsel
Screen Actors Guild – American Federation of Television and Radio Artists

Jeffrey Bennett
Chief Deputy General Counsel, Legal & Government Affairs
Screen Actors Guild – American Federation of Television and Radio Artists

Purvi Patel
Counsel
Screen Actors Guild-American Federation of Television and Radio Artists

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