Comments by the National Music Publishers' Association
Submitted in Response to US Justice Department
Antitrust Division Solicitation of Public Comments
Regarding Review of the ASCAP and BMI Consent Decrees

The National Music Publishers' Association ("NMPA") submits these comments on behalf of its music publisher members and their songwriter partners, who create and license the vast majority of songs enjoyed in the U.S. everyday. We applaud the Justice Department ("DOJ") for undertaking a serious review of the ASCAP and BMI antitrust consent decrees.[1] NMPA believes the consent decrees have become a significant impediment to a well-functioning market for licensing the performances of musical works, resulting in inefficient licensing and failing to provide fair market-based compensation for songwriters and music publishers. The consent decrees impose an inherently inflexible court-administered rate-setting process that is unresponsive to market forces and fails to serve the legitimate interests of any stakeholder, including the consumers of music. In addition, pursuant to recent court decisions, individual publishers are prohibited from electing to negotiate new media rights directly without forfeiting their right to engage in any collective licensing at all, creating a licensing ecosystem that is unacceptable.

The music industry today is not the same as when the consent decrees were entered into in 1941, before the Internet, before satellite radio, and before digital streaming. Advances in digital technology have dramatically changed the way music is consumed. And, today, licensees include powerful and highly sophisticated digital distribution companies like iTunes, Google's YouTube, Spotify and Pandora, all of which possess significant power vis-à-vis the creators of music. The decrees must be substantially modified to reflect these realities, so that consumers

[1] *See* Final Judgments entered in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y) and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y), as amended.

can continue to have access to a wide variety of legal options for enjoying music across multiple platforms and devices and permit music creators to be fairly compensated for the use of their property, talent, and effort.

NMPA makes three primary recommendations for modernizing these decades-old decrees, to remove the confusion, uncertainty, and inequity that plague music performance rights licensing in the United States today.

1. ***Allow publishers to elect to negotiate directly digital distribution rights.*** The decrees should be modified to allow individual publishers to withdraw selectively rights from any performance right organization ("PRO") in order to engage in direct, bilateral negotiation. The purpose of the decrees was to regulate the collective licensing of music when BMI and ASCAP licensed almost all music in the marketplace, not to prevent copyright owners from engaging in individual licensing, which is presumptively legal, and by promoting competition, achieves one of the overarching objectives of antitrust law. Just as licensees currently have the right to elect bilateral negotiations, so should individual publishers.

2. ***Allow the decrees to sunset or provide for automatic periodic assessment of their continued necessity.*** Current DOJ policy rejects the concept of perpetual decrees, particularly in rapidly evolving industries such as music distribution. Consistent with that policy, and reflective of recent changes that have increased competition in the licensing of performance rights, these decrees should provide for a definite sunset or, at least, automatic periodic assessment of their continued justification based on the structure of the licensing market.

3. ***Improve the rate-setting process.*** As long as the decrees continue to exist, they must be more efficient, fair, and market-responsive. For example, users should be required to pay for music they use during negotiations and any rate court proceedings. Rates should be determined through a more expedited and predictable procedure, such as arbitration, rather than through an expensive and time-consuming proceeding in federal court. And, any arbitration or judicial proceeding should be required to take into account market-negotiated rates as benchmarks.

NMPA believes these changes are essential to a more efficient and fair system of licensing music. They would help to restore a market-based mechanism for determining the fair

value of creative works and give songwriters and publishers needed flexibility in responding to evolving consumer demand.

Background

1. NMPA

NMPA is the largest music publishing trade association in the United States and the voice of music publishers and their songwriter partners. Its mission is to protect, promote, and advance the interests of music's creators.

Based on the breadth and diversity of its membership, NMPA is uniquely suited to address issues confronted by songwriters and publishers under the ASCAP and BMI decrees. NMPA represents songwriters and publishers of all catalogue and revenue sizes, from large international companies to small independent businesses and even individuals. Although NMPA's member songwriters and publishers are not parties to the consent decrees, they are perhaps most greatly impacted and burdened by the constraints imposed by the decrees.

2. Performance Rights, the Role of the PROs, and The Original Purpose of the ASCAP and BMI Consent Decrees

Every recorded song begins with a musical composition, which is created and owned by the songwriter and/or music publisher.[2] Copyright law grants several types of rights for musical compositions, and these rights are typically licensed by publishers to music users. Music publishers issue different types of licenses for the use of the copyrighted works they own and/or control, including performance licenses (for radio, live venue, online streaming, etc.), mechanical licenses (for the reproduction of works on CDs, digital downloads, on-demand radio,

[2] There is also a sound recording right owned by the recording artist and/or a record label.

etc), synchronization licenses (for music used in television, film, YouTube, etc.), and folio licenses (music published in written form and lyrics).

Like most copyright licensing markets, the market for performance rights licenses is a free market, unconstrained by statute or regulation. Absent the ASCAP and BMI consent decrees, the market for these licenses would function much like any other, with supply, demand, and price determined by natural market forces.

For historical reasons, the performance rights to most compositions performed in the United States are administered today by a "performance rights organization," or a PRO, such as BMI or ASCAP. Performance rights have been licensed collectively for the benefit of both rights-holders and music users. PROs provide valuable administrative and copyright enforcement services that individual rights holders may, as a practical matter, be unable to duplicate easily. They also provide a single source where music users can obtain rights to substantial repertories, providing them with a simple and efficient means of licensing most music performed in the United States. A PRO typically pools the performance rights for its members' compositions, issues users a blanket license to perform these compositions, monitors usage to detect unauthorized performances and enforce rights, conducts surveys to estimate the frequency with which various compositions are performed, and distributes payments to its members.

DOJ and the courts have recognized the procompetitive benefits offered by PRO licensing. However, the consent decrees were not intended to prohibit or penalize direct, ex-decree bilateral licensing. In fact, the consent decrees, which prohibit the PROs from obtaining exclusive rights to license members' compositions, were designed to ensure that such direct licensing could occur, in order to inhibit ASCAP and BMI's perceived exercise of market power.

3. The Consent Decrees Now Distort Competition

Today there is neither an effective free market for the licensing of performance rights, nor any way for one to exist, unless and until the consent decrees are modified. Although the consent decrees were imposed to protect against anticompetitive behavior, they are now used to distort and manipulate the market for the benefit of a handful of powerful digital distribution companies that are the gatekeepers between music's creators and those who want to enjoy that music.

These large technology companies have been able to use the consent decree provisions to further their own financial and competitive interests. For that reason they apparently oppose consent decree reform that would increase competition, transparency, and flexibility that would allow copyright owners to negotiate in a fair and unfettered market place. It should be clear that these digital distribution companies do not speak on behalf of artists, songwriters or music users, but on behalf of large corporate interests that are concerned about the impact of a competitive and open market on their bottom lines.

NMPA cannot predict what rates ultimately would prevail in bilateral, free market negotiations. But it believes that opposition by digital services to such negotiations is motivated by a desire to continue to benefit from an effectively compulsory below-market license.

NMPA understands that digital distribution services pursuing certain business models may believe they can maximize profits only by paying what amounts to a below-market rate. But the antitrust laws are not designed to pick winners and losers or to support any specific business model. Rather, antitrust law is designed to let the market decide which business models it favors. A contrived and restrictive licensing system that produces below-market rates,

artificially bolsters faulty business models, and harms consumer welfare is not reflective of a free market and is not a legitimate goal of antitrust enforcement.

4. The Current Rate-Setting Process is Not Market-Responsive

The licensing and rate-setting processes provided for in the consent decrees heavily burden songwriters and publishers and benefit the large technology companies and digital services that seek performance licenses. ASCAP and BMI must grant a license to all the musical works in their repertories upon request, even where there is no agreed-to royalty rate for such use. An applicant that requests a license from ASCAP and BMI is not compelled to, and for its own strategic reasons, typically does not, provide any information that would allow for setting of an interim rate for users to pay for songs used during the negotiation of a royalty rate. This allows users such as digital music services to use legally all of the music in the PRO's repertory, while either delaying payment or not paying anything to ASCAP and BMI for their respective songwriters and publishers for that use. And, if a royalty rate cannot be negotiated, as is frequently the case, ASCAP and BMI must engage in lengthy and costly rate court proceedings, the costs of which are borne by their songwriter and publisher members through administrative fees.

Rate court proceedings, moreover, are poorly suited to determining an appropriate market royalty rate. DOJ itself in numerous situations has recognized the undesirability of substituting regulation for market-pricing and the difficulty for a court in performing that function, even in situations where relevant benchmarks are available.[3]

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[3] *See* Federal Trade Commission and Dep't of Justice, *Excessive Price,* Response to OECD Working Party No. 2 on Competition and Regulation 1-2 (Oct. 17, 2011) at 4 ("Th[e] market pricing mechanism promotes the most efficient allocation of resources in a free market economy, and this same efficient allocation of resources is the bedrock of antitrust policy and enforcement in the U.S. . . ."). *See also Pacific Bell Telephone v. Linkline Comm.*, 129 S.Ct. 1109, 1121 (2009) ("Courts are ill suited 'to act as (continued…)

Proposed Modifications to the Consent Decrees

Music industry stakeholders and consumers alike generally agree that the market for performance rights licenses should encourage innovation by allowing new legal music services to enter the market; it should provide consumers with a wide variety of music options; and the creators of music should be adequately compensated. To achieve these commonly accepted goals, the ASCAP and BMI consent decrees should be modified in at least the following three ways.

Modification #1: Selective Withdrawal of Rights

Voluntary collective licensing through the PROs developed as a market-based solution to a problem, to address the inefficiencies and high transaction costs associated with licensing performance rights to thousands of dispersed music users that inhibited the broad legal use of music. But such collective licensing is unnecessary where licensing transactions do not involve the same high transaction costs, as when publishers negotiate directly with large, centralized music users like online streaming services.

As they are currently interpreted, the consent decrees unreasonably *force* publishers to license the performance rights for *all* of their works collectively, binding individual publishers to ASCAP and BMI for all purposes even as the process for engaging in the direct licensing of rights to some music users is made more efficient. Thus tied to ASCAP and BMI for the

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central planners, identifying the proper price, quantity, and other terms of dealing.'"); *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) ("How is a judge . . . to determine a 'fair price'? Is it the price charged by other suppliers . . . ? Is it the price that competition 'would have set' . . . ? How can a court determine this price without . . . acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years?. . . We do not say that these questions are unanswerable, but we have said enough to show why antitrust courts normally avoid direct price administration. . . .").

licensing of performance rights, individual publishers lack the flexibility to change the way they license their works in order to respond to changes in digital technology.

In the current digital market, speed and the ability to license multiple rights are key. Currently, publishers are restricted in their ability to choose when to negotiate directly with music users and bundle performance rights licenses with other types of licenses, such as mechanical reproduction rights, that may be necessary to operate a successful online music service. Licensees alone have the right to decide when to directly negotiate a performance license with publishers, and can further decide to abandon direct negotiations and license through ASCAP or BMI if they determine the terms to be more favorable. Publishers are also hampered where they desire to negotiate directly global rights for the new digital music market that operates and competes on a worldwide scale. But the consent decrees limit the ability of publishers to respond to these demands.

Hamstrung by the consent decrees, both the PROs and publishers are forced to react slowly and inefficiently to what has become a fast-moving and dynamic market environment. Ultimately, these inefficiencies negatively affect consumers by slowing the rate at which consumers are able to access music content on new platforms.

Changes in the technological landscape of the music industry have driven corresponding changes to the consent decrees in the past. For example, when the ASCAP consent decree was last modified in 2000, changes in technology were among the principal reasons given by the Justice Department in support of modification.[4] The rise of online music services led to a clarification that "through-to-the-audience" licenses were available to users that transmitted

[4] *See* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, *United States v. ASCAP*, Civil Action No. 41-1395, at 18 (S.D.N.Y. Sept. 4, 2000), *available at* http://www.justice.gov/atr/cases/f6300/6395.pdf.

music over the Internet. Since 2000, the number, sophistication, and industry importance of these online music services have exploded, resulting in wholesale changes in the way music is consumed and distributed. Just as the evolution of technology required a decree modification in 2000, the more sweeping changes since then require additional modifications today.

The consent decrees should be modified to allow individual publishers to elect to withdraw certain rights for direct, bilateral negotiation. Banning direct, bilateral negotiation and forcing publishers to license collectively for all purposes is inconsistent with the original objective of the consent decrees, sound antitrust policy, and the principle of free markets. In fact, publishers already engage in direct, bilateral market negotiations with digital services and other licensees for a number of licensed rights, including synchronization and lyrics. Only the market for performance rights is constrained by the consent decrees.

Even small publishers, with adequate technology, can efficiently engage in direct licensing with some music users. Doing so would potentially reduce administrative fees and would allow them to bundle performance rights licenses with other types of licenses and enter into unique deals with certain users that benefits both parties and consumers of music. There is no justification from prohibiting any publisher from engaging in such negotiations.[5]

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[5] Recent arguments by certain large technology companies that allowing direct negotiation by individual publishers could be anticompetitive are based on a false assumption that users lack access to information about what catalogues of musical works are owned by particular publishers. In fact, however, today both ASCAP and BMI provide great transparency and access to such information to both licensees and to their songwriter and music publisher members. The PROs publish databases of musical works and their owners for reference by licensees and additional information about licensees and usage for composers and publishers. And, both Universal Music Publishing Group and Sony/ATV recently announced that their entire song database will be made even more easily accessible to music licensees. *See* Ed Christman, *UMPG to Make Entire Database Easier for Licensees*, BILLBOARD (June 27, 2014), *available at* http://www.billboard.com/biz/articles/news/publishing/6140985/umpg-to-make-entire-database-easier-for-licensees; *see also* Ed Christman, *Sony/ATV Makes Organized Catalog Available Online*, BILLBOARD (July 16, 2014*), available at* http://www.billboard.com/biz/articles/news/publishing/6157855/sonyatv-
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Modification #2: Periodic Review of the Consent Decrees

The Justice Department has very recently stated its position that "legacy" consent decrees, "except in limited circumstances, are presumptively no longer in the public interest."[6] In its manual, the Antitrust Division states that modification or termination may be appropriate when a decree "is or has become anticompetitive or otherwise undesirable. . . . Decree provisions that were perfectly sensible when entered can become inappropriate over time."[7]

The ASCAP and BMI consent decrees were designed to constrain the PROs' exercise of market power through collective action at a time when two PROs effectively controlled the licensing of most music. However, recent developments, including the introduction of a fourth performing rights organization, Global Music Rights, are changing the structure of the performance rights market.[8] Moreover, publishers currently have the right to withdraw entirely from the PROs, and through modification of the consent decrees NMPA hopes they will gain the right to withdraw partially rights and license works directly to consumers. With an additional, unregulated performance rights organization entering the market and acquiring valuable music catalogues[9], and the potential for partial or complete withdrawals by publishers from ASCAP

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makes-organized-catalog-available-online. Unfounded concerns about transparency should not be used to prevent free market negotiations outside the PROs.

[6] *See* Press Release, Department of Justice, *Antitrust Division Announces New Streamlined Procedure for Parties to Modify or Terminate Old Settlements and Litigated Judgments* (Mar. 28, 2014), *available at* http://www.justice.gov/opa/pr/2014/March/14-at-321.html.

[7] *Antitrust Division Manual*, Department of Justice, at III-146 (5th ed. 2013).

[8] *See* Ed Christman and Ray Waddell, *Irving Azoff's Next Frontiers? Publishing and Blue-Chip Marketing*, BILLBOARD (April 18, 2014) available at http://www.billboard.com/biz/articles/news/publishing/6062521/irving-azoffs-next-frontiers-publishing-and-blue-chip-marketing. SESAC has been operating as an unregulated performing rights organization since 1930.

[9] *See*, Ed Christman, *Pharrell to Leave ASCAP for Irving and Grimmet's Global Music Rights*, BILLBOARD (July 25, 2014) available at http://www.billboard.com/articles/business/6188942/pharrell-to-leave-ascap-for-irving-and-grimmets-global-music-rights.

and BMI, ASCAP and BMI may cease to exercise potentially anticompetitive market power, eliminating the justification for the consent decrees.[10] Increased competition to ASCAP and BMI from other PROs and music publishers themselves would preclude ASCAP and BMI from being able to exercise market power, and the concerns giving rise to the consent decrees would no longer exist. It would make no sense and be inequitable to subject songwriters and publishers using ASCAP and BMI to license performance rights to their works to the limitations and burdens of the consent decrees.

Although NMPA understands that the long history of the consent decrees could itself give rise to concern about the impact of change, at least two factors mitigate against such concern. First is the intolerable uncertainty that has resulted from recent interpretations of the decree and the potential incentives they create for some of the largest publishers to withdraw completely from the PROs notwithstanding the disruptive effect this could have in the market. Second is the fact that partial withdrawal is most likely with respect to digital rights, for which the market is not yet established.

Since the consent decrees were first put into place, and even since the ASCAP decree was last modified in 2000, the marketplace for performance rights licensing has changed considerably. Music users, historically envisioned as small and lacking in bargaining power or the ability to negotiate directly with songwriters and publishers, have been increasingly replaced with large, sophisticated digital music distributors, each of which is capable of engaging in direct,

[10] The United States acknowledged this very fact when it supported the entry of the modified ASCAP consent decree in 2000. *See supra* note 1, at 9 n.10 ("Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of the justifications for collective licensing of performance rights by PROs.").

bilateral licensing with publishers without the need for the consent decrees. Because of the uncertainty surrounding the future of the industry and the speed with which the competitive landscape is changing, the consent decrees should be modified to provide for a DOJ review to ascertain whether the PROs continue to exercise the same market power that initially gave rise to the consent decrees.

One need not look far to find a fully functioning market in which organizations aggregate and license creative works without market power. With no market power, these organizations do not raise the competitive concerns that originally motivated the consent decrees. In fact, many independent record labels use aggregators or global rights management companies that license and distribute content and enforce rights on their behalf. For example, Merlin represents over 20,000 independent labels and distributors accounting for ten percent of the U.S. music market,[11] demonstrating that an organization without substantial market power can aggregate and license creative works without posing an anticompetitive threat. If a significant number of publishers decide to withdraw certain categories of works from ASCAP and BMI, they will be no different, and the continued need for the onerous conditions imposed by the consent decrees with respect to those categories should be reevaluated.

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[11] Glenn Peoples, Pandora Signs First Direct Label Deal With Merlin, BILLBOARD (August 6, 2014), *available at* http://www.billboard.com/biz/articles/news/digital-and-mobile/6207066/pandora-signs-first-direct-label-deal-with-merlin?utm_source=twitter. As a further example, The Orchard licenses nearly a third of all the music for sale in Apple's iTunes Store. *See* Derek Sylvan, *Early Digital Bet Now a Sweet Song*, THE WALL STREET JOURNAL (May 13, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887324244304578473030110212430.

Modification #3: Rate-Setting Reform

The ASCAP and BMI consent decrees' current procedure for setting license rates has proven to be slow, expensive, and inaccurate, and often results in songwriters and publishers going entirely uncompensated or being forced to accept unfair, below-market rates for the use of their creative works. The cumbersome process dictated by the consent decrees should be modified in three principal ways. First, the consent decrees should require music users to pay license fees whenever they perform a copyrighted work, including during the period before an interim or final rate is set. Second, the rate court mechanism should be replaced by binding arbitration, which would result in a rate-setting process that would be faster, less expensive, and more predictable. Third, any rate-setting process should attempt to approximate the fair market value of the requested license through the required consideration of evidence of rates set under direct agreements in the free market.

Interim Payment of License Fees — The consent decrees currently provide no recourse for songwriters or publishers to receive compensation for the performance of their works before an interim rate is set. A music user need only apply to ASCAP or BMI for a license to begin immediately using all of the musical works in the PRO repertory, but the publisher and songwriter of those works has no power under the consent decrees to ask the court to set an interim rate—only the music user or the PRO can do that. And, as explained above, licensees often strategically refuse to provide the information that would enable the PRO to set an interim rate. Furthermore, there is no automatic escrow provision, which puts songwriters and publishers at risk that they may never be compensated for the use of their works. Without this sort of provision, licensees are not required to set money aside for the use of publisher and songwriter compositions during the period before an interim rate has been set in a market where

some services, especially digital music services, go out of business before ever making a single payment to the PRO.

The decrees should be modified so that, upon application to ASCAP or BMI for a license, the applicant would receive a license and may begin performing the works covered by the license, provided it begins paying to the PRO an interim rate. Similar provisions have been included in other antitrust consent decrees, such as the decree entered upon the merger of Thomson and West Publishing in 1997.[12] That decree also required the issuance of a license upon request, but set automatic default rates to ensure that the copyright holder would be paid by the licensee. The addition of such a provision in the BMI and ASCAP decrees would clarify the confusion introduced by the courts overseeing the consent decrees regarding interim licenses, ensure that users could immediately begin performing a licensed work upon application to a PRO, and guarantee that songwriters and publishers are compensated for the use of their musical works.

Arbitration — The consent decrees currently require that either the PROs themselves or music users initiate rate court proceedings if negotiations over license rates break down. Songwriters and publishers who own the works being licensed have no independent ability to determine when or if a rate court proceeding should be initiated, although they shoulder the cost of each proceeding. The rate court proceedings often result in full federal civil trial and appeal, complete with the extensive discovery prescribed by the Federal Rules of Civil Procedure, resulting in situations where songwriters and publishers wait years to receive full payment (or any payment at all) for use of their copyrighted creative works. Further, rate court proceedings

[12] *See* Final Judgment, *United States et al. v. The Thomson Corp. & West Publishing Co.*, No. 96-1415 (D.D.C. Mar. 7, 1997).

are often incredibly expensive and time-consuming for all parties, lasting for years and costing millions of dollars.[13]

The decrees should be modified to provide for rate-setting through binding arbitration. Rate-setting would be faster, possibly less expensive, and more predictable through the implementation of well-defined rules and guidelines to focus and govern the process. These rules can limit and simplify discovery, evidentiary procedures, and motions practice to reduce time and costs, and the timeline from start to finish could be greatly accelerated. Moreover, arbitration can provide the ability to select an arbitrator with music industry expertise. And, the decrees should further prescribe a time by which arbitration must commence if a rate has not been agreed to by the parties, encouraging both sides to finalize a rate through negotiation. Where negotiations fail to produce agreement on a rate, the arbitration proceeding would simplify and expedite the process and make it less expensive. In an industry that is so rapidly changing, the greater flexibility afforded by arbitration is a necessity.[14]

Consideration of Rates Negotiated in the Free Market: The current practice under the consent decrees arbitrarily places the burden of proof on the PRO to show why its proposed rates are reasonable rather than requiring the rate court to consider evidence introduced of fair market rates. While the current rate-setting proceedings can often produce below-market rates that are drastically out of line with the rates produced between parties directly negotiating in the free

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[13] *See In re MobiTV, Inc.*, 712 F.Supp.2d 206 (S.D.N.Y. 2010) (lasting twenty-four months); *In re THP Capstar Acquisition Corp.*, 756 F.Supp.2d 516 (S.D.N.Y. 2010) (lasting forty-nine months).

[14] Similar arbitration provisions have been included in several recent analogous consent decrees, including the NBCU-Comcast consent decree, which provides for commercial arbitration if an online video distributor cannot reach a negotiated agreement with Comcast. *See* Modified Final Judgment, *United States et al. v. Comcast Corp. et al.*, No. 11-cv-00106 (D.D.C. Sept. 1, 2011). Under this consent decree, an aggrieved party can petition DOJ for permission to submit their dispute to arbitration under the American Arbitration Association's Commercial Arbitration Rules and Expedited Procedures. A similar procedure could be adopted for determining fair market rates for PRO licenses.

market[15], arbitrators or arbitration panels should be required to consider and apply evidence of free market negotiated rates and terms in order to approximate the fair market value of a license and to take into account dynamic market conditions. The objective of the rate-setting process should be to reflect the value of what would be negotiated in a free market. This process will ensure songwriters and publishers are paid quickly and fairly for use of their songs, at rates that reflect market valuation. It will further ensure that songwriters and publishers who remain in ASCAP and BMI, either by choice or by necessity are not competitively disadvantaged by a rate-setting process that fails to consider the true, fair market value of their creative works.

Conclusion

Music publishers are united with other industry stakeholders and consumers in their desire to create a marketplace for music rights licensing that encourages innovation, provides consumers with numerous options for enjoying musical works, and ensures that publishers and songwriters are fairly compensated for their creative contributions. The ASCAP and BMI consent decrees perhaps provided sensible safeguards at some point in their history, but they have since been overtaken by a rapid evolution in digital music technology and consumer preferences.

To restore efficiency, flexibility, and responsiveness to this market, NMPA and its membership respectfully recommend that the consent decrees be modified in three ways: to allow for the partial withdrawal of certain rights from ASCAP and BMI, to be periodically

[15] For example, while direct bilateral negotiations in the free market between publishers and iTunes radio resulted in a 10% royalty rate for publishers, the rate-setting process in In re Pandora Media resulted in a significantly lower rate of 5.1%. *See* Ed Christman, *Publishers to Get Bigger Payday from Apple Thanks to Direct Licensing*, BILLBOARD (June 5, 2013), available at http://www.billboard.com/biz/articles/news/digital-and-mobile/1565762/publishers-to-get-bigger-payday-from-apple-thanks-to.

reviewed to determine whether ASCAP and BMI continue to possess market power, and to reform the rate-setting process by providing for interim license rates and binding arbitration. If these changes are adopted, the music industry will be better able to meet the demands of a dynamic marketplace with speed and innovation that will ultimately benefit consumers.