Comments by Peermusic
Submitted in Response to US Justice Department Antitrust Division
Request for Comments on Review of ASCAP and BMI Consent Decrees

Peermusic welcomes the opportunity to provide comments in support of the review by the Department of Justice of the ASCAP and BMI Consent Decrees. Specifically, we are eager to express our support for modification of the Consent Decrees in light of the particular threats to Peermusic's ability to compete as an independent publisher increasingly dependent on public performance revenues in a radically changed and rapidly evolving marketplace.

I. Background

Peermusic is the trade name for a group of music publishing designees under common family ownership since the company's establishment in 1928. In addition to its founding role and extensive and influential activity in discovering and promoting Rhythm and Blues, Jazz, Latin, and Country music from the beginning of the recording era, Peermusic was actively involved in Rock 'n' Roll from its inception. Today Peermusic holds extensive catalogues in a variety of genres and continues to cultivate new songwriters across the creative spectrum. From inception Peermusic has leveraged the particular strengths of an independent publisher to the benefit of its longstanding roster of songwriters, the public, and the uniquely American craft of popular songwriting.

II. Public Performance Rights Are Critical to Independent Publishers

Peermusic has traditionally relied upon a diverse set of revenue streams arising from the recognition by U.S. law that the copyright in a musical composition is inherently composed of a bundle of rights: the right to make copies in phonorecord form, to prepare derivative works, and

to perform a musical work publicly, among others. These rights traditionally reflected distinct technological methods of music consumption by the public, and resulted in distinct sources of revenues and profits for entrepreneurial licensees of the individual rights: from makers of piano rolls in the early twentieth century, to radio broadcasters decades later, to the innovative digital music services of today. The ability to negotiate with these diverse licensees, parsing and combining these rights in licenses in the marketplace, historically enabled Peermusic to ensure steady streams of income, both to career songwriters and to performing songwriters whose revenues from non-publishing sources were inherently unpredictable and volatile.

The statutory division of rights also allowed music publishers to license each branch of the bundle separately and – critically – allowed smaller independent publishers to aggregate certain licenses through collective societies and agents: the Harry Fox Agency with respect to the right of mechanical reproduction, and the PROs (ASCAP, BMI, and later SESAC) representing the right of public performance. Remaining elements of the bundle not licensed on a mass-user basis and not subject to government oversight or regulation – the "synchronization" right to create derivative audiovisual works, for example – remained with the music publisher to negotiate freely.

The diversification of revenue streams – and the critical assistance of HFA and the PROs in establishing, maintaining, and policing certain of those streams – allowed Peermusic to mitigate the ups and downs of music income for its songwriters, and to devote resources to authors and composers with a long view toward individual creative development and the advancement of the craft of songwriting. Multiple sources of revenue also allowed Peermusic to continue to invest in future songwriters, on the assumption that structural or temporary weaknesses in any particular source of revenue could be counterbalanced by the remaining

sources. Unfortunately, the devastating effect of digital piracy in the past fifteen years radically weakened what had been a core revenue stream: mechanical royalties. Further, interactive streaming technologies now provide a near-total consumer substitution for the former practice of purchasing and collecting phonorecord copies. As a result, it appears clear to most in the industry that phonorecord sales revenues will not recover, and that the diversity of predictable music revenues has diminished in absolute terms.

As a result of both of these phenomena – piracy and the substitution of streams for sales – public performance royalties will for the foreseeable future bear a significantly greater share of the burden of supporting the songwriters of today and tomorrow. It comes as no surprise that we are also seeing a corresponding increase in the impact of Consent Decree restrictions on Peermusic's ability to continue to compete as an independent publisher. The negative impact arises from a number of features of the Decrees: tactical litigation by licensees to minimize rates and pay nothing in the interim, the absence of free-market agreements to inform rate proceedings, and our inability to step in and require licensees to negotiate directly when direct agreements would lead to fairer and more efficient results, to name a few.

Peermusic therefore views the outcome of the review of the Consent Decrees, and these features of the Decrees in particular, as critical to its future ability to support and service its songwriters, clients, and the listening public. We must protect and preserve what is working for independent publishers in the current PRO licensing system; we must work to fix what is not functioning; and we must modify the system to adapt to a new and rapidly evolving marketplace.

III. Independent Publishers and Licensees Need the PROs

Peermusic must have the benefit of collective licensing societies to negotiate fair and competitive rates on its behalf and on behalf of its songwriters. The PROs have, over the decades, invested in and developed administrative structures on which Peermusic and its songwriters, not to mention the vast majority of U.S. licensees, now heavily rely. It would be impossible for Peermusic to negotiate with the thousands of individual radio stations, broadcast entities, live venues, and (today) Internet licensees that wish to publicly perform musical compositions in our catalogue of over a quarter of a million works, and it would be impossible for each such licensee to ensure that it had secured all of the rights it needed to operate its service. Even if these negotiations were possible, administering thousands of licenses, processing millions of lines of usage data, policing compliance, and modifying agreements to adapt to changes in the market would be unthinkably costly and inefficient.

Perhaps the major music publishers will be able to establish data systems, hire small armies of personnel to negotiate and monitor all public performances of their works throughout the United States, and replace the PROs as the direct link between songwriters and their performance income, all without a radical disruption in the availability of musical works to the public. The independent publishers cannot. If no revisions are made to the Consent Decrees, or if revisions that are made do not allow the PROs to obtain competitive market rates, the major publishers will likely withdraw their catalogues entirely from the PROs. The collateral effects could be drastic: independent publishers would be left to bear the full burden of the PROs' administrative costs. We would further find ourselves laboring under Consent Decrees that prevent us from competing on a level playing field with music publishers negotiating directly with licensees. For example, a Peermusic co-writer of a musical work co-published with a major

publisher securing a direct deal with a streaming service would see lower per-stream rate than her counterpart, even for an equal interest in the very same song.

It is clear that Peermusic and smaller independent publishers need the PROs. However, modifications must be made to the Consent Decrees to allow independent publishers the flexibility to negotiate directly in cases in which the scale of the license or the type of service make direct licensing the more efficient choice.

IV. The Ability to Require Licensees to Negotiate Directly

The current "all in or all out" judicial interpretation of the Consent Decree requirements for participation in the PROs is particularly harmful to Peermusic, given its status as an independent music publisher large enough to render direct negotiations an efficient choice in certain cases. However, regardless of the efficiency of direct licensing from a business perspective, the ultimate say is not ours. While licensees are free to elect to negotiate directly with Peermusic to secure public performance rights in our catalogue, the choice remains entirely one-sided as long as we wish to remain a member or affiliate of the PROs. At any point a licensee can opt to withdraw from direct negotiations and seek a license from the PRO, including tactical litigation if the PRO terms do not satisfy the potential licensee. Not only does this threat impose an artificial "ceiling" on rates in direct negotiations, but when the threat is carried out, the licensee is free to use the entire Peermusic catalogue without any compelling requirement to make any payments in the interim. If Peermusic is to be able to tell its songwriters that it is getting their music to the public quickly, efficiently, and at competitive rates, it must be able to elect to negotiate directly.

Outside of the United States, we have firsthand experience as to the benefits of flexibility in our decisions to use or to refrain from using local collection societies. Peermusic is unique among U.S. independent publishers in that it has over the years established a wide network of branch offices worldwide. While our operations span the globe from Hong Kong to the United Kingdom, we have historically had a particularly strong presence in the Latin American region. The worldwide scale of our operations, and our ability to function in practice as a major publisher in the Latin territories, has led to numerous direct discussions and negotiations with major U.S. licensees seeking to secure global rights in the Peermusic catalogue, including (but rarely limited to) public performance rights. In response, we have established an international digital licensing group to oversee and assess, on a case-by-case basis, where it is most efficient to license these rights directly, where our resources are best allocated by using local societies, and where we may wish to combine collective and direct licenses for a particular licensee worldwide.

We have seen from our global perspective that public performance rates outside the United States appear comparatively stable, based on a combination of market agreements and determinations by local copyright tribunals that do not consistently yield below-market rates. Accordingly, our negotiations generally do not grind to a halt with licensee attempts to exploit regulatory rate structures to drive rates down to the exclusion of all else. Instead, the discussions of licensing arrangements are largely cooperative, driven by a shared interest in drafting the right license (or combination of licenses) that will convey the full range of rights required to allow the service to reach its target audiences as quickly and efficiently as possible.

In today's marketplace Peermusic must have the ability to require a licensee to engage in direct negotiations. To do so we must remove the artificial incentives for licensees to "game the system" by negotiating directly only when doing so will provide short-term tactical benefits, and

refusing to negotiate when the licensees believe they can extract better terms through PRO litigation than through negotiations with an owner that ultimately cannot say "no."

Peermusic believes that the Consent Decrees should be modified to allow a copyright owner to withdraw rights with respect to certain digital public performances of its compositions, to elect to negotiate directly, and – if the owner believes necessary in its business judgment – to refuse to license if it cannot come to terms with a given licensee.

V. Reform of PRO Rate-Setting Procedures

Even if Peermusic were permitted to deal freely and directly with its public performance rights in cases where doing so would be the most efficient route to a fair license, for the vast majority of licenses we will continue to rely on BMI, ASCAP, and SESAC. Further, smaller independent publishers – critical incubators of niche talent or administrators of specialized catalogues – may not have the resources to negotiate direct deals under any circumstances. The Consent Decrees should be modified so that the existing rate-setting structure does not punish publishers that continue to license public performance rights solely or partially through the PROs.

A. Market Rates

Above all, one element of the rate-setting process must be clearly established for independent music publishing to remain viable in the current era: market rates. Any changes to the Consent Decree procedures for the establishment of rates – whether through revisions to the guidelines applied by the rate-court judges or through the establishment of a streamlined arbitration procedure – must require that actual market terms be accurately assessed and

matched. It will not be sufficient to require a judge or arbitrator merely to consider such terms, and it will not be enough simply to match headline usage rates.

If major publishers withdraw their catalogues from the PROs, independent publishers must have the ability through the rate-setting process to obtain, consistently and predictably, terms that reflect those established in the free market. Otherwise the independent publishers will simply lose the ability to compete for new talent, develop new songwriters, or curate and preserve existing catalogues. The benefits of signing to an independent publisher – individualized attention, long-term creative relationships, specialized services in a genre or region – will be overwhelmed by the simple fact that competing publishers operating outside the PROs will secure more value per stream of that writer's work.

It is also critical that judges or arbitrators have a transparent view of market terms. Merely matching rates will not be enough if free-market agreements include consideration not reflected in rates – equity in licensees, advances, guarantees, barter value, "administrative fees" or service charges, etc. These elements of consideration will place non-PRO licensors at an artificial competitive advantage in their ability to secure new talent, and could lead to headline rates that on their own do not reflect what the market will bear. We acknowledge that securing this transparency will present challenges, in light of the privity between direct licensors and licensees, increasingly restrictive confidentiality provisions in music licensing agreements, and the countervailing aim of reducing the burdens of discovery under the current rate-court structure.

These challenges might be addressed through a requirement that music services that enjoy the benefits of proceedings under the Consent Decrees voluntarily present evidence of the

terms of their direct licenses. Perhaps such submissions could be made under seal, although the requirement that final rates reflect these market terms would effectively render the private terms public upon finalization of the proceedings. In any event, licensees would be free to refuse to share such terms (including the value of barter or other consideration), but they would then forfeit recourse to the rate court (or arbitration proceeding) for that license. Licensees refusing to share the material terms of their agreements with the rate court or arbitrator would then be required to return to the table with the PROs, which would then be empowered to refuse to license.[1]

One possible result of the mandatory matching of market rates would be a notable reduction in licensees' incentives to litigate. If services no longer believed that they could secure below-market rates from litigation (and were no longer able to withhold any payments in the process, as discussed below), then litigation would no longer stand as the strategic option it represents today. Independent publishers that remained in the PROs would not be placed at a competitive disadvantage against those with the resources to license freely, and the PRO savings in litigation costs would be passed along to their songwriter and publisher members and affiliates.

B. Procedural Reform

In their current form, the Consent Decrees lead to costly and lengthy rate-court proceedings when the PROs and music services fail to come to terms. Peermusic and other

[1] As to the particular challenge of assessing total consideration under these market agreements between licensees and third parties, we have seen, in the context of the Section 115 rate determinations, that stakeholders were able to come to agreement on methods of defining such total consideration for benchmark purposes. See 37 C.F.R. § 385.21; Definitions, Subpart C service revenue, (2)(i)-(iv) (defining "service revenue" to include monetary amounts recognized by the service provider and "any associate, affiliate, agent or representative" thereof, as well as "the value of any barter or nonmonetary consideration"). A similar approach could be applied in arriving at market terms for public performance rights, whether under revised rate-court guidelines or under a new arbitration structure.

independent publishers are directly harmed by the costs and delays of these proceedings – in the lack of revenues during the protracted period of non-payment in the course of litigation, and in the enormous legal costs that reduce the amounts the PROs could otherwise remit to their publisher and songwriter members and affiliates.

Music users that resort to the rate courts may use the Peermusic repertoire before any rates are set. These users are entitled to build a consumer base, establish market position, develop their products, and monetize Peermusic's songs directly and indirectly without payment. In some cases it will be years before we can account to our songwriters for these uses. In cases where a startup service using unpaid content fails during litigation, or an "exit" from the company seems a more profitable route for its founders, Peermusic's songwriters will never be paid for the use of their works. Independent publishers cannot afford to, and should not be required to, subsidize content-dependent businesses simply because those business choose to litigate over rates. The Consent Decrees should provide for the establishment of interim rates, and to require the payment of these rates by licensees using content during the pendency of any rate proceedings.[2]

Apart from the lost or delayed revenues resulting from extended periods of non-payment under the Consent Decrees, the actual costs of litigation incurred by the PROs in rate-court proceedings are necessarily passed on to publishers and members through increased administration fees. Independent publishers that choose to remain with the PROs will bear an increasing proportion of these fees. As noted above, Peermusic believes that the principal means

[2] Interim rates could be determined using methods familiar to arbitration, whether or not arbitration ultimately replaces the rate-court system currently in place: so-called "pendulum" or "baseball arbitration," or variants thereof, for example. It is our understanding that temporary royalty rates are successfully established using such methods in Germany, where the PRO and licensee present their respective proposed rates; interim payments are made directly to the licensor at the lower rate, with separate escrow payments equal to the difference between the rates, to be settled upon conclusion of the rate proceedings.

of managing these costs is to reduce the incentives for licensees to litigate, by ensuring that rate proceedings predictably result in terms that reflect benchmarks negotiated in the marketplace. However, to the extent that rate-court proceedings will continue to play a role in the licensing of public performance rights, we agree with many of our fellow stakeholders that these proceedings must be streamlined, more rapid, and less expensive for all parties.

We also agree that binding arbitration might serve as an appropriate replacement for the costly rate proceedings under the current federal court structure, provided that such proceedings incorporate the requirement that market terms be transparently available to the arbitrator, who will be provided the means and the mandate to accurately assess and match those terms upon conclusion of any such proceeding.

VI. Conclusion

The independent music publisher is the patron of the undiscovered songwriter, the advocate of active authors and composers, and a crucial conduit linking these artists and their lives' work to the public. While all music publishers serve these valuable roles to varying degrees, the independent music publisher is uniquely positioned to cultivate innovative talent that has yet to capture the attention of major music corporations, to support the pure vocation of songwriting for those that do not survive on performing or recording revenues, to focus on niche markets and musical styles, and to continue to re-introduce the classics of the American songbook to new generations.

However, radical changes in the ways music is distributed and consumed, and the inability of the legal and regulatory structure to keep pace with these changes, have combined to threaten the continuing viability of the independent music publisher in the United States.

Particularly for the independent music publisher, the cumulative effects of music piracy and the substitution of streams for sales have brought into critical focus the limitations of the Consent Decrees on the licensing of public performance rights.

While Peermusic must continue to rely on the PROs to ensure that a large proportion of music users have access to our catalogue, we must have the ability to require direct negotiations with new licensees in those cases where doing so will most efficiently lead to fair rates for the use of our compositions. For all other cases, incentives to litigation must be removed by mandating market rates and requiring interim payments by licensees.

If, despite these modifications, disputes over reasonable rates arise, the rate-setting process must be streamlined to reduce the increased impact of the associated costs on independent publishers that will continue to depend on the PROs. Mandatory arbitration may be an alternative, but any proceeding must end with a determination of rates that reflect actual terms negotiated freely in the market. Otherwise the Consent Decrees will have the opposite of their intended effect: competition among music publishers for songwriters and catalogues will be reduced, and in many cases, the particular contributions of the independent music publisher to American songwriters and their audiences will be lost.

Peermusic would like to express its support to the Department of Justice in its decision to review the ASCAP and BMI Consent Decrees, and we thank you for the opportunity to submit these comments.