ASCAP and BMI Consent Decrees – Key Background Information

Overview: First established in 1941 to address the anticompetitive activities by ASCAP and BMI around licensing the public performance of musical works, the consent decrees promote competition in the marketplace by ensuring that all licensees—from the corner bar to the innovate streaming service—can obtain the necessary licenses to play music on fair terms. The decrees are a linchpin that makes the music industry of today what it is, promoting a healthy and competitive music marketplace that benefits music fans, creators and the industry writ large.

Key Points to Consider:

- **The Decrees Work, and the Industry Depends on Them:** Since their establishment in the early 1940s, the ASCAP and BMI consent decrees have successfully restrained the two PROs and allowed the U.S. music industry to flourish. The decrees, as DOJ acknowledged when they reaffirmed their role three years ago, are the cornerstone of the modern music industry: "the consent decrees remain vital to an industry that has grown up in reliance on them." Removing them would be harmful for artists, songwriters, venues, broadcasters, streaming services and – most importantly – music fans.
- **Music Fans Have the Most to Lose if the Decrees Aren't Protected:** The ASCAP and BMI consent decrees have become so tightly woven into the fabric of the music industry that simply getting rid of them—whether now or five years from now—without an alternative framework already in place would lead to chaos in the marketplace and, ultimately, would harm consumers by increasing prices and diminishing the availability of music. This isn't theory, it's what those advocating against the decrees have said: ASCAP and BMI have both stated they intend to increase prices dramatically, as have the publishers. The result: less music at a less affordable price.
- **Removing the Decrees Without a Replacement in Place Would be Disastrous:** To set the ASCAP and BMI consent decrees on a path to termination would result in chaos in music licensing markets, ultimately diminishing the availability of music to audiences across the United States. What will predictably occur in the event of termination is a patchwork of protection that fails to protect small or independent licensees, and a raft of protracted litigation that wouldn't benefit fans or artists alike.
- **Adding a "Sunset" Provision to the Decrees Is No Solution:** Adding a "sunset provision" to the existing decrees would only give those eager to engage in anti-competitive behavior a tangible goal for how long they have to hold out from embracing a collaborative path forward. The PROs and music publishers will have no incentive to come to the table to craft such a solution if they know that they will be able to fully leverage their market power by holding out for a few years.
- **Allowing Partial Withdrawal Would be Harmful:** Recent years have seen major music publishers try to withdraw licensing rights for so-called "new media services" from ASCAP and BMI in a cynical attempt to pad their pockets at the expense of consumers. Both the courts and DOJ have rejected those efforts, and for good reason: such a regime does nothing for competition or consumer welfare while allowing the publishers to impose an added tax on the economy. The result would be less music available to consumers at a higher price point, all while stifling competition and adding additional layers to a licensing system that is already fraught with confusion.

- **DOJ Should Form a Federal Advisory Committee:** When Congress passed the Music Modernization Act, it explicitly considered and supported the ongoing existence of the consent decrees. As such, it is imperative that any process to review the consent decrees or consider new licensing frameworks be robust and substantive and involve experts from all stakeholders coming together to collaborate on a solution. Thankfully, Congress has provided a blueprint that the Department of Justice can use for such a pathway through the creation of a Federal Advisory Committee. The Department of Justice should convene such a committee here—as it has in studying previous critical antitrust issues--rather than relying on a rushed comment period. This Federal Advisory Committee could review the decrees, collect and study critical industry data, and engage with stakeholders from across the industry in order to provide confidence in the pathway forward.