From: John Doe <54610873[redacted]
Sent: Wednesday, August 6, 2014 7:06 PM
To: ATR-LT3-ASCAP-BMI-Decree-Review <ASCAP-BMI-Decree-Review@ATR.USDOJ.GOV>
Subject: ASCAP and BMI Consent decrees

To the U.S. Department of Justice:

I am writing in response to your request for comments concerning the review of the Consent Decrees limiting the anti-competitive practices of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). While I have elected to submit this comment anonymously for fear of retaliation from these entities, I can disclose that I am the manager of a small performance space that hosts original live music performances by independent musicians, and has been persistently threatened with litigation despite making no use of PRO content.

First, I would like to strongly urge the Department of Justice not to release ASCAP or BMI from their obligations under the Consent Decrees, and in particular, not to interfere with the rate court mechanism which the Consent Decrees provide. Thanks in large part to the existence of this rate court, the fees paid by venues that purposefully use content from the ASCAP and BMI repertories is generally reasonable. In contrast, the fees charged by the Society of European Stage Authors and Composers ("SESAC") are nearly twice the amount charged by ASCAP or BMI, even though SESAC has a substantially smaller repertory. Moreover, SESAC has obscured the contents of its repertory to force prospective licensees to purchase a license out of fear of what the repertory might contain. SESAC has also been far more aggressive and threatening in their collection practices based on my experience with them. It is my firm belief that it is the Consent Decrees that keep ASCAP and BMI at least vaguely honest, and that SESAC must be subjected to similar constraints or its practices will only grow more egregious over time. If the rate court mechanism were eliminated, or replaced by an arbitration system that would be prohibitively expensive for prospective licensees, prospective licensees would have no meaningful protection from these entities' anti-competitive tactics.

Second, I am writing to point out that the existing Consent Decrees are woefully inadequate on a singled issue: the right of performers and establishments that do not wish to use content from the ASCAP and BMI repertories, and are willing to take reasonable steps to guard against infringement, to exist without the constant existential threat of litigation seeking to compel the purchase of content that is not wanted. Currently, all three of these Performer's Rights Organizations ("PRO's") maintain a firm position that anyone that allows the performance of live music on their property, original or not, must pay these entities for a blanket license to their content. Their argument is that, even if a small coffee shop, art gallery or music venue takes every reasonable precaution to protect against use of the PRO's

content, there is still a significant risk that a musician will perform a cover song without the establishment's permission or knowledge. In such an event, the establishment would then be liable for damages of $30,000 per song, even if the infringement was not willful, which is more than enough to bankrupt most hospitality businesses and non-profits. Moreover, the courts sometimes impose individual liability on owners or find infringements to be willful (allowing for damages of $150,000 per song) based solely on the receipt of numerous threatening letters from the PRO's, even where the establishments have not purposefully used the PRO's content. This grants the PRO's the ability to terrorize any establishment that allows the performance of original live music into either ceasing to allow the performance of original music or purchasing a license to content they do not want.

The practical effect of this is that the PRO's do not just own their music, they own the right to perform music at all, and no establishment can reasonably allow for the performance of live music without purchasing their content. The risk of litigation is just too great, and the cost of the licenses are often more than a struggling business or non-profit could afford or would stand to make from using their content. The internet is replete with stories of cafes, bars and art spaces that used to allow the live performance of original music, but were forced to stop permitting live music entirely due to the threat of litigation from these entities. As a result, smaller performers are finding it increasingly difficult to find places where they are allowed to perform. The sort of places that previously provided open mic nights or similar outlets for less established musicians to perform have largely been scared away through the extortionary threats of the PRO's from allowing even original content. Even many mid-sized venues have now taken to charging ASCAP fees to the small original artists that perform there, to fund their own purchase of a license, effectively depriving these small performers of what modest revenues they make to pay the far wealthier ones who receive the overwhelming bulk of royalties. Having been threatened numerous times by these PRO's, despite repeatedly outlining the measures taken to avoid any use of PRO content, I can confirm that it feels very much like a mafia-style shake down. No amount of explaining or documenting an establishment's anti-infringement policies is sufficient to dissuade these entities from their threatening posture; their position is uniformly that anyone that allows the performance of live music must pay them, whether the content is original or not. These threats sometimes rise to the level of a collection agent screaming over the phone. I have been mugged at gunpoint under circumstances that felt more polite.

According to the ASCAP website, in setting its fees, "ASCAP operates under the principle that similarly situated users should be treated similarly." For this goal to hold true, the Consent Decrees must be modified to recognize that forums for original music, which take reasonable precautions to avoid infringing on a PRO's content, are not similarly situated to a business that purposefully and regularly uses copyrighted content. There are already a large variety of categories of licenses, but there needs to be a new category for original music

venues, who do not wish to use licensed content, but seek protection against the risk that a performer might use licensed content in violation of the establishment's policies. The license could be differentiated on the basis of anti-infringement policies that the establishment agrees to adopt, or there could be an audit mechanism, so long as the cost to the establishment remains substantially less than the cost imposed on an establishment that intentionally uses PRO content.

As the PRO's have recognized, even with optimal anti-infringement policies, there still remains a risk of ruinous litigation in the event a performer doesn't comply with those policies. Given the astronomical damages available under the Copyright Act, the cost of even one copyrighted song being performed by a musician without the venue's knowledge, and in violation of its policies, could be more than the cost for an entire decade of purchasing a blanket license to the PRO's content. The disproportionality of this is analogous to replacing our current traffic laws with a system where, instead of receiving a ticket, a first time speeder is summarily shot.

To remedy this situation and provide some measure of protection for establishments and musicians that seek only the right to perform their own content, a new and substantially less expensive version of the PRO's licenses needs to be created for original music establishments. Otherwise, the number of small venues available to entry-level performers will continue to dwindle, and the existing regime will do nothing but continue to promote the interest of wealthy, well-established and well-represented musicians at the expense of the little ones. The PRO's own the music in their repertories, but they cannot be allowed to own the very concept of music, or to control who is allowed to perform even their own content. Unfortunately, this is effectively the situation as it stands, and the PRO's will continue in this manner unless the Consent Decrees are modified to protect original music performers and original music venues from such conduct.

Sincerely,

John Doe