



DEPARTMENT OF JUSTICE
Antitrust Division

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July 21, 1995

Bennett M. Lincoff
Director of Legal Affairs
American Society of Composers, Authors & Publishers
One Lincoln Plaza
New York, NY 10023

Marvin L. Berenson
Senior Vice President and General Counsel
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019

Laurie Hughes
General Counsel
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55 Music Square East
Nashville, TN 37203

Dear Messrs. Lincoff and Berenson and Ms. Hughes:

This letter responds to your request on behalf of the American Society of Composers, Authors & Publishers; Broadcast Music, Inc.; and SESAC, Inc. ("the musical rights societies") for the issuance of a business review letter pursuant to the Department of Justice's business review procedure, 28 C.F.R. § 50.6. You have requested a statement of the Antitrust Division's present enforcement intentions with respect to a series of meetings to be held to discuss proposed legislation concerning the licensing practices of musical rights societies.

In your letter, you indicated that Congressman James Sensenbrenner has introduced H.R.789, the Fairness in Music Licensing Act of 1995. Congressman Carlos J. Moorhead, Chairman of the Courts & Intellectual Property Subcommittee of the House Judiciary

Committee, has requested that the interested parties meet and discuss the legislation. As a result of that invitation, the musical rights societies intend jointly to take certain action.

In your business review request, you indicate that it is contemplated that the musical rights societies may engage in some or all of the following activities:

- (1) jointly discussing, proposing, supporting, opposing, altering, or amending legislation and/or amendments to that legislation;
- (2) jointly discussing, agreeing and carrying out activities to inform Congress of their views with respect to legislation, or amendments to legislation;
- (3) jointly lobbying Congress with the intent of influencing Congressional activities; and
- (4) jointly submitting views on matters relevant to the proposed legislation in response to inquiries from Congress.

In addition, the musical rights societies intend to engage in joint discussions on various issues surrounding the legislation. For example, the musical rights societies indicate that one of the issues that the legislation addresses is the ability of licensees to get access to the musical rights societies' respective repertoires. You have represented that the mechanics of each society's on-line access system, which are being independently designed and programmed by each society to provide access to repertoires, likely will be a topic of discussion in these meetings.

It is the musical rights societies' intention not to engage in any joint discussions of pricing. You have represented that at no time will the musical rights societies raise or respond to any suggestion that they discuss rates or fees for the licensing of public performance of music. Among other issues that might be discussed is the possibility of establishing ad hoc "customer relations" committees for each musical rights society.

In addition to the joint discussions that will be held, it is possible that the musical rights societies will reach an agreement with those seeking the legislation on issues that would solve concerns of those sponsoring this legislation. The musical rights societies have represented for the purposes of seeking a business review letter that they will not enter into any joint agreement that would have any anticompetitive effect unless that anticompetitive effect was minimal and was outweighed by economic efficiencies.

After careful consideration of the information you have provided, the Department of Justice has no present intention to challenge the activities contemplated by the musical rights societies in conjunction with the Fairness in Musical Licensing Act of 1995.

Your business review request can be analyzed by independently examining each of the three types of activities the musical rights societies potentially will engage in with respect to this legislation. First, the musical rights societies intend to engage in joint discussions and reach joint agreements with respect to the legislative proposal at issue, the Fairness in Musical Licensing Act of 1995. Second, the musical rights societies may engage in joint nonprice discussions on issues raised by the legislation. Finally, the musical rights societies may reach joint private marketplace agreements on issues designed to eliminate the need for any legislation or any legislative proposal.

Your initial interest is with respect to joint discussions, agreements, or other joint actions with respect to the legislative proposal at issue. You indicate that discussions with respect to the legislation are being held at the specific request of a subcommittee chairman.

The antitrust laws generally do not prescribe joint activities among economic rivals conducted for the purpose of petitioning the Government for legislative action. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965). While there are exceptions to this general rule, none appear to be involved in the joint discussions and agreements that would be reached with respect to the legislation that you have addressed in your letter. Thus, for example, the Division would not challenge under the antitrust laws any joint discussions, proposals, support, opposition, alteration, or amendments to legislation by the musical rights societies. Also, we would not challenge joint discussions, agreements or activities to inform Congress of the musical rights societies' views with respect to legislation or amendments to legislation. Finally, we would not challenge the musical rights societies' joint lobbying of Congress with the intent of influencing the legislative outcome, nor would we challenge the musical rights societies' joint submission of views on the legislation, or responses to inquiries from Congress. All of these types of conduct would be protected petitioning activity under the Noerr-Pennington doctrine.

Second, you have indicated that joint discussions may occur among the musical rights societies that potentially would go beyond the proposed legislation and discuss certain industry issues generally. Much of the discussions likely would be protected under the Noerr-Pennington doctrine if done with respect to petitioning the government with respect to the Fairness in Musical Licensing Act of 1995 or alternative legislation. In any event, the antitrust laws rarely impose liability for joint discussions. In order for a violation of Section 1 of the Sherman Act to exist, there must be a contract, combination or conspiracy; in other words, there must be an agreement between two or more persons. Of course, explicit agreements are not necessary, an agreement can be shown by circumstantial evidence. The primary antitrust concerns arise when competitors engage in joint discussions regarding prices, market allocation, or service restrictions. In such circumstances, the possibility of a tacit agreement or understanding resulting in harm to competition is heightened. You have indicated that you are aware of this antitrust concern and that the musical rights societies will not be part of any such discussions. In this context, when you are avoiding pricing discussions and if you avoid discussions of other

competitively sensitive areas such as market allocation or service restrictions, it is unlikely that such discussions would violate the antitrust laws.

Finally, you have indicated that in order to resolve matters addressed by the proposed legislation, you may go beyond discussions and reach joint agreements among the musical rights societies in lieu of legislation. Of course, Noerr-Pennington protections do not extend to such private, marketplace agreements even if they are prompted by legislative proposals. Any such agreements that amount to price-fixing, market allocation, and service restriction could be per se illegal. Other agreements typically would be analyzed pursuant to the rule of reason. The objective of a rule of reason analysis is to determine whether competition may be reduced, and, if it might, whether the agreement is likely to produce procompetitive efficiencies that outweigh its anticompetitive potential. You have represented for purposes of seeking a business review letter that the musical rights societies do not intend to enter into any joint agreements that would have an anticompetitive effect unless that anticompetitive effect was minimal and was outweighed by economic efficiencies. To the extent that any joint agreements entered into either do not have an anticompetitive effect, or the anticompetitive effect is minimal and is outweighed by economic efficiencies, the rule of reason analysis would result in a conclusion that the antitrust laws were not violated.

Based on the information available to us, the Department of Justice has no present intention to challenge under the antitrust laws the practices, discussions and agreements referred to in your letter of June 30, 1995. Further, we would not intend to challenge under the antitrust laws any agreements outside the price-fixing, market allocation, and service restriction areas unless they are likely to result in reductions to competition that are not outweighed by procompetitive efficiencies. This letter expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring any enforcement action in the future, if the actual operation or any aspect of your discussions or agreements proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely yours,

/s/

Anne K. Bingaman
Assistant Attorney General