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August 5, 2014

John R. Read
Chief, Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW, Suite 4000
Washington, DC 20001

Dear Mr. Read:

American Beverage Licensees (ABL) appreciates the opportunity to submit comments pursuant to the U.S. Department of Justice (DOJ), Antitrust Division request for information and comments regarding the Consent Decrees governing the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). American Beverage Licensees was created in 2002 and represents the interests of on-premise (bars, taverns, nightclubs, restaurants) and off-premise (package liquor, beer and wine stores) beverage alcohol retailers.

Most establishments licensed to sell beverage alcohol to consumers – especially bars, taverns, nightclubs and restaurants – use copyrighted musical works in the course of their business practices. These beverage licensees work with performing rights organizations (PROs) to make sure they are in compliance with copyright laws. ABL members were involved in legislative efforts in 1998 to amend the U.S. Copyright Act, 17 U.S.C. 110(5), so as to clarify the scope of the exemption for certain performances of music in food service, drinking and retail establishments by means of radio and television transmissions.

ABL submits these comments with the goal of developing a more transparent and predictable process for setting royalty rates for the public performance use of copyrighted musical works in eating and drinking establishments; and adopting a more effective mechanism for remediation for beverage licensees, when engaging in music licensing fee disputes.

Specifically, ABL wishes to address the following two issues outlined in the DOJ notice:

How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?

Modern technology has made it possible for ASCAP and BMI to create searchable databases of the musical works in their respective repertoires. However this transparency and accuracy does not permeate into all aspects of the royalty rate-setting process. Despite the availability of ASCAP & BMI's repertoires, most on-premises licensees that use copyrighted material in their businesses are advised that they should obtain blanket licenses from the three largest PROs: ASCAP, BMI and SESAC.

From what our small, local taverns and bars tell us, the rate-setting process and measures used by individual PROs to determine the fees for these blanket licenses appear quite arbitrary and at times illusory of the actual instances and nature of public performances of copyrighted musical works in their businesses. While rate worksheets exist, fees have been known to change significantly from year-to-year, despite few if any changes to a licensee's business model or use of copyrighted works. Whether fair and reasonable or not, once a music licensing fee is determined by the PRO, there is little practical opportunity for the licensee to negotiate due to fear of costly litigation.

Another concern of beverage licensees is that the three largest PROs charge curiously similar rates despite having repertoires that differ substantially in size.¹ As artists sign-on to be represented, pass away or switch PRO affiliation, the number of copyright owners and copyrighted musical works each PRO represents fluctuates. One common sense solution would be to pro-rate licensing fees based on the percentage of copyrighted musical works or artists represented by each PRO at the time of the licensing agreement.

A questionably-defined criterion that is used for rate-setting, as prescribed by the Fairness in Music Licensing Act of 1998², defines "gross square feet" as "the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise." This means that locations in the establishment, including walk-in coolers, closets and other places where customers are not intended to frequent, are considered part of the space for public performance³. These locations, by their very nature as storage areas, are not part of the space for public performance, and thus it would make sense to reevaluate the standards of this measurement.

Should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration? What procedures should be considered to expedite resolution of fee disputes? When should the payment of interim fees begin and how should they be set?

Originally, the Consent Decrees called for disputes over fees between music licensees and ASCAP or BMI to be resolved by a "rate court" process where a reasonable fee would be determined by a judge in the U. S. District Court for the Southern District of New York. The Fairness in Music Licensing Act of 1998 attempted to make it easier for licensees to settle rate disputes with ASCAP and BMI by allowing them to initiate cases to a federal district court in the city of that jurisdiction's U.S. Court of Appeals.

While an improvement over the original arrangement, this remains an impractical remedy for most bar and tavern owners. Disputing a \$500 or even \$1,000 fee discrepancy can involve significant legal and travel costs to a licensee, a fact that does not escape the PROs as they determine rates. The current arrangement may be a useful tool for large organizations with the financial wherewithal for legal counsel and associated costs, but it is a severely limited and cost prohibitive option for small business owners seeking legal relief, to the point that fees are almost never challenged through this mechanism.

A sensible alternative that would improve safeguards against abusive practices and unreasonable charges by PROs is local arbitration of music licensing fee disputes. An arbitration process that is balanced, independent and cost-neutral would fairly determine reasonable fees; provide a practical and usable remedy for music licensing rate disputes; and

¹ While SESAC is not supervised by a Consent Decree, it is much smaller than the other two PROs. Despite this, there is now anecdotal evidence that SESAC is demanding fees that are similar to ASCAP and BMI.

² Pub. Law 105-298; <http://www.gpo.gov/fdsys/pkg/PLAW-105publ298/html/PLAW-105publ298.htm>

³ ASCAP's website states that "A public performance is one that occurs 'in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.'"

offer a more geographically accessible system for small business licensees. In addition, and to take advantage of the ever-growing use of technology, creating an online mechanism wherein licensees could present evidence in support of their fee challenges to an arbitrator or rate judge would be an even more cost-effective remedy.

While the Consent Decrees do provide benefits pertaining to preventing antitrust violations, there is clearly room for improvement and modernization when it comes to determining music license fees and the opportunity for licensees to dispute those fees.

Sincerely,



John D. Bodnovich
Executive Director
American Beverage Licensees

ABL State Affiliates

Alabama Beverage Licensees Association	Indiana Licensed Beverage Association	New York State Liquor Store Association
Alaska CHARR	Kansas Licensed Beverage Association	Retail Liquor Association of Oklahoma
Anchorage CHARR	Kentucky Assoc. of Beverage Retailers	Malt Beverage Distributors Assoc. of Penn.
Arkansas Beverage Retailers Association	Maryland State Licensed Beverage Assoc.	Rhode Island Liquor Stores Association
Colorado Licensed Beverage Association	Massachusetts Package Stores Association	ABC Stores of South Carolina
Connecticut Package Stores Association	Tavern League of Minnesota	Licensed Beverage Dealers of South Dakota
Retail Bev. Council, Florida Retail Feder.	Mississippi Hospitality Beverage Assoc.	Tennessee Wine & Spirits Retailers Assoc.
Georgia Alcohol Dealers Association	Montana Tavern Association	Texas Package Stores Association
Beverage Retailers Alliance of Illinois	Nevada Tavern Owners Association	Virginia Licensed Beverage Association
Idaho Licensed Beverage Association	New Jersey Liquor Stores Alliance	Tavern League of Wisconsin
Illinois Licensed Beverage Association	Empire State Restaurant & Tavern Assoc.	Wyoming State Liquor Association
Indiana Association of Beverage Retailers	Metropolitan Package Stores Association	