Before the
CHIEF, LITIGATION III SECTION, ANTITRUST DIVISION
OF THE U.S. DEPARTMENT OF JUSTICE
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In the Matter of Review of ASCAP and BMI Consent Decrees	)	In Re: Final Judgments in United States v. ASCAP, 41 Civ. 1395 (S.D.N.Y.), and United States v. BMI, 64 Civ. 3787 (S.D.N.Y.) ("Consent Decrees")

COMMENTS OF AMERICAN BEVERAGE LICENSEES
(ABL)

/s/

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COMMENTS OF AMERICAN BEVERAGE LICENSEES

American Beverage Licensees (ABL) appreciates the opportunity to submit these comments pursuant to the United States Department of Justice Antitrust Division ("DOJ") in response to the request for public comment concerning "PRO Licensing of Jointly Owned Works" as part of the DOJ's ongoing review of the consent decrees governing the performing rights organizations ("PROs") American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI").[1]

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 beverage licensees – especially bars, taverns, nightclubs and restaurants – use copyrighted musical works in the course of their business practices. As such, they collectively pay hundreds of millions of dollars a year in licensing fees to ASCAP and BMI.[2]

Beverage licensees have a long history of interacting with PROs and understand why the consent decrees that govern PROs are necessary. At the same time, beverage licensees continue to seek greater transparency when it comes to the business practices of PROs.

ABL supports the DOJ's review of the consent decrees and addresses the specific questions below:

1. **Have the licenses ASCAP and BMI historically sold to users provided the right to play all the works in each organization's respective repertory (whether wholly or partially owned)?**

   YES. As the DOJ points out in its request for public comment:

   > The organizations' licenses grant users the rights to play works, not interests in works. For example, BMI's model license for bars and restaurants promises "[a]ccess to more than 7.5 million musical works" and grants to the user "a non-exclusive license to

[1] http://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2015
[2] http://www.billboard.com/articles/business/6692988/bmi-surpasses-1-billion-in-revenue-for-year

> publicly perform . . . all of the musical works of which BMI controls the rights to grant public performance licenses during the Term." Similarly, ASCAP's Business Blanket License grants the right to perform "non-dramatic renditions of the separate musical compositions now or hereafter during the term of this Agreement in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights."

Beverage licensees commonly understand that when they obtain a "blanket license" from a PRO, they have the right to use all the works in that PRO's repertoire, irrespective of what may be considered a partial or "split work." The very use of the term "blanket license" implies as much, and the ability to use all of the works in a PRO's repertoire is one of the benefits that PROs tout when urging beverage licensees to pay for a license. Beverage licensees also enter into these agreements to abide copyright laws and mitigate the risk of copyright infringement actions by PROs.

In public comments[3] written by ASCAP and submitted to the DOJ during the ongoing review of ASCAP and BMI consent decrees, ASCAP states:

> ASCAP's membership is as varied as its repertory, which represents every genre of music. And, true to its principles of fairness, ASCAP's licensing is agnostic to its repertory; a blanket license permits a licensee equal access to all or any types of music in the repertory, whether top 40 hits or older, rarely performed catalog works.
>
> Licensees are, through a single license with a single entity, authorized to perform any or all of the millions of songs in ASCAP's repertory (including additional songs that enter the repertory during the term of the license and countless foreign works).

When defining a "blanket license", the ASCAP website[4] states:

> "Blanket license" is a license which allows the music user to perform any or all of over 8.5 million songs in the ASCAP repertory as much or as little as they like. Licensees pay

[3] http://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307803.pdf
[4] http://www.ascap.com/licensing/termsdefined.aspx

> an annual fee for the license. The blanket license saves music users the paperwork, trouble and expense of finding and negotiating licenses with all of the copyright owners of the works that might be used during a year and helps prevent the user from even inadvertently infringing on the copyrights of ASCAP's members and the many foreign writers whose music is licensed by ASCAP in the U.S.

It is clear to any reasonable observer that the intent of the blanket licenses sold to users provides that user the right to use any and all of the works in the PRO's repertoire.

2. If the blanket licenses have not provided users the right to play the works in the repertories, what have the licenses provided?

As explained in the response to the preceding question, beverage licensees enter into blanket license agreements with PROs precisely because they do provide users with the right to play all the works in a PRO's repertoire.

3. Have there been instances in which a user who entered a license with only one PRO, intending to publicly perform only that PRO's works, was subject to a copyright infringement action by another PRO or rightsholder?

ABL is unaware of any such instance.

Anecdotally, however, there have been occasions in which a beverage licensee enters into a license agreement with "PRO A", and "PRO B" will, unsolicited, soon thereafter demand that the beverage license enter into agreement for a license with their organization. These demands have been made in person, by telephone and in writing. The rationale that is provided by PRO B is that the beverage licensee will be unable to prevent works licensed by PRO B from being used in his/her business. Suggesting to an agent of a PRO B that a business only intends to use the works of PRO A only seems to invite further scrutiny by PRO B.

Beverage licensees have long complained of a culture of intimidation perpetuated by PRO representatives who engage in aggressive collection tactics; and a lack of practical

recourse for small business owners with limited financial resources to dispute demands. Beverage licensees are also aware of the well-publicized history of litigiousness of PROs, making it unsurprising that some beverage licensees may be unjustly compelled to obtain licenses from multiple PROs even though their intent is to use only the works licensed by a single PRO.

4. Assuming the Consent Decrees currently require ASCAP and BMI to offer full-work licenses, should the Consent Decrees be modified to permit or require ASCAP and BMI to offer licenses that require users to obtain licenses from all joint owners of a work?

NO. In that the purpose of the consent decrees is two-fold:

a. To create some efficiencies for licensees seeking to obtain the right to use copyrighted works without having to interact with all individual copyright holders;
b. To limit the vast market power ASCAP and BMI have abused in the past and enjoy at present.

The importance of maintaining this balance cannot be overstated, nor can its fragile nature. Instituting the change suggested in the question would greatly minimize the efficiencies created through collective licensing by diminishing the value of ASCAP and BMI licenses. It would also diminish the protections afforded licensees under the current PRO umbrella by arbitrarily embracing an additional class of licensing entities most likely comprised of individual co-owners of split works.

For independent beverage licensees, the specter of undertaking the identification, calculation and payment to these individuals would be devastating. Perversely, it would also lead to less revenue for artists as the higher costs for licensees and consumers would almost certainly lead to less music in beverage licensees' establishments.

5. If ASCAP and BMI were to offer licenses that do not entitle users to play partially owned works, how (if at all) would the public interest be served by modifying the Consent Decrees to permit ASCAP and BMI to accept partial grants of rights from music publishers under which the PROs can license a publisher's rights to some users but not to others?

It is difficult to envision how further fracturing a licensing system – which already suffers from a lack of transparency – by allowing music publishers to partially participate with PROs and requiring split share licensing for works (thus rendering user licenses from ASCAP and BMI essentially worthless), would in any way serve the public interest.

6. **What, if any, rationale is there for ASCAP and BMI to engage in joint price setting if their licenses do not provide immediate access to all of the works in their repertories?**

   ABL does not see any rationale for ASCAP and BMI to engage in joint price setting if they cease to provide the overwhelmingly primary service for which beverage licensees engage and contract with them. Should the efficiencies and benefits that serve as the justification for ASCAP and BMI's survival of antitrust scrutiny disappear, the legality of current collective licensing practices by these PROs would need to be reevaluated.

ABL thanks the Department of Justice for considering these comments.

Respectfully submitted,

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