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November 20th, 2015

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Caroline Shaw, Jackson Family Wines

WineAmerica appreciates the opportunity to submit its 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). WineAmerica was founded in 1978 and represent wineries and vineyards in 46 states.

The majority of wineries and vineyards use copyrighted and non-copyrighted music at their location. These venues are usually in rural areas, where agri-tourism is an important part of the local economy. Having affordable music to provide to consumers is an important part of the winery and vineyard business model.

WineAmerica submits these comments with the goal of developing a more transparent and predictable process for setting and collecting royalty rates for the public performance use of copyrighted musical works in wineries and vineyards, including creating a truly competitive and healthy business environment.

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)?

Historically ASCAP and BMI have offered licenses to perform their entire repertory. The problem arises in that they do not provide an accurate list reasonably accessible to users. As a result, there is a lack of transparency as to what music is covered by a license. Winery and vineyard business owners need to know what music is covered when they purchase a blanket license from BMI and/or ASCAP. An up-to-date, easily accessible database of ownership would address this problem.

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

In BMI's contract, they state that their blanket license grants the user access to over 7.5 million music works. But when searching their online database they state, "BMI makes no warranties or representations whatsoever with respect to its accuracy. Any use of this information is solely at the risk of the user."

The blanket licenses do provide the users the right to play the works in their repertory, but ASCAP and BMI, in their own words, will not stand by the accuracy of what they provide. Housing universal database of ownership with a third-party, such as the copyright office, is one way to eliminate this problem.

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?

This is a widespread experience for a winery or vineyard; to purchase a blanket license from one Performance Rights Organization (PRO), only to be subsequently threatened by another. Even when a winery or vineyard instructs a performer to perform only music from one organization, the other organization will very often approach the owner threatening legal action. Further, when a winery plays solely original music, with song-writers who are not signed to either ASCAP or BMI, both organizations continue to threaten legal action. The anti-competitive nature of ASCAP and BMI's business practices prevent the necessary competition for a healthy marketplace. Business owners need assurances that when they purchase a blanket license from one PRO, or when they perform solely original or traditional music, they will have legal recourse protecting them from harassment by other PROs.

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. Requiring the purchase of a license for joint ownership would further the anti-competitive behavior of BMI and ASCAP. It would eliminate buyer's choice in the marketplace. By requiring multiple licenses for a single musical work, it would raise the cost of performing music. Venues are already canceling live music due to costly licenses. Requiring the purchase of multiple licenses would dramatically raise the number of wineries and vineyards no longer offering live music, hurting business, the music industry, and the consumer.

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?

Offering licensing that does not allow for partially owned works would increase the already difficult process of complying with a purchased music license. Without a transparent database, a user would not know if the music they are paying is solely or partially owned. Requiring a user to purchase a licensing from both BMI and ASCAP to play a single song is double charging. It is the responsibility of the PROs to equitably distribute funds to the artists whom they represent. We ask that PROs perform this task in a transparent manner.

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?

ASCAP and BMI should not be allowed to engage in joint pricing. The purpose of the consent decrees is to encourage competition between ASCAP and BMI. From the perspective of a user, competition is important because it serves as a check against the consolidated market power which both ASCAP & BMI have amassed as a result of their aggregation of musical composition licensing rights. By requiring ASCAP and BMI to operate independent of one another (i.e. set separate prices), wineries and vineyards would be empowered to shop around for the best rates. This choice, in theory, would create competition in the marketplace by encouraging both PROs to establish prices that are fair and reasonable. Ensuring our members are able to obtain reasonably priced licenses from ASCAP and BMI is very important to wineries vineyards – considering their financial/budget constraints. Subjecting our industry to ‘supra-competitive’ prices would rapidly increase the rate at which wineries and vineyards cancel music at their venue.

Our industry is subject to strict regulation to prevent anti-competitive practices - winery and vineyard owners understand the importance of choice for the consumer. A competitive and transparent music marketplace will encourage more wineries and vineyards to play music and hire local musicians, increasing royalties paid to songwriters, and benefiting the music industry as a whole.

Sincerely,

WineAmerica, the National Association of American Wineries

Along with our partners:

Paul Kronenberg, President, Family Winemakers of California

Josh McDonald, Executive Director, Washington Wine Institute

Duane Wallmuth, Executive Director, Walla Walla Wine Alliance

Jana McKamey, Director of Government Affairs and Member Relations, Oregon Winegrowers Association

Beverly Stotz, Executive Director, New Mexico Wine Growers Association

Debbie Reynolds, Executive Director, Texas Wine and Grape Growers Association

Jim Trezise, President, New York Wine and Grape Foundation

Steve Bate, Executive Director Long Island Wine Council

Suzy Hays, President, New York Wine Industry Association

Jennifer Eckinger, Executive Director, Pennsylvania Winery Association

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Rob Bitner, Bitner Vineyard, ID

Jerry Douglas, Biltmore Wines, NC

Scott Osborn, Fox Run Vineyards, NY