



August 9, 2019

Public Comments of American Beverage Licensees Submitted in Response to the U.S. Department of Justice’s Request for Comment on the Future of the ASCAP and BMI Consent Decrees

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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 “Antitrust Consent Decree Review – ASCAP and BMI 2019” as part of the DOJ’s review of the consent decrees (“consent decrees”) governing the performing rights organizations (“PROs”) American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”).ⁱ

American Beverage Licensees was created in 2002 and represents the interests of more than ten-thousand on-premise (bars, taverns, nightclubs, restaurants) and off-premise (package liquor, beer and wine stores) beverage alcohol retailers. Many retail beverage licensees – especially bars, taverns, nightclubs and restaurants – obtain licenses to legally use copyrighted musical works in the course of their business practices. As such, they collectively pay many millions of dollars a year in licensing fees to ASCAP and BMI.ⁱⁱ

Beverage licensees have a long history of doing business with ASCAP and BMI, and they strongly believe that the Consent Decrees are important and necessary elements in maintaining an orderly music marketplace in which small businesses, songwriters and the public benefit by allowing what would be an otherwise unlawful monopoly to exist with firm DOJ oversight so as to create efficiencies for the collection of fees and distribution of royalties. Without these reasonable guardrails, history has shown us that the stunning market power these two businesses possess would lead to abuse of that market power and anticompetitive behavior.

To be clear, the current music licensing ecosystem is not perfect. ABL and its members have advocated for measures that would increase transparency and incentivize greater openness and consumer fairness for music licensees. But even this imperfect system is far better than unleashing unchecked monopolistic power on local bars, taverns and restaurants who have largely worked within today’s regulatory framework for decades. Terminating the consent decrees is a solution in search of a problem and would imperil the music performance marketplace in profound ways.

The Consent Decrees continue to serve an important purpose today by preventing anti-competitive behavior amongst these two PROs and should remain in force. The consent decrees provide the only check against PRO collusion and monopoly pricing power. By their own account, ASCAP and BMI have grown revenue steadily as the music landscape has changed, in part because there is a market in which music providers can operate thanks to assurances from the Consent Decrees.

Terminating the ASCAP and BMI consent decrees would undermine the basic framework that provides vital efficiencies for venues to lawfully play music in their businesses, including:

- **EFFICIENCY.** PROs provide an efficient way for bars, restaurants and taverns to license music by aggregating large numbers of musical works into a single catalog. They grant “blanket” licenses to bars and taverns for those works to be performed. Terminating the ASCAP and BMI Consent Decrees would be extraordinarily disruptive for bars, restaurants and taverns and could force them to eliminate music altogether should those licenses be eliminated, limited or meaningfully altered in ways that would increase the burden on licensees.

- **FEE COLLECTION.** PROs collect fees from the businesses playing music and distribute those fees as royalties to affiliated copyright holders. Songwriter compensation would almost certainly decrease with Consent Decree termination, and fee collection would be less efficient.
- **PRICING EQUALITY.** PROs collectively negotiate and must set prices at fair rates that are comparable for similarly-situated businesses. PRO monopoly rate-setting power would enable PROs to force bars, restaurants and taverns to pay whatever rates they demand in a broken “market.”
- **NON-DISCRIMINATION.** PROs must grant licenses on a non-discriminatory basis to everyone. If the Consent Decrees are terminated, PROs would be free to deny a license to any bar, restaurant or tavern they choose, essentially picking winners and losers in the marketplace based on whatever political, geographic or other criteria they wish to apply.

As recently as 2016, the DOJ completed a two-year review of the ASCAP and BMI consent decrees, “determining that no modifications are warranted at this time.” During that and previous review processes – performed by Administrations from different party affiliations – the lasting importance and ongoing effectiveness of the Consents Decrees has been reaffirmed. The marketplace for music continues to evolve to meet consumer needs and fairly compensate songwriters. With record revenues once again in 2018, ASCAP and BMI’s members are benefitting from the varied ways in which modern listeners are enjoying music.

If we are to assume the public interest in access to lawful public performances of music and rightful compensation of copyright holders, then the public interest would not be served by the termination of the Consent Decrees. By terminating the Consent Decrees, and opening the door to a return of the ills that plagued the music licensing system in the pre-Consent Decree era, the public would suffer as music providers would be faced with an emboldened PRO cartel willing to push the antitrust limits knowing that local bars and taverns are challenged to participate at the highest levels of copyright litigation.

Should a decision to terminate the Consent Decrees be made, a termination with immediate effect would be the most damaging and chaotic scenario for bars, taverns and restaurants that license copyrighted works. The basic business premise that they have operated under for decades would disappear overnight, with no legislative or legal back stop to immediate and potentially drastic changes.

Congress has also been clear about a termination process and providing “a reasonable time before the date on which the Department of Justice files with the appropriate district court of the United States a motion to terminate a consent decree between the United States and a performing rights society.” It spoke authoritatively on reviewing and terminating the decrees in the Orrin G. Hatch–Bob Goodlatte Music Modernization Actⁱⁱⁱ, which was signed into law on October 11, 2018 and states:

The Department of Justice shall provide timely briefings upon request of any Member of the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives regarding the status of a review in progress of a consent decree between the United States and a performing rights society.

During the notification described in paragraph (1), and not later than a reasonable time before the date on which the Department of Justice files with the appropriate district court of the United States a motion to terminate a consent decree between the United States and a performing rights society, the Department of Justice should submit to the chairmen and ranking members of the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a written notification of the intent of the Department of Justice to file the motion.

PROs that are not under Consent Decrees provide an example of the behavior beverage licensees could expect should the ASCAP and BMI Consent Decrees be terminated. Based on member surveys conducted by ABL, as well as years of personal experiences shared by beverage licensees, it is clear that PROs not under Consent Decrees are much more aggressive in their tactics while also being less responsive to their customers. It is this disregard for customers and ultimately the public that is worrisome and endemic to actors in what is essentially a non-competitive marketplace.

For most small beverage business owners who wish to provide music in their venues, their understanding of music licensing is plain, simple and correct: the government allows an otherwise unlawful price-fixing regime in return for the ability to closely track those actors and make sure it is abiding basic agreements to ensure fairness. These Consent Decrees and the DOJ's involvement in this enterprise is much different and much more relevant than most other Consent Decrees. ABL believes that these sensible agreements should continue for the good of the entire music ecosystem.

ABL thanks the Department of Justice for considering these comments. If you have any questions, please contact me at bodnovich@ablusa.org.

Sincerely,

A handwritten signature in black ink that reads "John D. Bodnovich". The signature is written in a cursive, flowing style.

John D. Bodnovich
Executive Director
American Beverage Licensees

ⁱ <https://www.justice.gov/atr/antitrust-consent-decree-review-ascap-and-bmi-2019>

ⁱⁱ <https://www.ascap.com/~media/files/pdf/about/annual-reports/2018-annual-report.pdf>;

https://www.bmi.com/pdfs/publications/2018/BMI_Annual_Review_2018.pdf

ⁱⁱⁱ <https://www.congress.gov/bill/115th-congress/house-bill/1551/text#toc-H5EEC3B4CBFBC4E6291DCCFACD3D5AB3C>