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Via www.regulations.gov

**Public Comments of the Bowling Proprietors' Association of America Submitted in Response to the
U.S. Department of Justice's Request for Comment on the ASCAP and BMI Consent Decrees**

August 8, 2019

Introduction

The Bowling Proprietors' Association of America ("BPAA") respectfully submits the following comments pursuant to the U.S. Department of Justice, Antitrust Division ("DOJ") review of the consent decrees 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"). BPAA's comments will address why the Consent Decrees continue to serve competitive practices today, the importance of allowing Congress to act prior to taking action on the decrees, and the impact on small businesses across the United States if the decrees were modified or terminated.

BPAA is the leading voice for over 3,300 bowling centers across the nation, with members located in every state. We represent and work to empower bowling proprietors as they work to innovate their business, serve their consumers, and lead in their communities. The bowling industry generates over \$150 million to host cities of the thousands of national and local tournaments. Additionally, with over 67 million Americans bowling annually, bowling is the top participatory sport in the United States.

Bowling centers are at the heart of our nation's communities. We provide a source of entertainment, sport and comradery to families and friends of all ages. Part of that entertainment involves playing music in our centers to give a positive and welcoming experience to the millions of annual customers. Music contributes to the success of our bowling centers, and playing music for our customers comes with no additional fee. There is no purchasing requirement at bowling centers, nor do we charge "cover fees" for customers to gather at our establishments. All of our members pay for the right to play music in their bowling centers, and they rely heavily on the Consent Decrees with ASCAP and BMI to protect those interests.

Our members are deeply concerned for the future of the consent decrees governing ASCAP and BMI. The Consent Decrees provide music licensees with important pro-competitive benefits that ensure that music can be licensed at a fair and reasonable price. Our members depend on these legal guardrails, and to lose those protective measures would encourage ASCAP and BMI to leverage their power and engage in predatory pricing on our nation's bowling centers.

I. The Consent Decrees Provide a Series of Fundamental Principles that Help Promote Competition.

ASCAP and BMI enjoy a massive 90 percent market share of musical works. Bowling centers, as well as restaurants, bars and other small businesses, rely on many of the aspects of the Consent Decrees in protection from acts of anticompetitive behavior.

For instance, both decrees currently require ASCAP and BMI to provide a non-exclusive license to any potential licensee that applies for one. This happens even if both parties cannot agree on a rate prior to the license being granted. This prevents the threat of statutory damages for copyright infringement from ASCAP and BMI on licensees to set monopoly rates.

Additionally, the decrees prohibit discrimination, requiring ASCAP and BMI to offer similar licenses to similarly situated licensees. There is mutual benefit from this nondiscrimination requirement. Music licensees benefit from designating a non-exclusive licensing committee to negotiate industry-wide rates, and ASCAP and BMI benefit from lowered transaction costs by avoiding individual negotiations with every potential licensee of a particular type.

These principles allow for stability in the marketplace and protections for small businesses. Terminating or modifying the Consent Decrees in any way would not lead to more competition in the marketplace. It would only make it more difficult for licensees, particularly those small businesses that are limited financially, to protect themselves from anticompetitive behavior leveraged by ASCAP and BMI.

II. DOJ Should Allow Congress to Act Prior to Taking Any Actions on the Consent Decrees

Last year, Congress passed the bipartisan Music Modernization Act (“MMA”)¹. This legislation requires DOJ to alert Congress of its plans at least 90 days before it takes any steps in federal court to terminate the Consent Decrees². This provision also requires DOJ to provide Congress with a report on the impact that these actions would have on businesses that seek licenses to publicly perform musical works.³

Further, many Members of Congress have been outspoken about this issue, even providing letters to DOJ in caution of the potential harms that would result from terminating the decrees. They ask that the agency work with Congress to establish a licensing framework prior to taking action⁴. They warn that if the proper framework were not put in place prior to the termination or sunset of the decrees, this could cause widespread disruption and chaos in the marketplace.

¹ Public Law No. 115-264.

² [Sec. 105]

³ [Id.]

⁴ [Graham— “...The purpose of my letter is not to prejudge the outcome of your review, but rather to express my concern that moving to terminate or even sunset the ASCAP & BMI consent decrees, without first working with my committee and the Congress as a whole to establish an alternative licensing framework, could severely disrupt the entire music licensing marketplace.” Klobuchar, Leahy, Blumenthal, Booker—“...we urge you to remain mindful of the disruptive and harmful effects that terminating or weakening certain ‘legacy’ judgments may have on markets and consumers. When considering your approach to the judgments that still have a pervasive influence on current markets, we respectfully request that the Division take appropriate action to allow relevant parties to negotiate an alternative regime before taking unilateral action by terminating or weakening these judgments.”]

Additionally, termination or modifications to the either decree could disrupt key considerations and incentives Congress would need in order to provide the legislative framework to withhold stability in the marketplace. For this reason, we encourage DOJ to allow Congress to take further actions to provide a safety net for small businesses, like bowling centers, before terminating or modifying key components of the Consent Decrees.

Conclusion

In 2014, the DOJ opened an inquiry into the operation and effectiveness of the Consent Decrees with ASCAP and BMI. This led to a two-year review, resulting in two rounds of public comments and meetings with dozens of industry stakeholders, investigating whether various modifications to the consent decrees were necessary for the changes in modern music consumption. In the agency's closing review statement, DOJ "concluded that the industry has developed in the context of, and in reliance on, these consent decrees and that they therefore should remain in place."⁵

On behalf of the small businesses that BPAA represents across the United States, we support DOJ's previous decision to allow the Consent Decrees to remain in place. By taking the same approach in this current review, DOJ will avoid a massive disruption in the industry's marketplace and prevent ASCAP and BMI from anticompetitive, predatory practices on our nation's small businesses. If DOJ does determine to take any actions, we encourage the agency to work with Congress to provide the proper legislative framework to withhold stability in the market place. BPAA urges DOJ to keep the Consent Decrees in place to help bowling centers continue to provide entertainment and enjoyment for our millions of annual customers.

Sincerely,

A handwritten signature in black ink that reads "Roger Nyquist". The signature is written in a cursive, flowing style.

Roger Nyquist
Chairman, Government Relations Committee
Bowling Proprietors' Association of America

⁵ [Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (August 4, 2016, page 22)]