From: Randy McKay <ra[redacted]>
Sent: Tuesday, August 6, 2019 6:05 PM
To: ATR-LitIII-Information (ATR) <ATR.LitIII.Information@ATR.USDOJ.gov>
Subject: ASCAP & BMI Consent Decree Review

Re: ASCAP & BMI Consent Decree Review

I am writing on behalf of our two nonprofit performing arts centers, but also representing the performing arts presenting industry as a whole.

ASCAP and BMI are already aggressive and monopolistic Performing Rights Organizations. Only the Consent Decrees keep them from acting in complete opposition to the needs of the industry and, ultimately, the writers whom they are supposed to represent. Please do not do away with the consent decrees, but rather strengthen them against ASCAP and BMI's heavy-handed, monopoly-like behavior with licensees.

No other vendor or service provider charges me regardless of whether I use their goods or services. But the available blanket licenses for live performance from both ASCAP and BMI do just that. Much like a mafia protection fee of old, ASCAP and BMI aggressively threaten my business if I will not pay their exorbitant rates, even though they cannot tell me if I've even used a single song from their writers archive in any night or event. That is convenient, monopolistic behavior and should be closely examined in any anti-trust review. As YouTube has incorporated in their business, technology now exists to listen for copyrighted music and charge for songs actually used. Yet ASCAP and BMI conveniently hold to their blanket licenses so they can continue to pressure venues into paying for product they haven't used. Or they offer the venue to "self-report" songs used -- a process rendered impossible via both entities' intentionally confusing data bases with thousands of similarly titled songs, making it impossible for a venue to self-report accurately even if it wanted to do so without running the risk of being held accountable for huge penalties if it got the wrong song title from the wrong entities' data base.

Additionally, BMI's recent contract behavior is egregious and would never happen in a world where they did not have a monopoly – canceling many venues' licenses last year and issuing interim licenses that contained no pricing schedule, saying it would be determined later and made retroactive. When BMI did issue pricing, it was a nearly 400% increase in cost with no phase-in period and made retroactive to services and events that had already taken place and for which the venue could no longer recover any of the new licensing costs. Further, rather than the previous contract's reliance on ticket revenue in calculating fees due to BMI, this new contract now attempts to calculate the fee on ticket revenue, ticketing service fees (which likely go to the ticketing software

provider and not the venue anyway), VIP lifts on tickets (which the artists keep, not the venue), parking fees, concession/bar revenue and other income streams that are neither the venue's income nor derived from use of BMI's music archive. And again, without any way to even know if a single BMI song was used during the event being charged by BMI.

Neither is the licensing for live performance proportional to the fees collected from broadcast entities for a similar number of listeners to a piece of music. Whereas a song played in commercial broadcast stations maybe be charged at a few pennies per thousand listeners or even much less, live performance of works are charged blanket licenses which take a set, non-negotiable percentage of ticket income rather than a per-use fee per listener as is typical in broadcast. This results in a situation where public performance pays a much higher per-listener rate than for broadcast use AND pays whether any of a PRO's music was used or not. For one concert or performing arts event, say, in a 1,000 seat venue with a ticket price of $50, BMI would charge $750 for a live performance versus the $4 for 20 songs in a broadcast to 1,000 listeners. When you factor in that each rights organization charges a similar percentage fee, you're talking about $2,000-$2,500 per concert versus $12 for broadcast of a similar amount of music. Add to the fact that in the live concert industry, promoters are only allowed by artists to receive at most 15% profit and that PRO's will take 4-5% or more of the GROSS income, and there is almost no reason to promote live music now.

In short, the Consent Decrees are needed to curtain the aggressive and egregious behavior of these organizations and prevent the collapse of the music industry as a result. But more specific language should be adopted around live performance music use as it has around broadcast use to keep these organizations' aggressive tendencies in check and the charges across types of users consistent.

Thanks,

Randy McKay
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