

From: Chandler Davis <chand[REDACTED]>
Sent: Friday, June 21, 2019 7:44 PM
Cc: Rep.DavidGomberg@oregonlegislature.gov; senator_wyden@wyden.senate.gov;
Senator_Merkley@Merkley.senate.gov
Subject: Public U.S. Department of Justice Review of ASCAP and BMI consent decrees

Public Comment Re review of ASCAP and BMI Consent Decrees:

The following is from two editorials I wrote for the more than 1,000-circulation newsletter of the Newport (Oregon) Community Drum Circle in January and May of 2019 and subsequently circulated to local and regional news media and to our Oregon Coast state and federal legislative delegations, whose offices have since informed me that they are following up on our concerns).

JANUARY 10, 2019 --

FYI – I think this is something that all our elected officials need to be aware of and it is impacting our communities all over the country (particularly in culturally challenged rural areas such as the Oregon Coast) in many vital economic and cultural dimensions. - Chandler

As posted to Facebook – “HERE’S AN EDITORIAL ON THE RECENT LOSS OF VENUES FOR LIVE MUSIC IN LINCOLN COUNTY that I just published in the Newport Community Drum Circle’s 1,000+ circulation January “DrumBeat” newsletter and am sharing with local news outlets. It’s not a new story; indeed, it is one that has gotten very old and some of us believe that it needs to be addressed....”

Newport Community Drum Circle
Celebrating our ELEVENTH YEAR of Personal
Enrichment, Community Building, Cultural
Diversity, and Participatory Entertainment on
the beautiful Central Oregon Coast!

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♪♪ **A RARE DRUM BEAT EDITORIAL** ♪♪ **Calling all musicians, music fans, and club owners....**

The recent accelerating loss of venues who present live music on the Central Oregon Coast has greatly diminished affordable opportunities to hear good music, has undermined the quality of life in our communities, and threatens to destroy the remarkably rich and varied popular music scene in Lincoln County.

During the past few years dozens of once-flourishing music venues of all kinds have abandoned live music, mainly – according to both club owners and musicians – in response to persistent and abusive pressure from **ASCAP**, **BMI** and **SESAC** national music licensing organizations. **ASCAP**, which appears to be the more aggressive of the three, has been accused of periodically sending out undercover freelance agents (who reportedly get paid a percentage of the fees collected from the venues). The agents secretly record every instance of the use of licensed contemporary popular music. Although original compositions and music published before 1923 that is in the public domain is exempt, virtually every instance and every conceivable form or environment in which contemporary popular music is presented from tiny clubs and restaurants to art galleries to office parties to charity events and fundraisers to a band that plays 99% percent original music and an occasional standard to karaoke and amateur open mike performances to a radio in the backroom of a non-music retail outlet, gallery, or real estate office to a 12-stool tavern or coffeeshop is potentially subject to exorbitant licensing fees designed for large concert venues.

A tiny tavern on the Bayfront was intimidated into paying \$2,000 a year in fees to the three agencies and now faces more increases to cover a karaoke night that presents essentially the same music as already licensed for the bands. A small Newport restaurant that has been known for years for its excellent, eclectic original music used to have music seven days a week. After being harassed and threatened when the **ASCAP** spies came through Newport a few years ago, they reduced the music from seven to two nights a week plus a popular long-running amateur open mic. A week before Christmas, this year, they were forced to shut down the amateur open mic and most of their usual and most popular weekend acts can no longer perform their mainly-original music, because their acts also include a few established songs that their audiences insist on hearing.

Several of the most popular and best-known Lincoln County bands report that they are having trouble getting gigs; several of the best known sat out New Year's Eve without a gig. The club owners and musicians are telling me that the agents demand fees that are based on the maximum potential capacity of the venue, as determined by the local Fire Department, regardless of actual attendance at the music events or even seating. I'm told that the minimum fee is based on 65 seats regardless of the actual size or capacity of the venue. Clubs which generally feature only exempt original material are still

harassed. Business owners tell me the agents have told them it doesn't matter ("How do you know there is no licensed material, do you know every licensed song ever written?"). A club owner told me, "It doesn't matter how much original material you have, if one band plays one licensed song, they want the entire fee for the year." The former owner of an all-originals club in Salem said, "It didn't matter, they wouldn't believe me" and the harassment continued until she finally shut the club down. A local club owner who finally gave in and paid the fees said, "All it would take is one cell phone with a licensed song for a ringtone and we're in trouble."

And the end result of all this is that venues of all kinds quit offering live music (and lose the business that music brings in), aspiring artists and future **ASCAP** members no longer have small local venues in which to break into the business and learn their craft, the local economy and tourism suffer, the quality of life for all of us suffers without affordable live music; if nobody's playing local live music anymore ASCAP's artists sooner or later suffer too; everybody loses!

The fees set for licensing and how they are determined, as well as how collected fees are distributed to the original artists appears to be entirely up to the three big licensing organizations without oversight or regulation. Other venue owners say that in some places the lack of local regulation makes it easy for unethical club owners to use the undercover agents to force their competitors out of business.

The agents have no law enforcement authority, but they allegedly threaten venue owners with a federal lawsuit if they don't comply. A California club was sued for six years' worth of back fees and levied a \$150,000 penalty which put it out of business. A non-profit coffeehouse in Tennessee was forced to discontinue its monthly live music fund raisers for local charities by the licensing organizations' intimidation and threats of federal lawsuits.

The rules under federal law are airtight according to attorneys, and the agencies essentially *never lose* in the regional out-of-town federal courts where the lawsuits are heard. The Oregon Attorney General's office and our State Representative David Gomberg have said that the state has no jurisdiction. A loose group of local professional musicians (including several songwriters whose work is licensed by **ASCAP**), club owners, and volunteer attorneys has been looking into the most recent series of abuses in Lincoln County, however, and singer-songwriter-guitarist **Richard Silen** has stepped forward with a strategy that we believe might allow us to bypass the jurisdictional issues: Instead of challenging the enabling federal legislation (which none of us really question, since none of us begrudge creative artists their intellectual property rights or right to earn royalties where reasonable and appropriate), Richard proposes that we focus on the abusive collection tactics and the absurd and unjust criteria used to establish the fees.

Here is Richard's initial post on Facebook (you can follow the argument and join the discussion on Richard's Facebook timeline or on mine, at "Chandler Davis," or contact me at chandler@chandlerdavis.com):

"Greg Ernst, Rob Connell, Chandler Davis, Kevin Strever, David Gomberg et. al. - It seems to me that if we knew some musically concerned attorneys - we could attempt to initiate either a state law (as FL did) or class action on the part of club owners making this case; that this assessment of value, unlike other similar assessments (usage fees, income tax, etc.), charges on the basis of potential headcount (FD occupancy declaration) rather than on gross receipts and is essentially unfair because it establishes fictitious value as a basis for assessment. Would compensation for usage of patented medicines be reasonably assessed by the size (number of beds) of the hospital or usage of the medicine?"

The ultimate purpose would be to recognize ability to pay or reward commensurate with the live musical pursuit as trumping a valuation methodology that only recognizes the size of the building that houses the activity. Rights accruing to physical reproduction (CD, records) are assessed on sales, not pressings - yet clubs' assessments bear no similar connection to revenues.

I would think working musicians would help raise money to pursue, just as venue operators would. The argument is with the methodology of the assessment, not the right to pursue compensation for use of intellectual property. Seems easier concept to "sell" legally.

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DISCLAIMER: Although I am a performing musician and the leader of the Newport Drum Circle and Thunder & Lightness Ensemble which perform regularly in all kinds of Lincoln County music venues, the recent ASCAP activities do not affect me directly because the traditional and indigenous music that we play is either safely in the public domain or entirely original (and because rhythm per se cannot be copyrighted). It does affect me indirectly -- as it affects us all -- in that it substantially affects the number of venues of all kinds that are willing to risk presenting live music of any kind. -- Chandler

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"The PROs have been criticized for years for their aggressive stance; in the mid-1990s ASCAP bowed to public outcry after attempting to collect licensing fees from the Girl Scouts for singing campfire songs...."

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MAY 3, 2019 --

Editorial Follow-up...

**2019 Waldport Beachcombers Days
*CANCELLED AFTER 63 YEARS***

***Leaders cite pressure from music royalty
collection agency!***

**The following editorial follow-up will appear in the upcoming May edition of the
Newport Community Drum Circle Newsletter, The Drum Beat:**

When we editorialized in January about the periodic harassment of small local music venues by the giant national music licensing organizations, we were focusing on the resulting significant loss of regular venues for free or affordable live music on the Central Oregon Coast during recent years. Although we mentioned the harassment of non-profit and community music events (such as Farmer's Markets) in other areas, we did not anticipate that any of these agencies would have the nerve to shakedown one of our own venerable decades-old Lincoln County community festivals.

The all-volunteer non-profit Waldport Beachcomber Days Committee had just put out its poster and announcements in late April – promising live music, of course -- for the 2019 Beachcomber Days event, when the group's leaders were contacted by BMI, one of the largest of the music licensing organizations, demanding royalty fees. At its meeting, on April 30, after trying in vain to find a way to avoid the fee demands without putting the committee and themselves in liability to federal lawsuits, the committee cancelled the event! Nobody seems to remember anyone ever trying to extort these fees from the 63-year-old free Waldport community celebration (which uses any money raised to grant scholarships to help local high school students attend college). Other nonprofit events and tiny local music venues who were generally never bothered in the past, however, have been pressured elsewhere in recent years by the PROs (Professional Rights Organizations) as the music business has changed due largely to the internet. Ironically, Beachcomber Days had been in decline before the current committee revived it last year primarily by adding a robust three-day schedule of local music which included many of the top music acts in the county and drew large crowds to the tiny coastal village.

BMI (Broadcast Music, Inc), and the two other major music PROs, ASCAP (American Society of Composers Authors and Publishers) and SESAC (Society of European Stage Authors & Composers) enforce public music performance rights and collect royalties for the copyright holders. Despite the impression promoted by the agencies that they're

advocates for struggling individual artists, most of the money they collect goes to large media corporations; the same corporations that have been forcing beginning artists desperate for national distribution to sign away their rights to the labels or their publishing affiliates for decades. The role of the agencies had not generally been controversial, however, when they focused on commercial broadcasting rights and collecting performance royalties from large venues and stadium style commercial concerts. But the agencies have extended their reach aggressively to small town venues and non-profit events in rural areas. A few years ago, the agencies were forced to bow to public outcry when they attempted to collect licensing fees from the Girls Scouts for singing campfire songs.

Venue owners say the agencies employ undercover agents (who earn a commission on the fees they collect) to catch them allowing even a single licensed song to be performed (or even playing a song on a backroom radio if it can be heard by any member of the public). The agencies cover different popular songs and artists and each one must be paid off for the venue owner to be protected.

The agencies have no law enforcement authority and there are no criminal violations to enforce. Venue owners say they are threatened with lawsuits in out-of-town regional federal courts if they don't pay the demanded fees. Lawyers say the federal law is airtight. All the agency needs to prove is that the licensed song was played and could be heard by members of the public. Whether the venue owner had given permission or presumably even had any control over the performance is apparently irrelevant. A BMI leader once claimed they had never lost a case in federal court.

Lawsuits can be filed and penalties demanded separately for every licensed song played and judgements can amount to hundreds of thousands of dollars, more than enough to put a small venue out of business. Virtually no one is exempt: "The need to obtain permission to authorize the public performance of music is not contingent upon the profitability of the presenter's organization. 'Charitable' use of music is exempt only under very narrow exceptions." the BMI website says.

In a club situation, the annual fees are based on the *potential* audience (total capacity of the venue determined by the local Fire Department) not actual audiences or revenues produced by the performance. One tiny Newport music venue pays more than \$2,000 per year to the three agencies and they are demanding more, the owner said.

For a "Festival or Special Event" that does not charge admission the BMI website states the fee as 1.5% of the licensee's total entertainment cost (which includes payment to the musicians) or \$243 per event whichever is higher. Each of the other two agencies would also have to be paid. A Waldport committee member said on Facebook that "Beachcombers would need a minimum of \$750 to cover just the right the play music. And it could be upwards of \$3000."

Local musicians and club owners can cite dozens of local venues that have decided that the cost of paying the PORs exorbitant fees – or of ignoring them and risking a ruinous

lawsuit – is too much for their small businesses and discontinued live music. The Waldport Committee came to a similar conclusion.

Even if the committee decided to do the event without music, a committee member said, the committee and individual members still could be held liable, “If a vendor has an Ipod playing in their booth...If someone in the parade has a car radio on...If someone brings their guitar down and plays a song...”

As far as we can determine, there are no federal rules that would prevent the PROs from using any of those absurd scenarios to threaten and extort fees from any public event or publicly accessible business in Lincoln County. (Who’s next? The Yachats and Gleneden Beach Fourth of July festivities? The Toledo and Depoe Bay Wooden Boat Shows? Loyalty Days? Newport Seafood and Wine Festival? Dozens of summer crafts fairs and Farmer’s Markets throughout the area? House concerts? Amateur Open mics?)

After our January editorial went online, a handful of local musicians and lawyers expressed willingness to look into the problem. Guitarist and ASCAP-licensed singer/songwriter Richard Silen wrote: “It seems to me that if we knew some musically concerned attorneys we could attempt to initiate either a state law...or a class action on the part of club owners making this case; that the assessment of value unlike other similar assessments (usage fees, income tax, etc.), charges on the basis of potential headcount (FD occupancy declaration) rather than on gross receipts and is essentially unfair because it establishes fictitious value as a basis for assessment. Would compensation for usage of patented medicines be reasonably assessed by the size (number of beds) of the hospital or usage of the medicine?”

An article on the website of one entertainment law firm says: “ASCAP files between 250 and 300 copyright infringement lawsuits annually and BMI files between 100 and 200 lawsuits annually, with penalties in [federal] court ranging from \$750 to \$30,000 **per song**. [My emphasis.] In 2012 the Ninth Circuit upheld a district court’s ruling that [a small California ‘Chicken and Waffles’ restaurant chain and its owner] were liable for copyright infringement, awarding \$36,000 in statutory damages and \$162,728 in attorney’s fees to the plaintiff ASCAP...In 2011 ...BMI sued a North Carolina restaurant for copyright infringement of four songs. The restaurant was ordered to pay BMI \$30,450 in damages.”

The Waldport Committee’s online announcement on May 1, noted the committee had been “targeted by BMI...demanding that we pay licensing fees for any music that might occur during the event or risk facing lawsuits.” The announcement said the issue “took the Beachcomber Days Committee by surprise as no prior BCD committee has been approached for POR licensing. We have already decided to move forward with planning for 2020 which will give us time to research and obtain the necessary licensing fees...” The committee still will award three promised 2019 scholarships to benefit local Waldport youth and says it is reaching out to sponsors, donors, and vendors to refund monies where necessary. The announcement said: “We hope the community will

understand that the committee made this decision with difficulty and that we did not want or expect this to happen...but the Performing Rights Organizations are an external force too big to handle this year.”

If you care about protecting what is left of the vibrant live music scene in Lincoln County, we suggest you start raising hell about this at every level. Local leaders are taking the position that the problem is federal and out of their jurisdiction. (When Richard and I contacted State Rep. Dave Gomberg, in January, he also cited jurisdictional issues, but he said he was aware of the local impacts and promised to look into state level solutions during the current legislative session. I haven't heard back from him since January, however. I also contacted U.S. Senators Wyden and Merkley but got nothing from them but form letters.)

The federal courts may be out of the reach of local officials, but it is certainly within their jurisdiction and responsibility to defend the right of local small businesses and non-profits to be treated fairly, to protect the cultural and economic vitality and tourism appeal of our communities, and to put direct pressure on our federal representatives to work on solutions at the national level. Whatever happens (or, more likely, doesn't happen) at the federal level, the intimidation tactics and virtual extortion of local businesses and community groups by these private corporations, at the very least, need to be addressed and strictly curtailed at the local and state level! -- **Chandler Davis, Newport Community Drum Circle.**

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Thank you for considering my comments and the concerns of our communities in this important matter.

 [Facebook](#)

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