COMMENTS FROM
ODYSSEY ENTERTAINMENT.
TO THE UNITED STATES DEPARTMENT OF JUSTICE
REVIEW OF THE ASCAP AND BMI CONSENT DECREES
August 4, 2019

Introduction:

We would like to submit the following comments in response to the U.S. Department of Justice Antitrust Division's announced review of the ASCAP and BMI Consent Decrees. We respectfully ask that the Department maintain the Movie Theater Exemption. We are a small, locally-owned independent chain operating theatres in the small cities of Okoboji, IA, Hutchinson, MN, Watertown, SD, Detroit Lakes, MN and Fond du Lac, WI.

Reasons to Maintain the Movie Theater exemption:

Motion Pictures are a collaborative art form that combines several arts into a finished product. The acting and directing arts of theater, music, photography, and many other crafts and skills are combined to make a motion picture. All of these arts and crafts are needed and cannot be separated. The Performing Arts Organizations (PRO's) such as ASCAP, BMI, SESAC, and others, would have us believe that the music portion of a motion picture can be separated out and that they should be paid for it a second time; first by the studio, then again by the theatres. This is an illogical overreach on the part of the PRO's and makes no sense. The music cannot be separated from a movie any more than the photography, scene painting, computer graphics, or any other portion, can be separated out. The producers and director of a film make the decisions of who to hire and what music should be used when they produce the movie. The producers make the artistic and financial deals with the creative talents. Once the movie is made, those decisions can't be changed by the theatre showing the movie or by the theatre patron who pays to enjoy it.

Despite the fact that the studios charge theatres film rental (normally a percentage of ticket sales averaging around 55%) the PRO's claim they are also entitled to collect an additional percentage of ticket sales for the music embedded in the motion picture even though they've already been (usually handsomely) paid for that same work. Based on the logic the PRO's are using, the Screen Actors Guild, Writers Guild, Screenwriters Guild, and all the other crafts and services could also try to collect additional percentages of ticket sales from directly theaters for their work even though they had already made a deal with, and been paid by, the studio for that work.

Prior to the 1948 Consent Decrees, the studios did attempt to collect from theatres for the music in sound motion pictures. Commenting on the 1948 case of M. Witmark Sons v. Berger Amusement Company, Minneapolis theatre owner Ben Berger explained to us it was a form of double taxation. ASCAP, Witmark and other PRO's were collecting from the studios and again collecting from theatres for the same pieces of work. The Courts of Appeal ruled in favor of theatre owners against the PRO's in the cases of M. Witmark v. Berger Amusement Company and M. Witmark Sons v. Jensen.

History of PRO's attempts to collect from theatres:

ASCAP and BMI have a history of aggressively pursuing theatres for royalties. After losing the above mentioned cases for the music embedded in motion pictures, these organizations went after theatres to collect royalties for the non-synchronous music played between movies on records or tapes during intermissions. Since it was a public performance and the theatres choose the music they played at intermission, this was a justifiable charge. However, their execution of setting and collecting fees was unreasonable and anti-competitive. The approach was aggressive and usually included threats of lawsuits.

As a result, many theatres switched to playing only copyright-free, music that is in the public domain such as classical music from long dead composers. By the 1980's, most theatres quit playing intermission music altogether and switched to pre-show video programs consisting mainly of local and/or national ads

Financial impact that would be caused by elimination of the Movie Theater Exemption:

Theatres, especially independent theatres operating in America's smaller towns, are currently struggling to stay alive on very narrow margins. The studios have increased film rental percentages in the past three years to an average of 56 percent. Theatres must cover their other costs including rent, utilities, payroll, insurance, real estate taxes, repairs, etc. out of the remaining 44%. State and local sales and admission taxes usually varying from 5 to 10% must also be deducted from the each ticket. Most theatres barely breakeven or lose on money showing movies. The rest of the expenses, and any profits, come from the sales of concessions. But theatres need good movies to attract people to the theatres to buy the concessions.

We anticipate that the PRO's would charge the same 2 to 3 percent that they charge theatres in other countries where local laws allow them to do so. Speaking for our company, and I believe most other independent theatre owners, we would not be able to afford such a sizable additional burden. We are already criticized for high ticket prices. There is strong consumer resistance to current prices, so raising ticket prices to cover these additional expenses would not be a viable way to cover these costs.

The need to maintain Department Jurisdiction over the PRO's

While getting rid of legacy decrees that have outlived their usefulness is a laudable goal that will save the Department time and the taxpayer money, there are some industries and companies who have demonstrated such a propensity to engage in anti-competitive, unfair and monopolistic practices that the Department needs to maintain jurisdiction over, and continued scrutiny of them. ASCAP, BMI and the other PRO's definitely fit in this category. Theatres and the public need this protection.

While theoretically a theatre or other business or retailer certainly has the protection of the courts should these companies engage in unlawful practices. The reality is that few, if any, small theatre owners have the money or resources to survive the prolonged litigation it would take to fight the PRO's and re-argue the reasons that caused the Movie Theatre Exemption to be granted in the first place. We need the Department of Justice to continue to act as an umpire to make sure the game is played fairly and to act as a deterrent to the unfair practices the PRO's have attempted in the past and indicated their desire to pursue again.

Conclusion:

Unlike the days of silent movies when local piano players hired by the theatre selected the music to accompany the motion pictures, nowadays theatres have no choice in the music that is embedded in the movie. We can't change or eliminate the music. We pay high film rentals to the studios for the movie. Those film rentals include the work of all the artists and craftsmen that went into the movie. Why should the music publishers be any different?

In conclusion, we urge the Department of Justice to maintain enforcement of the ASCAP and BMI Consent Decrees and the "Movie Theater Exemption."

Respectfully submitted,

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