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**Sent:** Thursday, August 8, 2019 7:51 PM  
**To:** ATR-LitIII-Information (ATR) <ATR.LitIII.Information@ATR.USDOJ.gov>  
**Subject:** Consent Decree Review ASCAP and BMI Comments

To: Department of Justice

From: Washington Wine Institute

Re: Consent Decree Review ASCAP and BMI

The Washington Wine Institute, a nonprofit trade Association representing the Washington State wine industry, respectfully submits the following comments regarding the ASCAP and BMI Consent Decrees. On behalf of wineries across Washington State, we urge the Department of Justice to preserve and protect the pro-consumer Consent Decrees governing the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).

Together, ASCAP and BMI control nearly ninety percent of the music licensing business, and these decrees serve the public interest by providing essential protections from anti-competitive behaviors. At the heart of the ASCAP and BMI consent decrees are a series of important principles. Namely, obligations that:

- prohibit either PRO from discriminating against similarly-situated licensees;
- require ASCAP and BMI to provide a license to any potential licensee that applies for one, even if the parties cannot agree on rate prior to the license grant;
- grant the right of direct licensing;
- forbid exclusive licensing on the part of either PRO as a means of guaranteeing alternatives to the blanket license; and
- provide licensees with access to a forum to establish reasonable licensee fees in the event that ASCAP or BMI cannot agree with a licensee.

While far from perfect, ASCAP and BMI provide an efficient way for wineries to play music while ensuring we compensate the songwriters and copyright holders who create it. Their blanket licenses, made possible by the decrees, underpin the music licensing system, and the termination or sunset of the decrees would lead to chaos for the entire marketplace, jeopardizing the licensing system as we know it.

As it stands today, business owners lack access to essential, reliable information about what each performance rights license entails and as a result, cannot make an informed decision when seeking to license music from any one of the ever-increasing number of music licensing collectives. Given this long-

standing lack of transparency and the PROs reliance on heavy-handed tactics and take-it-or-leave-it demands, many businesses have dropped music altogether. Without the consent decrees, many more businesses would discontinue music, resulting in fewer places across our communities for musicians to perform and decreased songwriter compensation. Or, alternatively for those wineries who decided to continue to license from ASCAP and BMI, they would be forced to pay supra-competitive prices.

The Consent Decrees continue to serve an important competitive purpose today. Without a court ordered mandate preventing ASCAP and BMI from sharing licensee information, we believe that they would demonstrate anti-trust behavior to the detriment of the market. As it stands now, there is already a damaging level of distrust in the licensee community. Wineries hold the opinion that ASCAP, BMI, and SESAC are currently pooling information. Despite our education efforts, this view persists as a result of continued and repeated heavy-handed, and often misleading, tactics on the part of the licensors.

SESAC, which is not under a Consent Decree, holds no impetus to work with its industry partners, and repeatedly acts against the spirit of anti-trust laws by sending wineries inflated invoices, making threats against the business, and raising prices beyond what small business can pay. Without the decrees in place, the harassment from ASCAP, BMI, and SESAC will only get worse. In order to keep paying artists, it is vital that these decrees are not eliminated or sunsetted without a legislative agreement in place.

Wineries are denied fair market competition when they are told by ASCAP, BMI, and SESAC that they are required to purchase licenses with all three organizations in order to avoid lawsuits. The one potential to bring competition to the marketplace is transparency. Transparency in music licensing would give wineries the opportunity to choose between the different licensing organizations. The ability to choose which repertory to purchase would address the escalating price of these licenses, another factor which causes wineries to cancel their music.

If policymakers are interested in making any changes to the existing regime, the framework should be altered in such a way as to guarantee greater transparency and in a manner that would apply with equal force to all collectives that license the right to publicly perform musical works; including such entities as SESAC and GMR and any future PRO that is established. Our national Association of American Wineries, WineAmerica, has worked with ASCAP and BMI to educate wineries on the legal requirement to

purchase a license--the parameters placed on ASCAP and BMI by the Consent Decrees facilitates this process. The Consent Decrees give wineries assurance that they are engaging with a fair actor.

Existing antitrust statutes and applicable caselaw is not sufficient to protect competition in the absence of the Consent Decrees. The vast majority of wineries are small business who lack the funds and resources to challenge ASCAP, BMI, or SESAC in court. Small businesses are the entities most vulnerable to antitrust behavior. Further, when large companies win protections through the court system, these protections are applicable to the parties in that case alone leaving small wineries without the protections needed to host music on their premises.

Many wineries have cancelled their live music programs. This has cost the local musicians income, and limited the licenses being taken by wineries, thereby lessening the amount paid to songwriters. Just as the Department of Justice concluded less than three years ago and after a two-year review, the ASCAP and BMI consent decrees continue to be relevant and necessary today and in the future. We ask the Department of Justice to protect our ability to play music, host new and upcoming artists, and ensure these pro-consumer decrees are protected.

Josh McDonald  
Executive Director  
WA Wine Institute

