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Sent: Tuesday, August 5, 2014 12:55 PM
To: ATR-LT3-ASCAP-BMI-Decree-Review <ASCAP-BMI-Decree-Review@ATR.USDOJ.GOV>
Subject: Comment on ASCAP/BMI Consent Decrees

*In the opinion of this songwriter, the **ASCAP/BMI consent decrees have devolved** into a unimpeded way for the well-funded music services (Sirius, Clear Channel, Spotify, Pandora, etc) that can afford the lobbying and litigation costs to produce the legislation and directives they depend upon for their outrageous profits at the expense of the artists in the creative commons. **The music services use the rate courts to acquire and maintain a competitive advantage at great expense to their own shareholders, taxpayers, and songwriters such as me.***

I am an American songwriter, a member of ASCAP, leader of the bands Semi-Free and the singer in Flutterbox. I'm submitting this comment on my own behalf in opposition to the ASCAP and BMI consent decrees. I believe these out-dated government actions essentially are a compulsory license outside of the Congress that take away songwriters' rights to due process of law. They take away our valuable property rights to negotiate our own licenses, and they essentially force songwriters into being judged guilty before we've even expressed ourselves.

As a practical matter, all American professional songwriters have to join either ASCAP or BMI or SESAC in order to earn a living. That means that the vast majority of songwriters are subject to the consent decree from the time they write their first song to beyond the grave.

The DOJ has essentially created a single exchange within the federal courts that requires songwriters to join a regulated PRO in order to participate in the market.

***The government limits my ability to participate in the vaunted free market, takes my property rights without due process or just compensation, even limits my right of speech (that is, public performance of my songs) as I must participate in this process or effectively forgo compensation whenever my songs are performed in public.** I know that there's the theoretical possibility of a direct license outside of the consent decrees, but as a practical matter, I can tell you that is very rare because it is rarely offered.*

***Songwriters are singled out for the government's scrutiny before they have done anything except engage in speech and create songs.** At least the compulsory license in the Copyright Act is a legislative action. Under the consent decrees, generations of songwriters are and have been powerless to stop the government from taking our rights. I do not understand how the Department of Justice has the authority to force us to submit to this process.*

*As soon as an ASCAP writer creates their first song, the writer is forced into a court proceeding that was opened in 1941, seventy three years ago. **Even if I accept the unconstitutional premise that I am guilty until I can prove to the government that I am not, and that my licensing decisions require review by a federal judge at great social expense, what possible justification can there be for my decisions today being subject to a case opened so long ago?** How does the federal government know that every single member of this class is doing something wrong? How is that possibly Constitutional? Why am I and all current and future songwriters required to pay for whatever misdeeds that occurred decades ago?*

***The consent decrees act as a kind of compulsory license by government edict.** The government compels songwriters to allow music services to use our songs whether we like it or not. And unlike the Copyright Act, I can't complain directly to rate court except at great expense. There is no legislator to unseat if we don't like the rate court's decision. The consent decrees take the creative property of over half a million Americans simply because they are songwriters! Foreign songwriters whose work is swept up in the American system and can't afford to complain to the WTO suffer the same injustice.*

And if we must live under consent decrees, why must all the cases be heard before the same judge in New York City? The consent decrees force music services to make their case before a single judge in New York City—twice, once for ASCAP and again for BMI – a very expensive process that only the most well-heeled services can afford. Why shouldn't a service be able to bring their rate case in San Francisco, Los Angeles, Nashville, Austin, Athens—or any federal court?

How many new entrants don't come into the market at all because they are scared off by the expense of the rate court process and the uncertainty of litigation?

So not only have the operation of these consent decrees created a single market inside a federal court, I suggest that they actually limit access to that market to the number of potential buyers who can afford the millions in legal fees required to participate. I think most songwriters would say that they want to license their works to innovators, and yet access to the rate court market is limited to the rich innovators as a practical matter. I aver that **the consent decrees are anticompetitive**.

I can tell you that living under these consent decrees feels oppressive and I have found that when the government acts oppressively it is often acting outside of the Constitution.

This is not to say that the government should not pursue claims against songwriters if we actually do violate the antitrust laws. I'm not asking for a free pass. We should get the same treatment as Google, Microsoft or anyone else. It's also not to say that there wasn't some justification for the consent decrees long ago. But from this songwriter's perspective, that time has passed.

Songwriters want justice and turn to you for help. Rid us of these consent decrees forthwith!

Respectfully submitted,

Janine Nichols

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