July 22, 2014

John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 5th Street, NW, Suite 4000
Washington, DC 20001

Dear Mr. Read:

The National Restaurant Association (the "Association") respectfully submits the following comments pursuant to the United States Department of Justice, Antitrust Division's ("DOJ") notice of solicitation of public comments (the "Notice"), concerning its review of the operation and effectiveness of the final judgments in *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y.), and *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y.) (the "Consent Decrees"). The Association's comments will specifically address whether the rate-making function currently performed by the rate court should be altered to a system of mandatory arbitration and what procedures should be considered to expedite the resolution of fee disputes.

NRA was founded in 1919 and is the nation's largest trade association that represents and supports the restaurant and foodservice industry (the "Industry"), with over 500,000 member business locations. The Industry employs 13.5 million Americans in 990,000 restaurant establishments. Many Industry businesses have entered license agreements with performance rights organizations ("PROs") for public performance playing of copyrighted musical works and would be directly impacted by any changes to the license fee and rate dispute mechanism. The Association has worked closely with the U.S. Copyright Office ("USCO") and legislators to amend the U.S. Copyright Act, 17 U.S.C. 110(5)B, and recently submitted comments in response to USCO's request for input as to changes to copyright laws. The Association submits these comments with the goal of working with the DOJ and other stakeholders, including both the copyright distributors and PROs, to construct a more efficient approach to the rate-setting process for commercial and public performance use of musical works.

Should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration?

Licensing rates and the criteria used by the PROs to charge music licensing fees continue to be a top concern for the Industry. The underlying perception of our members is that the criteria used to set fees is arbitrarily established solely by each PRO, and is essentially nonnegotiable. If a license agreement is not entered, restaurant owners that play copyrighted music face substantial fines and potential litigation for violations of federal copyright laws. Furthermore, the costs to challenge any license fee proposal and the legal mechanism to do so inhibits small business

owners from obtaining more practicable means to review the reasonableness of a PRO demand. Therefore, mandatory arbitration may not necessarily solve the underlying economic concerns that many licensees have in resolving rate disputes.

What procedures should be considered to expedite resolution of fee disputes?

Although the 1998 amendments to federal copyright laws to expand the mechanism under the Consent Decrees allowed rate disputes to be resolved in federal district courts in the geographical area of the licensee rather than only in NYC, it remains both time consuming and economically infeasible for many licensees that are small businesses, and thus, to our knowledge, there have been few rate-fee challenges. Moreover, since SESAC was never sued by DOJ for antitrust violations similar to ASCAP or BMI, it is not under any federal court consent decree. Thus, businesses are likely subject to SESAC's license agreement's governing jurisdiction provision decided by SESAC if such initial agreement is signed, presenting SESAC licensees with the same challenges that existed for licensees with ASCAP and BMI prior to the 1998 amendments to federal copyright laws.

In order to provide a more fair and balanced approach for both PROs and licensees, the DOJ could recommend establishing a mechanism whereby a federal court would appoint a rate expert to timely hear and decide challenges at no cost to the licensee and PRO in the licensee's geographic region. Alternatively, DOJ could examine setting up venues similar to "mechanical right" licenses by having administrative royalty boards ("CRBs") for "public performance use" of musical works. Regardless what approach is taken, it seems arbitration needs to be more expeditious and economical for both licensees and PROs.

Conclusion

We appreciate the opportunity to submit comments on behalf of our members and the Industry, and the Association looks forward to working with the U.S. Department of Justice and other stakeholders, including performance rights organizations, music distributors, etc., to create a more efficient system for licensees to challenge license fee demands of the PROs for public performance use of copyrighted musical works.

Sincerely,

David Matthews
General Counsel, Executive Vice President
National Restaurant Association