

May 23, 2014

Jacqueline C. Charlesworth
General Counsel and Associate Register of Copyrights
United States Copyright Office
101 Independence Ave., SE
Washington, DC 20540

Dear Ms. Charlesworth:

The National Restaurant Association (the “Association”) respectfully submits the following comments pursuant to the United States Copyright Office (“USCO”) Announcement at 79 FR 14739, entitled *Music Licensing Study: Notice and Request for Public Comment* (the “Notice”), concerning the effectiveness of existing methods of licensing music and evaluation of possible revisions to the U.S. Copyright Act, 17 U.S.C. 101 *et seq.* (the “Act”). The Notice outlines certain basic and distinct areas under the Act for licensing music, including: (1) royalty rates and terms for private use evaluated under Section 115 of the Act through an administrative tribunal, the Copyright Royalty Board (“CRB”); and (2) royalty rates and licenses for commercial and public performance use of musical works not covered by the Section 115 or CRB evaluation procedures. It is this second area, “public performance use” of musical works, to which the Association’s comments will be directed, and specifically our suggestions for a better and more cost-efficient mechanism to resolve license fee disputes.

The National Restaurant Association was founded in 1919 and is the largest restaurant and foodservice trade association in the United States – representing and supporting over 500,000 restaurant and foodservice establishment member locations, including both national chains and small businesses, as well as the entire restaurant and foodservice industry (the “Industry”). The Industry employs 13.1 million Americans in 980,000 restaurant locations. Many Industry businesses use copyrighted works to enhance their customers’ experience and would be impacted by any revisions to existing federal copyright laws. The Association has worked closely with the USCO and legislators, including in 1998 to amend the U.S. Copyright Act, 17 U.S.C. 110(5)B, and the license fee and rate dispute mechanism that should be established for public performance playing of copyrighted musical works. The Association submits these comments with the goal of working with the USCO and other stakeholders, including both the copyright distributors and performance rights organizations (PROs). We aspire to construct a more balanced, neutral and effective approach to the royalty rate-setting process for commercial and public performance use of musical works.

Challenging the Royalty Rate-setting Process and Standards (Questions 5, 6, 15 and 24) – Licensing rates and the criteria used by the PROs to charge music licensing fees have been a top concern for the Industry for decades. The underlying perception of our members is that the criteria used to set fees is arbitrarily established solely by each PRO, is essentially nonnegotiable, and any proposed license fee based thereon is presented on a “take-it-or-leave-it” basis. If a license agreement is not entered, restaurant owners face huge fines and potential litigation for

violations of federal copyright laws if the music is played. Furthermore, the costs to challenge any license fee proposal and the legal mechanism to do so inhibits small business owners from obtaining a fair and usable means to review the reasonableness of a PRO demand.

The mechanism to challenge PRO license fees varies depending on which PRO (ASCAP, BMI or SESAC) is the licensor seeking a license agreement for the public performance of its copyrighted musical works. As the USCO points out in its Notice, ASCAP and BMI were separately sued decades ago by the U.S. Department of Justice (“DOJ”) for antitrust violations in regard to both PROs’ licensing practices. These litigations resulted in settlement agreements (“consent decrees”) signed and overseen by the U.S. District Court for the Southern District of New York, requiring any license fee or rate dispute regardless of the licensee’s location to be resolved only in the U.S. District Court in NYC.

This mechanism, however, proved ineffective and virtually unused since the signing of those decrees. The basic reason from what our members have informed us, includes the fact that costs and time to bring a federal court litigation by the licensee in NYC far exceeds any fee in dispute. While the 1998 amendments to federal copyright laws theoretically improved the mechanism by allowing license fee challenges against ASCAP or BMI to be made in the federal district court in the city of the U.S. Court of Appeals governing the jurisdiction where the licensee is located rather than in New York, from a practical standpoint, this did not solve the problem. License fee disputes with either ASCAP or BMI remained far more expensive to challenge than paying the fee demanded. To our knowledge, this changed approach since 1998 also resulted in little, if any, rate fee challenges.

Even worse, 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, i.e., under such license agreement, it appears the law to resolve any rate dispute is also in the State of New York, presenting SESAC licensees with the same economic challenges that existed for licensees with ASCAP and BMI. Moreover, questions also exist for a potential first-time SESAC licensee where challenges would occur if a business owner, initially negotiating a license agreement, refuses to sign an initial license agreement because of a rate dispute. Absent a contract or even a contractual relationship, where and what mechanism allows a rate dispute with SESAC to be decided?

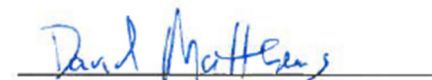
If the USCO seeks to recommend to Congress a solution, then creating a neutral, fair and economically feasible mechanism for both the PROs (licensor) and the licensee should be the goal. For example, the USCO could consider recommending to Congress setting up venues similar to the “mechanical right” licenses by having administrative royalty boards (“CRBs”) for “public performance use” of musical works as well. Another possibility: recommend to Congress that the statute establish a mechanism whereby a federal court would appoint a rate expert to hear and decide challenges at no cost to the licensee or PRO in the licensee’s geographic region. Either option would potentially make it more efficient to resolve license fee disputes, establish a reasonable approach to setting fees and establish a usable mechanism for both parties.

The Effectiveness of the ASCAP and BMI Consent Decrees (Question 7) – With regard to royalty rate (license fee) challenges under the federal court consent decrees for ASCAP and BMI, they have in part been effective, but in part ineffective. The beneficial part that in the Association’s view warrants continued use and oversight by the court, include the consent decree obligations not to charge different fees for similarly situated licensees; to have licenses issued on a non-exclusive basis; and to have license fees be nondiscriminatory to similarly situated licensees. These obligations directed to prevent potential antitrust violations appear as valid now as they did when DOJ first filed the litigations against ASCAP and BMI.

On the other hand, as explained above, the 1998 Amendments to federal copyright laws to expand the mechanism under these two decrees to make licensee fee challenges usable by allowing rate disputes to be resolved in federal district courts in the geographical area of the licensee rather than only in NYC, while a step in the right direction, remains economically infeasible for licensees. In the restaurant Industry, licensees are mostly small businesses, and from a practical perspective, unwilling to challenge what may appear to be an unfair and unjust license fee when litigation costs would far exceed the fee in dispute. The decrees should be further amended to include a reasonable and cost-efficient mechanism. The Association proposes that a rate judge be assigned by the Court and used to evaluate and decide all ASCAP and BMI license fee challenges, at no costs to either party (except as to either party deciding to engage its own attorney) and while many disputes it seems should be resolved on submittal of written documents, to the extent a hearing may be in order in any given dispute, the hearing should be held in the locality of the licensee.

Conclusion – We appreciate the opportunity to provide comments on behalf of our members and the Industry, and the Association looks forward to working with the U.S. Copyright Office and other stakeholders, including performance rights organizations, copyright distributors, etc., to create a more balanced, fair and effective system for licensees to challenge license fee demands of the PROs for public performance use of copyrighted musical works.

Sincerely,

A handwritten signature in blue ink that reads "David Matthews". The signature is written in a cursive style and is positioned above a horizontal line.

David Matthews
General Counsel, Executive Vice President
National Restaurant Association