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Action Aisle

All-Male Programming: An Antitrust Violation?

Clara Lyle Boone of the Arsis Press in Washington, D.C., has asked us to reprint the following correspondence that documents her ongoing attempts to persuade the U.S. Department of Justice to investigate current gender monopoly in concert programming-the prevalent policy of conductors, orchestra boards, artists' managers, and others in the music industry of rejecting out of hand anything composed by a woman. She argues that it is an instance of sex discrimination; the Civil Rights Division, however, has declined to investigate. She argues further that it constitutes an illegal restraint of trade, that is, that the policy of performing only music composed by men restrains Arsis Press and other publishers of music composed by women from doing business and is thus a violation of the Sherman Antitrust Act. The Antitrust Division, however, has declined to investigate. Boone has found that the Justice Department attorneys do not understand the music industry and can not fully comprehend these arts and gender issues. She offers the letters and her commentary on them in hopes that IAWM members will be able, collectively, to help the attorneys realize the importance of the issues.

Item #1

Letter from Clara Lyle Boone of Arsis Press, Washington, D.C., to Senator Wendell Ford, November 17, 1994:

Arsis Press has been publishing concert and sacred choral music by contemporary women composers for twenty years. In the face of rising costs, the possibility of our achieving profitability continues to be quite slim.

A basic reason for this is the age-old conditioned perception of concert audiences that women do not write music. Our first priority in 1974 was to establish that they do. Most of our composers hold doctoral degrees in music composition, and we struggle, day by day, to create markets for their music. It is extremely difficult to challenge a 300- year tradition of all-male concert programs.

How helpful it would be if Title VI of the Civil Rights Act of 1964 included gender! We are advised that it is not wise to open this title for amendment, and we are looking at other more promising legal means to help us become competitive.

We see hundreds of performing organizations across the country operating in restraint of trade by waving their all male banners. We see their exclusive policy being subsidized by the federal funds in their budgets. The National Symphony Orchestra is having another all-male season in its usual tradition, and we are feeling the financial pain. Without performances we can expect no sales, no broadcasts and, of course, no performing rights fees.

We have been able to observe a steady diminishing of prejudice in the last decade. More conductors are open minded and will take the time to learn a new score. We hope to see the position of the federal government clearly established to forbid the use of federal funds unfairly and to provide legal recourse when discrimination is overt and documented.

We have a contractual obligation with the Library of Congress to preserve our papers. For this reason, we have twenty years of records either in our own possession or already in storage at the Library. We would like to do whatever we can to send a message of inclusiveness to all the federally funded arts monopolies.

Item #2

Letter from Senator Wendell H. Ford (Kentucky) to Clara Boone, dated November 22, 1994:

Dear Clara:

Thank you for your letter regarding the age-old tradition of all-male concert programs, and the struggle to establish women composers in this field. I can certainly understand your concern with this matter.

As you may know, Congress is limited in its ability to directly influence the specific actions and regulations of Executive agencies. However, I have taken the liberty of forwarding your letter to the Department of Justice for their consideration and comment. I will contact you upon receipt of a response.

Sincerely,
Wendell Ford

Item #3

Letter from Senator Ford to Clara Lyle Boone, dated January 4, 1995:

Dear Clara,

Enclosed is the response that I received from the Department of Justice regarding the possible discrimination of female composers on the basis of gender. The Department has no knowledge of the National Symphony Orchestra limiting its performances to works by all-male composers. However, they would suggest that you discuss you concerns directly with the National Symphony and the management of the Kennedy Center for the Performing Arts.

Should you wish to pursue this further, please don't hesitate to contact my office for more assistance. I appreciate the time that you have taken to advise on matters of concern to you, I only wish that the outcome was more positive.

Best wishes.

Sincerely,

Wendell Ford

ltem #4

Letter from Deval L. Partrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Washington, D.C., to the Honorable Wendell Ford, U.S. Senate, dated December 27, 1994:

Dear Senator Ford,

This is in response to your letter forwarding correspondence of Ms. Clara Lyle Boone of Arsis Press. Ms. Boone raises a concern about musical performing organizations that receive Federal financial assistance who may be discriminating on the basis of gender when they do not include works by female composers in their concert seasons. We apologize for the delay in responding.

Ms. Boone notes that Title VI of the 1964 Civil Rights Act prohibits recipients of Federal financial assistance from discriminating on the basis of race, color, and national origin, but not gender. As you know, Title IX of the Education Amendments of 1970, prohibits sex discrimination in education programs receiving Federal financial assistance. Thus, to the extent that it can be shown that a musical organization is part of an educational program or activity that receives Federal financial assistance and that it refuses to perform compositions by female composers because of their gender, it is possible that Title IX may be violated. That is a determination that would have to be made on a case-by-case basis. Complaints alleging violations of Title IX should be filed with the agency that provided the Federal financial assistance.

Ms. Boone cites as an example of a possibly discriminatory organization, the National Symphony Orchestra, because it is having another all-male season. We have no knowledge as to whether the National Symphony has limited its performances to works by male composers in the past or whether it refuses to perform the works of female composers because of their gender. However, it may be useful for Ms. Boone to discuss her concerns directly with the National Symphony and the management of the

Kennedy Center for the Performing Arts, where the National Symphony performs. I hope you find this information of use.

Sincerely,

Deval L. Patrick

Item #5

Letter from Brenda F. Carleton, Chief, Legislative Unit, U.S. Department of Justice, Washington, D.C., to Clara Lyle Boone, dated May 31, 1995, with copies to Joyce L. Hundley, Antitrust Division, and Bill Yeomans, Civil Rights Division:

Dear Ms. Boone:

Thank you for bringing to the attention of the Antitrust Division your concern that musical performing institutions, such as symphony orchestras, have violated federal law by refusing to perform musical scores created by women composers.

You explained that you have previously presented your concerns to the Department of Justice's Civil Rights Division. You received a letter in reply from Assistant Attorney General Patrick informing you that the federal civil rights laws do not provide a remedy for the situation you describe. You subsequently contacted enforcement officials in the Antitrust Division, including myself, to determine whether federal antitrust laws may have been violated by what you believe to be a persistent refusal to include works by contemporary or deceased women composers. You also seek the Antitrust Division's assistance in introducing legislation that would address the type of discriminatory practices you believe exist, should existing federal antitrust law not apply.

As stated in your letter, you are not aware of evidence of collusion on the part of artistic or management directors or other officials of musical performing institutions; however, you believe that such institutions perpetuate a nationwide discriminatory policy with respect to the performance of musical scores composed by women. This conduct, you believe, constitutes the basis of a violation of Section 2 of the Sherman Act.

After careful review of the information and material you have presented, we have concluded that your antitrust allegations lack a sufficient basis to justify further inquiry by the Antitrust Division. Section2 of the Sherman Act prohibits actual or attempted monopolization of any relevant market. The offense of monopolization is generally held to require two elements: (1) the existence of market power, that is, a dominant market share such that a single firm can control price or exclude competitors from the market; and (2) the use of unlawful means to achieve or maintain a monopoly. The multitude of performance fora in the United States belies the assertion that performance institutions are situated to engage in monopoly conduct. Moreover, it appears from the information provided in your letter that works by women composers, including published works offered for sale by your company, are increasingly performed to audiences in Europe and have begun to gain recognition by audiences in the United States.

We must also decline your request for assistance in seeking new laws to address the conduct you have described. In the past thirty years, antitrust enforcement has benefited by the application of sound legal and economic analysis emphasizing that enforcement should focus on consumer welfare. We do not find a viable theory of anticompetitive harm to consumers that would justify a recommendation to the President to seek changes in existing law. Of course, you may wish to talk to your elected representatives about their interest in seeking the changes you advocate.

If you remain convinced that the antitrust laws might provide a legal remedy for your concerns, I suggest that you consult with private counsel who can advise you in greater detail of the strengths and weaknesses of the legal argument you wish to advance.

I and others with whom you have spoken at the Antitrust Division acknowledge your concern and commitment to encourage the performance of musical compositions by women. We appreciate your having brought this matter to our attention.

Sincerely,

Brenda F. Carleton

Commentary
by Clara Lyle Boone

My involvement with the U.S. Congress in matters related to the arts dates back to 1956 when I rode the train to Washington during the spring break at Emma Willard School in Troy, New York. I brought with me proposed revisions to the Copyright Law, and my Kentucky Congressman, Brent Spence, forwarded my recommendations to the Chairman of the House Judiciary Committee. In early 1960 I was dropping off to Members of Congress a proposal for federal aid to the arts. My proposal was included in the Democratic Party Platform of that year (p.49). The resulting bill, shepherded through Congress by John Brademas, master of the legislative process, was enacted by Congress in 1965 and created the National Endowment for the Arts and the National Endowment for the Humanities.

Although it is still legal to discriminate against women in the use of federal funds, several of the grant programs have responded positively to sundry complaints of gender discrimination. They maintain civil rights offices and will mail forms for filing a formal complaint. Mr. Patrick's letter states clearly our current situation.

I believe that as women in music we have a special responsibility to assure that another generation does not come to maturity believing that women do not write music. It should not carry over into the twenty-first century that women can be in tears upon hearing their first concert work by a woman composer.

My recollection is that the reason Title IX includes prohibition against sex discrimination is that opponents of the bill expected to kill the entire bill by that insertion. The vote that assured passage of the bill was a major surprise. I was present in the gallery in 1959 when the House of Representatives resoundingly voted down equal pay for equal work. Electronic voting was not then installed, and I still cringe when I recall the macho mood on the floor.

We can be part of the winds of change. Ms. Carleton's letter alerts us to ways to improve our tactics. Not having legal precedents or case histories regarding gender consensus monopoly, we can place our most effective emphasis on the deprivation of audiences (consumers) in being quarantined with all-male concert programs. We as music professionals constitute an insignificant voting bloc, but enlightened concert audiences can swing an election. Arsis Press and the growing number of standard publishers bold enough to publish music by women are deprived of essential markets, women composers are deprived of important audiences, but most of all, nation-wide audiences are deprived of the healing of gender-blind program building.

Ours is the gender that holds a legal monopoly in giving birth. Our laws are intended to cooperate with nature. However, a pattern of entire seasons of all-male programs is a common sense example of illegal monopoly. The gender bias has continued for so long without a legal challenge that a whole supporting music industry exists around the concept of all-male concert programs. This is our inheritance from our European culture.

Who should be called to account? Where does one begin? There is no experienced core of attorneys in the Antitrust Division. In fact, one staff member commented, "You need a Ruth Bader Ginsburg!"

It is a revelation to sit down in any repository or library and read the Sherman Act of 1890. There are too many men in the music business telling me that I am on track or on target for me to be willing to give up on this approach. It seems most practical to notify, first of all, the artist management organizations that provide communities across the continent with their single-gender music, i.e., the standard repertoire. The ruling to accomplish that purpose needs to come from the Antitrust Division.

We yet hope for a meaningful dialogue with someone in that office. As an individual retired from the classroom, I cannot but be surprised that conclusions have been rendered without any questions being asked. I have been advised that the internal structure of the Antitrust Division revolves around corporations and corporation lawyers. The newspapers remind us of Microsoft and megabucks!

The encouragement for me is that the Sherman Act first refers to persons and then stipulates that corporations are to be treated as individuals. The act was created to aid persons who are, like my sole proprietorship, Arsis Press, experiencing restraints in trade because of unfair business practices. This

noble legislation of the nineteenth century defined successful commerce in the language of common sense. That is really all that we are asking of the Antitrust Division.

Clara Lyle Boone founded Arsis Press in 1974 for the purpose of publishing music by living women.