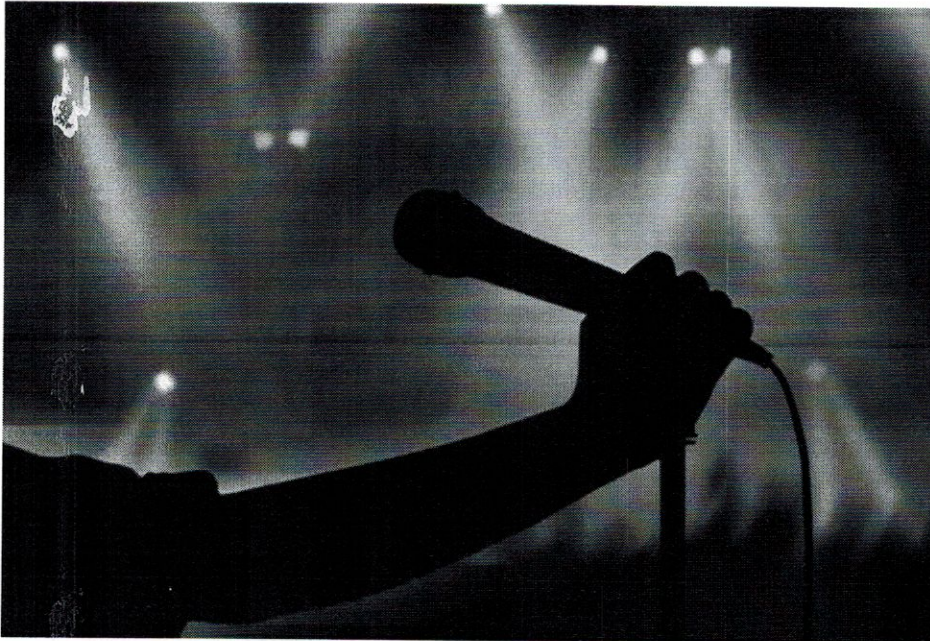


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The Performance Right

A World in Transition

BY TODD BRABEC

Section 106 of the Copyright Act provides:

Subject to sections 107 through 122, the owner of a copyright under this title has the exclusive right to do and to authorize any of the following:

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; [and]

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.¹

These two exclusive rights of copyright are at the heart of the worldwide business of music. They involve musical compositions and sound recordings, the rights of copyright owners and limitations on those rights, and how creators and copyright owners are compensated.

Unique Aspects of Labor Law in the Entertainment Industry

BY HOWARD D. FABRICK

The title of this article presupposes that there exists some well-defined and universally recognized definition of the "entertainment industry." There is no such definition but rather diverse forms of entertainment, each with its own definition. The classic story about the circus elephant keeper is illustrative. At his retirement party when asked how he could have spent 40 years following the elephants with a shovel and wheelbarrow, he replied, "I love being in show business."

The definition of "entertainment industry" is comparable to the definition of beauty—it's often in the eye of the beholder. There are a multitude of activities that fall within the very broadest definition of the term. It could be defined as every activity on which the public spends its leisure time dollars. The hotels in Las Vegas consider themselves to be in the entertainment industry, as do Carnival and Princess cruises.

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THE MUSIC BUSINESS PRE-DIGITAL

In the world of traditional media—radio and television primarily—the music licensing process has evolved into a fairly straightforward process. For musical compositions, songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC (performing rights organizations or PROs), which negotiate license agreements for the use of music, collect the fees, and distribute them back to writers and publishers who have performances in specific media. If the PRO and a user cannot come to an agreement as to license fees, courts intervene and determine “reasonable fees” for music use.

In the area of sound recordings, performances on traditional over-the-air radio are exempt from royalties and considered as “promotional” tools to drive sales. A record company’s main source of income, other than record sales, comes from the licensing of master recordings to television series, feature films, and advertising commercials, among other uses. And then came the online/digital world—a technological revolution that changed everything.

A rather simplistic view of the music business, but one that serves as an appropriate starting point for an increasingly changing and complex business.

MUSICAL COMPOSITIONS

In the United States, there are three primary organizations that represent songwriters, composers, and music publishers on a nonexclusive basis in the negotiation, collection, and distribution of music performance license fees. The organizations are the American Society of Composers, Authors and Publishers (ASCAP, 1914); Broadcast Music, Inc. (BMI, 1939); and SESAC (1930). They are referred to as performing rights organizations (PROs). The primary sources of license fees are traditional radio, broadcast and cable television, and general licensing (live performance, music in bars and restaurants, etc.).

New media license fees, which include online and digital music services, currently represent a relatively small portion of U.S. domestic music license fees (approximately \$100 million of a total annual U.S. domestic PRO collection of \$1.4 billion). Royalty distributions are made 50 percent to writers and 50 percent to music publishers after operating costs are taken into account (approximately 12–13 percent in the case of ASCAP and BMI). There is a PRO in practically every country of the world where, via reciprocal agreements with ASCAP, BMI, and SESAC, U.S. writers’ and publishers’ works are represented and paid for when performances occur in foreign territories.

In the case of ASCAP and BMI, both entered into consent decrees with the government in 1941, with amendments to those decrees in 1950, 1960, and 2001 in the case of ASCAP, and in 1966 and 1994 for BMI. One aspect of these decrees that has had a significant effect on the determination of license fees is the existence of a separate “rate court” for ASCAP and for BMI, which comes into play when the PRO and a music user cannot come to a negotiated agreement as to what “reasonable” license fees should be in any given area. The decree allows any

party to apply to the court (U.S. District Court for the Southern District of New York) for a determination of interim and final fees. These rate courts have been in existence with ASCAP since 1950 and with BMI since 1994, and have determined fees and license terms for the major traditional media areas of radio and broadcast and cable television, as well as, in recent years, the online music community. It is in these latter “new media” decisions and settlements where most of today’s complex issues have arisen.

SESAC, the smallest of the U.S. PROs, operates on a for-profit basis as opposed to the nonprofit operations of ASCAP and BMI, is not governed by a consent decree with the government, and does not have a “rate court”—type procedure for license fee adjudications and disputes. Under a recent October 2014 settlement with the Television Music License Committee (TMLC) regarding a class action antitrust suit involving local television stations though, SESAC has agreed to binding arbitration for any future licensing fee disputes with the settlement class that cannot be resolved by negotiation. It was further agreed that SESAC could not interfere with the ability of any affiliate to issue a public performance rights license directly to a settlement class member. A final settlement approval hearing is set for March 2015 in the U.S. District Court for the Southern District of New York.²

In the online world of music licensing, the ASCAP rate court has been instrumental in deciding not only what “reasonable” license fees should be but also what is actually licensable by the U.S. PROs. Interim fee and final fee decisions have involved many of the biggest players in the “new media/technology” world and have resulted in license fees significantly below what the PROs and copyright owners were requesting. To put the online fees into perspective, ASCAP, BMI, and SESAC collected approximately \$1.4 billion in domestic U.S. license fees (radio, broadcast and cable television, live, etc.). Of this amount, approximately \$100 million was generated from all online/digital uses. An additional \$700 million is received each year by the U.S. PROs from foreign collection societies (PRS, GEMA, SACEM, SIAE, SGAE, SOCAN, APRA, IMRO, etc.) for performances of U.S. writers’ works performed in foreign countries, with a small portion of that money attributable to online uses. Most publishers, incidentally, collect their foreign country performance royalties directly from those societies as direct members or through subpublishers.

Commencing with the 2007 AOL/RealNetworks/Yahoo case, rate court filings, hearings, and decisions have involved YouTube, MobiTV, AT&T Mobility, Verizon Wireless, Spotify, Ericsson, and Netflix, among others.³ A brief summary of some of the most important points of these cases should help in understanding the current status of online performance licensing:

The AOL/RealNetworks/Yahoo rate court case had major worldwide significance, as there was a summary judgment ruling that the downloading of a music file did not constitute a public performance under the Copyright Act—a ruling totally contrary

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to the laws of most other countries with the exception of Canada.⁴ This decision was affirmed by the Second Circuit Court of Appeals,⁵ with cert denied by the U.S. Supreme Court.⁶ The Second Circuit also remanded the fee formula back to the district court for further proceedings.

The 2009 Verizon Wireless rate court case reaffirmed the AOL “no performance in a download” decision in a ruling that stated that the transmission of a ringtone to a cellular telephone customer did not constitute a performance, and that the mechanical ringtone rate of \$0.24 per download was the only appropriate right and compensation involved.⁷ The primary issue of the 2009 AT&T case was whether previews of ringtones were to be considered “fair use” rather than licensable performances.⁸ The court ruled in favor of ASCAP, and a customer’s previewing of ringtones was therefore licensable by the PROs. An interim fee 2009 decision regarding YouTube was a good example of the size of court-set “reasonable” music license fees, with an order of \$70,000 a month.⁹

The 2010 MobiTV case involved what a reasonable license fee should be for the delivering of television programming to mobile telephones and audio channels. In this case, the court returned to the early 1990s ASCAP performance licenses with Turner Broadcasting that set a three-tiered license based on the music intensity of the program. The music intensive fee was 0.9 percent of defined revenue, with 0.375 percent for general entertainment and 0.1375 percent for news and sports programming.¹⁰ The Second Circuit affirmed the lower court decision.¹¹

All of the aforementioned cases were eventually settled, with additional settlements and agreements entered into with Apple, Rdio, Spotify, Netflix, Hulu, and others. Practically all settlements in this area are confidential.

DMX and Pandora

Two additional rate court cases, DMX and Pandora, involved not only the determination of reasonable license fees but also the role that direct licensing plays in the PRO licensing picture. Under the ASCAP and BMI consent decrees, the agreements that writers and music publishers sign with ASCAP and BMI are nonexclusive—members and affiliates are allowed to directly license their works to a music user and bypass the PRO structures entirely.

DMX is a leading background and foreground music service provider that provides preprogrammed music for business establishments via direct broadcast satellites or on-premises delivery mechanisms. DMX hired a company to assist and design a direct licensing program with copyright owners that eventually resulted in direct licenses representing over 7,000 catalogs, including one major music publisher, Sony. DMX was requesting from ASCAP and BMI a “through-to-the-audience” blanket license that reflected the DMX direct licenses already obtained as well as those to be negotiated in the future.

In July 2010, the BMI rate court entered a final rate for the blanket license subject to adjustment of DMX’s BMI performances directly licensed.¹² In a separate decision, the ASCAP rate court ruled that ASCAP is required to issue to DMX a blanket license with “carve-outs” for the direct licensing program.¹³ Both decisions were appealed to the Second Circuit, which in June 2012 affirmed the district court decisions.¹⁴ The resulting rates significantly reduced the license fees that DMX was paying to ASCAP and BMI.

Pandora is the leading Internet customized radio service and is considered a noninteractive service as opposed to an on-demand/interactive service where the user chooses what he or she wants to hear. Pandora entered into license agreements with both ASCAP and BMI in 2005 and terminated those licenses at the end of 2010 and 2012, respectively. In the case of ASCAP, Pandora applied to the court for a through-to-the-audience blanket license for the period 2011 through 2015. In the case of BMI, Pandora filed an application for a five-year license commencing January 1, 2013.

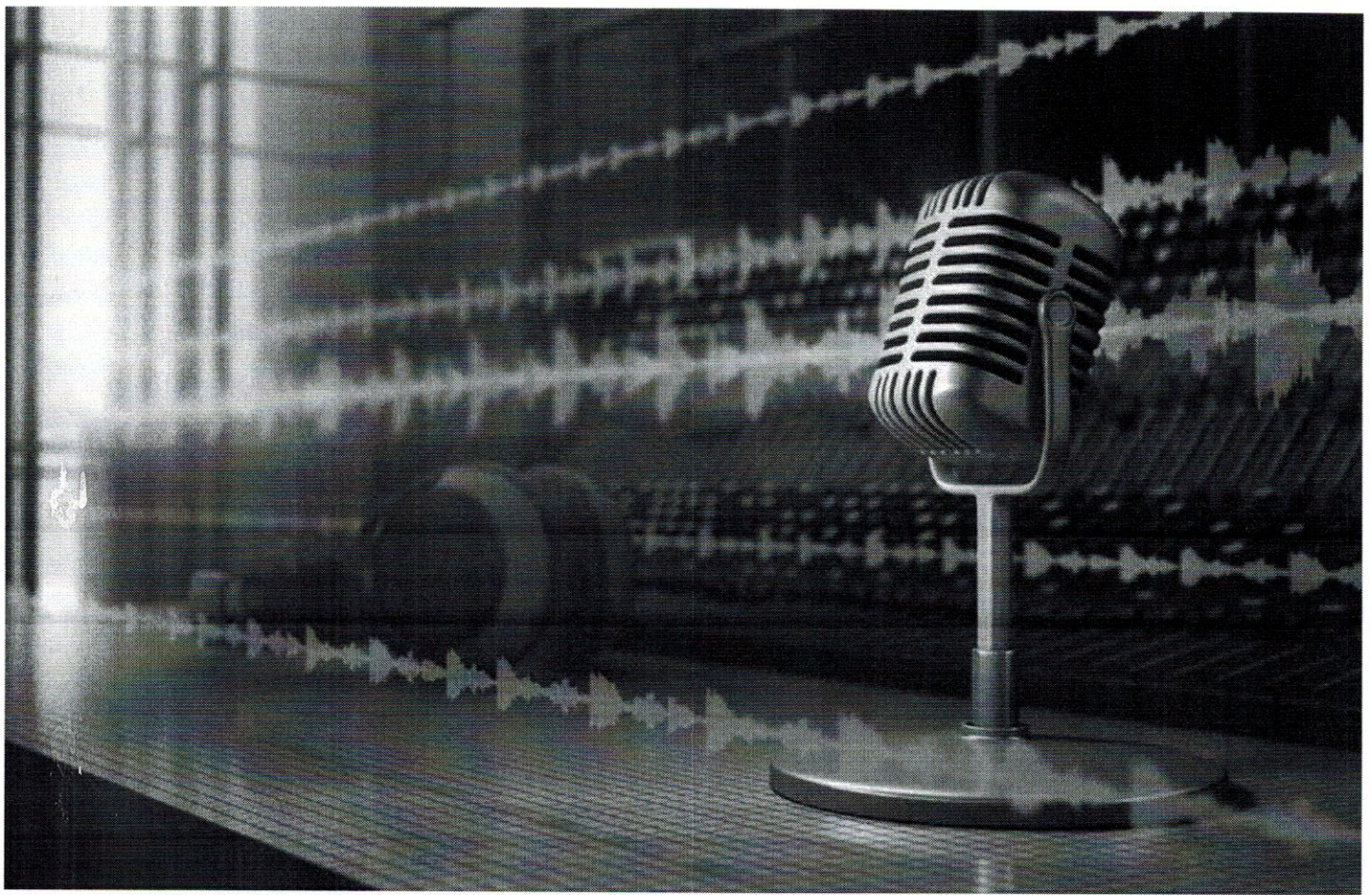
Based primarily on the small license fees that were awarded by the ASCAP and BMI rate court judges commencing with the AOL/RealNetworks/Yahoo case in 2007, the major music publishers, starting with EMI (later acquired by Sony), notified ASCAP and BMI that they were withdrawing their catalogs for online licensing purposes. The majors felt strongly that they could negotiate more financially acceptable online value deals than the arrangements that had been set by prior rate court decisions and the subsequent settlements emanating from those decisions. These online media withdrawals were accomplished by specific changes in the rules, regulations, and practices of ASCAP and BMI. Upon withdrawing their works, a number of the publishers entered into direct licensing deals with Pandora, in effect creating a system whereby Pandora had licenses with ASCAP, BMI, and SESAC, as well as short-term negotiated direct performance licenses with the major publishers. Discussions were also held between ASCAP, BMI, and the major publishers with a view toward ASCAP and BMI handling the administration of the online licenses negotiated by the publishers.

In response to a motion for summary judgment in September 2013, Judge Cote, the ASCAP judge, ruled that a selective withdrawal of new media rights by publisher members could not be implemented without violating the consent decree, and further that the ASCAP repertory subject to that license is all works in ASCAP at the time Pandora applied for a license (January 1, 2011)—not when the final license is arrived at.¹⁵ In short, an application for a license is treated as a license in effect, and in this case no works could be removed by any ASCAP member during the period 2011 through 2015. And when works are finally removed by any publishers, those works have to be removed for all licensing purposes, not just for online licensing. Any users with license agreements still in effect at the time of the withdrawal could continue to use the withdrawn works up until their specific license agreement expires.

In a similar motion for summary judgment in the BMI case, Judge Stanton allowed the removal of works that occurred prior to January 1, 2013, but ruled that those works could not be licensed by BMI to any others after any existing license agreements expired.¹⁶ If BMI cannot offer those compositions to new media applicants, their availability does not meet the standards of the BMI decree and they cannot be held in the BMI repertory. The BMI-Pandora rate court trial is set for 2015.

To put both judges’ “all in or all out” summary judgment decisions into real world perspective, if one were to remove works from the current \$100 million PRO annual license fee area of the online world, one would be forced eventually to remove those works from the other \$1.3 billion in PRO domestic license fees being generated by traditional media (radio,

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broadcast and cable television, live, etc.). Not to mention the effect that such withdrawals would have on the reciprocal “flow through of money” agreements between foreign collection societies and the U.S. PROs. As a point of reference, it is important to note that practically all new PRO licensing deals with traditional media (radio, television, etc.) include streaming, website music uses, mobile apps, digital and primary broadcasts, mobile and wireless platforms, webcasts, and multicasts.

On March 14, 2014, Judge Cote issued her “determination of reasonable license fees” 136-page decision in the ASCAP-Pandora rate court case.¹⁷ The judge ruled that the appropriate fee for the years 2011–2015 was 1.85 percent of revenue less certain deductions. ASCAP had requested a rate of 1.85 percent for 2011 and 2012, 2.5 percent for 2013, and 3 percent for 2014 and 2015. Pandora had requested a rate between 1.7 percent (the current traditional radio rate—Pandora had acquired a small radio station in an attempt to qualify for this rate) and 1.85 percent (the ASCAP form rate in effect for Pandora since 2005).

Two of the more important issues in the Pandora rate court proceedings involve the concept of the divisibility of copyrights, which allows a publisher/copyright owner to make deals with various classes of users for their catalog, and the disparity in payments between artists and record companies and songwriters and music publishers for the same type of performance.

As to the latter issue, the AOL/RealNetworks/Yahoo 2007 rate court case provided evidence of the over \$30 million paid

by these services to the major record companies over a two-year period, whereas their fees to the PROs were, in comparison, very small. As to Pandora, the company expended in 2013 approximately \$315 million of its total revenue of \$600 million on content acquisition. Of that amount, close to \$290 million went to SoundExchange for artists and record companies, with all three PROs collecting a total of less than \$25 million for songwriters and publishers. As a point of additional reference, total 2013 limited performance right statutory royalties to SoundExchange were \$650 million in addition to significant record company interactive streaming license fees and payments negotiated with the services, whereas combined ASCAP, BMI, and SESAC revenue for all new media uses from all licenses and services was less than \$100 million.

In July 2014, ASCAP, along with Universal Music Publishing, Sony/ATV Music, and EMI Music as intervenors, filed an appeal from the two district court opinions with the Second Circuit.¹⁸ The basis of the appeal was that the district court erred in ruling that the amended final judgment of 2001 prohibited ASCAP from accepting partial grants of public performance rights, and that the district court in setting a final license fee ignored recent arms-length relevant benchmark agreements.

As to the “partial grants” prohibition, ASCAP’s position was that the consent decree long ago removed any prohibition on the right of members to reserve for themselves the right to grant exclusive licensing rights to music users. Further, such a

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prohibition is in direct conflict with the exclusive rights provided by the copyright law to copyright owners.

As to the issue of ignoring benchmark agreements in the setting of final reasonable license fees, ASCAP pointed out that the Universal Music, Sony/ATV Music, and EMI Music Pandora direct license deals were all in excess of the 1.85 percent court-set fee, as was the 2013 negotiated ASCAP Apple iTunes radio license—all “arms-length willing buyer and willing seller agreements.” Further, the Second Circuit, in its 2010 RealNetworks/Yahoo decision, confirmed that a 2.5 percent rate was a valid benchmark even though it vacated the district court’s across-the-board application of that rate to all of RealNetworks’ and Yahoo’s services.¹⁹ Accordingly, the current district court erred in ignoring the Second Circuit’s guidance in RealNetworks/Yahoo, which established that a rate of 2.5 percent revenue (or higher) is reasonable for all-audio, music-intensive digital music services similar to Pandora’s.

Direct Licensing

The ability of a copyright owner to directly license a work to a music user and bypass the PROs was a major issue in the ASCAP and BMI DMX rate court decisions as well as the current Pandora litigation. Language in both the ASCAP and BMI consent decrees guarantees the right of any member or affiliate to directly license their works to a user. SESAC, as it is not under a consent decree with the government, incorporates language in its writer and publisher affiliation agreements that insures the right to directly license—“publisher retains the right to issue nonexclusive licenses directly to any third person for the public performance in the United States, its territories and possessions, of any work subject to this Agreement.”

When songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC, they sign representation agreements granting to the PRO the nonexclusive right to license the nondramatic public performances of their works. Though each PRO contract and governing documents are different as to their terms, length of contract, withdrawal of works and resignation/termination provisions, dispute resolution procedures, payment schedules, distribution rules, and benefits, they all are nonexclusive agreements whereby the writer or publisher can license a work directly. The PROs cannot interfere in any way with this right or the ability to exercise this right.

Language as to the ability to directly license as well as the effect of a direct license has been standard in many types of industry license agreements, including work-for-hire/employee-for-hire contracts, for many decades. A sample clause might read:

The performing rights in the composition, to the extent permitted by law, shall be assigned to and licensed by the applicable performing rights organization with said organization authorized to collect and receive all monies earned from the public performance of the composition and to pay the writers and publishers directly. If to the extent it is unlawful for the PRO, or any of its affiliates, to issue blanket small performing rights licenses or the applicable performing rights society does not from time to time, for any reason whatsoever maintain a regular system of collecting performance fees and/or a third-party

licensee (i.e., a television network, independent television station, digital music service, etc.) requires direct licensing of such rights, company and publisher shall have the right to directly license their respective shares of the public performance rights in the composition to such third parties. If the company or publishing designee receives a distribution of earned public performance fees from any source that does not make a separate distribution directly or indirectly to publisher and to composer, then publisher shall be entitled to receive its portion of such fees and composer shall be entitled to receive the writer’s share of such fees.

Additional variations of a direct license clause are as follows:

Licensee desires to obtain from publisher a blanket license for all necessary performance, reproduction, and distribution rights implicated by the delivery of programming embodying publisher’s catalog, and publisher is willing to grant such right to license on a nonexclusive basis.

The right to publicly perform and to authorize others to perform the composition by means of a media entity not licensed by ASCAP, BMI, or SESAC is subject to clearance of the performing right either from Licensor or from any other duly authorized licensor acting for or on behalf of Licensor subject to good faith negotiations in accordance with established industry customs and practices.

An issue in many agreements is what happens to the writer share when a copyright owner, usually the music publisher, directly licenses a work to a user. Clauses range from “payments to be made based upon the prevailing PRO rates for the specific use,” “compensation to be negotiated in good faith,” “reasonable fee,” “fee subject to arbitration,” “a complete buyout with no further compensation or continuing royalties,” or “50 percent of any license fee received.”

A further unresolved issue as to an allowable and effective direct license under court or consent decree interpretation involves the situation where a music user (traditional broadcaster, online music service, etc.) contacts a copyright owner directly with the request versus the situation where the ASCAP or BMI copyright owner approaches the user to negotiate a direct license—a fine distinction but an important one in current litigation and consent decree interpretation.

Department of Justice Intervention

In part because of the Pandora decisions, a major development occurred in June 2014 when the Department of Justice (DOJ) announced that it would review both the ASCAP and BMI consent decrees “to account for changes in how music is delivered to and experienced by listeners [and to determine] what modifications would be appropriate.”²⁰ The DOJ allowed a 60-day period for comments from any interested party (music publishers, songwriters and composers, PROs, online service companies, music users of any nature, the general public, etc.).

A cross-section of some of the views was illustrative of the issues as well as the diametrically opposed positions of many of the parties. The comments very much reflected a creators v. users scenario.

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On the music user side, the National Association of Broadcasters (NAB), the Digital Media Association (DiMA), Netflix, Fox News, the Radio Music License Committee (RMLC), the National Restaurant Association, and the Consumer Electronics Association, among others, submitted comments. The creator/copyright representative side included comments from the PROs ASCAP, BMI, PRS for Music (U.K.), SOCAN (Canada), JASRAC (Japan), and SIAE (Italy), as well as the Society of Composers and Lyricists (SCL), the Nashville Songwriters Association International (NSAI), the National Music Publishers' Association (NMPA), and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), among others.

ASCAP, in its comments, requested that the rate court be replaced with a faster and cheaper dispute resolution procedure, that ASCAP be allowed to bundle and license multiple rights (the current decree prohibits ASCAP from licensing any right other than performance) and allow partial grants of rights from its members.²¹ The arguments centered on the fact that new media users need multiple rights in their business, that publishers need flexibility to manage rights and negotiate contracts terms, and that property rights are divisible, assignable, and licensable either in whole or in part. BMI, which is not prevented from bundling or licensing multiple rights, requested that publishers be allowed to withdraw digital rights and that a binding arbitration model replace the consent decree mandate.²²

The SCL (film and television composers and songwriters) was in favor of consent decree changes and expressed concerns that if the major music publishers withdrew completely from ASCAP and BMI, the transparency and accountability of the PRO collective licensing model would be affected, and further that in a bundled rights situation it would be difficult to ascertain the value of the performance right in bundled transactions.²³ Most writers in this field sign "work-for-hire" contracts where the backend performance royalties represent a substantial portion of their income. The 165,000-member organization SAG-AFTRA, the largest labor union representing working media artists, commented that the scales have tipped too far in favor of licensees' interests over those of artists and that the rate setting process set forth by the consent decrees is inefficient, expensive, and burdensome on the PROs, and if not modified will significantly devalue a writer's works.²⁴

Sony/ATV Music supported amending the consent decrees to allow copyright owners the ability to limit the scope of the rights they grant to ASCAP and BMI in their musical compositions and to require the PROs to accept those grants; supported an expedited arbitration process for resolving rate disputes; and recommended that the reviews of the decrees occur periodically to take into account new technology changes and conditions. Sony/ATV was not in favor of allowing the PROs to handle rights other than performing rights, as it was their position that these markets already functioned well and that the introduction of such regulated entities into the market for these other rights would be costly and disruptive.²⁵

As to the foreign PROs that submitted comments, widespread concern centered on the belief that the current consent decrees were outdated in today's world and that changes were essential if music was to be appropriately licensed and

compensated. Partial grants of rights and the bundling of multiple rights are commonplace in the foreign marketplace, and dispute resolution procedures are less cumbersome than the U.S. rate court. PRS for Music in the United Kingdom, which receives over \$100 million a year in U.S. performance royalties for its members from ASCAP and BMI, expressed concerns over the present decrees and stated that it would consider licensing the British repertory directly in the United States rather than through intermediaries if it proved more efficient.²⁶

DiMA, a trade organization whose members include Apple, Amazon, Microsoft, and YouTube, stated that the decrees have not harmed ASCAP or BMI financially in terms of the music industry generally, and that the PROs must be subject to oversight as their anticompetitive behavior continues to this day. Further, if the DOJ does allow all the PROs to bundle rights as well as permit partial withdrawals, then substantial oversight must be put in place; songwriters should be allowed to keep their rights with their PRO if that's what they wanted, regardless of whether the publisher removed the works.²⁷

The RMLC strongly felt that the decrees were necessary to keep the market power of ASCAP and BMI in check.²⁸ If publishers were allowed to withdraw from the PROs, they could leverage their outsized market share to extract exorbitant license fees from licensees. Both the NAB²⁹ and Television Music License Committee also shared these views. As to Netflix, its position was that the decrees were in place to constrain the PROs market power.³⁰ It was against allowing partial publisher withdrawals, but if the DOJ allowed them, then conditions would have to be imposed to mitigate any adverse consequences. Finally, the rate court must stay in place though it does need to be streamlined.

SOUND RECORDINGS

Prior to 1972, no federal copyright protection existed for sound recordings. Congress rectified that situation by extending copyright to any recordings that were fixed on or after February 15, 1972. The owners of the copyright therefore had the exclusive right to reproduce and distribute phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same. Pre-1972 recordings remained subject to the protection afforded by state laws.

As to the performance right aspect of sound recordings, the right that was enjoyed by musical compositions was non-existent for records. No performance royalty existed in any medium for sound recordings. That changed in 1995 with the passage of the Digital Performance Right in Sound Recording Act (DPRSRA), which provided for a limited right when sound recordings are publicly performed "by means of a digital audio transmission."³¹ The 1998 Digital Millennium Copyright Act (DMCA) included webcasting as a category of performance applicable to this limited performance right.³² This new right applied specifically to satellite radio (e.g., Sirius XM), Internet radio (e.g., Pandora), and cable television music channels (e.g., Music Choice).³³ Broadcast radio continued to be exempt.

It is important to note that the statutory license applies only to noninteractive services. The right to perform copyrighted sound recordings for on-demand services (interactive services) remains with the copyright owner (normally the label) and is a negotiated agreement between the label and the music user.

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These deals have taken many forms, including percentage of gross or net revenue formulas, per performance rates, an equity stake in the business, or a combination of these and other elements.

The rates and terms of the sound recording statutory license are set by the Copyright Royalty Board (CRB), an administrative body created by Congress. SoundExchange, a nonprofit organization, has been designated by the Librarian of Congress and the CRB to be the sole entity to collect, administer, and distribute the royalties from noninteractive webcasting, digital cable, and satellite transmissions and satellite audio services. Congress also gave SoundExchange the right to negotiate agreements separate from those set by the CRB through the Webcaster Settlement Acts of 2008 and 2009.³⁴ Services therefore can choose whether to be licensed under the CRB rates or the SoundExchange negotiated rates.

There are five major sound recording licensing categories, each of which is subject to a separate rate proceeding. The categories are webcasting, satellite radio, preexisting music services, other cable and satellite music providers, and business establishments. An example of one of these proceedings involved Sirius XM satellite radio, which concluded in 2012 and set rates for a five-year period at 9 percent of gross revenue for 2013 increasing to 11 percent in 2017.³⁵

Webcasting IV—the proceeding regarding future webcasting rates—commenced in early 2014 and will conclude at the end of 2015 and will set rates for the period 2016–2020.³⁶ The most recent five-year CRB per-performance statutory webcasting rates were \$0.0019 for 2011, \$0.0021 for 2012 and 2013, and \$0.0023 for 2014 and 2015.³⁷

The Webcaster Settlement Acts of 2008 and 2009 allowed SoundExchange to negotiate alternative royalty rates (“pure-play” rates) with certain webcasters. For nonsubscription services and broadcasters streaming their content on the Internet, the “pureplay” per-performance rate started as \$0.00102 for 2011 and increased to \$0.0013 in 2014 and \$0.0014 in 2015. The rate applicable is the greater of the per-performance rate or 25 percent of U.S. gross revenue. The “pureplay” per-performance rate for subscription services started at \$0.0017 in 2011 and increased to \$0.0023 and \$0.0025, respectively, for 2014 and 2015.³⁸ No percentage of revenue figures applied to the subscription rate. Under those agreements, webcasters therefore had a choice to be licensed through 2015 either with the CRB rates or the SoundExchange “pureplay” rates.

As to the current *Webcasting IV* CRB proceeding, SoundExchange’s initial rate proposal for the 2016–2020 period was a “greater of” formula taking into account a per-performance rate and a percentage of the service’s revenue. Specifically, the per-performance rate for commercial webcasters would commence at \$0.0025 in 2016 with escalations to \$0.0029 in 2020. The percentage of revenue would be 55 percent for all five years. Its proposal was based on the fact that webcasting is a vibrant and growing industry, that it has widespread adoption by consumers, and that direct licensing deals between record companies and on-demand services (interactive streaming) were the most appropriate benchmarks to use. A review of these deals confirmed that the record companies received a minimum share of 50–60 percent of a service’s revenue, with allocations based on each record company’s share of total streams.

Music services, on the other hand, argued in their direct case that the industry is not profitable even considering payments under the reduced Webcaster Settlement Act agreements. Pandora, Sirius XM (streaming component), and the broadcasters, through NAB among others, came up with proposals ranging from a royalty of \$0.0005 per performance for all five years, to \$0.0016 pending study of the direct deals, to a \$0.000125 rate similar to the Canadian rate. Pandora supported a “greater of” rate of \$0.0010 per performance or 25 percent of revenue.

SoundExchange Distributions/Direct Licenses

SoundExchange collected \$650 million in 2013 pursuant to the statutory license and distributed \$590.4 million to artists and sound recording copyright owners.³⁹ Collections and distributions for 2014 are projected significantly higher than 2013. Royalty distributions are allocated 50 percent to sound recording copyright owners (many times the label), 45 percent to featured artists, and 2.5 percent each to nonfeatured musicians and nonfeatured vocalists via the Intellectual Property Rights Distribution Fund administered by the American Federation of Musicians and SAG-AFTRA. An additional \$6 million was collected from foreign country collection societies that handle the performance right in sound recordings. As to this latter collection, it is limited based on the reciprocal right being administered in each country. As the U.S. sound recording performance right is a very limited one (noninteractive streaming primarily), it substantially reduces the amount of royalties coming into the United States for overseas sound recording performances.

Finally, in the case of rights owners wishing to directly license their works to noninteractive services and not rely on the statutory license or SoundExchange separately negotiated deals, SoundExchange does offer administration services to both labels as well as artists for those works.

Pre-1972 Sound Recordings

As previously mentioned, sound recordings fixed prior to February 15, 1972, are not subject to copyright, and any rights they do have depend solely on whatever rights are afforded to sound recording owners under state law.

In September 2014, in *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, the U.S. District Court for the Central District of California ruled in a motion for summary judgment that copyright ownership of a sound recording under the California statute includes the right to publicly perform the recording, and that Sirius XM’s streaming of the 1960s band the Turtles’ pre-1972 recordings without authorization and without paying royalties constituted copyright infringement.⁴⁰ In November 2014, the U.S. District Court for the Southern District of New York in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, ruled that Sirius XM had committed copyright infringement and engaged in unfair competition by publicly performing sound recordings owned by Flo & Eddie.⁴¹ These cases and their appeals as well as similar pending cases regarding the same or similar issues need to be watched, as they could have a very significant impact on future sound recording license fees and royalties to labels and artists.

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WHERE DO WE NOW STAND?

Of the two performance areas under discussion, musical composition rights and sound recording rights, the sound recording side seems much clearer than the composition side. The sound recording performance right, at least for now, is a very limited right (traditional radio, for example, is not included) and has a statutory scheme in place with rates set by either the CRB, by SoundExchange with users, or by direct negotiations between copyright owners and users. Over the past 10 years, this has been, percentage wise, by far the biggest growth area for sound recording copyright owners.

The musical composition performance right, on the other hand, has more questions and unresolved issues in the licensing process than ever before. Not only do you have unresolved rate court cases and issues affecting every aspect of the licensing of music in the “new media” world (not to mention the effect on traditional media licensing) but also the entrance into the field of new types of PRO models (music publishers, business entities, administration services, foreign territory rights management organizations, etc.). This could, depending on your point of view, significantly complicate the existing licensing structure for music users, achieve “willing buyer, willing seller” market rates for the creative community and their representatives, strengthen the arguments for licensing through the traditional PRO model, weaken the current traditional PRO structures, increase license fees and royalties in some areas with reductions in others, initiate an era of PRO selective administration services only, create new writer and music publisher royalty payment formulas, values, compensation plans, guarantee arrangements, royalty advance deals, bonus and “rewards for success” policies, and other financial incentive plans, among other possibilities and results.

In addition, the direct licensing of works by copyright owners, never a major factor in the past, has taken on new significance in not only the online “new media” world of music licensing but also traditional media music licensing practices. Finally, the DOJ review of the ASCAP and BMI consent decrees, in effect since 1941, could have a significant effect on the future of music performance licensing, assuming that any changes encompass more than just minor modifications.

The foreign marketplace, responsible for the collection of over \$1.5 billion in annual U.S. writer and publisher performance fees, represents an additional area of concern regarding the stability, continuation, and accuracy of “overseas” royalty payments. The issues in this area are more significant for songwriters and composers than music publishers, as many publishers collect their monies directly from foreign societies as members or via subpublishers. For successful songwriters, film and television composers, and writer estates, foreign royalties—for many, easily in excess of 50 percent of their short-term and long-term royalty income—have always flowed through the societies through reciprocal agreements, and any change in those relationships could have a major impact on the ability to license, track, audit, collect, and receive foreign country songwriter and composer royalties.

The best advice for the future—in all of your deals, negotiations, and contracts—“prepare for every contingency and possibility,” as they may very well come true.

Welcome to the “new world of performance licensing.”

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ENDNOTES

1. 17 U.S.C. § 106.
2. See *Meredith Corp. v. SESAC, LLC*, No. 1:09-cv-09177-PAE (S.D.N.Y.).
3. See Todd Brabec & Jeff Brabec, *Online Music Licensing: From PROs, AOL, and MobiTV to SoundExchange, AT&T, and the CRB*, ENT. & SPORTS LAW., Oct. 2011.
4. See *United States v. ASCAP*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).
5. *United States v. ASCAP*, 627 F.3d 64 (2d Cir. 2010).
6. *ASCAP v. United States*, 132 S. Ct. 366 (2011).
7. *In re Cellco P'ship*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009).
8. *United States v. ASCAP*, 599 F. Supp. 2d 415 (S.D.N.Y. 2009).
9. *United States v. ASCAP*, 616 F. Supp. 2d 447 (S.D.N.Y. 2009).
10. *In re MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010).
11. *ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012).
12. *Broad. Music, Inc. v. DMX, Inc.*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010).
13. *In re THP Capstar Acquisition Corp.*, 756 F. Supp. 2d 516 (S.D.N.Y. 2010).
14. *Broad. Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2d Cir. 2012).
15. *In re Pandora Media, Inc.*, Nos. 12 Civ. 8035, 41 Civ. 1395, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013).
16. *Broad. Music, Inc. v. Pandora Media, Inc.*, Nos. 13 Civ. 4037, 64 Civ. 3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).
17. *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317 (S.D.N.Y. 2014).
18. *Pandora Media, Inc. v. ASCAP*, No. 14-1158 (2d Cir. Aug. 4, 2014), ECF No. 143, available at http://www.ascap.com/~media/files/pdf/advocacy-legislation/pandora_media_v_ascap_ascap_opening_brief.pdf.
19. See *United States v. ASCAP*, 627 F.3d 64 (2d Cir. 2010).
20. *Antitrust Consent Decree Review*, U.S. DEP'T OF JUSTICE (June 2014), <http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html>.
21. Public Comments of the American Society of Composers, Authors and Publishers Regarding Review of the ASCAP and BMI Consent Decrees (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf>.
22. Public Comments of Broadcast Music, Inc. (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307859.pdf>.
23. Comments of the Society of Composer & Lyricists (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307971.pdf>.
24. Comments of Screen Actors Guild-American Federation of Television and Radio Artists (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307818.pdf>.
25. Sony/ATV Music Publishing LLC Comments Submitted to the Department of Justice in Connection with Its Review of the ASCAP and BMI Consent Decrees (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307983.pdf>.
26. Antitrust Division Review of American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) Consent Decrees (“Review”) (Aug. 5, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307652.pdf>.
27. Comments of Digital Media Association (“DiMA”) (2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307972.pdf>.
28. Comments of the Radio Music License Committee, Inc. and the Television Music License Committee, LLC (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307977.pdf>.
29. Comments of National Association of Broadcasters (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307974.pdf>.
30. Comments of Netflix, Inc. (Aug. 6, 2014), <http://www.justice.gov/atr/cases/ascapbmi/comments/307908.pdf>.
31. Pub. L. No. 104-39, 109 Stat. 336 (1995).
32. Pub. L. No. 105-304, 112 Stat. 2860 (1998).
33. See 17 U.S.C. §§ 112, 114.
34. Pub. L. No. 110-435, 122 Stat. 4974 (2008); Pub. L. No. 111-36, 123 Stat. 1926 (2009).

35. *In re* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, No. 2011-1 (C.R.B. Dec. 14, 2012), available at http://www.loc.gov/crb/comments/2012-12/Public_Initial_Determination.pdf.

36. See *In re* Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (*Webcasting IV*), No. 14-CRB-0001-WR (C.R.B. 2014).

37. 37 C.F.R. § 380.3.

38. Notification of Agreements under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796 (July 17, 2009).

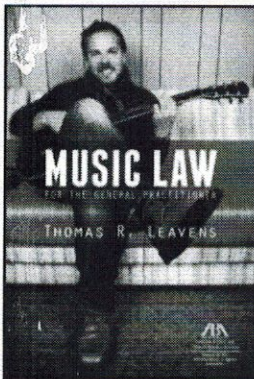
39. See Comments of SoundExchange, Inc. 3, 20 (May 23, 2014), http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/SoundExchange_Inc_MLS_2014.pdf.

40. Order Granting Plaintiff's Motion for Summary Judgment, *Flo & Eddie*, No. CV 13-5693 PSG (RZx), 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014).

41. Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, *Flo & Eddie*, No. 13 Civ. 5784(CM), 2014 WL 6670201 (S.D.N.Y. Nov. 14, 2014).

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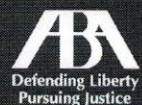
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