

Legal Snapshot – Issues for Audio Services

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Issues to Discuss

- ASCAP/BMI Consent Decrees – and the future of the performance right for the musical composition
- Update on SoundExchange Royalties
- Pre-1972 sound recordings
- Other music uses by broadcasters
- Other copyright issues including the use of photos
- Sponsorship ID
- Privacy issues and TCPA

Music Royalty Basics

- Two copyrights in all recorded music
 - Musical work or musical composition – words and music
 - Sound Recording or master recording – recording of a song by particular artist
- Lots of different rights in each work – most of our discussion is about the “public performance right”
 - But also rights to make reproductions and “derivative works”
- For the musical composition public performance, that’s what you pay to ASCAP, BMI and SESAC (the “PROs”)
- For sound recording public performance, it’s only digital payments so far –paid to SoundExchange
- For other rights – payments go elsewhere, many requiring direct licenses from copyright holders

Where is the Controversy?

- In the past, most of the big issues have been over sound recording issues
 - The “performance tax” on over-the-air radio
 - The cost of streaming fees
 - More recently, pre-1972 sound recordings
- Now, more and more issues over the musical composition
 - Song writers feel that they are not getting enough money compared to the sound recording copyright holders
 - Big publishers looking to withdraw their catalog from ASCAP and BMI
 - Pursuing relief in lots of forums
- Plus, Congress is doing an overall look at Copyright reform, and music is a big part

Consideration of Songwriter Concerns

- DOJ just finished looking at amending the antitrust consent decrees that govern ASCAP and BMI – what PROs wanted:
 - Did not want rate review by Court (arbitrator instead)
 - Wanted different rate setting standards
 - Want to be able to do more with music rights than just public performance
 - Want to allow publishers to partially withdraw their catalog
- Issues for broadcasters
 - Less experienced forum reviewing rates (and more expensive)
 - No more three-stop shopping to get rights to all songs
 - Don't know who owns what songs, so difficult to manage too many collection groups

What DOJ Did

- No changes to basics of the consent decrees
- Instead, DOJ required “100 percent licensing” of “joint works”
- Esoteric concept dealing with songs that have multiple composers – important where those composers are not part of the same PRO
- DOJ said that if a broadcaster or other user licenses part of the work – they get full rights to use it, and songwriters need to take care of paying their co-owners – really what music services thought that they had now
- But, on Friday, BMI rate court judge rejected DOJ interpretation
- More to come!

Other Composition Issues

- GMR – Global Music Rights – new PRO seeking to license music rights – have withdrawn these rights from ASCAP and BMI for composers including the Eagles, John Lennon, Pete Townsend, Pharrell Williams
 - Already seeking licenses from business music services – online audio next?
- Other big publishers considering withdrawals too
- Could result in a fracturing of music rights

SoundExchange Issues

- Appeal of 2015 CRB decision pending – SoundExchange and certain noncommercial webcasters appealing
 - Likely resolution - 2017
- No resolution on the table for small webcaster issues – so no percentage of revenue royalties now exist
- For broadcasters who stream, no performance complement waivers in place at the moment
 - During any 3-hour period:
 - No more than 3 sound recordings from one album
 - No more than 2 songs from any album can be played consecutively
 - No more than 4 sound recordings from the same artist or from any set or compilation

Sound Recording Issues

- Broadcast Performance Royalty still kicking around in Congress
- Pre-1972 sound recording royalty suits
 - Pre-1972 US sound recordings not covered by Federal law
 - Courts in NY and California have found state performance right in pre-1972 sound recordings, Florida court went the other way
 - Appeals being considered now – if a right is found, oldies stations might have to pay sound recording performance royalties for over-the-air broadcasts
 - But there are questions about whether digital versions of songs are really pre-1972 recordings

Other Music Uses

- Using music any on-demand service (*including podcasts*) or in video productions usually requires *direct licenses* from copyright holders
 - Most stations can't podcast their morning show because of difficulty in getting rights
 - No one-stop clearing house for podcast music rights
- User-generated content – do you let audience post music or music videos on your website?
 - Register with Copyright Office name of person to get take-down notices
 - If registered, and you follow rules like not encouraging infringement, having good terms of use, don't have actual knowledge of infringement, and take-down infringing content when asked – safe harbor from liability

Other Copyright Issues

- Big issue for many websites is unauthorized use of content found on the Internet
- Lots of legal action by photographers when website operator takes a picture found on the Internet and posts it on their own website without permission
 - Use clearinghouses for photos to get rights to use lots of stock photos to illustrate content on your site
- Generally – users don't give up copyrights just because they post material on the Internet
- If material is registered with the Copyright Office, damages can be as high as \$150,000 – usually lower unless infringement is willful or repeated, but can reach that high

Sponsorship ID

- FTC requires disclosure of sponsors of any online content
- Includes not only program material, but even social media posts
- Includes not just money, but getting anything of value – including free stuff for use in reviews
- Like FCC rules, but potentially stricter
- Big fines for violations, and long periods of government supervision

Privacy

- Comprehensive Federal privacy rules are coming one day, but now a hodgepodge of laws and policies both state and Federal
- Need to disclosure what you are doing with information that you are collecting
- Need to consider policies for using and disposing of information you gather – including upon sale of your business
- Need to be very careful with security for all data, especially financial information
- Watch out for collecting information about children
- Strict limits, big fines and potential civil actions for sending texts without very explicit permission under TCPA

Lots More We Could Talk About

- Trademark Issues and Branding – especially important for online companies given the ease of detection of trademark infringement
- Protection of Domain Names in world of expanding domain extensions
- Patent issues and the importance of indemnities in hardware and software contracts
- Employment issues
- International legal issues – including libel issues
- Lots of general business issues that affect any company

For More Information

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