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PERSPECTIVE

Music licensing regime is out of tune

By Michael R. Morris

On May 6, in *Pandora Media Inc. v. America Society of Composers, Authors and Publishers (ASCAP)*, the 2nd U.S. Circuit Court of Appeals affirmed the decision of a federal district court in New York. At issue were two separate rulings. The first granted Pandora's motion for summary judgment that the "consent decree" governing ASCAP's licensing activities precluded its publisher members from withdrawing certain public performance rights — here, mew media license rights — and entering into direct, more lucrative deals with music users like Pandora. The second ruling set the license rate Pandora will pay for the performance of songs in the ASCAP repertoire through December 2015 at 1.85 percent of revenue.

Interestingly, shortly after the 2nd Circuit's ruling, another district judge in New York ruled Pandora should pay 2.5 percent of its revenue in exchange for a "blanket license" issued by Broadcast Music Inc. (BMI). No doubt Pandora will appeal this as well.

The 2nd Circuit's decision is just the latest potentially game-changing development in the music royalty fee battle taking place today. Other developments include the Department of Justice's decision to review the decades-old consent decrees governing the largest performance rights organizations (PROs) in the country, as well as proposed legislation in Congress which would expand the types of evidence judges can consider in deciding fee disputes.

The Consent Decrees

ASCAP, founded in 1914, and BMI, founded in 1939, are the largest PROs in the U.S. They represent their songwriter and music publisher members by negotiating and administering licenses for the nondramatic public performance rights in works within their repertoires. They compile data on music usage, collect performance royalties from licensees, and distribute royalty payments among their members. Licensees of PROs include terrestrial radio stations, digitally transmitted radio stations (like Pandora), television stations and networks, digital music services, Internet sites as well as bars, restaurants and venues ranging from stadiums to clubs.

In 1941, the DOJ alleged that the PROs' control of music performance rights amounted to illegal restraints of trade under the Sherman Antitrust Act. The DOJ said the blanket licenses issued by the PROs constituted an anticompetitive concentration of power, and that such illegal restraints on trade resulted in license charges that were not competitive.

ASCAP entered into a settlement consent decree with the DOJ prohibiting ASCAP from getting exclusive grants of rights from its members and requiring ASCAP to charge "similarly situated" music users the same fees. An amendment to the ASCAP consent decree established a "rate court" — with jurisdiction under the federal district court in New York — to determine the fees if ASCAP and a potential licensee (like Pandora) cannot reach agreement. BMI entered into its own consent decree with the DOJ, which was later amended to include provisions similar to the ASCAP consent decree.

These consent decrees provide procedures for license requests and fee dispute resolution. If parties cannot agree on a fee, then either can commence a proceeding in the rate court. Either party also may ask the rate court to establish interim fees pending a resolution.

Despite technological and market changes within the music business, the consent decrees haven't changed since 2001 for ASCAP and 1994 for BMI. Last year, however, the DOJ decided to review the consent decrees and solicited public comments. Among other complaints, ASCAP noted that interim license fees frequently do not reflect actual value and encourage users to stay on interim terms while expensive rate court proceedings lumber along.

THE NEW YORK TIMES

Congress Steps In

Consumer habits have shifted with technology. Even permanent digital downloads of music, made ubiquitous when Apple introduced iTunes in 2003, continue to drop in favor of immediate music consumption by listeners who want to hear their music on-demand, without necessarily owning permanent copies.

Indeed, this week Apple announced its "Apple Music" streaming service to much fanfare. Combining 24-hour radio stations with on-demand capability and a social media feature linking artists and their fans, Apple is competing with both the Internet-based radio stations like Pandora and on-demand platforms like Spotify.

Meanwhile, in both Pandora cases in New York, the trial judges could not admit and be informed by current market rates for other uses of music — the Copyright Act prevents them from doing just that. However, the Songwriters Equity Act, recently reintroduced in Congress, would "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." The act would let the rate court consider the rates and terms for comparable uses and comparable circumstances under voluntary license agreements.

Since the consent decrees were implemented to restrict anticompetitive practices — real or imagined — it is ironic that the rate court can't consider other royalty rates in establishing digital performance rates and is actually limited by evidence of what constituted a fair market rate. Both BMI and ASCAP have argued that the current rate court procedure is costly and inefficient, and that an expedited arbitration procedure should be implemented.

Furthermore, restrictions on the ability of PROs to accept only complete and not partial grants of rights are outdated. Music publishers should be free to license "new media" rights directly to users like Pandora and Apple while permitting PROs to continue licensing more traditional uses. The current consent decrees simply did not contemplate the emergence of the Internet and the reasons music publishers eventually should not be faced with an all-or-nothing decision when granting rights to the PROs.

Takeaway

The Pandora decisions, coupled with the hamstringing effects of consent decrees from a bygone era, demonstrate why the music licensing system needs a complete overhaul. Songwriters, music publishers and the PROs deserve nothing less. The DOJ response to the comments on the consent decrees and the continued efforts to pass legislation like the Songwriter Equity Act will hopefully effect much needed reforms to the music industry.

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