



NEWSLETTER

An Entertainment Industry Organization

Pandora v. the Performing Rights Organizations: Major Changes in the World of Performing Rights?

by Steve Winogradsky

The President's Corner

Welcome, friends!

It is an annual CCC tradition to dedicate our September meeting to a legal update on issues impacting the world of copyright and intellectual property. This year in particular, we felt it was important to hold an additional mid-season legal update to discuss the current issues facing our industry and learn about the latest trends and developments.

I would like to take the opportunity to thank Steve Winogradsky, Esq. from Winogradsky/Sobel for all of his work in organizing tonight's panel.

In addition, I would like to thank our panelists Alison Smith, Stuart Rosen, Esq., and Clark Miller, Esq. for sharing their knowledge and insight into the challenges facing the music business. I look forward to what is sure to be a fascinating discussion.

I hope you all have a great time tonight.

See you soon!

Jeremy Blietz
President, California Copyright Conference

There have been two recent court decisions that could have a dramatic impact on how performing rights organizations ("PROs") in the United States represent music publishers and creators of music. As background, the right of public performance is one of the exclusive rights of copyright owners granted pursuant to the Copyright Act of 1976 (USC §1700). In the United States, there are three PROs: American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC. ASCAP and BMI, the two largest PROs, are non-profit organizations, while SESAC (by far the smallest of the three) is a privately owned, for-profit company. ASCAP and BMI are governed by consent decrees with the Department of Justice and are subject to rate court hearings on the procedures and policies, while SESAC is not. Despite that difference, their goals are the same: to license the public performance rights of their respective repertoires on behalf of their writer and publisher affiliates and members to venues and broadcasters using music (including Internet sites like Pandora), collect royalties from their licensees, and to distribute the royalties based upon their individually unique methodologies and business models. Public performance income represents approximately 45% of the total income earned by publishers and writers.

Pandora is an Internet radio station that streams music, either for free to the user with advertisements or by paid subscription without ads. Pandora has been paying approximately 4.3% of its income to the PROs for public performance royalties. Pandora has been very aggressive in its belief that the royalties paid by its service are already too high and has brought actions to try to lower the previously set rates. Recently, some of the major music publishers have sought to withdraw certain digital rights from the PROs in order to strike better deals for license fees with digital providers than have been negotiated by the PROs or ordered by the consent decrees. In doing so, those publishers would negotiate directly with the digital services for the licensing of their respective repertoires and for a (presumably

higher) royalty to be paid. Sony/ATV Music had previously withdrawn some of their digital rights from ASCAP and negotiated a rate of 5% directly with Pandora, about a 20% increase from the 4.3% collectively paid to ASCAP, BMI and SESAC.

Pandora and ASCAP had previously entered into a blanket license agreement that extended until December 31, 2015 that covered all music in the ASCAP repertoire. In September of 2013, in a ruling in the US District Court in the Southern District of New York, the Court held that the publishers could not selectively withdraw certain rights from ASCAP while there was a current license in effect with Pandora and that the entire ASCAP repertoire continued to be covered under the blanket license until the license terminated in December of 2015, thereby thwarting the attempts of the publishers in question to negotiate their own deals for the songs covered under the ASCAP license. (*In Re Petition of Pandora Media, Inc., Related to United States of America v. American Society of Composers, Authors and Publishers*, 1:12-cv-08035) Consequently, direct deals negotiated with Pandora for rates that are well above the 4.3% rate that Pandora paid to music publishers for licensing their songs last year are no longer valid, which means that publishers will lose millions of dollars in revenues, if the rate court doesn't set rates as high as the direct deals.

Further complicating the issue, in December of 2013, a different judge in the same District Court held that, since Pandora only had an interim license (not a current negotiated license) with BMI, publishers had the right to withdraw their catalogs from Pandora if they wished to do so. (*Broadcast Music Inc. v. Pandora Media Inc.*, 1:13-cv-04037) **However**, this Court ruled that publishers who wished to withdraw certain rights from BMI had to withdraw ALL of their rights by December 31, 2013, including BMI's right to license for television and radio on their behalf. This leaves these publishers in the position of having to negotiate separate deals with TV and radio stations all across the country, as well as all other users of music that would fall under a performing rights license, like concert halls, night clubs, Internet sites and many others, once any current BMI blanket licenses expire. The big question is what happens to the music publishing industry in general and BMI in particular if the three publishers with nearly 48% in market share --Universal Music Publishing Group, Sony/ATV and its EMI Music Publishing administered catalog-- completely withdraw from BMI, as sources say they are now making preparations to do as a result of the ruling.

Any music user without a current license in effect as of January 1, 2014 is potentially infringing the songs of any of the BMI publishers who withdraw. But how are these users to know which songs are being withdrawn and which are still covered by BMI? And will Pandora be forced to take songs off their service because of potential copyright infringement liability?

In Rate Court with ASCAP, Pandora had argued that they should be paying the same 1.7% that terrestrial radio was paying, while ASCAP maintained that the rate should be gradually increased to 3%. Since the time of the ASCAP ruling, the rate court determined that the current rate of 1.85% was extended until the end of 2015. It is expected that BMI, who is also in a Rate Court proceeding with Pandora, will be paid at the same rate.

Given that digital royalties are, at this time, a small percentage of the overall royalties collected by the PROs, it might not make sense for the publishers to withdraw from the PROs at this time and lose the negotiating strength that the PROs offer in other, more lucrative markets like television and radio. Digital royalties are by far the smallest channel in terms of revenue, paying ASCAP only \$25 million of the \$601 million collected domestically in 2012. In contrast, general licensing to stores, bars and clubs brought in \$82 million, while performances from TV, cable and radio, respectively, brought in \$104 million, \$204 million and \$177 million, according to ASCAP's annual report. (BMI and SESAC do not release information about their income breakdowns.) However, as the digital royalty pool grows in the future, it might be a situation that could be re-evaluated by the publishers at a later date and completely change the landscape of public performance royalties and the importance and negotiating clout of the PROs.

Steve Winogradsky is a partner of Winogradsky/Sobel in Studio City. He is the author of "Music Publishing: the Complete Guide".

PANELIST BIOS

CLARK MILLER

Warner/Chappell Music (WCM), the music publishing arm of Warner Music Group, announced the appointment of Clark Miller as Executive Vice President, North America, Operations. Based at the company's Los Angeles headquarters, Miller reports to WCM Chairman and CEO Cameron Strang and will work closely with Jon Platt, WCM President, North America.

Clark Miller most recently served as Executive Vice President of International Business Affairs and Global Opportunities for Sony/ATV Music Publishing, a post he had held since Sony/ATV acquired EMI Music Publishing in 2012. He previously spent 19 years with EMI Music Publishing, where he was named General Counsel and Executive Vice President in 2005. Miller began his career practicing law with Cassels Brock in Toronto before joining Peter Steinmetz & Associates as an entertainment and communications law specialist. He later established his own practice, Clark Miller & Associates, with a focus on entertainment law.

An accomplished guitarist, Miller holds a Bachelor's degree from the University of Toronto and earned his law degree from the University of Toronto Law School.

STUART ROSEN

As Senior Vice President & General Counsel, Stuart Rosen reports directly to BMI President & CEO Del Bryant, and oversees global operations of the BMI Legal department, directing the organization's legal affairs as well as all attorneys working within the company. He also supervises the company's legislative and regulatory activities.

Rosen joined BMI in 1996 as an Associate Attorney, and was promoted to Senior Attorney in 1999, to Assistant Vice President, Legal Affairs in 2002, to Vice President, Legal in September 2007 and to his current position in August 2011. From 2004 through 2011, he also served as the company's Corporate Secretary. Prior to joining BMI, he was in private practice.

Rosen received his undergraduate degree from Brooklyn College in 1981, and his Juris Doctorate from the University of Pennsylvania Law School in 1984.

ALISON SMITH

Alison Smith is Senior Vice President of Performing Rights at Broadcast Music, Inc. (BMI). In this role, Ms. Smith oversees the royalty distribution system, both foreign and domestic for BMI affiliates. Moreover, she has the additional responsibility of managing the Writer/Publisher Administration and Research Departments.

A Tennessee native, Ms. Smith joined BMI's Writer/Publisher Relations Department in BMI's Nashville office in 1985. She re-located to New York in 1987. It was in 1994 that she was named Assistant Vice President of Performing Rights and then subsequently named Vice President in 1996. Soon after, in 2003, she was named Senior Vice President. During her tenure at BMI, Ms. Smith has piloted the development of online digital tools to benefit BMI affiliates and music customers.

Considered an expert on performing rights administration, she has become an established thought leader and frequent guest speaker. Some of the groups Ms. Smith has spoken for include, the Society of Composers & Lyricists, the Association of Independent Music Publishers (New York and Los Angeles), the California Copyright Conference, the Church Music Publishers Association, the Production Music Association, and a number of performing rights organizations around the world.

In addition to the many accolades from industry peers, she was honored two years in a row in Billboard's Women in Music as a Top 30 Power Player.

Ms. Smith holds a Bachelor of Business Administration from Belmont University's School of Music Business.

STEVE WINOGRADSKY

With over thirty years experience as an attorney in the music industry, Steven Winogradsky is a partner in Winogradsky/Sobel in Studio City, California, providing global media and music business affairs & legal support for composers, songwriters, music publishers, recording artists and television, film, video and multi-media producers. In addition to an entertainment law practice, the company handles music clearance and licensing in all media for many production companies, worldwide administration of the publishing catalogs for a number of clients and New Media strategies and Revenue Modeling.

Prior to being in solo practice with The Winogradsky Company from 1992 to 2009, Mr. Winogradsky had served as Director of Music Business Affairs for Hanna-Barbera Productions, Inc., Managing Director of Music, Legal & Business Affairs for MCA Home Entertainment, Director of Music Licensing and Administration for Universal Pictures and Universal Television and Vice President of Business Affairs for The Clearing House, Ltd.

He was twice elected President of the California Copyright Conference, after spending nine years on the Board of Directors, and also served for four years as President of The Association of Independent Music Publishers.

Mr. Winogradsky is the author of the book “Music Publishing: The Complete Guide” published in 2013. He was also awarded the 2012 Texas Star Award by the Texas State Bar Entertainment and Sports Law section for his contributions to legal education in the State of Texas.

Mr. Winogradsky is an adjunct professor at California State University, Northridge (CSUN) in the Masters degree program in Music Industry Administration and was also named as one of the Outstanding Instructors in Entertainment Studies and Performing Arts at UCLA Extension, where he has taught since 1997.

He has written numerous magazine articles on the subject of music for motion pictures and television and has lectured on a variety of music-related topics at MIDEM, University of Houston Law Foundation (1993, 1994, 1997), Texas State Bar Entertainment Law Seminar (1994 - 2013), American Bar Association Entertainment & Sports Law Conference, University of Southern California Entertainment Law Institute, *The Hollywood Reporter* Film and Television Music Conference (1997-2000), *Billboard* Film and Television Music Conference, NARAS, The Society of Composers and Lyricists, Loyola Law School, Southwestern School of Law, California Lawyers For The Arts, The American Film Institute, LMNOP (New Orleans), The Toronto Film Festival, Canadian Music Week, Musicians’ Institute, McNally Smith College of Music, California State University, Northridge (CSUN), NARIP, The Copyright Society of the U.S.A., Scion Music(less) Conference and various other symposia.

In addition, he is a guitarist, singer and songwriter who is both a composer and publisher member of ASCAP.