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NEWSLETTER

An Entertainment Industry Organization

CALIFORNIA COPYRIGHT CONFERENCE

Pandora's Recent Royalty Rate Court Fights and Why the Music Licensing System Needs Overhauling

By Michael R. Morris

The President's Corner

Welcome to the 2015-2016 season of the California Copyright Conference. As technology continues to change the face of our business, we are in for possibly some of the biggest changes we have seen in a very long time. I'm pleased to have such a talented group of panelists tonight to present the latest copyright and legislative issues we are facing today. I want to thank Dina LaPolt, Jay Cooper, Stuart Rosen and our moderator, CCC Secretary, J. Charley Londoño for putting this together and sharing their knowledge of these often complicated topics. We will be providing updates on these and other relevant topics throughout the year at our dinners, via our website, social media and emails. Please follow us on Twitter, Facebook and LinkedIn as well as join our mailing list for the latest on these topics as well as other CCC announcements.

I want to give a big shout out and thank you to Anne Cecere our outgoing president for an amazing 2014-2015 season and for making the video recording and archiving of our panels a reality. Thank you for your passion and support of the CCC.

If you have not already renewed your CCC membership please do so today. Your support allows us to continue our educational efforts, networking opportunities and help to support our scholarship fund. We have some new membership options available so please check them out on our website, www.theccc.org/membership. Members also have access to our video archives as well as partner discounts and promotions.
Please join us next month for our panel, moderated by CCC board member and attorney Garrett Johnson. The focus will be on producers and the many other things they have been doing in today's market other than just making records. We have some exciting panelists planned who have been doing some pretty cool things so stay tuned for details and hope to see you there!

Diane Snyder-Ramirez
President, California Copyright Conference

Pandora Rate Court Decisions

On May 6, 2015, in Pandora Media, Inc. ("Pandora") vs. America Society of Composers, Authors and Publishers ("ASCAP"), the United States Court of Appeals for the Second Circuit affirmed the decision of Judge Denise L. Cote of the United States District Court in New York ("USDNY"). This case has farreaching repercussions for the U.S. music industry. At issue were two separate decisions of Judge Cote. The first granted Pandora's motion for summary judgment that the "consent decree" (discussed below) governing ASCAP's licensing activities precluded its publisher members from selectively withdrawing certain public performance rights – here new media license rights – and entering into direct, more lucrative deals with music users, which was what EMI Music Publishing, Sony/ATV Music Publishing, LLC and Universal Music Publishing, Inc. ("UMP") had previously done by withdrawing such rights from ASCAP and licensing them directly to Pandora.

Judge Cote's second decision, issued after a bench trial, set the license rate Pandora will pay for the performance of songs in the ASCAP repertoire for the period of January 1, 2011 through December 3, 2015 at 1.85% of revenue. Pandora had sought a rate of 1.75%, while ASCAP requested an escalating rate of 1.85% for 2011-2012, 2.5% for 2013 and 3.00% for 2014, 2015. The Second Circuit upheld the 1.85% flat rate. Interestingly enough, scarcely a week after the Second Circuit issued its ruling, in a heated court

battle between Pandora and Broadcast Music, Inc. ("BMI"), Judge Louis Stanton (also of the USDNY), ruled that Pandora should pay 2.5% of its revenue in exchange for a "blanket" license issued by BMI for the performance rights to songs within its repertoire. Although materially higher than the 1.75% rate Pandora had been paying BMI, it was significantly lower than the 3.825% rate reportedly sought by BMI (Pandora had made a 3.85% offer to UMP before Judge Stanton's ruling). Like Judge Cote's ruling in the ASCAP case, Judge Stanton had previously ruled in mid-December of 2014 that publishers could not selectively carve out digital performance rights from the BMI blanket license. No doubt, Pandora will appeal Judge Stanton's 2.5% rate to the Second Circuit, which ruled in favor of Judge Cote's 1.85% determination.

Against the backdrop of these rulings are some other potentially game-changing developments affecting music licensing, including the opening for review of the "consent decrees" governing the operations of ASCAP and BMI, and the introduction of legislation known as the Songwriter Equity Act in the 114th Congress which, if enacted, would amend Section 114(i) and Section 115 of the US Copyright Act by letting Copyright Royalty Judges consider rates and terms of voluntary licenses and requiring Copyright Royalty Judges to base their decisions on marketplace, economic and use information presented by participants in a rate dispute. Under current law, Judge Cote and Judge Stanton were precluded from considering such evidence.

To fully appreciate the significance of these music performance royalty battles, a brief historical and legal perspective is required, including the origin of performance rights organizations ("PROs") like ASCAP and BMI and the entry of the "consent decrees" with the Department of Justice governing these PROs.

History of PROs and the Consent Decrees

ASCAP, founded in 1914, and BMI, founded in 1939, are the largest PROs in the United States. PROs like ASCAP, BMI and SESAC represent their respective 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 such 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 Department of Justice ("DOJ") alleged that the control of music performance rights in the hands of ASCAP and BMI amounted to illegal restraints of trade under the Sherman Antitrust Act (15 U.S.C. §§1 and 2), suing both PROs. The gist of these cases was that the "blanket licenses" issued by ASCAP and BMI for their repertoires constituted an anticompetitive concentration of power in the hands of these PROs, 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 license fees to music users "similarly situated." Significantly, the 1950 amendment to the ASCAP consent decree established a "Rate Court" (with jurisdiction under the USDNY) to determine ASCAP's fees if ASCAP and a potential licensee (like Pandora) could not reach their own performance royalty rate agreement. BMI entered into its own consent decree in 1941 with the DOJ, which initially did not include the compulsory licensing or rate price limitations of the ASCAP consent decree (as amended in 1950). However, the compulsory license provisions and the Rate Court mechanism were subsequently added to the BMI consent decree. Although vast technological and market changes within the music business have and continue to occur, the consent decrees haven't changed since 2001 for ASCAP and 1994 for BMI.

These consent decrees provide specific procedures for license requests and fee dispute resolution. For example, ASCAP has 60 days following a music user's written license request to propose a fee or request additional information. Should the parties remain unable to negotiate a fee, then either party can commence a proceeding in the Rate Court. Also, either party may ask the Rate Court to establish interim fees pending agreement or final judicial resolution. The role of the Rate Court and the continuing viability of the consent decrees themselves in the rapidly changing music world are now subjects of increasingly heated debate and proposed legislation.

Last year, the Department of Justice solicited public comments in conjunction with its review of the BMI and ASCAP consent decrees, and many parties, including BMI and ASCAP, submitted them. Regarding the Rate Court, ASCAP noted that prior to the last amendment of its consent decree in 2001, the Rate Court had typically been used to spur negotiations and settlement of rate disputes. However, over the past 30 years, ASCAP has engaged in over 30 such proceedings (14 since 2005), allegedly costing ASCAP tens of millions of dollars in litigation costs. ASCAP further noted that a user requesting a license from ASCAP is immediately entitled to perform all works in the ASCAP repertory, but until final fees are set by negotiation or the Rate Court, an "interim" license and fee, either set by agreement or the Rate Court, serves as a placeholder. ASCAP contends that such "interim" licenses frequently do not reflect actual value and encourage users to stay on interim terms while timeconsuming and expensive Rate Court proceedings lumber along.

These concerns about the relevance of the consent decrees, the continuing role of the Rate Court, and the limitations on the rights of PROs like BMI and ASCAP to license only performance rights in a digital world where the rise of the internet has accelerated the need for users to efficiently license both performance and other rights (discussed below) all underscore the need for changes to both consent decrees dating back to the analog era and how music rights get licensed in general.

Changes On the Horizon for US Music Licensing?

The explosive growth of "new media" music services offering music over the internet and wireless networks presents many challenges and opportunities for the music industry. With options including digital radio companies like Pandora and Sirius XM, interactive companies such as Spotify, and video services like YouTube, the public is consuming music more voraciously than ever. But consumer habits have shifted significantly, and even permanent digital downloads of music, made ubiquitous when Apple introduced its iTunes store 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. And not surprisingly, on June 8, 2015, Apple announced with much fanfare its own internet "Apple Music" streaming service for unlimited music at a cost of $10 per month. Combining both 24hour radio stations with ondemand capability and a social media feature linking artists and their fans, Apple is competing with both the internet-based radio stations like Pandora and ondemand platforms like Spotify.

As the music business struggles to adapt to marketplace changes, seismic shifts in consumer preferences away from ownership models is generating intense competition among Apple, Pandora, SiriusXM, and other digital purveyors of music. So it is hardly surprising that the DOJ revisited the decades-old ASCAP and BMI consent decrees and their effects upon these PROs, their licensees and the music business. Meanwhile, in both Pandora decisions, the trial judges could not admit and be informed by current market rates for other uses of music, and in fact sections 114(i) and 115 of the US Copyright Act prevented them from doing just that. The Songwriters Equity Act, reintroduced in March of this year in the 114th 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." In establishing such rates, this bill 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 anti-competitive practices of BMI and ASCAP – real or imagined – it is ironic that the Rate Court can't currently consider other royalty rates in establishing digital performance rates, and in fact, is limited by evidence of what constituted a fair market rate. And somewhat anomalously, Judge Cote determined a rate of 1.857% for Pandora in its ASCAP case, which was almost 42% less than the 2.5% rate set by Judge Stanton in his BMI decision!

Both BMI and ASCAP have argued in their submissions to the DOJ that the current Rate Court procedure is costly and inefficient, and that an expedited arbitration procedure should be implemented. This author agrees with such streamlining.

In addition, the current consent decree restrictions on the ability of BMI and ASCAP to accept only complete and not partial grants of rights is an outdated restriction from a bygone age. Music publishers should be free to license "new media" rights directly to users such as Pandora and Apple while permitting PROs to continue licensing more traditional uses (such as television, terrestrial radio stations, restaurants and bars). When formulated (and even when amended), the consent decrees couldn't anticipate the emergence of "new media" music services and the reasons why music publishers eventually should not be faced with an "all-in" or "all-out" choice when granting rights to the PROs. In today's world, the antitrust concerns of the consent decrees are simply inapposite to the partial withdrawal of such rights, which arguably would promote more competition.

Finally, and beyond the scope of an extended analysis in this article, is the issue of whether a PRO like ASCAP should be permitted to license multiple rights in musical compositions, and not be limited to licensing only performance rights. ASCAP's consent decree explicitly prohibits this and, as a matter of practice, PROs like BMI presently license only performing rights. But digital services that stream music "on demand" need both a performance license and what is known as a "mechanical license" under Section 115 of the U.S. Copyright Act to reproduce the work as part of the streaming process. Mechanical licenses were traditionally issued by a music publisher or its agent, like the Harry Fox Agency, to a record label for the right to sell records embodying the recorded songs, but technology has expanded when a mechanical license is required. A good case can now be made for the PROs to administer such licenses, particularly when coupled with a performance license.

And ASCAP argues convincingly in its comments to the DOJ that permitting ASCAP to issue multiple licenses, including synchronization for use of songs in movies and television, as well as mechanical licenses and licenses for print works, would offer end users of music a simplified "one-stop" approach to music licensing, which is offered by many foreign PROs (including GEMA, the German PRO, which licenses synchronization, mechanical and public performance rights). Although other domestic PROs, like BMI and SESAC, are not specifically barred from issuing multiple license, BMI too argues that it should be explicitly permitted to license other rights, given the industry-wide demand for such "bundling," and the efficiencies that would accompany it. Significantly, the Commerce Department Internet Policy Task Force noted in its 2013 report on digital copyright policy that "antitrust law constrains the PROs from licensing the mechanical rights for works in their repertoire." This report then emphasized that bundling of reproduction and performance rights to permit "one-stop" shopping was desirable, stating: "collective licensing, implemented in a manner that respects competition, can spur rather than impede the development of new business models for the enjoyment of music online."

The recent Pandora decisions coupled with the hamstringing effects upon BMI and ASCAP of consent decrees from another era are compelling reasons why an outdated 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.

Michael R. Morris, managing partner of Valensi Rose PLC, has blended his tax law expertise with his passion for music and entertainment, resulting in a unique practice. He is a former IRS trial lawyer and a Certified Specialist in Taxation Law, as well as a past-president of the California Copyright Conference. He can be reached at mrm@vrmlaw.com.

PANELIST BIOS

JAY COOPER, ESQ. - SHAREHOLDER; FOUNDER, LA ENTERTAINMENT PRACTICE, GREENBERG TRAURIG, LLP

Jay L. Cooper focuses his practice on music industry, motion picture, television, Internet, multimedia and intellectual property issues. He represents individuals and companies on intellectual property matters including recording and publishing agreements for individual artists and composers; actor, director, producer and writer agreements in film and television; executive employment agreements; complex acquisitions and sales of entertainment catalogs; production agreements on behalf of music, television and motion picture companies, and all entertainment issues relative to the Internet.

Jay has guest lectured at Harvard Law School, UCLA Law School, USC Law School, USC Music School, Stanford Law School, Boalt Hall, Tulane Law School, the Florida Bar Association, the Texas Bar Association, the Practicing Law Institute, the California Copyright Conference, MIDEM, the American Film Market, the Cannes Film Festival, the American Intellectual Property Law Association, the U.S. Copyright Society, and the American Bar Association. He is also a former adjunct professor of Entertainment Law at Loyola Law School.

DINA LA POLT, ESQ. - OWNER, LAPOLT LAW P.C.

Dina's law firm specializes in representing creators, including recording artists, songwriters, producers, musicians, authors, writers, photographers, actors, and others. Dina is an expert at strategizing and solving complex and sophisticated legal and business issues relating to contracts, copyrights, trademarks, rights of publicity, and litigation.

In addition to practicing law, Dina serves as an activist for creators and celebrities in the areas of privacy, copyright, and fairness in radio, often becoming involved in legislative matters that affect the rights of her clients and advocating on their behalf. She is an attorney advisor to the GRAMMY Creators Alliance, a group formed to present a unified voice for music creators on legislative issues.

Last year, as part of the ongoing review of federal copyright law in Washington, D.C., she submitted a highly publicized comment paper to the U.S. Department of Commerce Internet Policy Task Force in opposition to suggestions that music creators should lose their right of approval over remixes, mash-ups, and samples by the implementation of a compulsory license.

This year, Dina was named to both the Hollywood Reporter's *Power Lawyers 2015 Top Music Business Attorneys* and Billboard's *Music's Most Powerful Attorneys*. She teaches a course entitled "Legal and Practical Aspects of the Music Business" at the UCLA Extension Program, and has since 2001, and served as the editor of *Building Your Artist's Brand as a Business*, published by the International Association of Entertainment Lawyers in 2012.

J. CHARLEY LONDOÑO, ESQ. - LAW OFFICE OF CHARLEY LONDOÑO, AND SECRETARY OF THE CCC

Prior to practicing law, Charley was a music industry executive, having worked in the radio promotion departments of major label record companies (Arista, A&M, IRS, and MCA). He primarily practices in the areas of music, film, television, and new media. Charley counsels both companies and individuals regarding entertainment transactional issues. His practice concentrates in the protection, clearance, licensing and distribution of intellectual property rights for music, film, television, and varied digital platforms. Charley is a member of The State Bar of California and The Florida Bar.

STUART ROSEN, ESQ. - SENIOR VICE PRESIDENT, GENERAL COUNSEL OF BROADCAST MUSIC, INC. (BMI)

Stuart Rosen is the Senior Vice President and General Counsel of BMI, overseeing global operations of the Legal Department, directing the organization's legal affairs, as well as all attorneys working within the company.

Rosen joined BMI in 1996 as an Associate Attorney. He was promoted to Senior Attorney in 1999, Assistant Vice President of Legal Affairs in 2002, and Vice President of Legal in 2007. From 2004 through 2011, he also served the Board of Directors and the company in the capacity of corporate secretary.

Prior to BMI, Rosen was in private practice at Sills Cummis Epstein & Gross and Thelen Reid Brown Raysman & Steiner LLP. He earned his Juris Doctorate from the University of Pennsylvania Law School.

SAVE THE DATE - **Next Month: Producer Panel**

Tuesday October 13th at the Sportsmen's Lodge Event Center

12833 Ventura Blvd, Studio City, CA 91604

6:15 PM Check-In ● 6:30 PM Cocktails ● 7:00 PM Dinner

Please check our website and your inbox for more information soon!