CMCNY

Council of Music Creators of New York

Issues of Importance: The History of Pandora

The advent of digital music distribution has brought internet entrepreneurs face-to-face with an arcane (some would say Byzantine) system of licensing music that involves multiple rights, multiple rights owners, and a handful of organizations that purport to license some - but not all - of those rights on behalf of their "members" - all of whom, however, can also license those rights directly. In other words, it's a mess.

Therefore, it's certainly understandable that internet music innovators, anxious to launch their businesses, are less-than-happy with this situation. Songwriters, composers, artists, record companies, and music publishers have all grown up with this system, so it makes sense to us, just as the Chinese alphabet makes sense to billions of people, but is utterly incomprehensible to everyone else.

A few years ago, the Copyright Royalty Board (CRB), a group of three federal judges, which sets rates for performances of sound recordings under the Digital Millennium Copyright Act (DMCA), set a rate of $0.00102 cents per song streamed by companies like Pandora.[1] In 2012, this amounted to about 46% of Pandora's income. The money was paid to SoundExchange, which distributes money to record companies, featured artists, and, to a certain extent, musicians who play on their records.[2]

During that same year, Pandora paid only about 4% of its income to PROs representing songwriters, composers, and music publishers. Why such a low rate? Historically, terrestrial broadcasters had licenses with the Performing Rights Organizations (PROs)[3] that were based on percentage of income. Over the years, that rate fluctuated between 3 and 5% of income, with various types of offsets and carve-outs, adjusted for market share. As the digital music market developed, the PROs struggled to find licensing models that worked. Digital providers argued they were just like traditional broadcasters; the PROs rejected that argument and asked for a higher rate.

CMCNY believes that the PROs are right: Pandora is unlike any radio station that ever existed. It's interactive: consumers can determine pretty much what they want to hear. It's very intensive: Pandora and other digital providers perform a much higher rate of music than broadcasters. Their only product is music. No news, no information, no weather reports. Just music. So we believe that Pandora should pay more for the use of our work, the sole product/service they offer. How *much* more is the question.

---

[1] Originally, the CRB set a higher rate, but legislation was introduced to reduce it.

[2] The DMCA created a new right of public performance for recordings, as opposed to performances of songs, but so far only digital providers have had to pay it.

[3] There are currently three American PROs: the American Society of Composers, Authors & Publishers (ASCAP), owned by its constituent songwriters and publishers; Broadcast Music, Inc. (BMI), owned by broadcasters; and SESAC, is a privately held company. Every other country that recognizes performing rights has only one organization, which is usually state-run.

Last fall, Pandora and ASCAP entered into an interim license agreement **designed to cover** Pandora's use of the ASCAP repertoire while the two sides worked out an agreement about the **future** fee for the license. **However, w**hen the two sides couldn't agree on a license fee, Pandora went to court to see if the judge would grant them a lower rate than what ASCAP was asking. That case is pending and the trial will begin in November. Meanwhile, the interim rate Pandora is paying to all PROs combined is a very low (approximately) 4%.

Earlier this year, several publishers, including all of the largest, withdrew their "digital rights" (the right to license music to digital users, **including** Pandora) from ASCAP, and entered into direct licensing negotiations with Pandora. Then suddenly, a few weeks ago, **perhaps hoping or sensing that the court may grant its request for a lower rate,** Pandora went to court **to ask** the judge for a Summary Judgment invalidating those publisher withdrawals, arguing their interim license with ASCAP was a "license in effect" and that the withdrawals of publishers that took place after the interim license went into effect should not affect them. **In late September, t**he judge agreed, ruling that publishers are either ASCAP members for ***all*** types of uses, or they're not. No publisher may make a partial withdrawal of digital rights, ever. The upshot? Publishers are able to license directly to Pandora, but only if they withdraw ***all*** of their rights (i.e. terrestrial radio and TV, cable TV, etc.) from ASCAP.

A few weeks ago, Pandora went to court asking the judge for a Summary Judgment denying ASCAP publisher members the right to withdraw their digital rights from ASCAP ***after*** Pandora had entered into an interim license agreement with the PRO. Pandora argued their interim license was a "license in effect" and that the withdrawals of publishers that took place after the interim license went into effect should be deemed invalid. The judge agreed, ruling that publishers are either ASCAP members for ***all*** types of uses, or they're not. No publisher may make a partial withdrawal of digital rights, ever. The upshot? Publishers are able to license directly to Pandora, but only if they withdraw ***all*** of their rights (i.e. terrestrial radio and TV, cable TV, etc.) from ASCAP.

A few weeks ago, Pandora went to court asking the judge for a Summary Judgment denying ASCAP publisher members the right to withdraw their digital rights from ASCAP ***after*** Pandora had entered into an interim license agreement with the PRO. Pandora argued their interim license was a "license in effect" and that the withdrawals of publishers that took place after the interim license went into effect should be deemed invalid. The judge agreed, ruling that publishers are either ASCAP members for ***all*** types of uses, or they're not. No publisher may make a partial withdrawal of digital rights, ever. The upshot? Publishers are able to license directly to Pandora, but only if they withdraw ***all*** of their rights (i.e. terrestrial radio and TV, cable TV, etc.) from ASCAP.

The trial to determine a final rate for Pandora goes on, and eventually the judge will set one for Pandora, and effectively for all digital providers. What will happen after that is anyone's guess. Meanwhile, songwriters — those whose work makes Pandora's business possible — continue to be grossly under-compensated.