Broadcast LAW BLOG

PUBLISHED BY
Davis Wright Tremaine LLP

Another Royalty Payment for Webcasters? EMI Withdraws From ASCAP For New Media Licensing

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May 08, 2011

Just as webcasters thought that they had their royalty obligations figured out, there comes news that the already complicated world of **digital media royalties** may well become more complicated. Last week, EMI, which in addition to being a record label is a significant music publishing company, has reportedly decided to withdraw portions of its publishing catalog from ASCAP - which had been licensing the public performance of these songs. The withdrawal from ASCAP applies only to "New Media" licensing. What is the impact? As of today, webcasters pay ASCAP, BMI and SESAC for the rights to play virtually the entire universe of "**musical compositions**" or "**musical works**" (the words and musics of the song). By withdrawing from ASCAP, EMI will now license its musical compositions itself, adding one more place that webcasters will need to go to get all the rights necessary to play music on an Internet radio type of service. In addition to royalties paid for the musical composition, webcasters also pay SoundExchange for public performance rights to the **sound recordings** (the song as recorded by a particular singer or band) - and by paying this one organization, they get rights to perform all sound recordings legally released in the US. But any Internet radio operation needs both the musical composition (except for those compositions that have fallen into the public domain) and the sound recording performance rights cleared before they can legally play the music.

The news reports quote EMI as talking about the efficiencies that will be created by its licensing the musical compositions directly - in conjunction with the licensing of other rights - like the rights to make reproductions of its compositions, or the rights to publicly perform sound recordings to which its record label holds the copyright. But the whole idea of a performing rights organization with collective licensing is that it provides to digital music services the efficiencies offered by a one-stop shop for the purchase of rights to all a very large set of musical compositions. Up to now, a digital music service knew that, by entering into licensing agreements with ASCAP, BMI and SESAC (the "**performing rights organizations, or "PROs**"), it had rights to virtually all the musical compositions that it would normally use (i.e. they received a "blanket license"). If these rights are balkanized, so that each significant publisher licenses their own music, the webcaster will have to make multiple stops to license all the music they need - which always leads to confusion. The more places they have to go to license music, the more

possibility that they will overlook a necessary rightsholder. But there is even a bigger potential issue for webcasters - price.

ASCAP and BMI, which are the largest of the performing rights organizations - together controlling an estimated 85 or 90 per cent of the musical compositions - are subject to antitrust consent decrees. They can't discriminate between music rights holders, and must offer the same licenses to similarly situated services, i.e. they must charge all webcasters according to set formulas - they can't cut deals with individual webcasters and offer them better deals, unless such deals are open to all that have similar qualifications. Moreover, the rates that they charge are subject to government oversight by a "rate court" - a Federal District Court judge who can hold a trial to determine the reasonableness of any proposed rate. This oversight is required by the antitrust consent decrees that govern both ASCAP and BMI.

As we have written before, SESAC, the smallest of the current PROs, is not subject to rate court review for its rates, nor is it restricted from "cutting deals" on the rates that it charges. It is a private company, not subject to any antitrust consent decree. Some music users have, from time to time, suggested that SESAC be brought under such decrees - including a group of TV stations that filed a lawsuit a year ago seeking to impose antitrust scrutiny on SESAC. As SESAC is often able to require royalties from users that seem higher than those that would be due to it if it was paid on a strictly pro rata basis, these kinds of concerns arise from time to time.

But SESAC is still a fairly large organization, in business for a long time, and most media companies are accustomed to dealing with it. EMI, and any other publisher that follows its lead, would seemingly be in a position similar to that of SESAC, and not be covered by the antitrust consent decrees. Thus, any such publisher could charge what it wanted for the public performance right to the compositions that it controls, and even charge different services different amounts. And it may be difficult for licensees to realize that they have to deal with a new organization or organizations to license music, and it will make it harder to determine which songs a music service has licensed or which ones it already has the rights to use. Some webcasters are still are surprised that they have to pay SoundExchange, which has been around in one form or another for a decade, so how will they get the word that they now can't rely on ASCAP, BMI and SESAC for all their public performance needs for musical compositions? While ASCAP's amended regulations (see Section 1.12 of those regulations dealing with this New Media opt-out) provide that any publisher that decides to avail itself of this New Media opt-out must notify all services of the fact that it is opting out, and what songs it will be licensing directly, as SoundExchange has itself found out, such notices often don't command the attention that one might think that they would.

Collective licensing was developed to provide a one-stop shop to clear vast catalogs of music. Many feel that it is necessary for those users - like a webcaster - who needs acceess to a broad array of music in order to operate its business. When the sound recording performance royalty was first established in the 1990s, it came with a mandatory collective licensing approach (the "**statutory license**"), so that all users could easily determine how to pay for the music that they use, without needing to deal with every rights holder - perhaps having to negotiate a different deal with each one. As we wrote here, that is why Internet radio has had the Beatles catalog for so long, even though interactive digital music services, which don't have a compulsory collective license only recently have been able to obtain such licenses.

If music publishers associated with record labels generally start to exercise their rights to withdraw their catalog from the PROs, it's possible that they could even exert more control over the use of the sound recordings. If, for instance, they control both the publishing and the master recording (the sound recording) rights to a particular band's music, and they feel that the statutory sound recording performance royalties set by the Copyright Royalty Board are too low for a particular recording, they can effectively block the use of that sound recording by extracting a higher price for the musical composition the next time the license for that composition becomes due. One could even see different prices being charged for the rights to different musical compositions (in fact, most Beatles compositions are held by EMI - so it is possible that every Internet radio operator will not have access to their recordings if this combined licensing scheme goes into effect). While the efficiencies claimed by the publisher might exist in the case of some interactive services, or in cases where you are dealing with a very limited number of songs (e.g. negotiations to use the music in video productions), for traditional Internet radio services, the efficiencies seem to diminish, not increase.

Just what digital services are affected by this move? **Broadcasters** do not seem to have to worry about this development, as the amendment to ASCAP's regulations allowing this partial withdrawal from its licensing system excluded them (and the **definition of "broadcaster"** under the antitrust conset decree (see Section II(f)), seems to **exclude cable and direct broadcast satellite** as well, as indicated in ASCAP's press release on the matter. This exclusion would seemingly include broadcaster's Internet simulcast's of their over-the-air programming. But other digital music services that are subject to Sections 114 (webcasters), 115 ("DPD", or "digital phonorecord deliveries", i.e. copies or reproductions of musical compositions made digitally) and 106(1) (other digital reproductions by audio services), are all covered.

This is an evolving story. There are many questions that remain. One unanswered question is exactly which songs are covered by this opt-out. Another is how it will affect the rates charged by ASCAP. Finally, the practical effect remains to be seen. It may

well be that this new system will in fact prove more efficient, or will provide benefits to users and composers - or it may impose some of the burdens that I describe above. Until this is all sorted out, music companies will need to watch carefully to ensure that they license the music they need - from the proper places. More on some of the other issues involved in digital music licensing can be found in our advisory - ***The Basics of Music Licensing in a Digital World***.