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TRANSPARENCY IN MUSIC LICENSING AND THE STATUTORY REMEDY PROBLEM

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INTRODUCTION

The modern conversation about music copyright has been shaped by the emergence of new digital business models. As these new markets for music open, one might expect the remunerative opportunities for creators would improve commensurately. But while new digital revenue streams produced \$4.51 billion in sales last year, many musical artists suffer financially.¹ Meanwhile, new entrants to the digital market often run at a deficit. In 2014, Pandora Radio paid close to 50 percent of its revenue to music labels and musicians, but only 4 percent to songwriters.²

1. RIAA total for SoundExchange distributions, subscription services and on-demand ad-supported streaming. See Joshua P. Friedlander, "News and Notes on 2014 RIAA Music Industry Shipment and Revenue Statistics," Recording Industry Association of America, March 2015. <http://riaa.com/media/D1F4E3E8-D3E0-FCEE-BB55-FD8B35BC8785.pdf>

2. David Israelite, "Fact: Pandora Pays Songwriters Just 4% of Revenues," *Digital Music News*, Feb. 10, 2015. <http://www.digitalmusicnews.com/2015/02/10/fact-pandora-pays-songwriters-just-4-revenues/>

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One consequence is that tensions have erupted between these new distribution platforms and traditional stakeholders in music copyright. As musician and songwriter David Byrne – famous for his work with the Talking Heads and a board member of the performance rights organization SoundExchange – wrote recently in an op-ed in *The New York Times*:

It's easy to blame new technologies like streaming services for the drastic reduction in musicians' income. But on closer inspection, we see that it is a bit more complicated.³

If federal copyright was created to empower Congress to compensate creators fairly for their work, why hasn't the copyright system – which, in the area of music, is shaped by rate-setting bodies and relatively new protections for recordings – evolved adequately to further that goal? Stakeholder lobbying likely plays a role, as does political gridlock and ignorance on the part of some policymakers of how music copyright operates.

But another significant issue in the modern system for music copyright is a startling lack of transparency. Without an effective system to identify precisely who holds copyright interests in many compositions and recordings, incumbent stakeholders and new digital services will fail to find common ground. This paper explores how this aspect of the

3. David Byrne, "Open the Music Industry's Black Box," *The New York Times*, July 31, 2015. <http://www.nytimes.com/2015/08/02/opinion/sunday/open-the-music-industrys-black-box.html>

music-copyright framework might be reformed to better serve a modern, free and disintermediated market.

A HISTORY OF TECHNOLOGICAL DISRUPTION

Before the Copyright Act of 1831, musical compositions were registered as “books,”⁴ providing songwriters a copyright only in the written sheet music. Even after the 1831 act created musical compositions as a category unto themselves, until the dawn of the 20th century, the only copyright in a piece of music was in the reproduction of the composition.

In 1908, the Supreme Court faced a difficult decision as to whether to provide songwriters and composers a right in music converted into so-called “piano rolls.” Songwriters and composers believed their compositions were being exploited without just compensation by piano-roll manufacturers. The piano-roll makers transferred the compositions into rolls that were essentially unreadable by the human eye, but which could be read by “player pianos,” such as the Melville Clark Piano Co.’s popular self-playing “Apollo” pianolas. The court ruled in favor of the piano-roll manufacturers, disenfranchising the songwriters and composers.⁵

In response, Congress passed the Copyright Act of 1909, which introduced the first compulsory license for the manufacture and distribution of “mechanical” embodiments of musical works (in this case, the piano rolls). This compulsory license was a substantial advancement for copyright protection of a songwriter’s works. It entitled the copyright owner not only to create and release their work, but also to “authorize the creation and release of a mechanical copy.” The licenses also allowed the creation and distribution of mechanical copies by other parties, so long as “the subsequent manufacturer complied with the fee requirements of the statute and paid a statutorily set license fee.”⁶ In 1927, the National Music Publishers Association established the Harry Fox Agency to license mechanical embodiments on behalf of rights owners.⁷

The 1909 act also explicitly conferred to copyright holders a right in public, for-profit performances of their works.⁸ Initially, songwriters and composers lacked a reliable means to account for such performances or to collect royalties directly from venues where their works were performed. Soon there-

after, composer Victor Herbert and attorney Nathan Burkan established the first performance rights organization (commonly referred to as a “PRO”) – the American Society of Composers and Publishers (ASCAP).⁹ Where the Harry Fox Agency collects royalties from each sale of a mechanical embodiment, ASCAP collects royalties each time a musical composition is played. ASCAP provides blanket licenses for its member songwriters’ compositions. It collects a fee, with the songwriter collecting the remainder.

ASCAP’s insistence that restaurants and other venues owed royalties for player-piano performances of copyrighted musical compositions was not received kindly by the businesses. After all, patrons and customers generally weren’t charged admission fees to hear the music, which was used to provide background ambiance.¹⁰

In 1914, ASCAP filed suit against a hotel restaurant which featured an orchestra as background music,¹¹ ultimately leading to a unanimous 1917 Supreme Court decision that decreed ASCAP’s artists were entitled to royalties for public performance of their music.¹² Two years later, ASCAP finalized the first international reciprocal licensing arrangement, with PRS for Music (then called the Performing Rights Society of Great Britain).¹³

But solving the player-piano problem was only the first of many challenges music right-holders would face in the 20th century. Terrestrial broadcast radio began to gain popularity in the 1920s and 1930s and World War II made radio even more central to public life. As more families purchased radio sets for their homes, PROs like ASCAP fulfilled their constituent artists’ needs by issuing blanket licenses that allowed broadcast stations to play music from a diverse catalog.

But ASCAP’s dominance wouldn’t go unchallenged. In 1930, German immigrant Paul Heinecke established the Society of European Stage Authors and Composers (SESAC).¹⁴ The mission of Heinecke’s PRO was to bring European artists to the forefront of American broadcasting. Foreshadowing the organization’s later reputation as the most technologically savvy and musically ambitious of the American PROs, SESAC assisted the Federal Communications Commission in distributing licenses for gospel music to broadcasters to

4. Wikipedia, “Copyright Act of 1831,” accessed Nov. 30, 2015. https://en.wikipedia.org/wiki/Copyright_Act_of_1831

5. Lydia Pallas Loren, “THE DUAL NARRATIVES IN THE LANDSCAPE OF MUSIC COPYRIGHT,” *Houston Law Review*, pp. 546-547, Dec. 19, 2014. <http://www.houston-lawreview.org/wp-content/uploads/2015/01/4-Loren.pdf>

6. Loren, p. 547

7. Harry Fox Agency, “What does HFA do,” accessed Nov. 30, 2015. https://www.harryfox.com/publishers/what_does_hfa_do.html

8. The 1909 act solidified a right established in the Copyright Act of 1897, ch 4 29 State 481-82; Loren, p. 683.

9. Loren, p. 683

10. *Ibid.*

11. *Ibid.*

12. Loren, p. 684.

13. Wikipedia, “American Society of Composers, Authors and Publishers,” accessed Dec. 1, 2015. https://en.wikipedia.org/wiki/American_Society_of_Composers,_Authors_and_Publishers

14. SESAC, “SESAC was established in 1930 and built on service, tradition and innovation,” accessed Dec. 1, 2015. <http://www.sesac.com/About/History.aspx>

comply with the FCC's mandate.¹⁵ SESAC remains unique among PROs in that it is for-profit and by invitation only.

Unhappy with ASCAP's dominance and its rates, radio executives of the National Association of Broadcasters (NAB) formed their own PRO in the 1930s, aptly titled Broadcast Music Inc. (BMI). Much like SESAC, BMI tasked itself to act as protector of often-overlooked corners of the industry, seeking out emerging markets like the historically African-American genres of blues, jazz, rhythm and blues and gospel. BMI also is credited with first bringing rock and roll into American homes.¹⁶ Like ASCAP, BMI and SESAC also later would create reciprocal licensing arrangements with international PROs.

This ecosystem of performance rights distribution has served an invaluable purpose in ensuring that songwriters receive fair compensation for their work. ASCAP and BMI today act as intermediaries for more than 90 percent of licensed music: ASCAP has more than 8.5 million songs¹⁷ in its repertoire and BMI has roughly 10.5 million.¹⁸ SESAC doesn't publicly quantify the size of its library,¹⁹ but it currently is seeking to acquire the Harry Fox Agency, which would add 6.7 million musical compositions, including mechanical rights, which remain relevant as computers now serve as the modern equivalent to the player-pianos of a century ago.²⁰

While some artists do not subscribe to a PRO, most have found them to be an effective means to collect royalties. Businesses that host performances of copyrighted music receive licenses from one or all three of the PROs, or risk statutory fines for willful infringement of public performance rights.

Before 1971, music copyrights extended only to songwriters and composers. Congress that year amended the copyright code to extend to performing artists a right in sound recording for works fixed on or after Feb. 15, 1972.²¹ Four years later, Congress flirted with extending a right to performance of sound recordings "similar to that for mechanical reproductions of musical works," as part of the initial Senate draft of

the Copyright Act of 1976.²² That notion was met with stark opposition from broadcasters, PROs and others.

Even though the performance right in sound recordings was excluded from the final version of the Copyright Act, Congress directed the Copyright Office to provide recommendations on the topic by Feb. 3, 1978. The broadcasters submitted testimony maintaining their opposition to performance rights in sound recordings, arguing that "airplay promotes record sales and boosts performers' popularity." In effect, they maintained that playing musical works over the airwaves constituted a form of free advertising, for which the broadcasters should not be required to pay royalties.²³

Efforts to gain public performance rights in sound recordings continued into the dawn of the digital age. As on-demand audio began to gain popularity – with the looming possibility of a "celestial jukebox" that would allow a listener to play any song at any time – Congress passed the Digital Performance Right in Sound Recordings Act of 1995 (DPRA).²⁴ The law did not provide for a general public performance right like that in musical compositions, but it granted exclusive rights to perform copyrighted works publicly through digital audio transmissions.²⁵ Royalties from digital audio transmissions are collected by SoundExchange, a new PRO initially established by the Recording Industry Association of America, but which now operates independently.

Terrestrial radio has remained exempt from having to pay royalties in performance rights in sound recordings. Testifying in June 2014 on behalf of the National Broadcasters Association, YMF Media LLC Senior Advisor Charles M Warfield Jr. told the House Judiciary Committee that terrestrial radio's exemption from the secondary copyright was for "the public good," adding that the medium "informs, educates and alerts listeners to important events, topics and emergencies."²⁶ Warfield argued that if small, independently owned terrestrial broadcast stations were required to pay the same royalty licenses as digital audio transmission services like Pandora, they too would end up "losing money with every listener."²⁷

Effectively, the United States continues to employ a royalty policy in music copyright that favors older forms of mass-media music distribution over newer, more technologically advanced ones.

15. Ibid.

16. BMI, "BMI's Timeline Through History," accessed Dec. 1, 2015. http://www.bmi.com/about/75_years

17. ASCAP, "Common Music Licensing Terms," accessed Dec. 1, 2015. <http://www.ascap.com/licensing/termsdefined.aspx>

18. BMI, "BMI Search," accessed Dec. 1, 2015. <http://www.bmi.com/search>

19. SESAC does make a full list of musical compositions readily available on its website in PDF format, but does not offer a numerical value for the number of compositions.

20. Press release, "SESAC to Acquire the Harry Fox Agency," SESAC, July 7, 2015. http://www.sesac.com/News/News_Details.aspx?id=2253

21. Wikia, "Sound Recording Act of 1971," IT Law Wiki, accessed Dec. 1, 2015. http://itlaw.wikia.com/wiki/Sound_Recording_Act_of_1971

22. Loren, p. 576

23. Loren, p. 568

24. Loren, pp. 568-569

25. Loren, p. 569

26. U.S. House Judiciary Committee, "Statement of Charles M. Warfield Jr.," Hearing on Music Licensing Under Title 17: Part Two, June 25, 2014. http://judiciary.house.gov/_cache/files/d1f414c8-3e5b-4a4c-8d8f-3e5c3597851c/062514-music-license-pt-2-testimony-nab.pdf

27. Ibid.

TODAY'S PLAYING FIELD

Digital and satellite services are relative newcomers to the music copyright landscape. The DPRA classifies digital transmission services by whether they are available only by subscription and, among non-subscription services, whether they are interactive or noninteractive. The statute defines an “interactive service” as:

[O]ne that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.²⁸

Under the DPRA, there are three “tiers” to a public performance right. As law professor Lydia Loren of Lewis & Clark Law School describes them, they are:

1. some performances of sound recordings by means of digital audio transmissions were statutorily exempt
2. some were granted a compulsory license in the statute and
3. some were left within the complete control of the copyright owner to be voluntarily licensed within the confines of statutory limits on such licenses.²⁹

Loren refers to this third category, which includes most interactive digital streaming services,³⁰ as an “oxymoronic category of a mandatory scheme of ‘voluntary licenses.’”

³¹ The Digital Millennium Copyright Act of 1998 (DMCA) changed the terms for noninteractive services, subjecting

them to a compulsory licensing scheme.³² Congress termed the new category, “eligible nonsubscription transmissions,”³³ an amalgamation of the subscription and noninteractive services designated by the DPRA.³⁴

Services that seek to provide digital audio transmissions of copyrighted musical works must acquire licenses both for the musical compositions themselves and, separately, for the sound recording. Such licenses are granted by PROs,³⁵ the two largest of whom – ASCAP and BMI -- are governed by consent decrees originally reached decades ago in antitrust lawsuits brought against them by the federal government.³⁶ SESAC is not bound by consent decree, but currently is a defendant in two separate antitrust lawsuits.³⁷

The ASCAP and BMI consent decrees require them “to grant a nonexclusive license to publicly perform all of the works in their repertoires to any potential licensee who makes a written application.”³⁸ Both interactive streaming services and noninteractive services must submit a request to the PRO to acquire a blanket license of its work. New entrants that lack an established rate must engage in negotiations to obtain an “appropriate rate” from the PRO.³⁹ During those negotiations, most entities will be able to use the PRO’s repertoire without infringing copyright, and applicable royalty fees generally are deferred until the matter is resolved.⁴⁰ If a rate cannot be agreed upon, either party may apply to the applicable rate court to determine a “reasonable” fee.⁴¹ Such disputes currently are heard in the U.S. Southern District of New York; Judge Denise Cote oversees ASCAP licenses and Judge Louis L. Stanton oversees those from BMI.⁴²

32. Loren, p. 692

33. The statute defines an “eligible nonsubscription transmission” as a: “noninteractive nonsubscription digital audio transmission not exempt under subsection (d) (1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmission of broadcast transmission, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.” 17 USC 114(j)(6)

34. For an expanded explanation of the subcategories under the noninteractive license, see Loren, “The Dual Narratives in the Landscape of Music Copyright”

35. Songwriters may only be a member of only one PRO. A publisher may have catalogs in all three of the organizations.

36. U.S. Justice Department, “ANTITRUST CONSENT DECREE REVIEW - ASCAP AND BMI 2014,” <http://www.justice.gov/atr/ascap-bmi-decree-review>

37. See *Radio Music License Committee Inc. v. SESAC LLC*, 12-cv-05807-CDJ, Eastern District of Pennsylvania, and *Meredith Corp. v. SESAC LLC*, 09-cv-09177-PAE, Southern District of New York.

38. Copyright Office: 40 citing Consent Decrees: ASCAP consent Decree VI.; BMI Consent Decree VI. A.

39. 41 citing Consent Decrees: ASCAP Consent Decree IX.F.; BMI Consent Decree XIV. A.

40. 41 citing Consent Decrees: ASCAP Consent Decree IX.E.; BMI Consent Decree XIV. A.

41. 41: citing Consent Decrees: ASCAP Consent Decree IX.A.; BMI consent Decree XIV.A.

42. 41 citing Consent Decrees:

28. 17 U.S. Code § 114 - Scope of exclusive rights in sound recordings. <https://www.law.cornell.edu/uscode/text/17/114>

29. Loren, pp. 691 - 692

30. Spotify is an interactive digital service which conducts direct deals. An example of such a deal is its contract with Sony. See Micah Singleton, “This was Sony Music’s contract with Spotify,” *The Verge*, May 19, 2015. <http://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract>

31. Ibid.

The court determines the “fair market value” of the PRO license using the standard of what a license applicant would be expected to pay in an “arm’s length” transaction.⁴³ The PRO has the burden to prove that the royalty rate it seeks is “reasonable,” while the court may impose a rate if it determines the proposed rate is not reasonable.⁴⁴ A PRO may apply for an interim rate, pending final determination of the applicable rate, which the court must set within three to four months.⁴⁵ When the interim fee is determined by the court, the licensee is required to pay the fee retroactively to the date of its license application.⁴⁶ Final rates also are applied retroactively.⁴⁷

The consent decree system allows potential licensees to sidestep the threat of statutory damages provided for in the Copyright Act. In nearly every amendment to the Copyright Act made in the past century, Congress has raised the prescribed statutory damages. In 1909, the range was \$250 to \$5,000. The 1976 act raised them to a floor for innocent infringers of \$100 to a \$10,000 maximum for so-called “ordinary” infringement, while also creating a new “willful infringement” cap that permitted damages up to \$50,000. The Berne Convention Implementation Act in 1988 raised damages again, with a range for non-willful infringement of \$500 to \$20,000, while willful infringement increased to \$100,000. In 1999, the Digital Millennium Copyright Act (DMCA) increased damages again to present-day standards. For non-willful infringement, the current range is \$750 to \$30,000. For willful infringers, the cap is \$150,000.

Statutory damages for copyright infringement are unique in federal law. They permit plaintiffs to receive an aggregating statutory award on a strict liability basis, with no required proof of harm. They also are unique in that they are levied against investors in defendant businesses, who are themselves only indirectly involved in the infringing acts.

However, the system is bedeviled by a lack of transparency, the product of decades of publishers and intermediaries relying on analog traditions in the digital age. As Lee Knife, executive director of the Digital Media Association, told Congress in June 2014:

The importance for transparency is obvious. If service providers can’t find the rightful owner of a copy protected work they can’t license and pay for it.⁴⁸

Recently, some publishers have withdrawn their performance rights from the PROs without fully disclosing their catalogs or the full range of works, including all performances, included in the songs in their catalog. This has forced digital music providers either to license directly with the publishers at higher rates than would ordinarily be set under the consent decree framework or else face statutory damages for infringement.

The music business is built on the traditional roles played by publishers and intermediaries. The system depends on the rights-holders and PRO gatekeepers to perform their jobs to the highest caliber and not use their disproportionate market leverage under the law to inflate rates. Moreover, today’s digital music market is composed of countless daily micro-transactions. While digital platforms have strived to create a transparent market, the paradigm has shifted from “music-as-a-product” to “music-as-a-service.” This has resulted in uneven distribution of royalties, and it is artists who most often fall through the cracks.

UNDERPAID ARTISTS AND WEAPONIZED RIGHTS

The market for music consumption has exploded since 1909. Over the last century, consumers have gained a host of new means to listen to music, from terrestrial broadcast radio to vinyl record to tape to compact disc to satellite broadcast radio to digital download to, most recently, digital noninteractive radio and digital interactive radio. With each new medium, new ways are found to manipulate the system of copyright.

Congress cannot hope to stay ahead of these technological developments. This is not due to lack of foresight, as individual members often are quite knowledgeable about how the music industry is evolving. Rather, it is largely the inevitable result of competing political interests who each seek to retain a stake in the game. These interests include, but are not limited to, legacy entities such as terrestrial broadcast radio and performance rights organizations, all of which have weathered the storm of transitions in copyright policy over the past century. The loser in this system is most often

43. 41 citing Pandora Ratesetting, 6 F. Supp. 3d at 353

44. 41 citing Consent Decrees: ASCAP Consent Decree IX.B-D.; BMI Consent Decree XIV.A.

45. Interim fee proceedings must be completed within 90 days for ASCAP and 120 days for BMI. citing: ASCAP Consent Decree IX(F); BMI consent Decree XIV.B.

46. 42 citing ASCAP Consent Decree IX(F); BMI Consent Decree XIV.B.

47. 42: citing ASCAP Consent Decree IX(F); BMI Consent Decree XIV.B.

48. U.S. House Judiciary Committee, “Testimony of Lee Knife,” Hearing on Music Licensing under Title 17 – Part One, June 10, 2014. http://judiciary.house.gov/_cache/files/82d2bdbf-a92b-46f0-8829-a1ff040d1dfe/knife-dima-music-licensing-testimony.pdf

the artist. As Taylor Swift eloquently wrote when she pulled her catalog from Spotify last year:

I'm always up for trying something. And I tried it and I didn't like the way it felt. I think there should be an inherent value placed on art.⁴⁹

A musician's business lies in his or her body of work. The goal of copyright law is to spur creation, but its reality often requires artists also to function as attorneys, managers, publicists and skilled business people. Since few creators can play all these roles, musicians often lean on third parties, like PROs, labels and publishers.

Each musical composition has two accounts: an account for the songwriter and an account for the publisher.⁵⁰ It is the PRO's job to track performances to pay the account holders. ASCAP tracks their members' performances by reporting direct usage from licenses in "census surveys," which do not include regulated radio stations. Terrestrial radio calculates royalties based on a sample survey and ASCAP also utilizes some sample surveys.⁵¹ Digital streaming services, both interactive and noninteractive, report directly to ASCAP.⁵²

The international system of accountability is even stranger. PROs in the United States now have reciprocal licensing agreements with performance societies abroad to avoid so-called "black box" royalties: that is, those locked away without any attribution. The process requires a local PRO to collect the royalties, extract their fee, and distribute the remainder to the songwriter's domestic PRO. The domestic PRO then extracts its own fee, before that remainder finally reaches the songwriter and publisher.⁵³ Labels currently retain 73 percent of the royalties from streaming services.⁵⁴ This process may take from one to three years, during and even after which the artist is not left with much to show for their time.

Even as artists' rewards are shrinking, intermediaries now have unprecedented power to use artists' rights, including information asymmetries about who holds which rights, as negotiating weapons in standoffs with digital platforms over royalty payments. This "weaponization" can be attrib-

uted, in part, to the lack of transparency in licensing. The system is opaque largely due to a thicket of layered statutes, each passed in an attempt to keep up with technology. The United States was left in an ambiguous position during the century when it would not join the Berne Convention, which it finally joined in 1989. To satisfy the needs of an international marketplace, Congress enacted several subsidiary acts to open trade⁵⁵ and, in doing so, further muddied the copy-right waters.

Those muddied waters were on full display in 2013 when the two largest publishers in the United States, Sony/ATV and Universal Music Publishing Group, withdrew their catalogs from ASCAP in order to negotiate directly with streaming services. For the 2005 to 2010 period, Pandora – the largest digital noninteractive radio service, with 79.4 million active listeners in the United States, New Zealand and Australia⁵⁶ -- had negotiated a 1.70 percent rate for ASCAP songs, which went up after renegotiations in 2012 to a 1.85 percent blended rate for terrestrial and Internet radio.⁵⁷

Sony alone controls about 30 percent of the market, including the EMI Group publishing repertoire that Sony co-owns as part of a consortium. After the publisher's withdrawal from ASCAP, Pandora requested that Sony disclose precisely what was in its catalog, so that they could remove those songs from their service. They were repeatedly denied, leaving Pandora with the choice to shut down its business, face crippling copyright infringement liability or agree to Sony's royalty terms.

When Universal withdrew its catalog from ASCAP, it proposed an industrywide royalty rate of 8 percent of gross revenue, which would be pro-rated to the publisher's share of songs played on Pandora.⁵⁸ Pandora this time requested Universal provide a list of works to remove from its service, which it did, but insisted that Pandora sign a confidentiality agreement that would prevent it from using the list to remove Universal's works.⁵⁹

Judge Denise Cote, who oversees ASCAP rate disputes for the Southern District of New York, ultimately determined

49. Pamela Engel, "Taylor Swift Explains Why She Left Spotify," *Business Insider*, Nov. 13, 2014. <http://www.businessinsider.com/taylor-swift-explains-why-she-left-spotify-2014-11>

50. Rethink Music, "TRANSPARENCY AND MONEY FLOWS IN THE MUSIC INDUSTRY," Berklee Institute for Creative Entrepreneurship, p. 10, July 14, 2015. <http://www.rethink-music.com/download-page>

51. *Ibid.*, p. 18

52. *Ibid.*

53. *Ibid.* 20

54. Rethink Music, "TRANSPARENCY AND MONEY FLOWS IN THE MUSIC INDUSTRY," Berklee Institute for Creative Entrepreneurship, p. 14, July 14, 2015. <http://www.rethink-music.com/download-page>

55. Sound Recording Act of 1971 and Copyright Act of 1976

56. Wikipedia, "Pandora Radio," accessed Dec. 1, 2015. https://en.wikipedia.org/wiki/Pandora_Radio

57. U.S. District Court for the Southern District of New York, *In re Petition of Pandora Media Inc.*, March 18, 2014. <https://assets.documentcloud.org/documents/1094198/213326561-ascap-pandora-rate-decision.txt>

58. *In re Pandora*, p. 75

59. *Id.* at pp. 76-77

that ASCAP, Sony and Universal used their “considerable market power” collusively.⁶⁰

Universal, which held at least fractional rights in 20 percent of the songs on Pandora’s service, also pulled its catalog from BMI. In the ensuing dispute, Judge Louis L. Stanton went one step further than Cote and concluded that the publisher could not execute a “partial” withdrawal of its catalog, concluding that it was equivalent to a full withdrawal.⁶¹ Ultimately, he decided on a 2.5 percent blanket license for Pandora’s gross revenue, subject to adjustment if more works are licensed directly.⁶²

Transparency is key to a competitive marketplace and the present system of consent decrees were put in place to prevent overt anticompetitive behavior. Unfortunately, as these cases underscore, the PROs and publishers have an overarching stake in the game and have used their power to make it difficult for new entrants to thrive. By capitalizing on information asymmetries, the PROs are able to leverage the threat of huge fines to extract substantial increases in royalties. The Justice Department’s Antitrust Division currently is conducting a review of whether the consent decrees need to be modified.⁶³

CONCLUSION

The music industry pie is sufficiently large that technology companies and content companies can and should work together.⁶⁴ A crucial first step toward achieving that would be the creation of a comprehensive “rights” database, ideally one that serves as a global effort.

An open, transparent and fully monetized catalog – such as those already provided by the International Standard Recording Code (ISRC) for sound recordings and the Inter-

national Standard Work Code (ISWC) for musical compositions – would be the easiest method to attribute appropriate royalty payments to the appropriate artists.

Other initiatives include the Digital Data Exchange (DDEX), which catalogs output by setting a standardized supply chain of communications, but this process has been arduous and has not picked up steam.⁶⁵

Finally, the service Kobalt acts as a global identification system, allowing artists to receive real-time information on how their music is being distributed on a worldwide basis. It already serves 8,000 songwriters and artists, who are responsible more than 40 percent of the Billboard Top 100.⁶⁶

But much more work is needed. It may be time to take this burden out of the hands of companies and into the public realm, via crowdsourcing. Wikipedia, which at its inception was considered unreliable, has since become the dominant encyclopedia of the digital age. By following a similar model and allowing the public to contribute, independent and self-publishers will have control.

No one is as invested in an artist’s work as the artist himself or herself. No one gains more from an artist being adequately compensated than the consumer. Intermediaries have served their role for a century, but it may be time for a truly disintermediated market in music. It’s had a rough start, to be sure, but as the disintermediated market gains popularity, the public can be entrusted to find and reward both the best art and the best systems for distributing that art.

ABOUT THE AUTHOR

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She received her primary legal degree from the University of Glasgow School of Law and a master’s of law in intellectual property from the George Washington University School of Law. She also holds a master of letters in Victorian literature and bachelor’s in English literature.

Previously, she assisted the government affairs team at Caterpillar Inc. on domestic patent policy; was a research assistant to Robert Brauneis of GW Law; a legal analyst with Curated Media; and a Luther Rice Fellow.

She has written on topics pertaining to music licensing, fair use, the doctrine of equivalents in Germany and England and the influence of British Victorian literature on American post-World War Two politics.

60. Other findings include: Sony and UMPG justified their withdrawal of new media rights from ASCAP by promising to create higher benchmarks for a Pandora’s ASCAP license and purposefully set out to do just that;

UMPG pressured ASCAP to reject the Pandora license ASCAP’s executives had negotiated, and Sony threatened to sue ASCAP if it entered into a license with Pandora

ASCAP refused to provide Pandora with the list of Sony works without Sony’s consent, which Sony refused to give; and

Despite executing a confidentiality agreement with Pandora, Sony made sure that Universal learned of all the critical terms of the Sony-Pandora license and “ASCAP expected to learn the terms of any direct license that any music publisher negotiated with Pandora.” *Id.* at pp. 97 - 98

61. U.S. District Court for the Southern District of New York, *Broadcast Music Inc. v Pandora Media Inc.*, pp. 11 -12, May, 28, 2015. http://www.bmi.com/press/releases/broadcast_music_inc_v_pandora_media_inc_opinion.pdf

62. *Id.* at p. 60

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