

Digital Get Down- *Music Licensing in the Digital Age*

BY AMANDA ALASAUSKAS

Music has always been an important part of my life. I remember my dad sitting me down on the couch late on a school night and forcing me to watch the entirety of *The Beatles Anthology*. It was 2001, I was in fourth grade, and the Internet was as young as I was—ten years old.^[1] From then on out, I dabbled in the arts throughout my life. I played the violin, sang in the choir (including, but not limited to, the show choir at my high school, complete with red sequin dress), and participated in musical theatre. Well, you know what they say about those who can't do. . .they go to law school. After four years and a bachelor's degree in criminal justice, I decided that my time in law school and my career would be better spent doing something that I was passionate about—music and entertainment.

Entertainment law has been the perfect way for me to marry my passion for the arts with my passion for the law. In October of 2016, I was afforded the opportunity to attend the Annual Meeting for the ABA's Forum on the Entertainment and Sports Industries in Las Vegas, Nevada as a student reporter. Many of the panels focused on the digital era, whether it be streaming or dealing with new technologies. It is very apparent that the time of *The Beatles* is gone and the Internet plays a larger role in the media and our lives than it did in 2001. One particular panel that I found myself attending was *The Digital Life of Songs and Recordings: The Anatomy of Digital Licenses*, which is the focus of this article.

The esteemed panel consisted of Casey M. Chisick, Partner at Cassels Brock & Blackwell LLC in Toronto, Ontario; Timothy A. Cohan, Senior Vice President of Legal and Business Affairs at Peermusic in Burbank, California; David Ring, Attorney and Digital Media Consultant, and Former Executive Vice President of Global Digital Business at Universal Music Group in Los Angeles, California; and Charmaine D. Smith, Shareholder in the Entertainment and Media Practice Group at Greenberg Traurig, LLC in Atlanta Georgia. The panel was moderated by Zeina H. Grenier, Vice President of Business and Legal Affairs at Universal Music Publishing Group in Santa Monica, California.

A Balancing Act of Interests: *The Licensor vs. The Licensee*

Through Article 1, Section 8 of the United States Constitution, Congress is empowered to “promote the

Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.”^[2] Section 106 of the Copyright Act states that an owner of a copyright has the exclusive right to authorize the public performance of their work and, in the case of sound recordings, the performance of their work through a digital audio transmission.^[3] With regard to traditional media, mainly radio and television, music licensing is a simplified process. There are two copyrights in music: the sound recording and the musical composition. Songwriters, composers, and music publishers are able to affiliate with performing rights organizations (PROs), which, in return, will negotiate agreements, collect fees, and distribute the fees back to the writers and publishers for the performance of the music composition of those works.^[4] In the United States, there are four PROs in which artists can affiliate: American Society of Composers, Authors and Publishers (ASCAP)^[5], Broadcast Music, Inc. (BMI)^[6], Society of European Stage Authors and Composers (SESAC)^[7], and Global Music Rights (GMR).^[8] In order to obtain the rights for a musical composition, the potential licensee may negotiate a license agreement with the PRO for the use of the music. If the PRO and the user are unable to agree on a fee, a court intervention will determine what the “reasonable fee” for the use of the music will be.^[9] Regarding sound recordings, before the digital era, a record company's main source of income were record sales and the licensing of master recordings for use in television, films, and commercials.^[10]

Technology and the Internet are blessings, as well as curses. Musicians and creators are able to develop and distribute their works in a way that was never before possible. Music can be created at home instead of in the studio, musicians can collaborate with artists from across the globe and market themselves online, and venues, such as satellite radio, offer a wide array of music options to new audiences on a grand scale.^[11] However, as was stated in the opening statements of the panel, there is a saying that “digital is the future,” but digital is here, it is the current.^[12] Digital streaming has outpaced the physical world, causing confusion and concern to consumers, musicians, publishers, and record labels alike.^[13] When it comes to starting a new digital music service, there are a number of licenses that need to be obtained, all requiring individual fees and contracts.^[14] For instance, if a service

wants to use recorded masters—not every service does—it needs to get rights from the record company. Eventually what has to happen is a balancing of the interests of the content owner licensor and the interests of the licensee.

From the perspective of the licensors and content owners, the main focus is maximizing the value for the artists and writers, so that they are adequately compensated for their work.^[15] Making a great sound recording is not cheap and is very time intensive. A priority of content owners is to make sure that artists are able to make a living off of their craft. However, when making these deals, content owners still want to empower up and coming digital services and help them get off of the ground floor, allowing them to have a thriving business in the market place and make money.^[16]

On the other hand, licensees presumably want to cut a fair deal with content owners in order to ensure that artists are being fairly compensated. However, while artist compensation is important, it's even more important to licensees that they have enough capital and leeway to build and scale a viable business.^[17] Two of the most important factors that go in to a service being able to accomplish this are the term of the contract and the rate they are paying for the license.

How Long is Too Short?

The duration of how long a digital license will last for a service is important for both the content owner and the service itself. The term determines how long the service has to exploit the music that it is licensing. The typical duration of a license is one to two years.^[18] Services who are looking to license music prefer a longer term.^[19] It takes a lot of time and money to negotiate these deals. If you have a short one-year term, there is barely any time that passes before a renewal needs to be negotiated. On the business side, longer terms allow services to have more ramp up time and focus on the business itself.^[20] This is best when services are still trying to raise money from investors. When there's more stability, there's more likely to be investments.

Meanwhile, licensors may want to have a shorter term, depending on the type of service and company they are licensing too. This is especially true when the service is new or experimental. The licensor may not want to lock in to a rate for a long period of time because it may not be certain where the service is going.^[21] Licensors also do not want to have an indefinite amount of time before a launch happens when deciding the start of the term. Licensors may put an end date in the contract, allowing the term to start no later than a specified date, even if the service has not launched.^[22]

David Ring argued that there is no reason for a short term in today's industry.^[23] In the early days of music

and downloads, record labels would ship CDs to stores and the stores would take what they wanted. If the CD didn't sell, the store would ship back the CD and would not have to pay. A policy rationale for short term deals at this time was a wariness of how the digital field would affect the CD wholesale unit. However, this rationale no longer makes sense, as CDs are more or less obsolete.

Ring gave the example of an app—such as musically, which allows users to create short videos to their favorite songs—created by four guys who did not have a lot of money.^[24] It is important for record labels and publishers to be able to get out of deals early if need be, but it is even more important that you enable services to become new and healthy customers.^[25] Licensors should allow services to run, get an audience, and grow by getting them a good deal so that they can become a viable customer in the future.^[26] As opposed to the late 90s, it is now against the industry's interests to have short term deals. It is now normal to invest in companies and services in this way. If the term is only one year, it is unlikely that anyone is willing to invest in the service when the core of the business is rights in music.^[27] However, as Zeina H. Grenier pointed out, short term deals are still desirable for the licensor because rates change quickly.^[28]

“Information wants to be free. Information also wants to be expensive. . . That tension will not go away.”-Stewart Brand

In this instance, music is information. While there may be a tendency to lay the blame at the feet of the licensors for the rates they put in front of the rate setting tribunals, Casey M. Chisick notes that many services may approach licensors with no money and an unwillingness to pay for content, or a willingness to pay a percentage of their revenue when there currently is no revenue or no plan to generate revenue.^[29]

As Timothy A. Cohan pointed out, the main reason for short terms in the United States is rate proceedings.^[30] The United States has a lower rate than the rest of the world. It's possible that if licensors are looking at a term that may extend into the new rate period, licensors may end up with the short end of the stick and get a lower rate, when everyone else may be getting an improved rate.^[31] Licensors do not want to enter into a contract for the indefinite future with a rate that has the possibility to increase in the rate courts.

The situation gets even more interesting in Canada, where reproduction rights societies are able to file tariffs with the copyright board for rate increases.^[32] As in the United States, these societies are reluctant to enter into a licensing deal when the rate that is entered into could change and be lower than what the Copyright Board

certifies.^[33] However, the biggest issue is the backlog of the Copyright Board. The current tariff in place is for the 2008-2010 term.^[34] When certified, the tariff which is currently in front of the Board will be for the 2011-2013 term.^[35] This tariff is not expected to be certified before 2017.^[36] To make things more interesting, the rates are retroactively applicable once the Board certifies them.^[37] This creates even more uncertainty because the rate for the year in which a digital service may be launching is actually years in the future.

Once again, a balancing of interests is necessary to overcome this hurdle. Licensors should not want to punish the start-up company which is trying to become a long-term customer.^[38] Ring suggested that both parties should acknowledge the potential rate change coming up, agree on the rate now, and then devise a formula to increase the rate which takes into account the potential rate change.^[39] There are almost no music services that have been able to ever return money to their shareholders and there are no new entrants into the industry.^[40] This is something that should worry the slowly dying music industry. A business is unable to grow and run when its cost of goods is 70% or more of every dollar that come in. In the case of Spotify, more than 80% of every dollar goes to content providers, societies, publishers, and record companies.^[41]

Licensors should look to these services, their customers, as the most important component and find a way to allow them to grow and earn a living so that they may actually return money to the shareholders.^[42]

Conclusion

Balance is important. The rights and interests of both the content owners, as well as those looking to license the content need to be considered. The creative people who give the world art forms, such as music, should be able to earn a living from the uses of the work by sharing in the profits that their work generates.^[43] Meanwhile, services looking to enter into the industry should be given the opportunity to grow and earn money. If the music industry wants to grow and have more services than the “big names” such as Google, Amazon, and Apple, a private solution needs to be figured out between the parties. This, as Ring stated, “. . . takes creative deal making, a little boldness, and a little risk.”^[44] Leniency on both the term and the rate of digital licensing deals will allow both the music industry and the services trying to enter it to grow at the rate that technology is and physical life is.

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Endnotes

- [1] The World Wide Web was released to the public on August 6, 1991. Martin Bryant, *20 years ago today, the World Wide Web opened to the public*, THENEXTWEB.COM (Aug. 6, 2011), <http://thenextweb.com/insider/2011/08/06/20-years-ago-today-the-world-wide-web-opened-to-the-public/>.
- [2] U.S. CONST. ART. 1 § 8.
- [3] 17 U.S.C. § 106.
- [4] See Todd Brabec, *The Performance Right—A World in Transition*, 42 MITCHELL HAMLINE L. REV. 16, 17 (2016).
- [5] ASCAP, <https://www.ascap.com/> (last accessed Nov. 3, 2016).
- [6] Broadcast Music, Inc., <http://www.bmi.com/> (last accessed Nov. 3, 2016).
- [7] SESAC, <https://www.sesac.com/> (last accessed Nov. 3, 2016).
- [8] Global Music Rights, <http://globalmusicrights.com/> (last accessed Nov. 3, 2016).
- [9] Brabec, *supra* note 4, at 17.
- [10] *Id.*
- [11] See *Music Copyright in the Digital Age: A Position Paper*, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (March 2008), https://www.ascap.com/~media/files/pdf/bill-of-rights/ascap_billofrights_position.pdf (hereinafter referred to as ASCAP Digital Age).
- [12] Zeina H. Grenier, Universal Music Publishing Group, *The Digital Life of Songs and Recordings: The Anatomy of Digital Licenses* (October 7, 2016).
- [13] *Id.*; see also ASCAP Digital Age, *supra* note 8.

- [14] See e.g. Glen Sears, *FAQ: 5 U.S. Digital Music Use Types & the Licenses You Need*, MEDIANET (June 19, 2015, 11:08 AM), <http://www.mndigital.com/blog/5-major-digital-music-use-types-licenses/>.
- [15] Grenier, *supra* note 12.
- [16] *Id.*
- [17] *Id.*
- [18] Charmaine D. Smith, Greenberg Traurig, LLC, *The Digital Life of Songs and Recordings: The Anatomy of Digital Licenses* (October 7, 2016).
- [19] *Id.*
- [20] *Id.*
- [21] *Id.*
- [22] *Id.*
- [23] David Ring, Universal Music Group, *The Digital Life of Songs and Recordings: The Anatomy of Digital Licenses* (October 7, 2016).
- [24] *Id.*; “What is Musical.ly?”, MUSICAL.LY, <https://musically.zendesk.com/hc/en-us/articles/213911748-What-is-musical-ly-> (last accessed Nov. 3, 2016).
- [25] Ring, *supra* note 23.
- [26] *Id.*
- [27] *Id.*
- [28] Grenier, *supra* note 12.
- [29] ¹ Casey M. Chisick, Cassels Brock & Blackwell LLC, *The Digital Life of Songs and Recordings: The Anatomy of Digital Licenses* (October 7, 2016).
- [30] Timothy A. Cohan, Peermusic, *The Digital Life of Songs and Recordings: The Anatomy of Digital Licenses* (October 7, 2016).
- [31] *Id.*
- [32] Chisick, *supra* note 29.
- [33] *Id.*
- [34] *Id.*
- [35] *Id.*
- [36] *Id.*
- [37] Smith, *supra* note 18.
- [38] Ring, *supra* note 23.
- [39] *Id.*
- [40] *Id.*
- [41] *Id.*
- [42] *Id.*
- [43] See ASCAP Digital Age, *supra* note 8.
- [44] Ring, *supra* note 23.



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