

# A Young Lawyer's Perspective From The Forum's Annual Meeting: How "Bigly" is the Future of the Music Industry? It's "Yuge!"

by Amanda Alasauskas

Music and entertainment have always been an important part of my life. Now that I have graduated law school and have been tossed into the "real world," I have found that my passion and enthusiasm for this field is stronger than ever. From October 5-7, 2017, I found myself in Las Vegas, Nevada, attending my second Annual Meeting for the ABA Forum on the Entertainment Sports Industries, this time as a Young Lawyer Reporter. I attended the panel *Turbulent Waters or Smooth Sailing: How Bigly is the Future of the Music Industry*, which was comprised of an ever enthusiastic and knowledgeable panel: Bill Coulter, Vice President and General Counsel of Music Reports, Inc.; Gary R. Greenstein, Partner at Wilson Sonsini Goodrich & Rosati; Marc Cimino, COO at Universal Music Publishing Group; Susan Genco, Co-President at Azoff MSG Entertainment, LLC; and Henry W. Root, Partner at Lapidus, Root, & Sacharow, LLP. They covered a variety of topics, namely the reproduction and public performance of copyrighted works on non-interactive and interactive streaming services, the economic state of the industry, and the ASCAP and BMI consent decrees which have recently been in the spotlight.

## Non-Interactive vs. Interactive Streaming Services and Public Performances

Under Section 106 of the Copyright Act, the owner of a copyright has the exclusive right

to reproduce, distribute, prepare derivatives, and publicly perform the work.<sup>1</sup> This public performance right is limited to digital audio transmissions and not terrestrial AM/FM radio.<sup>2</sup> The type of license a provider is able to get depends on whether they are interactive or a non-interactive digital music provider.<sup>3</sup> Non-interactive providers are those where the user will listen to music as if listening to a traditional radio broadcast and the user is not able to choose to listen to a specific song or artist. Examples of this type of provider are Sirius XM and Pandora. Non-interactive providers are able to obtain a statutory license and pay their royalties through SoundExchange. However, an interactive digital music provider allows users to have control over the specific song played, such as Spotify, and must individually negotiate a license with each performer. Terrestrial radio, meanwhile, pays nothing.

Streaming is now one of the most common ways for consumers to listen to music. 45% of consumers engage in licensed audio streaming, which is up from 37% in 2016.<sup>4</sup> Video streaming, including user upload services such as YouTube, takes up 55% of on-demand music streaming time, while free audio streaming and paid audio streaming take up 22% and 23%, respectively.<sup>5</sup> In the last six months, 44% of consumers are purchasing physical copies of music or paid downloads, 45% use audio streaming services, 75% use video streaming services, and 87% are listening to the radio, whether it is broadcast or internet.<sup>6</sup>

Whether consumers listen to Pandora, Sirius XM, or AM/FM radio, they are getting relatively the same experiences, yet are paying drastically different percentages to copyright owners. In 2012, Pandora paid record labels and publishers 55.9% of its revenue.<sup>7</sup> Meanwhile, the Copyright Royalty Board determined that Sirius XM only needs to pay 11% of its revenue. Again, terrestrial radio pays nothing, due to an outdated belief that radio airtime constituted free advertising for artists.

To make matters more convoluted, Spotify recently announced that it believes that it does not need

to pay for a mechanical license.<sup>8</sup> A mechanical license grants the rights to reproduce and distribute copyrighted songs on various platforms, including interactive streams.<sup>9</sup> It is apparent that the argument can be made that interactive on-demand services such as Spotify serve as substitutes for people buying music, and therefore publishers should receive mechanical royalties. It is even the industry consensus that mechanical royalties should be paid.<sup>10</sup> The issue now is whether there is actually a reproduction of the song that takes place on interactive services that does not take place on non-interactive radio.

### **The Economics of Balance Between Music and Business**

The economic prospects of the music industry are not as grim as they once were. Recorded music sales in the United States were up 11.4% in 2016 and the industry brought in \$7.65 billion in revenue.<sup>11</sup> These numbers show a rising amount of money paid for consumption of music, but the industry is not back to where it was when consumers forced to buy packaged goods.<sup>12</sup> However, today, consumers are able to choose the music they want and there has been a growing amount of subscribers to streaming services.

Spotify is arguably the largest subscription streaming service available to music consumers. However, it does not have a parent company to stand under, like iTunes and Apple Music does with Apple, or Amazon Music with Amazon. There are countless streaming services out there, but how many will actually survive? We've already lost a couple, including Beats Music, which was bought by Apple in May of 2014, and Rdio, which was acquired by Pandora in 2015.<sup>13</sup> Further, what is the evidence that standalone streaming services, like Spotify, can make money? Although it is not yet a public company in the United States, Spotify revealed it has paid out approximately 70% of its total revenue in royalties to rights holders since 2009.<sup>14</sup> When a company is paying out at as approximately 70% of its total revenues solely to copyright owners, this does not leave much room to pay investors and run the company.

Long story short: a business cannot survive if it cannot make money, but this also pertains to the artists and creators themselves. The problem with streaming services are that creators are not adequately compensated. If an artist cannot go out on tour and make money, they get shut down. Business models should not rest on the shoulders of the creators and margins that these streaming services make can be used as a way to pay the creator less. The challenge is better aligning the goals of those who create and those who deliver the content to the consumers, creating an appropriate split between services and creators, which then breaks down into a further splits, such as between creators and record companies. On the bright side, as streaming services continue to be a leading source of music consumption and consumers get used to paying for music on subscription services, the market will continue to evolve and mature.

### **ASCAP & BMI Consent Decrees**

The American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. are performing rights organizations ("PROs"). They grant licenses to music users, collect licensing fees, and distributes royalties to its affiliated copyright holders. The repertoires of both ASCAP and BMI comprise about 90% of the musical compositions publicly performed in the United States<sup>15</sup> and each take in over \$1 billion annual in licensing fees.<sup>16</sup> There are two other PROs in the United States, which currently operate without direct government oversight: the Society of European Stage Authors and Composers ("SESAC") and Global Music Rights ("GMR"). ASCAP and BMI operate primarily through blanket licenses, meaning licensees have the right to perform any of the compositions in the respective repertoires as often as they please for the license period. On one hand, blanket licenses reduce the transaction costs of licensing copyright compositions, let songwriters monetize their works immediately upon signing with the PRO, and immediately enable users to begin performing the works without fear of infringement.<sup>17</sup> On the other hand, the PROs' collective bargaining on behalf of rights holders who are otherwise competing afford the PROs

massive market power.<sup>18</sup> Blanket licenses offer all of the songs in the repertoires on an all-or-nothing basis, preventing songs from competing with each other based on price, raising antitrust concerns.<sup>19</sup>

In order to secure all necessary public performance rights, the majority of music users will obtain a license from ASCAP, BMI, SESAC, and GMR, thus obtaining access to nearly all musical works.<sup>20</sup> However, ASCAP and BMI currently operate under consent decrees, entered into after being sued by the Department of Justice in 1941. The consent decrees limit the way these two PROs operate, in several key ways: they can only administer performance rights, not other, often related rights; they must have non-exclusive licenses, meaning that publishers retain the ability to directly license their catalogues; they are required to grant a license to any party that requests one, which is then valid while the two parties attempt to negotiate a rate; and if the two sides are unable to reach an agreement regarding the rate, the dispute is settled by a rate court, which was formed under the consent decrees.<sup>21</sup> However, in recent years, with SESAC and GMR not subject to consent decrees, songwriters formerly affiliated with BMI or ASCAP have terminated their relationship to join these unregulated PROs because they “believe they retain greater control of their public performance rights, in particular the ability to license their works at a free-market, negotiated rate, when not subject to the automatic licensing and rate court provisions in the BMI or ASCAP consent decrees.”<sup>22</sup>

It is common for songwriters to collaborate with one another. In 2014, “93 of the top 100 charting songs had more than one writer.”<sup>23</sup> Virtually all songwriters and composers are affiliated with a PRO, and are free to join whichever they please. Most commonly, these interests are divided between BMI and ASCAP. This means that co-writers and co-composers to a work are often affiliated with different PROs, which results in “split works.” For example, three co-writers have equal rights to a song, one is with ASCAP, another is with BMI, and the other with SESAC—each would have 33% “fractional

interest” in the song. A large debate surrounding these consent decrees is the full work licensing interpretation. Currently, under the Department of Justice’s interpretation of the consent decrees, any co-author of a work is able to license 100% of the work, even if they created only a portion.<sup>24</sup> Therefore in the above example, BMI has to license 100% of the song, even though only one of the songwriters is affiliated with them. Therein lies to controversy. Should ASCAP or BMI be able to license 100% of a song it does not full have rights to? Even further, how is a PRO to pay a co-writer to song that they do not have information for and are not contracted to? Songwriters argue that the 100% licensing interpretation will affect who writes songs with whom to how songwriters are paid.<sup>25</sup> However, fractional licensing could increase transaction costs, meaning users would need to get a license from all PROs that co-songwriters belong to in order to use one song. Regardless, the final outcome of this legal battle, currently on appeal, will have a significant impact on songwriters and the music industry as a whole.

## **Conclusion**

What it comes down to is that the future of the music industry is complex and exciting. However there needs to be an alignment of goals and business models. The music industry is much more globalized than in the past and younger generations do not consume music on a genre basis, and merely just consume music. The big players will continue to get bigger and revenues will go up on copyright owner side. It is even possible that there is no need for piracy when you can get all of content on lawful service on your phone. However, if creators are not supported, the privilege of being a culture and country who continues to produce a great export will no longer be ours, as other countries are protecting their artists in a way that is not happening in the United States.

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<sup>1</sup> 17 U.S.C. § 106.

<sup>2</sup> Noah Drake, Comment, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.: Public Performance Rights for Pre-1972 Sound Recordings*, 6 CALIF. L. REV. CIR. 61, 65 (2015).

<sup>3</sup> Amanda Alasauskas, *Save Rock and Roll: A Look at Rights Afforded to Pre-1972 Sound Recordings and Why Federalization Should Be Granted*, 66 DEPAUL L. REV. 265, 274 (2017).

<sup>4</sup> *Connecting with Music: Music Consumer Insight Report*, IFPI (Sept. 2017), <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Ed Christman, *A Deep Dive Into Pandora's Payments to Publishers*, BILLBOARD, June 25, 2015, <http://www.billboard.com/articles/business/6612620/a-deep-dive-into-pandoras-payments-to-publishers>.

<sup>8</sup> Paul Resnikoff, *Surprise! Spotify Says They Don't Owe Anything for 'Mechanicals'*, DIGITAL MUSIC NEWS, Aug. 31, 2017, <https://www.digitalmusicnews.com/2017/08/31/spotify-mechanicals-surprise/>.

<sup>9</sup> *What is a Mechanical License?*, HARRY FOX, [https://www.harryfox.com/license\\_music/what\\_is\\_mechanical\\_license.html](https://www.harryfox.com/license_music/what_is_mechanical_license.html).

<sup>10</sup> *Turbulent Waters or Smooth Sailing: How Bigly is the Future of the Music Industry?* (Oct. 6, 2017.)

<sup>11</sup> Ed Christman, *U.S. Music Industry Sees First Double Digit Growth in Almost 20 Years as Streaming Takes Over*, BILLBOARD, Mar. 30, 2017,

<sup>12</sup> *Turbulent Waters or Smooth Sailing: How Bigly is the Future of the Music Industry?* (Oct. 6, 2017.)

<sup>13</sup> Christina Warren, *Streaming Music Services, From Most Screwed to Least Screwed*, GIZMODO, Mar. 25, 2017, <https://gizmodo.com/streaming-music-services-from-most-screwed-to-least-sc-1793612699>.

<sup>14</sup> Victor Luckerson, *Here's How Much Money Top Musicians Are Making on Spotify*, TIME, Dec. 3,

2013, <http://business.time.com/2013/12/03/heres-how-much-money-top-musicians-are-making-on-spotify/>.

<sup>15</sup> See Ed Christman, *ASCAP and Radio Group's 5-Year Pact Doesn't Address the Elephant in the Room*, BILLBOARD, Jan. 3, 2017, <http://www.billboard.com/articles/business/7640666/ascap-rmlc-radiolicensing-Agreement-analysis>.

<sup>16</sup> See 2014 ASCAP Annual Report, [http://www.ascap.com/-/media/files/pdf/about/annual-reports/ascap\\_annual\\_report\\_2014.pdf](http://www.ascap.com/-/media/files/pdf/about/annual-reports/ascap_annual_report_2014.pdf); BMI, *Quarterly Distribution Update* (Sept. 2015), <http://www.bmi.com/distribution/letter/572233>.

<sup>17</sup> Brief of Industry Participants as Amici Curiae in Support of the United States of America, *U.S. v. Broadcast Music, Inc.*, No. 16-3830-cv, at 5 (2d Cir., May 25, 2017).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Brief for Defendant-Appellee Broadcast Music, Inc., *U.S. v. Broadcast Music, Inc.*, No. 16-3830-cv, at 11 (2d Cir., Aug. 17, 2017).

<sup>21</sup> Jonathan Bailey, *Understanding the Music Licensing Consent Decrees*, PLAGIARISMTODAY, Aug. 5, 2014, <https://www.plagiarismtoday.com/2014/08/05/understanding-music-licensing-consent-decrees/>.

<sup>22</sup> Brief for Defendant-Appellee Broadcast Music, Inc., *supra* note 20.

<sup>23</sup> U.S. Copyright Office, *Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works*, at 12 (2016).

<sup>24</sup> Coe W. Ramsey, *Music Performing Rights Organizations and the "Full-Work" vs. "Fractional" Licensing Dispute: Government Seeks to Overturn Fractional Licensing Decision*, LEXOLOGY, May 23, 2017, <https://www.lexology.com/library/detail.aspx?g=5169651d-513b-4047-8263-9a994f0b8193>.

<sup>25</sup> Paula Parisi, *BMI Battles Department of Justice Over Song Licensing*, VARIETY, AUG. 17, 2017, [HTTP://VARIETY.COM/2017/MUSIC/NEWS/BMI-DEPARTMENT-OF-JUSTICE-BRIEF-SONG-LICENSING-1202531666/](http://variety.com/2017/music/news/bmi-department-of-justice-brief-song-licensing-1202531666/).