Leveraging Creativity in the New Age of New Media Music Licensing

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The flow of rights and royalties

TV & RADIO BROADCASTERS
- Pubs, Clubs etc

DIGITAL RETAILERS, INTERNET PORTALS, RINGTONE/REALTONE SUPPLIERS, MOBILE NETWORK OPERATORS, OTHER ON DEMAND SERVICES
- Blanket licence fees
  - Grant of rights
  - Record royalties
  - Blanket licences

FILM & TV PRODUCERS
- Brands
  - Blanket licence fees
    - Master use fees
      - Public performance rights
      - Performance royalties

CINEMAS
- Licences fees
- Public performance rights
- Public performance royalties
- Mechanical royalties
- Digital mechanical royalties
- Synchronization fees

CELAS & other overseas societies
- Digital mechanical royalties
- Mechanical royalties
- Writer’s share of public performance royalties (50%)
- Mechanical royalties and publisher’s share of PRS royalties (50%)
- Grant of publishing rights

PUBLISHERS
- Grant of publishing rights
- Publishing royalties

RECORD COMPANIES
- Royalties
  - Blanket licence fees
  - Grant of rights
  - Record royalties

Session Musicians
- Fee
  - Recording services
- Royalties
  - Assignment of communication to be public right in recordings
  - ER from public performance and broadcast (50%) shared with recording artists
- ER from broadcast etc (50%)

Producers
- Royalties
  - Management services
  - Fee of royalties
  - ER from public performance and broadcast (50%)
  - Shared with session musicians

Managers
- Management services
  - Management fee

Artists
- Recording royalties
  - Recording services
  - Production services
  - Fee
- Royalties
  - ER from public performance and broadcast (50%)

Songwriters
- Publishing royalties
- Royalties
  - ER from public performance and broadcast (50%)

FUNDERS
- Royalties
- Record royalties

BPI
- Royalties
- Blanket licences

PPL
- Royalties
- Blanket licences
- ER from public performance and broadcast (50%)
- Shared with recording artists
- Assignment or communication to be public right in recordings
- ER from broadcast etc (50%)
“New” Media Licensing

- “New”: Internet (digital cable, satellite)
  - “old”: not internet (FM/AM)
- Licensing:
  - “old” models/venues/CROs for licensing:
    - e.g. Performance Rights Organizations (PROs) ASCAP, BMI, SESAC (blanket licenses to publicly perform all music in a PRO’s catalog)
    - e.g. Harry Fox (private entity operating in the shadow of a compulsory license)
Fighting against “old” licensing models for “new” media

- 2010-2012: Large Music Publishers attempted to withdraw from the PROs, but only for “new media” (and then only for “large” new media companies)
- Challenged by Pandora in Nov. 2012
  - Result: Antitrust decrees do not permit a partial withdrawal
    - ASCAP case (Sept. 2013): attempted withdrawals are ineffective
    - BMI case (Nov. 2013): withdrawals resulted in a complete withdrawal from the catalog (new and old media)
Unfairness

unequal treatment

“fair share” payments to artists
For **radio and radio-like services**, blanket licenses determine who gets paid, and how much.

### Broadcast Radio
Terrestrial broadcast of any AM or FM station

- **PROS**: ASCAP, BMI, SESAC
- **Performer**: composition
- **Publisher**: copyright

In the US, terrestrial broadcasters **do not pay performers** or sound recording copyright owners.

### Webcast
Or digital performance

- **Pandora** • **Sirius XM** • **NPR streaming** • **Live365**

- **PROS**: ASCAP, BMI, SESAC*
- **UMPG and Sony ATV-EMI**
- **Performers**: composition

At the end of 2012, Universal Music Publishing Group and Sony/ATV-EMI pulled their digital rights from ASCAP and BMI, seeking to get a higher rate by negotiating directly with webcasters.

### SoundExchange
Digital performance of sound recording

- **50%**: record label
- **45%**: performer(s)
- **5%**: APM & SAG-AFTRA Fund

- **SoundExchange**: background singers and musicians

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http://futureofmusic.org/article/article/music-and-how-money-flows
For **interactive streams**, how the money flows depends on what entity negotiated the license.

For record labels that have a direct deal with services:

- **PROs, ASCAP, BMI, SESAC**
  - **performance of composition**
  - songwriter
  - publisher

- **UMPG and Sony ATV-EMI***
  - **performance of composition**
  - songwriter
  - UMPG and Sony ATV-EMI songwriters

- **publishers**
  - streaming mechanical royalty
  - songwriter

- **record label**
  - licensed use of sound recording
  - 10-50%
  - artist/band*

*At the end of 2012, Universal Music Publishing Group and Sony/ATV-EMI pulled their digital rights from ASCAP and BMI, seeking to get a higher rate by negotiating directly with services.

*Rate of payment from label to artist/band depends on terms of contract, and whether digital sale is classified as a sale or a license.

http://futureofmusic.org/article/article/music-and-how-money-flows
Unequal treatment: Some examples

Sound Recordings
- Don’t receive royalties from non-digital broadcasters
  - Skews the market, burdens digital broadcasters
  - Results in uncompensated uses
- Pre-’72 Sound Recordings don’t receive any federal copyright protection
  - State law protection varies
  - Unclear whether those varying state protection include public performance rights
Unequal treatment
(The kind that drives Music Publishers crazy)

Of its revenue in 2013 Pandora paid (approx.)

56% Sound Recording Public Performance rights
4% Musical Work Public Performance rights

Source: In re Pandora (ASCAP) rate court ruling from March, 2014
“Fair Share” payments to artists: Leveraging Creativity

- Role of copyright in organizing capital
- Allowing firms to invest
  - Creative content is one component
  - But so is distribution, exposure (advertising), accounting, etc.
- To permit for efficient coordination of capital, copyright is transferrable/assignable/licensable
  - But, left to private market, the vast majority of creatives (songwriters, musicians, singers) have little bargaining power and business savvy
    - Free market: allow for private ordering through contract
“fair share” for artists

- Should we as a matter of copyright policy insist on “fair” compensation for artists?
  - Analogy: “wage and hour” laws
“fair share” payments to artists (not just copyright owners)

- Nooks and crannies of copyright law require compensation be paid to artists
  - Statutory:
    - AHRA (§1007)– collected royalty pool split: “writers” (composer or lyricist), featured recording artist, nonfeatured vocalists & musicians
    - Sound Recording digital public performance statutory license (§114) – featured recording artist (45%), nonfeatured vocalists (2%) & musicians (2%)
  - Private market (with antitrust overlay):
    - ASCAP internal rules– direct payment to composers
      - Lesson: Corporate governance structures matter (antitrust decrees impose some requirements)
Problems for even the “required” payments that exist

- Non-exclusivity of licenses
  - Statutory licenses (§ 115, § 114) are one way to obtain authorization (not the only way)
  - Agreements b/t © owners and the PROs – antitrust decrees require that they cannot be exclusive (blanket licenses are just one option for “users”)
- Leads to private deals that do not mandate artist compensation
  - E.g. Non-interactive streaming arrangements (e.g. Clear Channel’s 2012 deal with Big Machine)
  - E.g. Carve-outs from PROs
- Other problems lurk in these private deals:
  - Lack of transparency
  - Lack of governance checks and balances on new Collective Rights Organization (SoundExchange)
short-term agenda

- Opportunities to guarantee payment to artists & provide accountability in governance and procedure
  - Sound recording public performance right
  - Federalizing pre-72 sound recordings
  - Larger copyright reform effort underway
New Age of New Media Licensing: Taking artist compensation seriously

- As we consider copyright reforms, if we are serious about artist compensation, reforms require:
  - Not only (assignable) copyright protection
  - But also limits on contracting practices
  - And, transparency and protective governance structures of PROs

- Leveraging creativity, with a healthy skepticism of the free market’s ability to result in distributive justice