

Symposium: Collective Management of Copyright: Solution or Sacrifice?

A Performing Rights Organization Perspective: The Challenges of Enforcement in the Digital Environment

Joan M. McGivern*

INTRODUCTION

This Article focuses on some of the practical challenges that the American Society of Composers, Authors and Publishers (“ASCAP”) faces in its day to day business efforts to license the public performing right in copyrighted musical works in the digital age under its antitrust consent decree.¹ In looking to the practical, this Article affirmatively does not delve into the development and use of the United States’ antitrust laws in setting fees for the public performance of the music in ASCAP’s repertory. In addition, the author notes that the comments made herein are necessarily constrained by having to navigate between the Scylla and Charybdis of ASCAP’s many pending court proceedings, negotiations and restrictions of protective orders. Nonetheless, while being mindful of these limitations, there is still much to say, from a practical perspective, beginning with: what does it mean to apply for an ASCAP license under ASCAP’s consent decree?

I. AN ASCAP LICENSE

ASCAP licenses are incredibly efficient means for giving users blanket access to

* Joan M. McGivern is the General Counsel and Senior Vice President of the American Society of Composers, Authors and Publishers (“ASCAP”). The views expressed in this commentary are solely those of the author. The author wishes to thank her many colleagues at work for their contributions in the preparation of this Article.

1. *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) (providing the consent decree). ASCAP’s first consent decree was entered in 1941. *See United States v. Am. Soc’y of Composers, Authors & Publishers*, 1940–1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941). Established in 1914, ASCAP is the oldest and largest performing rights organization (“PRO”) in the United States. There are two other U.S. PROs: Broadcast Music, Inc. (“BMI”), which operates under its own consent decree, and the Society of European Stage Authors and Composers, Inc. (“SESAC”), which does not operate under a consent decree. *See United States v. Broadcast Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,941, *modified by* 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. 1994). However, SESAC was sued by certain television stations, asserting SESAC had formed a cartel in violation of, *inter alia*, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The district court recently denied SESAC’s motion to dismiss and thus, that litigation is ongoing. *Meredith Corp. v. SESAC, LLC*, 09 Civ. 9177 (NRB), 2011 U.S. Dist. LEXIS 24517 (S.D.N.Y. Mar. 8, 2011).

perform without restriction the over 8.5 million copyrighted songs and musical works of ASCAP's over 400,000 members and of the members of foreign PROs who choose to affiliate with ASCAP (sometimes referred to as the "ASCAP Repertory"). The music user incurs no costs for locating copyright owners or for negotiating with them, nor is the music user burdened with any transaction costs that might otherwise be associated with preclearing the right to publicly perform the works.

When a music user, or licensee, pays for the license, ASCAP also takes care of all the tasks associated with distributing the license fees as royalties to its members, pursuant to ASCAP's distribution rules.² These tasks include, among others, analyzing tremendous volumes of music performance data from all forms of media, sending royalty statements and checks to ASCAP's members (or more recently, providing online access to these statements and direct depositing checks), answering our members' questions and building and managing huge databases and online access services for our members. The licensee is freed from dealing with any of these tasks.

Once a music user has merely applied in writing for a license, which it can do with no money down, it is legally immunized from being sued by ASCAP's members for infringement of the members' works. How is it possible that music users are allowed to simply apply for a license, enjoy the benefits of a license, but then not be obliged to pay until they and ASCAP have agreed upon a fee for their usage? Why is ASCAP barred from exercising what is a copyright owners' normal right to sue for infringement if usage and payment terms have not been agreed upon? The answer lies in ASCAP's consent decree or as we refer to it, "AFJ2." Under AFJ2, as well as its earlier versions, ASCAP must grant a license upon application and the music user—whom in ASCAP parlance, we call an "applicant"—need not pay anything until an agreement is reached or fees are set by the ASCAP "rate court."³ (All disputes regarding the setting of ASCAP license fees are heard by the same judge in the Federal District Court for the Southern District of New York, whom ASCAP refers to as the "rate court judge."⁴)

2. The rules and regulations govern distribution of royalties to members, including the Writers' Distribution Plans, the Writers' and Publishers' Distribution Formulas, the Weighting Rules and Weighting Formula. *ASCAP's Survey and Distribution System: Rules and Policies*, ASCAP (Sept. 2010), <http://www.ascap.com/members/governingDocuments/pdf/drd.pdf>. Distributions are made twelve times a year. *Id.* See generally I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Organizations, Revisited*, 50 J. COPYRIGHT SOC'Y 355 (2003) (providing more background on ASCAP).

3. See *Am. Soc'y of Composers, Authors & Publishers*, 2001 WL 1589999, at *4 ("ASCAP is hereby ordered and directed to grant to any music user making a written request therefore a non-exclusive license to perform all the work in the ASCAP repertory"), *7 ("Pending the completion of any such negotiations or proceedings, the music user shall have the right to perform any, some or all of the works in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation").

4. See *id.* at *1 ("This Court has jurisdiction of the subject matter hereof and of all parties hereto."). Currently, ASCAP's rate court judge is the Honorable Denise Cote, who was appointed by the Chief Judge of that court to succeed the late Honorable William C. Conner, who had presided over ASCAP's cases for over thirty years. See Douglas Martin, *William Conner, Judge Expert in Patent*

Upon receipt of an application, AFJ2 places the burden on ASCAP to engage the applicant either by quoting a reasonable license fee or by asking for the data it needs to quote a fee.⁵ ASCAP's members do not have the option of saying "no" to the public performance of their music by such applicants—as upon entering into a membership agreement, members forego such a right—unless they choose to license the public performance of their works directly, in which case the direct license can be limited by the copyright owner.⁶ If ASCAP and the applicant cannot reach an agreement on fees within the time allotted by AFJ2, it is the applicant who has the first opportunity to apply to ASCAP's rate court for the determination of a reasonable fee; after a further period of time, ASCAP also has an opportunity to apply to the court.⁷ In either case, ASCAP bears the burden of proof to establish the reasonableness of the fee it seeks.⁸

II. GENERAL CHALLENGES POSED BY DIGITAL MUSIC USERS

Since its founding in 1914, setting fees and obtaining payment to compensate its members and thereby secure adequate compensation for creators and copyright holders has always been a challenge for ASCAP, especially each time a new medium for performing music has been introduced.⁹ Following ASCAP's formation, it took three years of litigation before ASCAP was able to license restaurants and hotels that were publicly performing music.¹⁰ Today, working

Law, Dies at 89, N.Y. TIMES, Jul. 20, 2009, at A16; *Biography of Hon. Denise Cote*, INREACH, <http://www.legalspan.com/catalog2/faculty.asp?UserID=2009051399319481045%20%20%20%20%20%20%20&OwnerColor=%2301519A&recID=20090513-993194-80128> (last visited Mar. 20, 2011).

5. See *Am. Soc'y of Composers, Authors & Publishers*, 2001 WL 1589999, at *6 ("ASCAP shall, upon receipt of a written request for a license . . . advise the music user in writing of the fee that it deems reasonable for the license requested or the information that it reasonably requires in order to quote a reasonable fee.").

6. See *ASCAP's Membership Agreement*, ASCAP, <http://www.ascap.com/join/> (last visited Mar. 20, 2011) (noting that the agreement is the same for writer and publisher members).

7. See *Am. Soc'y of Composers, Authors & Publishers*, 2001 WL 1589999, at *6. The consent decree provides:

If the parties are unable to reach agreement within sixty (60) days . . . the music user may apply to the Court for a determination of a reasonable fee retroactive to the date of the written request for a license If the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when ASCAP advises the music user of the fee that it deems reasonable or requests additional information from the music user, and if the music user has not applied to the Court for a determination of a reasonable fee, ASCAP may apply to the Court for the determination of a reasonable fee retroactive to the date of a written request for a license

Id.

8. See *id.*

9. For example, radio broadcasters resisted being licensed for publicly performing music for many years, until that right was finally upheld. *Jerome H. Remick & Co. v. Am. Auto. Accessories Co.*, 5 F.2d 411 (6th Cir. 1925).

10. *Herbert v. Shanley*, 242 U.S. 591, 594–95 (1916). In *Herbert v. Shanley*, a restaurant and a hotel each claimed that they were not charging for the music, and therefore did not need a public performance license. *Id.* Justice Holmes, ruling in ASCAP's favor, wrote:

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected The defendants' performances are not eleemosynary It is true that the music is not the sole object, but neither is the food, which

within the confines of ASCAP's consent decree, this pre-existing struggle has become exacerbated in many respects in the digital space.

Digital users often question whether their particular uses of music really require a license. Not wanting to be sued, they apply for an ASCAP license anyway qualifying their requests as being "only to the extent such licenses are required."¹¹ Such qualified requests are typically accompanied by disputes regarding the scope and cost of the requested license. Even after applying for an ASCAP license, some applicants dispute ASCAP's need for usage and revenue data to quote a fee, assert that they really are not performing music at all, and/or assert that third parties are responsible for the performances.¹² During these disputes, applicants continue to enjoy the benefit of the consent decree's protection against infringement suits

Some digital services argue that they are not responsible for licensing performances because their services' "terms and conditions of use," explicitly shift licensing obligations to their users. Services such as these permit the public or subscribers to upload digital files (so called "user generated content" or "UGC") and knowingly host these files for others to access and share. These services assert that the responsibility for an ASCAP license rests with the often anonymous uploaders of the UGC content, because when these uploaders submit content to these services, the uploaders are asked to warrant and represent that they have all

probably could be got cheaper elsewhere. The object is a repast in surroundings that to people of limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up Whether it pays or not, the purpose of employing it is profit and that is enough.

Id.

11. See, e.g., *infra* note 29 and accompanying text (discussing license request of MobiTV). See also *infra* note 24 and accompanying text (discussing license request of YouTube).

12. ASCAP is not alone in confronting such behavior from applicants. For example, ASCAP's main competitor in the United States, BMI, just recently filed a petition against AOL Inc. ("AOL"), asserting that:

AOL to date has refused to provide . . . fundamental information to BMI. Instead, AOL has insisted that it is entitled to an open-ended automatic license under the BMI Consent Decree for whatever websites and other transmission facilities it chooses to employ to make public performances . . . —without having to provide a comprehensive list of those websites and other transmission facilities to BMI in advance. AOL has also played fast and loose with other fundamental aspects of the license it seeks, selectively disclosing which portions of its websites it wants excluded from its license because they are licensed by third parties, failing altogether to disclose which upstream or downstream performances it wants included or excluded from its licenses, and failing to update BMI on an ongoing basis as to any new and additional properties AOL seeks to cover under the license application In the more than three years that have elapsed since AOL's May 2007 application, and despite numerous further requests from BMI, AOL has persisted in refusing to provide a comprehensive description of the distribution platforms and types of music uses for which it seeks a license. Instead, it has continued to demand a performing rights license for whatever activities it chooses to undertake that are 'licensable public performances' under the Copyright Act To make matters worse, AOL has also asserted that certain performances of music within the AOL portal and websites have already been licensed by unspecified third parties and disclaimed any responsibility to license or pay for them AOL's request for such an indefinite, boundaryless [sic], and everchanging license fails to provide BMI with adequate parameters to use in its calculation of an appropriate blanket license fee.

Petition, Broadcast Music, Inc. v. AOL Inc., Civ. No. 10-9300 (S.D.N.Y. Dec. 13, 2010), at ¶¶ 1, 16–18 (internal citations omitted).

the necessary rights in the material—including the right to publicly perform any music contained in the file.

Some users, even though they have applied for an ASCAP license, claim that they are simply promoting ASCAP members' music or their use of music is exempted as a "fair use" under U.S. copyright law.¹³

Some services suggest that ASCAP utilize the "notice and takedown" provisions of the Digital Millennium Copyright Act ("DMCA") if ASCAP wishes to object to any performances taking place on the services' sites.¹⁴ But because these services have applied for a license, using the DMCA's procedures is not an option for ASCAP. Why? These services, by reason of their written applications for a license under the terms of ASCAP's Consent Decree, are protected from claims that they are making infringing performances.

III. CHALLENGE #1: THE SIMILARLY SITUATED DIGITAL USER

With these general challenges as a backdrop, there are three specific practical issues that ASCAP confronts when endeavoring to license digital music users under its consent decree. The first is satisfying the requirement that ASCAP license similarly situated users similarly, including quoting them comparable fees.¹⁵ In the world of radio and television, it was, and still is, relatively easier to compare stations to stations and arrive at fees that allow ASCAP to license "similarly situated" stations "similarly." Such relative ease of comparison likewise exists in physical establishment industries such as bars, hotels and restaurants. In those cases, setting standard industry-wide fees is fairly straightforward and highly efficient; in more mature industries, ASCAP frequently negotiates with industry associations or committees representative of the industry users. ASCAP consequently is able to create or negotiate "form" licenses that can efficiently be offered to all music users in a particular industry. In the digital space, however, the whole goal is to have a differentiated, unique business model and service that is unlike any other in the market—or at least better than the others.

Citing the uniqueness and "next generation" aspects of their services, digital

13. Copyright Act, 17 U.S.C. § 107 (2006) (providing fair use factors).

14. See *id.* § 512. Although called the DMCA, the Act was the Online Copyright Infringement Liability Limitation Act of 1998, which added § 512. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 201, 112 Stat. 2860, 2877 (codified at 17 U.S.C. § 512).

15. See *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-1395, 2001 WL 1589999, at *3 (S.D.N.Y. June 11, 2001) ("ASCAP is hereby enjoined and restrained from: Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated"). The court defines "similarly situated" as:

mean[ing] music users or licensees in the same industry that perform ASCAP music and that operate similar businesses and use music in similar ways and with similar frequency; factors relevant to determining whether music users or licensees are similarly situated include, but are not limited to, the nature and frequency of musical performances, ASCAP's cost of administering licenses, whether the music users or licensees compete with one another, and the amount and source of the music users' revenue.

Id.

services often attempt to negotiate bespoke, custom tailored licenses for their services, arguing that their activities do not fit within any of ASCAP's form Internet licenses.¹⁶ Nonetheless, these "new" services frequently do fit within the parameters of ASCAP's form licenses because their salient characteristics are similar to those of other users. Thus, even when a the service believes it is a unique "new kid on the block," very often, the service can still use one of ASCAP's form licenses. The reason that ASCAP presses its form licenses has not only to do with maximizing the efficiencies in administration of its licenses, but also with satisfying its obligation to license similarly situated users similarly.

Developing form licenses for use with digital services, in order to follow the strictures of ASCAP's consent decree, has been an ongoing process; and, even though ASCAP has been licensing digital services since 1995, we still refer to these licenses as "experimental licenses." By contrast, for decades, ASCAP has negotiated, and on occasion litigated with, radio and television "industry committees" that are able to represent the entire class of businesses publicly performing music. Unlike radio and television, there is no equivalent industry-wide committee for digital services with which ASCAP can negotiate form licenses. Even as the Internet matures, it remains doubtful that any such representative industry committee will emerge to represent digital services in negotiating, class-wide, for digital music users who require ASCAP licenses.

It should also be noted that the rapid evolution of digital services poses an additional challenge to ASCAP under its decree, a provision of which is implicated in the emergence of a new user group. Pursuant to AFJ2, ASCAP cannot rely upon fees agreed upon with a user for the first five years of licensing a new category of music user as evidence of a reasonable fee in a rate court, but it nonetheless remains obligated to license similar services similarly.¹⁷

IV. CHALLENGE # 2: THE "THROUGH-TO-THE-AUDIENCE" LICENSE REQUEST

The second practical issue that ASCAP faces in licensing digital services is satisfying AFJ2's requirement that ASCAP quote a fee for a "through-to-the-audience" ("TTTA") license request to any music user that "transmits content to other music users with whom it has an economic relationship relating to that content."¹⁸ Upon receipt of such a request, ASCAP must quote a fee which "shall

16. See, e.g., *ASCAP Experimental License Agreement for Interactive Services—Release 2.1*, ASCAP, http://www.ascap.com/weblicense/reports/pdfs/InteractiveLicenseAgreement_R2_1.pdf (last visited Mar. 20, 2011); *ASCAP Experimental License Agreement for Multiple Services—Release 1.1*, ASCAP, <http://www.ascap.com/weblicense/reports/pdfs/ASCAPExperimentalLicenseAgreementforMultipleSitesandServices.pdf> (last visited Mar. 20, 2011); *ASCAP Experimental License Agreement for Non-Interactive Services—Release 5.1*, ASCAP, http://www.ascap.com/weblicense/reports/pdfs/Non-InteractiveLicenseAgreementR5_1.pdf (last visited Mar. 20, 2011).

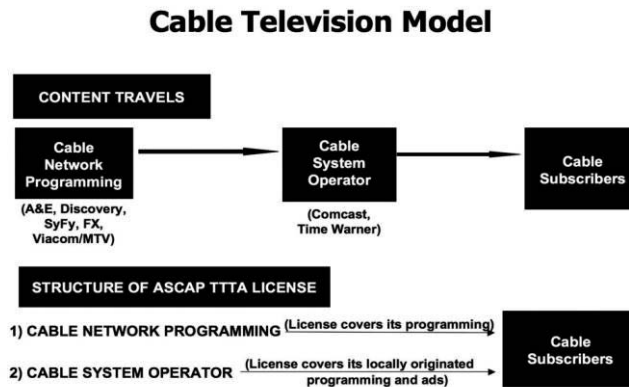
17. See *Am. Soc'y of Composers, Authors & Publishers*, 2001 WL 1589999, at *7.

18. See *id.* at *4. The consent decree requires ASCAP:

to issue, upon request, a through-to-the-audience license to a broadcaster, an on-line user, a background/foreground music service, and an operator of any yet-to-be-developed technology

take into account the value of *all* performances made pursuant to the license.”¹⁹ This sweeping concept is more easily understood by comparing the old linear broadcast licensing model to the models which ASCAP is not called upon to license.

In the broadcast world, the historic economic relationships between the music users were linear. While quoting reasonable fees in such contexts required work, the effort involved to arrive at a license structure that took into account the full value of all the performances being made was comparatively more straightforward and measurable. This is easier to understand if one looks at the following illustration regarding the original cable television model.



that transmits content to other music users with whom it has an economic relationship relating to that content; . . . The fee for a through-to-the-audience license shall take into account the value of all performances made pursuant to the license.

Id. See also *id.* at *3 (“Through-to-the-Audience License’ means a license that authorizes the simultaneous or so-called ‘delayed’ performances of ASCAP music that are contained in content transmitted or delivered by a music user to another music user with whom the licensee has an economic relationship relating to that content . . .”).

19. *Id.* at *4 (emphasis added).

As can be seen in the top portion of the illustration, the content travels in a linear fashion: from the cable program networks to the cable system operators and then on to the cable systems' subscribers. But ASCAP's licensing of this industry, as the bottom half of the illustration reflects, does not follow this linear pattern. In fact, after many years of litigation, ASCAP and the cable industry arrived at a two part licensing structure.²⁰ How did this structure evolve? It arose from the fact that the cable program networks demanded from ASCAP "through-to-the-audience" licenses. Thus, ASCAP came to license the cable program networks for their programming, which is transmitted to cable operators (and satellite operators), and then retransmitted by these operators to subscribers. The license was intended to capture the value of all the performances taking place upon transmission and retransmission, as each transmission is a separate public performance.²¹ In addition, to license all the performances being received by the subscriber, ASCAP also licenses cable operators for the noncable program network content that the operators deliver, referred to as "locally originated programming," and advertisements that cable operators insert.

That was the old linear world. Licensing in two parts, such as the cable model's approach, was ultimately doable and possible to administer on a cost effective basis. Fast forwarding to the new world: broadcasters and cable program networks no longer deploy their content in such a linear fashion; they now also apply for "through-to-the-audience" requests that are ever more expansive, and seek to apply to an ever wider category of uses. For example, ASCAP received the following request from the Radio Music License Committee ("RMLC") on behalf of a significant portion of the radio industry in December of 2009, seeking to cover all transmissions to all platforms, including "wireless platforms or via any other platform capable of displaying or disseminating a [radio] Stations' transmissions or . . . as applicable, the Station owners' radio division online or wireless transmissions."²² Shortly after receipt of this request, ASCAP and the RMLC

20. One of the first cable program network rate court cases was commenced in 1985. See *Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 566 (2d Cir. 1990). Further litigation ensued. It was not until 2002, seventeen years later, that the first industry form licenses were finally adopted. See *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206, 222 (S.D.N.Y. 2010) (pending appeal in the Second Circuit, No. 10-CV-3161 (2d Cir. Dec. 15, 2010)).

21. See *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988).

22. Letter from R. Bruce Rich, Counsel, RMLC, to Richard H. Reimer, Counsel, ASCAP (Dec. 11, 2009) (see Amended Petition / Application of the Cromwell Group, Inc. and Affiliates, et al. for the Determination of Reasonable Final License Fees at exhibit 1, *In re Application of the Cromwell Group, Inc.*, No. 10 CV 5210 (DLC) (MHD) (S.D.N.Y. July 29, 2010)). The representative of RMLC writes:

As for scope, the RMLC hereby requests a "through-to-the-listener" license from ASCAP covering whatever public performances of ASCAP-repertoire music occur in either (i) the Stations' (including any translators') transmissions to users for which an ASCAP license is required, however and whenever distributed, including, without limitation, all broadcast transmissions, digital transmissions, high-definition transmissions, and transmissions over Internet and wireless platforms or via any other platform capable of displaying or disseminating a Stations' transmissions or (ii), as applicable, the Station owners' radio division online or wireless transmissions.

Id.

jointly applied to the rate court for determination of final fees.²³

Another example of an expansive TTTA license request that ASCAP received was from YouTube in 2006.²⁴ YouTube requested a retroactive license to cover “all performances and YouTube incorporated programming . . . for which a license is required.”²⁵ It further sought to cover “programming or performances on youtube.com,” and “any location that YouTube distributes its services.”²⁶ That application raised a host of questions, such as: What was the full scope of all the performances sought to be licensed? Was user-generated content uploaded by anonymous users to be covered? Was user-generated content included within “YouTube incorporated programming”? Were YouTube videos embedded by users on third party sites to be covered—even when those embeds were arguably not, distributed by YouTube? Were there actual quantifiable, economic relationships between YouTube and these third party sites containing embeds, such that in quoting a fee, ASCAP could take into account the value of all the performances to be covered? The enormity of the possible scope of the requested license sought by YouTube is illustrated by the following diagram.

23. See Amended Petition / Application of the Cromwell Group, Inc. and Affiliates, et al. for the Determination of Reasonable Final License Fees, In re Application of the Cromwell Group, Inc., No. 10 CV 5210 (DLC) (MHD) (S.D.N.Y. July 29, 2010).

24. Letter from Zahavah Levine, General Counsel & Vice President Business Affairs, YouTube, Inc., to Chris Amenita, Senior Vice President, ASCAP (Sept. 25, 2006) (see Application of YouTube, LLC f/k/a YouTube, Inc., United States v. Am. Soc’y of Composers, Authors & Publishers, Civ. No. 41-1395 (DLC) (S.D.N.Y. May 13, 2008). The YouTube representative wrote:

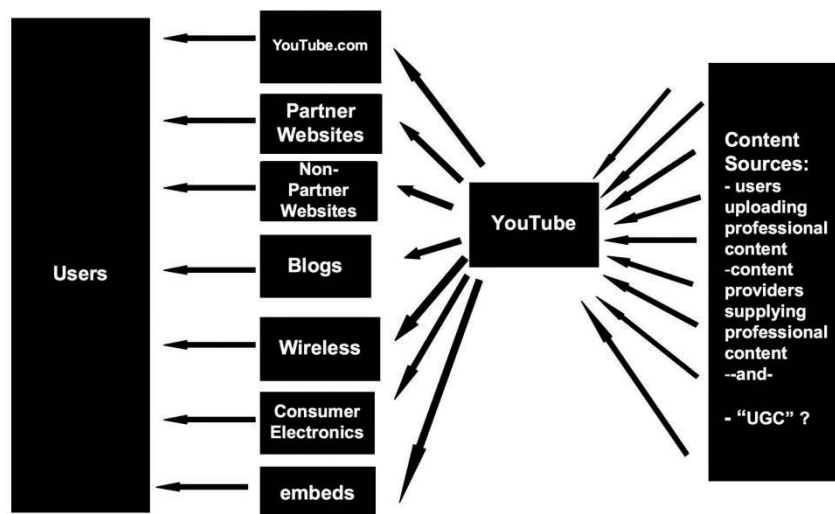
YouTube, Inc. hereby requests a blanket license fee quotation for a two-year period effective with the launch of the beta version of the site in May 200[5], to cover any public performances of ASCAP music in YouTube, Inc. programming for which a license is required. ASCAP's fee quotations should be “through-to-the-listener,” encompassing any public performances for which a license is required as rendered by YouTube, Inc. on youtube.com or any location through which YouTube, Inc. may distribute its services.

Id.

25. *Id.*

26. *Id.*

So what did YouTube want to cover?



By mid-2008, several years after YouTube had applied for a license, and efforts to agree on the scope of YouTube's application had failed, ASCAP applied to the rate court to set a fee.²⁷ More than a year after the case had been pending, the definitive scope of the license remained unclear. When pressed to take a position, YouTube's counsel explained its request to the rate court as follows:

I mean, to be candid. It's [i.e., the request] meant to be circular . . . [W]e don't want to apply for more than we need, and we knew ASCAP would take the position that you do require a license for it, so to avoid not getting the benefit of the full protection of the consent decree we applied for what we require a license and if we have a disagreement whether we require a license on this we will have to bring it before you [i.e., the rate court judge] one way or the other.²⁸

Indeed, under ASCAP's consent decree as currently written, digital service applicants have no incentive to narrow their TTTA requests because the more expansive the requests, the better protected they are from an infringement action.

Yet another illustration of a TTTA license request comes from the application of MobiTV, made in late 2003.²⁹ MobiTV is an audio and audio-visual aggregator of

27. See Application of YouTube, LLC f/k/a YouTube, Inc., Am. Soc'y of Composers, Authors & Publishers, Civ. No. 41-1395 (DLC).

28. Transcript of Sept. 16, 2009 Conference at 28–29, *Am. Soc'y of Composers, Authors & Publishers*, Civ. No. 41-1395 (DLC).

29. Letter from Jeff Bartee, Vice President of Finance, Idetic, Inc., to Richard Reimer, Counsel, ASCAP (Nov. 11, 2003) (on file with the public court files in *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206 (S.D.N.Y. 2010)). The representative of Idetic, Inc. writes:

Idetic, Inc. [now known as MobiTV, Inc.] is offering a service that allows mobile handset users

content which delivers that content to wireless carriers. The diagram above indicates the flow of content to subscribers of the wireless carriers.

As the right side of the illustration shows, the content that MobiTV aggregates and bundles, typically into channels, is varied and comes from many content providers, cable program networks, broadcast networks, background music providers and record labels supplying music videos. On the other side of the illustration are the wireless carriers to which MobiTV delivers the aggregated content. Some of these content providers and wireless carriers applied to ASCAP for their own TTTA licenses; other carriers did not.³⁰ Sorting out how to comply with the consent decree's obligation to quote a fee for the value of all the performances and the economic relationships between these music users, with overlapping license requests, is a fascinating challenge for ASCAP created by new technology.³¹

V. CHALLENGE #3: VALUING ALL PERFORMANCES IN NON-REVENUE MODELS

The third practical issue arises from the digital business models where revenue is driven by hardware sales and ad sales from high site traffic and not necessarily from content, per se. How should the value of all the performances of the musical works be measured if revenue is difficult to apportion or if the provision of content is not directly tied to revenue, yet the music content plainly adds "value" to the digital business and the overall user experience?

Who would want to own an Apple iPad or iPhone if it could not be used to access and enjoy creative content, at least in part? Even taking into account Apple's excellent products, can it be argued that consumers' desire for content, particularly music, drove sales of Apple's products? Whatever Apple's payments to creators of content have been, it is safe to say the revenues reaped by Apple from the sales of its hardware far outstrip the compensation flowing to content creators.³²

to access television and other content by aggregating television and other audio/visual content for transmission over telecommunications networks. Idetic, Inc., its subsidiaries and affiliates, are hereby requesting "through to the audience/viewer" performing rights licenses pursuant to Article IX of the ASCAP Second Amended government consent decree, only to the extent that such licenses are required, for the period commencing November 11, 2003 forward.

Id.

30. See, e.g., *In re Cellco P'ship*, 663 F. Supp. 2d 363 (S.D.N.Y. 2009); *United States v. Am. Soc'y of Composers, Authors and Performers*, 607 F. Supp. 2d 562 (S.D.N.Y. 2009).

31. ASCAP has filed an appeal with the Second Circuit from a decision rendered in *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206.

32. See, e.g., *Apple Reports First Quarter Results*, APPLE (Jan. 18, 2011), <http://www.apple.com/pr/library/2011/01/18results.html> (reporting Apple's revenues of \$26.74 billion in the fiscal 2011 first quarter, with a net quarterly profit of \$6 billion); Philip Michaels & Jason Snell, *Apple Tallies Record Revenue on Mac, iPad, and iPhone Sales*, MACWORLD (July 20, 2010, 4:52 PM), http://www.macworld.com/article/152825/2010/07/apple_3rdquarter_results.html (reporting that the strong debut sales of the iPad generated \$15.7 billion in sales and a profit of \$3.25 billion during Apple's fiscal third quarter and a rise in profits of seventy-eight percent over the last year's third quarter).

The YouTube service is another example: at the time it applied for an ASCAP license, media reports indicated that its revenues were low, and some reports claimed the service was “losing money.”³³ There was obvious “value” in a service that Google purchased for a reported \$1.65 billion, but that value did not flow back to the creators and owners of music, which had made and continue to make YouTube so popular.³⁴ The ASCAP members whose works were popular and performed on YouTube’s service in its early years became essentially compulsory investors, with no ability to enjoy a reasonable pro rata share of the value received by YouTube’s founders. Even if YouTube’s revenues grow and it comes to pay high license fees, the ASCAP members whose music will be popular and performed in the future will not necessarily be the same ASCAP members whose music contributed to helping YouTube in its early years.

And this brings me to my last point. In the linear broadcast world, ASCAP could use revenue as a factor in setting a license fee, not exclusively, but certainly as a factor. In the digital space, however, revenue is not as reliable an indicator of value; instead, value and revenue can be fundamentally disconnected, making revenue an inadequate proxy for compensation of the content creators that have helped to grow these businesses. This disconnect seems most striking in the case of music, even though music is being used and performed more intensively than ever to build new digital services as well as to spur the sales of digital products which allow ready access to music.

Creators understandably are left wondering what happened to the Copyright Act ensuring that there are incentives for creation and fair compensation for use. Just how should the balance that the Copyright Act is supposed to provide between creators and users be restored? How can creators, especially music creators and music copyright holders, be accorded meaningful participation in the “value” and the billions in revenues that flow to technology companies? ASCAP is working assiduously on behalf of its members to meet the challenges posed by these questions head on. In that regard, it is helpful to remember the words of Professor Kernochan, for whom Columbia’s Kernochan Center for Law, Media and the Arts was named, when he spoke of the need to take the longer and broader range view of the struggles of copyright owners for fair compensation. Some twenty-five years ago, he observed that:

Over the years, ASCAP, and later BMI, did battle with each developing user industry:

33. See Bobbie Johnson, *Does YouTube Actually Make Any Money?*, GUARDIAN TECH. BLOG (Apr. 7, 2009), <http://www.guardian.co.uk/technology/blog/2009/apr/07/youtube-video-losses>.

34. See Johnson, *supra* note 33; Paul R. La Monica, *Google to Buy YouTube for \$1.65 Billion*, CNNMONEY (Oct. 9, 2006, 5:43 PM), http://money.cnn.com/2006/10/09/technology/googleyoutube_deal/. Indeed, now, despite YouTube having its own corporate form, it is merely a product line of Google’s that contributes to Google’s overall enterprise. In the fourth quarter of 2010, Google reported revenues of \$8.44 billion and their employees were granted ten percent salary increases across the board starting in January 2011. See Amir Efrati & Scott Morrison, *Google to Give Staff 10% Raise*, WALL ST. J., Nov. 10, 2010, <http://online.wsj.com/article/SB10001424052748703523604575605273596157634.html>; *Google Announces Fourth Quarter and Fiscal Year 2010 Results and Management Changes*, GOOGLE INVESTOR RELATIONS (Jan. 20, 2011), http://investor.google.com/earnings/2010/Q4_google_earnings.html.

2011] THE CHALLENGES OF ENFORCEMENT IN THE DIGITAL ENVIRONMENT 643

with the movies (particularly the exhibitors) in both silent and “talkie” eras; with radio; with television; with jukebox owners, cable operators and public broadcasters. The adversaries keep coming. Old ones find new grounds for resistance; new industries raise new problems.³⁵

Throughout ASCAP’s history, the Society has vigorously defended the rights of its members, finding paths to secure fair compensation for its music creator and music publisher members, and will continue to do so in order to ensure that incentives to create new music will remain. In that spirit, it is hoped that this Symposium, titled *Collective Management of Copyright: Solution or Sacrifice*, will help seed ideas for solutions to these challenges confronted by music creators and copyright owners seeking to enforce their rights in the digital world.

35. John Kernochan, *Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints, and Public Attitudes*, 10 COLUM.-VLA J.L. & ARTS 333, 344 (1986).