



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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Music Licensing Alert – Radio Music License Committee Sues Global Music Rights

On Friday, November 18, 2016, the Radio Music License Committee (“RMLC”) filed an antitrust lawsuit against Global Music Rights (“GMR”). This lawsuit, filed in the United States District Court for the Eastern District of Pennsylvania, is a significant development and comes on the heels of recent demands by GMR for new music licensing payments from broadcasters.

Who is Global Music Rights?

GMR is a new performing rights organization (“PRO”) that was formed in 2013 and headed by music industry icon Irvin Azoff, the former executive chairman of Live Nation and personal manager of notable artists including the Eagles, Maroon 5, Bon Jovi, Journey, and Van Halen.

GMR is now the fourth PRO operating in the United States—the others are the more familiar ASCAP, BMI, and SESAC. Performing rights organizations grant licenses to broadcasters and other users of music (such as restaurants, bars, and retail establishments) for the right to perform music written by affiliated songwriters and publishers.

In recent years, GMR has lured songwriters away from the other PROs by promising to pay them more royalties than the other PROs. GMR's repertory includes an estimated 20,000 essential songs, including songs written or performed by Adele, Aerosmith, the Beatles, Bruno Mars, Jay-Z, Madonna, Pharrell Williams, Ryan Tedder, Steve Miller Band, Taylor Swift, Tom Petty & The Heartbreakers, and U2, among many others.

Most broadcast stations simply cannot avoid playing songs in GMR's repertory. Absent a license to perform these song, stations risk copyright infringement—for which statutory damages could be up to \$150,000 per song.

Negotiations between GMR and RMLC have been unsuccessful. RMLC reports that GMR has demanded fees of over \$42 million from the radio industry—proportionally greater than, and in addition to, what the radio industry already pays ASCAP, BMI, and SESAC. According to RMLC, GMR's share of songs played on radio is approximately 5% to 7.5%, while GMR's license fee demands equate to more than 15% of radio public performance fees.

What is the lawsuit about?

RMLC's lawsuit filed on Friday claims that GMR's demands for new license fees from radio stations violates antitrust law. In particular, RMLC claims that GMR has created monopoly power and "is deploying a calculated scheme to extort the radio industry" by "intentionally creat[ing] a repertory of copyrighted songs that it knows radio stations 'cannot exist without' and . . . implicitly threaten[ing] to start suing radio station for copyright infringement . . . unless they agree to pay supracompetitive rates for a license to play these songs."

ASCAP and BMI have been subject to judicially-monitored antitrust consent decrees since the 1940s—which were determined necessary to prevent ASCAP and BMI from engaging in anticompetitive conduct. RMLC's lawsuit against GMR is similar to antitrust lawsuits filed against SESAC by RMLC in 2012 and by the television industry in 2009. Each of those lawsuits resulted in favorable rulings for broadcasters, and each was settled with SESAC agreeing to an arbitration procedure to determine reasonable rates. The same judge who was assigned to RMLC's lawsuit against SESAC—Judge C. Darnell Jones II—has been assigned to the GMR lawsuit.

RMLC's lawsuit seeks immediate and preliminary relief. RMLC is asking the court to issue a preliminary injunction that, while the litigation is pending, would (1) require GMR to offer all commercial radio stations a blanket license at a reasonable rate that is proportional to the rates each station pays to ASCAP and BMI, and (2) prohibit GMR from suing any commercial radio station for copyright infringement until the station has had a fair opportunity to consider, and has rejected, such a reasonable license.

What does this mean for my station?

In general, the current term of stations' existing PRO licenses expire on January 1, 2017. At that time, songwriters who have withdrawn from ASCAP, BMI, and SESAC will no longer be covered by those PROs' licenses.

It is difficult—if not practically impossible—to determine, for any given song, whether a station needs to have a license from GMR in addition to ASCAP, BMI, and SESAC licenses. For example, when a song is co-written by a GMR songwriter and another songwriter affiliated with a different PRO, a station’s pre-existing license from that other PRO might be sufficient without also having to get a GMR license. This determination would need to be made on a song-by-song basis, and RMLC reports that GMR does not provide any information, in a reliable or transparent way, necessary to make such determination. While it may be the case that some co-written songs may not require a GMR license, other songs are 100% controlled by GMR—for which GMR is the only practical source to obtain a license.

You should evaluate this new music licensing challenge and risk of potential copyright infringement with your legal counsel. Whether, and when, to enter into a license agreement with GMR will depend on the unique circumstances of your station and risk tolerance, as well as future developments in RMLC’s lawsuit against GMR—in particular, whether the court grants RMLC’s request for a preliminary injunction and imposes a requirement that GMR issue licenses for reasonable rates.

We will continue to monitor the lawsuit and report on important developments.

Looking to Upgrade Remote Pickup Facilities to Digital? You Must Get a Waiver from the FCC

With the calendar getting ready to turn to a new year, many broadcasters will have new budgets and new projects, including the upgrade of legacy analog equipment to digital. For many newsgathering facilities, including most ENG gear, digital operations are permitted by the FCC’s rules. However, when it comes to remote pickup facilities (“RPUs”), the FCC’s rules remain stuck in the 20th Century, and only analog operations are allowed. (RPUs are a type of BAS—broadcast auxiliary station—that are commonly used by broadcasters to transmit program material from remote locations such as sporting events and on-the-spot news coverage back to the station studios.)

More than 18 months ago, the FCC launched a proceeding to consider a number of changes to its rules governing the licensing and operation of RPUs, including the use of digital emissions, which is prohibited under current FCC rules. Although the FCC solicited and received comments in the proceeding back in the spring of 2015, no further action has been taken yet.

As a result, any upgrade of analog RPU gear to digital will require a waiver from the FCC (and the waiver must be granted prior to the commencement of such digital operations). Over the past few years, several broadcasters have obtained waivers in various markets across the country. The principal concern of the FCC in considering digital RPU waiver requests appears to be interference potential. Generally, stations that have obtained a digital RPU waiver request have submitted a “no likelihood of interference” statement—signed by the market’s local frequency coordinator—as a part of their digital RPU waiver requests.

Stations Must Remain Vigilant About Indecency in News Coverage

No station wants indecent content—or even non-indecent but inappropriate or offensive content—to hit their airwaves, particularly in the course of news coverage. In this regard, the recent post-election protests have, in some instances, provided challenges to stations both in the provision of live coverage and production of packages for newscasts. In some markets, protestors have made use of the “f-word” and “p-word” on signs and shirts, and in chants and speeches, and some of these expletives have made it into news reports. Even coverage of relatively low key events such as local holiday parades may lead to increased risk in the current climate.

When stations are broadcasting live coverage of an event, it may be challenging to avoid the inadvertent airing of expletives and other inappropriate content. At a minimum, stations may wish to plan ahead in order to be prepared to dump out of coverage as needed. And, as an event or situation unfolds, it would be prudent for station personnel in the field to monitor the activities of those around them in an effort to identify signage and images that the station prefers not to air and, if warranted, to communicate with the newsroom about “risky” surroundings and environmental factors.

With respect to prerecorded, edited material (such as news packages), diligence is warranted not only on the front end—i.e., to avoid the recording of inappropriate material—but also during the editing process to ensure that any undesirable words or images that were captured during recording are cut, “bleeped,” blurred, pixilated, or otherwise dealt with prior to air. Attention to detail is especially important when there are crowds of people; images of signs, graffiti, buttons, or stickers; images of computer screens containing social media pages or internet search results; and other text-dense or image-rich subject matter.

During the editing process, inappropriate content sometimes “slips through the cracks” because it is outside of the visual field of the editor. Indeed, that is precisely what occurred when a television station was fined \$325,000 in early 2015 in connection with the airing of less than three seconds’ worth of video material of an overtly sexual nature (the station has appealed the fine, and the matter remains pending at the FCC). Other times, an inappropriate image or word is simply “lost” among a collage of on-screen words or images. Unfortunately, as we know all too well, internet users are masterful at finding and publicizing such errors.

So, whether your station is covering protests and demonstrations, holiday parades and events, or routine newsworthy developments, make sure your newsroom staff is prepared and focused to reduce the likelihood of airing expletives and other undesirable content.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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